CORN Publication Series 8

D/2002/0095/76
ISBN 2-503-51273-9

The management of common land in north west Europe, c. 1500–1850

Edited by Martina De Moor, Leigh Shaw-Taylor
& Paul Warde

BREPOLS

CONTENTS

LIST OF CONTRIBUTORS

STEFAN BRAKENSIEK	Department of History and Philosophy, University of Bielefeld, G
PETER HOPPENBROUWERS	Department of Medieval History, University of Amsterdam, NL
MARTINA DE MOOR	Department of Medieval History, Ghent University, B
LEIGH SHAW-TAYLOR	Jesus College, University of Cambridge, UK
KERSTIN SUNDBERG	Department of History, University of Lund, SW
NADINE VIVIER	Department of History University of Maine, FR
PAUL WARDE	Pembroke College, University of Cambridge, UK
ANGUS WINCHESTER	Department of History, University of Lancaster, UK

LIST OF FIGURES

LIST OF TABLES

Acknowledgements

As editors we have a number of debts of gratitude to discharge. Firstly, we would like to thank Jan Luiten van Zanden who played a critical role in getting this project established. His Chaloner Lecture, 'The Paradox of the Marken', at the Agricultural History Society's Annual Conference in Shrewsbury in April 1999, and subsequently published in the *Agricultural History Review*, was in many ways the catalyst for this project. He both persuaded CORN to fund the project and secured a session for our first meeting at the International Social Science History Conference in Amsterdam in April 2000. It is therefore very fitting that he should have written the preface to this book.

CORN funded both the Amsterdam meeting, the second meeting of contributors in Cambridge in late March and early April 2001 and the editorial meetings. We are also grateful for the hospitality and financial support in Cambridge of the Centre for History and Economics at King's College. Inga Huld Markan and Rosie Vaughan of the Centre's administrative staff ensured that everything ran smoothly.

Erik Thoen, president of CORN has been unfailingly supportive and contributed much to both meetings. Richard Hoyle, who acted as commentator at our first meeting, and Jeanette Neeson, who has done so much to stimulate interest in the history of common land and was kind enough to attend our first meeting, both made a number of very helpful suggestions. Petra van Dam, Heather Falvey and Jaques Beauroy contributed to our discussions. We also owe an intellectual debt to Elinor Ostrom whose theoretical work provided us with a starting point for our comparisons and whose influence can be seen throughout this book. Lastly, but most definitely not least, we must thank each of our contributors. Not only have they written the individual chapters but without exception they have consistently met deadlines (or at least not been very late!) and have been remarkably tolerant of our requests for clarifications and modifications to their chapters.

Martina De Moor, Leigh Shaw-Taylor and Paul Warde

Preface

International comparative work in agrarian history is relatively scarce, perhaps because it is so difficult. The agricultural development of regions, in particular in the period before the Industrial Revolution, is highly dependent on environmental factors (on soil types and climate, for example) which are highly specific for the regions involved, and is also embedded in equally locally-specific institutional structures (social relations, systems of tenure and landownership). Therefore, many attempts to do international comparative work have been relatively unsuccessful. Often they produced collections of (at best) interesting case studies on more or less similar topics, on the basis of which editors could only conclude that more research was needed to arrive at firmer conclusions.

This volume on comparative research into the structure and functioning of commons in western Europe in the early modern period is different. In 1998 a network for the study of commons in western Europe was set up by the editors of this volume, which has developed a successful strategy to do this type of research. The most important decision was to adopt a systematic theoretical approach for the project. Recent research in the field of new institutional economics on the topic of commons (or common pool resources), of which the book by Elinor Ostrom *Governing the Commons. The Evolution of Institutions for Collective Action* (1990) is perhaps the classic example, was the theoretical starting point of the project. In this way the organizers of the network also wanted to link their historical research to the contemporary debate on the institutional preconditions for sustainable management of common pool resources. This solid theoretical starting point made it possible to structure the inquiry: it produced, in essence, a number of questions that all authors writing on commons in different countries and regions had to address. Thanks to the broader CORN network (organized by the agricultural historians from Ghent University and the University of Louvain) it was possible to organize two workshops: the first was a session at the European Social Science History Conference in Amsterdam in 2000, the second a CORN workshop in Cambridge in 2001. The effect of organizing a second workshop was that authors became more familiar with the theoretical approach and were therefore better able to address the core issues of the project.

Another, perhaps less important decision was to focus on the actual functioning of commons *before* enclosure. In a number of countries the historiography on the commons has been dominated by the big debate on the dissolution of the commons during the eighteenth and nineteenth centuries. This debate has, however, often strongly affected the assessment of the functioning of the commons in the centuries before enclosure (see the Introduction to this volume). The project has attempted to 'jump over' the shadow that has been cast by the enclosure debate, basically by reconstructing in detail how the commons functioned in practice during the early modern period.

As the individual chapters show, and in particular the conclusion demonstrates, this strategy has worked well. Agricultural history of the period before the Industrial

Revolution can be studied in an international comparative way, which is also the aim of the CORN network. This can not only produce important new insights into the institutional and socio-economic development of western Europe in this period, but also help to test and refine theories from the social sciences. This volume shows that such a marriage between theory and historical research is the way to further develop the agenda for international comparative research.

Utrecht, December 2001

Jan Luiten van Zanden

1 Comparing the historical commons of north west Europe. An introduction

Martina De Moor, Ghent University
Leigh Shaw-Taylor, University of Cambridge
Paul Warde, University of Cambridge

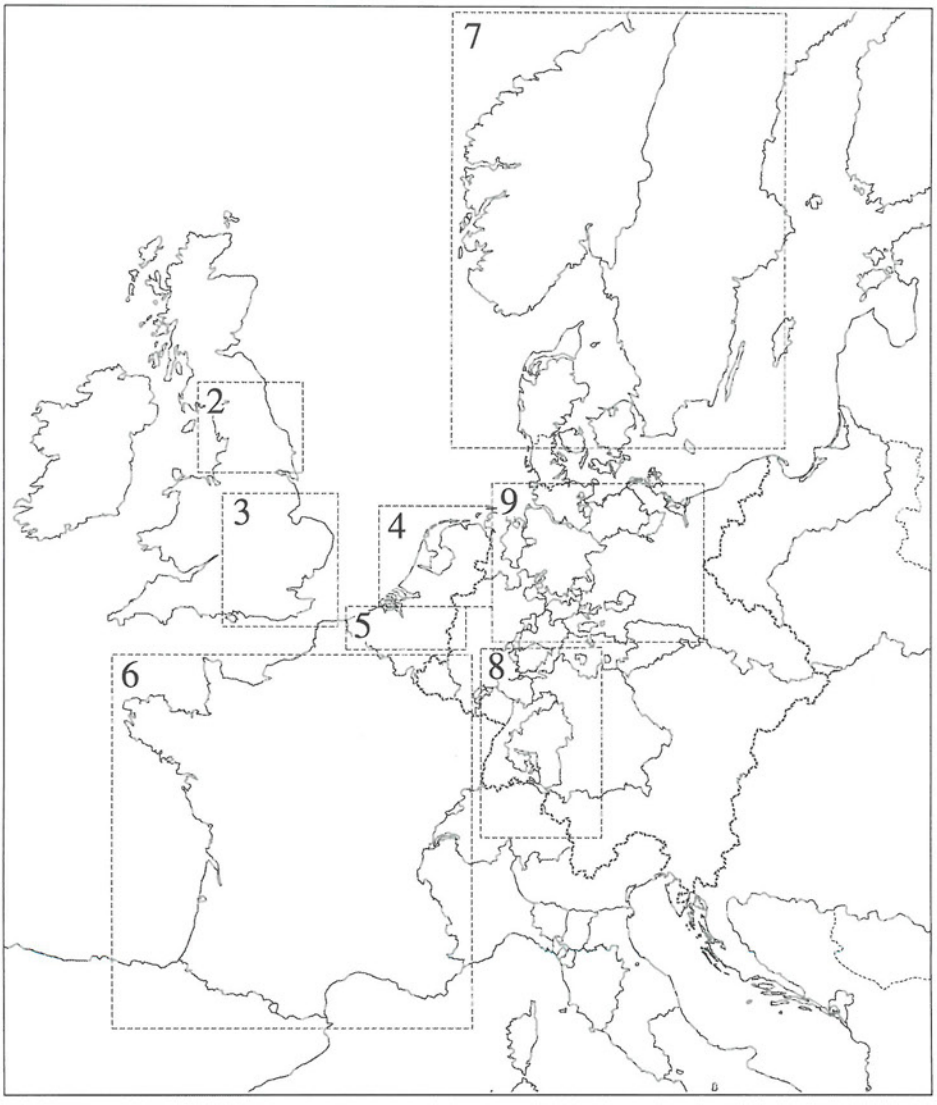
The subject of this book is the management of common land in north-west Europe from the close of the middle ages to the middle of the nineteenth century. This introduction sets out the key issues examined in the regional surveys that follow. These cover: northern England (chapter 2); southern England (chapter 3); the Netherlands (chapter 4); (Belgian) Flanders (chapter 5); France (chapter 6); the Nordic countries (chapter 7); south-west Germany (chapter 8) and northern Germany (chapter 9). Some preliminary conclusions are offered in the final chapter (chapter 10). Inevitably a number of technical terms have had to be used whose meaning may be obscure to the general or even specialized reader. We have therefore included a short glossary of the most important of these at the end of the book.

Common land was a key component of early modern agriculture in many parts of north west Europe, and its disappearance in some areas was a key political issue at the time and has been the subject of considerable historiographical debate since. 'Commoners' exercised rights to use resources over large expanses of permanently uncultivated land and or only temporarily cultivated land, the kind of open country such as heathland, rough pasture or woodland that we often associate with the expression 'the common' today. Often however, such rights were also exercised over much (or even all) of the land that was normally cultivated and farmed individually. This usually took the form of 'common rights', most importantly the right to pasture livestock, being exercised during that part of the year when the land was not under cultivation. Although most of the chapters in this book will concentrate on 'commons' or common lands in the sense of land that stood uncultivated for long periods, if not always, it should be remembered that such land was often part of a wider 'agro-system' that frequently embraced nearly all of the surface area. In many, though far from all, parts of north-west Europe this system included the collective use of resources such as grazing over land that was for the most part 'privately' owned and managed.

The 'agro-system'[1] of the early modern period had to meet a number of needs. It had to be able to provide food for the inhabitants, with a diet that was for the most part heavily dependent upon vegetable matter, usually grain crops. It had to provide fodder for livestock, which were vital not only as a source of foodstuffs (above all protein), but also of fertilizer and of draught power. Beyond this, peasants, farmers, labourers and others exploited the commons for a host of other resources. The very humus of the

[1] See glossary.

Figure 1.1 Europe in 1820, showing the areas discussed in each chapter (numbers refer to chapter numbers)



Source: By courtesy of IEG-maps (A. Kunz/J.R. Moeschl)

ground itself, as well as leaves and bracken, provided stall-bedding for the animals and additional fertilizer for the fields. Wood, bushes, gorse, peat and turves were burnt for fuel. Wood, ranging in size from willow switches to mature timbers, provided the basic material for everyday life, farm equipment and buildings. Other edibles such as fungi and berries supplemented the diet. The list is long, and the precise value of these resources varied considerably according to both local ecological conditions and the demand for particular resources.

At the same time, the commons and their users did not subsist in a local, 'natural economy' divorced from the influences of a wider world. As will be seen, seignorial lordship, the state, and markets were able to shape both the institutions that managed the commons, and the opportunity costs of those management strategies for particular users. Although theorizing on common property regimes has at times treated them as if they were independent systems with no external reference, again and again we shall see that these supposedly 'exogenous' factors were closely intertwined with the management of common land (Hardin, 1968). Indeed, it is only by undertaking comparative work, as we have attempted to do here, that the relative importance of all those factors bearing upon the commons can be effectively assessed.

At the most basic level, we are studying the relationship between resources and the management institutions which sought to control their use. By a management institution we are referring to the body that organized the use of the resource by drawing up a set of rules that the users were supposed to follow, and provided the means for their implementation. Management was the link between a resource and its users that allowed a 'common' to function sustainably. All the aspects of common land touched upon in this volume relate to this nexus between the form of the resource and the nature of the regulatory institution.

The end point of our account is determined by the fact that much common land across Europe came to be enclosed, privatized or both during the latter part of the eighteenth century and the nineteenth century. 'Enclosure' refers to the process of ending the exercise of common use-rights over land, usually accompanied by the construction of a physical barrier around the land, or barriers becoming a permanent feature in landscapes that previously had been open for common usage during some part of the year. 'Privatization' refers to the transfer to individual ownership of previously collectively or communally owned land. The two processes often went hand in hand, but it was also the case that 'enclosure' could be applied to land that was privately owned but nevertheless subject to common use-rights, or that land which remained collectively owned was enclosed and no longer used in common. Indeed, both processes occurred across the early modern period in most areas of Europe, but reached a particular intensity, usually with government support, in the decades running up to 1800. At that time and since, the 'degradation' of the common lands and various degrees of mismanagement of the resources have been advanced as explanations for the historical necessity of enclosure and privatization. What this debate has all too often lacked is a long-term perspective on the management of these lands over the centuries when they were a central aspect of the agrarian system. This volume is a first step towards providing that perspective in a comparative context.

I. The nature of common land

It has become clear that considerable scope for terminological confusion exists over the terms used to describe different types of common land in different parts of Europe. We have tried to use a consistent terminology across the chapters. This terminology is based upon English usages (although these have not been consistently used by all English-speaking historians), taking into account however possible nuances in other countries. The use of this collective terminology also provides us with a typology of forms of common lands that allows local variation and the peculiar characteristics of each region to be highlighted in a comparative context. This gives us a threefold typology, with some 'sub-groups' that require further explanation. As a broad guideline, common refers to the fact that this land was used by several people or households during a certain period, in distinction to land that was used by only one person or household throughout the whole year. The suffix (*arable, meadow, woodland* etc.) refers to the principal use of the land.

I.1. Common arable, common fields or open fields

All these terms refer to land whose primary use was arable (i.e. for the growing of crops). In its classic form in north-west Europe, this land was held in long thin strips. Each farmer held a number of strips scattered around a field system, and the farmers cultivated and harvested their own strips. However, after the harvest and in years when the land was uncultivated or fallow, the land was used for common grazing. The individual strips were grouped into blocks called furlongs, and in turn, furlongs were grouped into larger fields. The fields were management units for the purposes of crop rotations. Such field systems could contain two, three or more fields, but were usually cropped according to a two- or three-course rotation, meaning that every second or third year respectively each field was left fallow. *Open field* is a frequently used term for this arrangement, alluding directly to the physical openness of a landscape devoid of internal hedges or fences. Most writers use the terms *common field* and *open field* interchangeably. However, others have distinguished the term common field from open field on the grounds that in some areas (such as Kent in south-east England) open fields were not subject to common rights. These fields then were physically open but not common (Thirsk, 1964). To avoid this potential ambiguity we have employed the term *common arable* to refer to land that was primarily cultivated as arable but subject to common management and common rights when not cultivated. In the context of common land the word 'field' is generally used in English to refer to arable land rather than meadow or pasture or waste. By contrast, enclosed or private land whether arable, pasture or meadow may be referred to as a field.

I.2. Common meadow

'Meadow' refers to grassland used for the production of hay. *Common meadow* was generally open to common grazing after the hay harvest, but was usually divided into separate blocks in individual ownership in the same way as common arable. However, in some places the harvest rights in the common meadow were reallocated at random each year by the drawing of lots.

I.3. Common pasture, common waste, common

Permanent grass-land used for common grazing has been referred to as *common pasture*. The terms *common waste* or *common* refer to common land on which a wider range of resources may have been available. More often than not this was grass land used mainly for common pasture. But on some common wastes, rights to gather wood, gorse, heather, and bracken, or to dig peat might also be important (and sometimes more important). In England waste is sometimes used with the connotation of uncultivated or unimproved land, whether subject to common rights or not. 'Common' is of course the most widely used shorthand for this kind of land, and often a reference to the 'commons' is simply a reference to an area of 'common waste'. In the northern English uplands in the early modern period some of the better common pastures on the lower slopes were physically enclosed (normally by stone walls) from the more extensive common waste. These enclosed areas remained common pasture but were physically distinct from the common waste and this allowed them to be used differently. In England 'waste' could also encompass wooded areas, which was not always the case elsewhere. In these continental areas, woodland subject to common rights was often treated as distinct from non-wooded areas. We have used the term *common woodland* for such districts.

All of these usages refer only to the fact that *common rights* were exercised as use-rights over certain areas of land. Nothing can be inferred from this about the actual ownership of the land itself. Sometimes the owners were indeed the commoners themselves, or the institution into which the commoners were organized, or the local administrative body to which all users were subject. However, in the case of *common arable* and *common meadow*, the owners were private individuals or bodies. In the case of *common waste*, *pasture*, or *woodland*, the land itself was very often owned by private individuals or the state, and the commoners enjoyed specified *use-rights* over that land. In many parts of Europe nearly all of such land was 'owned' by seigniorial lords who also exercised other forms of influence over the commoners, such as landlordship or juridical powers. The dividing line between 'lordly' and 'state' power was often thin. Frequently the state was effectively another form of lordship but enjoying rather wider powers of intervention, and in some cases seigniorial lordship and state power were combined in one and the same person. As we shall see, the differing balance of these property relations and powers within local communities could prove important for both the management and the fate of common lands.

II. Historiographical approaches to the management of common land

We can identify two basic explanatory frameworks for the relationship between the state of the resource and the property regime that have been employed in debates from the mid-eighteenth century onwards, wherein both resource and property regime have played, respectively, the role of cause or consequence. These debates on the commons have either regarded the state of the resource as the cause of the common property regime, or have claimed that the type of property regime, in this case common property, was responsible for the state of the resource. These debates have been primarily, but not exclusively, concerned with the state of common waste.

In the first case common waste is regarded as inherently linked to infertile land or non-cultivated resources. It is assumed that common waste is primarily found on the most infertile land, or that the only suitable property regime for infertile land is common property. It is often assumed that common property was the usual way of dealing with land that was not cultivated and indeed originally embraced most of the land surface, before being pushed back by the advance of cultivation. Thus the origins of common waste would date back to a distant 'communal' past – the primitive stage of (Germanic) communal property according to Engels and Marx – which made it possible to share risks and supplement cultivation with resources from the common (Engels, 1973: chapter 7). Indeed, Marx regarded this type of property regime as one of the survival mechanisms of pre-industrial societies, which made it possible for peasants living on the threshold of starvation to endure the uncertainties and 'exogenous shocks' of an agricultural system characterized by low productivity. The property regime allowed the use of extensive areas at low labour costs and provided an 'insurance function' against the more variable yields of intensively utilized land. During the dissolution of the commons, associated with the rise of capitalism, this regime came under increased attack. It is often also argued that the privatization of the commons led to the proletarianization of the peasants and a loss of both this 'insurance function' and independence from the labour market, resulting finally in a decline in welfare. According to this view, the disappearance of common land either caused poverty or made already poor peasants even poorer. Before the dissolution levels of poverty were lower, and commons functioned as a kind of safety net for the poor (Allen, 1992; Hammond and Hammond, 1911; Neeson, 1993; Tawney, 1912: 234–280; Thompson, 1968: 233–258; 1993: 97–184; Marx, 1987).

The view that the type or state of the resource caused, or at least heavily influenced the property regime, can also be found in the recent literature on the commons that has emerged from economics and the political sciences (Bromley, 1989; 1991; 1992). Runge, for example, has argued that common property regimes can primarily be found in areas where the economic surplus is minimal. These areas are not likely to become private property since there is insufficient economic surplus to support the private property regime, which is presumed to be more expensive (Runge, 1992: 17–35). The surplus that can be obtained from such marginal areas does not justify the sort of investment required to consolidate and maintain them as private property. If there is poverty this should, according to this view, be regarded as a logical consequence of the fact that the poorer classes are drawn to this type of property regime since it costs less than private property. In turn, the poverty of the land is unlikely to be remedied by a community of impoverished users who lack the capital for investment. This does not, however, mean that the wealthier classes cannot or will not use the common land.

Both these views clearly regard common property in a positive light. They stress that common land is the best regime for certain types of land, thereby also allowing the poorer elements of society to survive. It is not the type of property, but rather the inherent nature of the land that is responsible for the fact that these lands – at least the waste lands – do not reach the same level of productivity as land that is not subject to common rights.

Opposed to this is the negative view of common property regimes, the conviction that it was the regime that caused the state of the resource and consequently the income

level of its users. Economic historians and contemporary thinkers have told this negative story about common property in two ways, both of them stressing the low productivity of the land. The first group, especially writers contemporary with the wave of privatizations and enclosures around 1800, stressed the disincentives to investing in the land to improve productivity caused by the property regime. The problem was not so much that common use degraded the resource, but that the presence of common rights prevented its improvement. Firstly, common rights prevented farmers from experimenting with new ideas or reacting swiftly to market signals as resource-use was often subject to collective rules requiring widespread or universal assent before changes could be implemented. Secondly, collective usages meant that farmers would not reap the full rewards of any investments made to enhance productivity. The second group, consisting mainly of economists both contemporary and twentieth-century, denounced the mismanagement of common resources and regarded this as an inevitable result of the problems inherent in communal property (North and Thomas, 1977: 234). Foremost amongst these problems was 'free-riding', the ability to obtain benefits from the resource without paying the full cost. According to this argument, common management cannot sustain the productivity of a resource since people only act to their own advantage and not for the good of all. If it is at all possible to 'free-ride', sufficient numbers will do so and the resource will be over-exploited. Consequently, the dissolution of the commons is essential for the better allocation of resources, as peasants, farmers and/or landlords will start to invest in the improvement of these lands once they have been privatized, and over-exploitation will then come to an end. The poor will become less poor when the commons have been eliminated.

Both the positive and negative views of the commons have triggered reactions, and in some cases enduring historiographical debates. The reactions to the positive view sparked the 'proletarianization debate', with its central question: did the dissolution of the commons cause the proletarianization of its users? The negative view, whereby common property inevitably leads to the mismanagement of the resource, we know as the 'Tragedy of the commons' debate. This book is primarily concerned with the latter. Hitherto, this subject has primarily been engaged with in detail by non-historians, particularly political scientists. A substantial body of theoretical literature has examined the questions of whether common property regimes can be 'sustainable' and 'efficient', or instead are doomed to over-exploitation. It was the article written by the American biologist Garrett Hardin, and published for the first time in Science in 1968 (Hardin, 1986), that provided the impetus for these discussions in the 1970s and which remains the best known formulation of what might be termed the orthodox position. This states that common property is inherently inefficient and results in the over-exploitation of the resources concerned; but recent literature has countered this viewpoint by providing empirical evidence for a more positive view (Netting, 1976; Ostrom, 1990; Feeny, 1990; Gibson, 2000). It has been stressed that it is possible for groups of users to develop institutions that monitor the behaviour of individual users in such a way that free-riding behaviour is suppressed. Formulated more positively: one needs institutions (rules and their implementation) which foster cooperation between individuals in such a way that they obey the rules, thus making an optimal (efficient) use of the commons possible. It has been argued that under certain conditions stable institutions of self-government can arise and function in a way which guarantees the sustainable use of resources subject to the common property regime.

Though Hardin's article kick-started the debate, he was of course not the first to discuss the relationship between population pressure, 'carrying capacity' and sustainability. In fact the negative opinion may be traced back as far as Aristotles' *Politics*: 'What is common to the greatest number gets the least amount of care. Men pay most attention to what is their own: they care less for what is common' (1995, Book II, Chap. 3). Closer to the present day, during the 1830s William Forster Lloyd described in his Lectures on population, value, poor-laws, and rent the embryo of Hardin's parable (Lloyd, 1832; 1833; 1834; 1835; 1836). Gordon and Scott added a fishery-variant to this in his 'The economic theory of a common-property resource : the fishery' (Gordon, 1954; Scott, 1955).

The debate continued in 1977 with *Managing the Commons*, by Baden and Hardin, and by the 1980s had reached several scientific disciplines. Political scientists studied the way that commons work all over the world in the present day. A landmark in the history of the debate was a conference held in Anapolis (Maryland, U.S.A) in 1985. A number of researchers working on different parts of the world used a framework designed by Daniël W. Bromley to standardise the collection and assimilation of 'case-by-case analyses' (National Research Council, 1986; Bromley, 1992). Some of the results of this subsequent research were published in the book *Making the Commons Work. Theory, Practice and Policy* (1992). In 1989 an ad hoc group of scholars including political scientists, anthropologists, economists, historians and natural resource managers founded the International Association for the Study of Common Property (IASCP), a non-profit association devoted to understanding and improving institutions for the management of environmental resources that are (or could be) held or used collectively by communities in developing or developed countries. Foremost among the advocates of the possibility of effective common property regimes has been Elinor Ostrom. Her book *Governing the Commons*, published in 1990, proposed a list of design principles which can be found in long-enduring 'Common Pool Resource' (CPR) institutions. (Further information on the IASCP can be found on: http://www.indiana.edu/~iascp).

However, this 'Tragedy' debate has come to be focused primarily on the commons of today, ranging from local to global commons such as air, water, fisheries and even the internet. Although originally based on a historical example, the relationship of the 'Tragedy' thesis to the many historical commons, even within the relatively narrow bounds of Europe, has received little attention. This is despite fairly uncritical absorption of both the 'pro-' and 'anti-'common property regime theses by various historians studying the agrarian economy of early modern Europe. This book makes a start, in a broad comparative context, towards correcting that imbalance.

III. The aims of the book

This volume brings together eight surveys of the management of common land in various regions of north-west Europe. These present outlines of this subject over the early modern period in a systematic way for the first time. Common lands have only recently received relatively detailed attention from a few scholars within the confines of national historiographies. These are now sufficiently developed for the results to be presented on a broader canvas, which itself should assist the development of research at

both a regional and a local level. The chapters cover France, northern and southern England, Belgian Flanders, the Netherlands, northern and south-western Germany, and the Nordic counties with a focus on Sweden. Although we encounter considerable variation both within and between these regions, they all experienced a relatively similar political history in comparison with areas further afield, and had comparable agrarian regimes and socio-economic structures. Thus these regions are well suited to a comparison of the management of common lands. There are enough factors that are, relatively speaking, constant across these regions to be able to identify whether particular causes might be identified with particular management strategies and their end results. While such work remains at an early stage, we believe that such comparison will be a key element in providing explanations for the fortunes of common land both in particular circumstances and more generally.

To assist the process of comparison, each author has sought to answer a consistent set of questions, although the tools available for answering them vary considerably from place to place. This begins with a basic outline of the topography, environments and agrarian economy of the region. Though it is always difficult to do justice to the complexities of these in a small space, it is important not to lose sight of the very fundamental constraints and opportunities that they offered to the managers and users of the commons. Although much theoretical work has focused on institutional issues, it was also the nature of the soil and the climate, the technological level or the employment opportunities in the wider regional economy, that determined the broader boundaries of what was materially possible. Whilst we find little evidence of a general 'environmental determinism', the nature of the resources available and the opportunity costs of their use are central to understanding the strategies of exploitation employed. Concomitantly the common lands are described, with their component parts (common arable, meadow, or waste) and their importance to the rural economy. Often the extent of common land was only effectively measured in the nineteenth century, and these surveys were themselves often poor guides to the real area subject to common rights in previous decades let alone in previous centuries. Nevertheless, where available, such figures allow us to move towards an overview of the relative importance of commons both as an economic factor, and as a feature of the landscape.

The next set of issues addressed concern perhaps the trickiest question of all: the legal basis of common rights and who actually owned the commons. There was no shortage of claimants, and much of the history of the commons over this period concerns the drawn-out establishment of precise boundaries to common land, arguments over what rights pertained to this land, specifying who could exercise and regulate the rights, and which jurisdictions had authority over such matters. Over most of Europe, from the twelfth century onward, 'property rights' were split, in that a distinction was made between a *dominium directum*, a right to the soil of a delineated area, and a *dominium utile*, a right to use the resources within a particular area. How this split worked out in practice, and how it was conceptualized, varied according to the nature of the resource and the political and institutional histories of localities. But broadly speaking, one of two situations prevailed in regard to the major common rights. Firstly, where the 'ownership' of the land, and the use-rights, belonged to the commoners, although these were usually still subject to some kind of feudal overlordship. Secondly, the case where

one person (or institution) owned the soil (usually a lord), and others owned the use-rights over certain resources on it.

In a third variant there were often further secondary customary usages whose legal status was rather 'fuzzier' and where the appellation 'common rights' is a well recognised shorthand but is problematic in so far as it conflates such customary usages or 'rights' with those clearly defined legal rights discussed above. In such cases some individuals, and not necessarily those who owned the principal use-rights, enjoyed a collective use which was justified by more limited rights to obtain subsistence (to collect deadwood or gorse for fuel, for example, or to glean in the fields after the harvest) or permitted out of 'mercy' or at the discretion of the owner. When such rights had been exercised for a very long time and were critical to some household economies, users might feel however that this third case had the full force of law underpinning their use of the resource. It should be stressed that this simple typology rests on *outcomes*. A consensus over how rights should be allotted, and the legal underpinning to this distribution, was by no means always present among users. The distinction between 'customary usages' and 'clearly defined legal rights' was not always accepted or recognized, and in practice the balance of property and use-rights was disputed at some point almost everywhere.

In turn, the community of users, or the 'commoners', had to be defined. Again, who might belong to this community, and what the precise legal underpinnings of local arrangements were, has a long and complex history over this period, which could result in different outcomes even in neighbouring villages. Rights might be granted to all residents of a community or to those living within a certain distance of the common; or might belong only to the residents or owners of particular buildings; or might be defined in relation to landownership in the village fields or to the size of one's agricultural enterprise and feudal services owed to lords or the village community. While it is tempting to draw further typologies, caution must be exercised in conflating arrangements that might be superficially similar but in fact had different functions, legal bases and origins. Part of the problem rests upon the fact that such rights only slowly became regulated by a centralized legal system operating under consistent and enforceable norms, usually enhanced by the recording of rights and regulations in writing. Even in the nineteenth century it was not unusual for such questions to be resolved at the level of individual commons. This was because most commons had been regulated by 'custom' (itself a slippery notion which was mutable at the time and has not always been used with due care by historians), the set of practices and rules approved and enforced at the local level by the community of users itself. In some regions this localized and adaptable, but by no means necessarily consensual or harmonious, system came gradually to be constrained or even superseded by the regulatory powers of local and central government, enshrined in statute law or the precedents established in higher courts. Yet this process was extremely uneven in its progress and the enforceability of dictates from 'the centre'. Nevertheless, as will become clear, the ability of the state to govern the localities and the priorities set by central government were of considerable importance throughout the period for the management of common lands.

This brings us onto the local institutions vested with the power to manage the commons. By 'institutions' we are referring to the nexus formed by formalized organizations

such as seignorial or village courts, assemblies or committees, the procedures they established and the officials they appointed. Even this short list indicates considerable variation, and it is thus important to delve directly into the manner in which these institutions attempted to control the common land and commoners' access to it. This encompassed the mechanisms by which common land was regulated and monitored, the kinds of rules drawn up, the duties and obligations of commoners and the sanctions imposed for infringements. While often related to the legal forms of access and what we shall call the 'embededness' in feudal or state institutions, these nevertheless displayed a functional homogeneity across north-west Europe that allows us to isolate the uses of particular forms of regulation, monitoring or sanctions in particular instances, and to evaluate their relative success.

A case in point was the increasing regulation of grazing on the commons. At some point, most areas of north-west Europe saw communities, lords or governments imposing limits on the number of livestock that households with common rights were allowed to send out grazing on the commons. This took two main forms. One, the rule of 'stinting', took the form of simply setting a maximum number of beasts that each household could graze, for example two cows and six sheep per household. Often stints did not apply equally to all commoners, but were graded in some manner. Those with larger landholdings, for example, could send out more animals. A variation on this theme, sometimes after an initial 'stint' where the grazing was free, was to charge for each additional beast sent out to graze. In such cases the charge was sometimes varied from year to year in order to control the total numbers of animals for which commoners were prepared to pay for grazing. Another system encountered very widely across Europe was that of 'overwintering' or 'levancy and couchancy' as it was known in English law. This provided that commoners could freely graze as many beasts as they were able to sustain off their own resources over the winter, when grass-growth was too meagre for common grazing. One effect of this rule was to prevent commoners from buying or renting livestock over the summer from elsewhere, grazing them on the commons and enjoying the rewards, and then selling them on in the autumn. This thus restricted the commercialization of the commons, but could also be seen as a way of communities (or lordships) preventing the capital depreciation of their assets (the common) by users who reaped profits but brought about an unequal distribution of the risks of over-use through their behaviour. The 'overwintering' rule, like graded stinting, in essence limited each user's use of the commons according to the size of their agricultural enterprise, a notion that could be linked itself into the commons as guarantors of household 'needs', the *necessitas domesticus*. They differed in an important way, however. Stinting permitted the managers of the commons to control the level of use to which the common pastures were subject according to conditions. In contrast, the rule of overwintering gave no freedom of manoeuvre to the managers, while individual users could expand and contract their exploitation of the common according to the size of their economic enterprise.

The value of resources to households, the reproductive cycles (or investment horizons) in which those resources were embedded, and the manner in which they could effectively be managed and monitored could vary considerably. Grazing, for example, regenerated quickly as well as being subject to regular use; mature timber for building took a long time to replace and was required only occasionally by a household; while the humus

collected for stall litter, or peat for fuel, could be extracted regularly but was effectively irreplaceable. When we disaggregate resources in this manner, we see that there was no such thing as the commons subject to a single management strategy and a commonly shared value for all, but rather use-rights exercised over a bundle of different resources that lay on common land. The varying opportunity costs of managing these resources in a particular way for households as different as an aged widow in a cottage with no livestock, a wealthy commercially-orientated farmer or a proto-industrial household with a single cow are plain to see. Opportunity costs measure the cost of a particular choice by the value of the 'next best choice' foregone by embarking on that strategy. Thus a household which has sufficient fodder without needing the common for its livestock might view the common as having a low value compared with the arable land it could become if partitioned, while the widow with a cow or goat who could not afford the costs of any arable cultivation will measure the value of the common against the alternative option, in this case, of getting no benefit from this land at all if it were partitioned.

It is for this reason that we considered it of great importance to specify the particular resources that could be extracted from the commons, and the values that they would have had to *particular groups of users*. Of course, most communities of commoners were differentiated to some degree both in wealth and in types of economic activity. To what extent a degree of equity among commoners was required for a common to function effectively and in a (reasonably) consensual manner is a moot point to which we shall return in the conclusions. Of particular importance, given the 'proletarianization debate', is an assessment of the value of the commons in the household economies of the poor.

All these users, as well as the common lands themselves, have histories. If we are to specify the values derived from commonly-managed resources, we must also understand how these changed over time. This could occur both for reasons 'endogenous' to the management of the common, such as whether the form of exploitation depleted a resource, or 'exogenous' factors, such as population growth or shifts in the wider economy, although these in themselves may not be independent with respect to the availability of common resources. With this, we return directly to the 'Tragedy of the commons' debate, whilst placing it in a considerably broader context than has often been the case.

The 'Tragedy of the commons' has been framed as being concerned with 'sustainability', but the concept of 'sustainability' is a slippery and problematic notion. It not least depends on what one wants to sustain and for whom. Even within the 'rubric' of the common lands, we will see that there were a variety of resources over which different groups exercised different claims – and desired uses that were potentially to the detriment of other possible uses. Too often 'sustainability' is treated as the maintenance of an ecosystem in its putatively 'natural' state. Yet many commons were in fact the result of prior human intervention, often massive human intervention, and subject to the re-evaluations of the managers and users as time passed. Sustainability, then, was always founded upon a particular 'mode of exploitation', and whether a management strategy was sustainable depends on whether or not it led either to 'over-exploitation' or to 'under-exploitation'. After all, a resource that is not effectively used is not likely to be 'socially sustainable' in the sense that users will probably want to change that use.

Once the 'mode of exploitation' has been clearly established it becomes possible to provide normative assessments of its sustainability that can be set against the opportunity costs associated with that mode. 'Good exploitation' today is generally seen as a set of practices that provide for the stability of the system, neither rapidly depleting it nor overly encouraging particular resources (canopy trees, grazing, fauna, etc.). That many, though by no means all, common lands were able to pass the 'longevity' test over centuries itself bespeaks a certain stability in operation. Nevertheless, this might not preclude the over-exploitation of particular resources, mature timber being one resource that very often disappeared at a relatively early date. Such events, reducing both resource diversity and bio-diversity, might be judged negatively from a modern ecological perspective. However, it may not have appeared that way to users at the time. If their measure of 'stability' was that of *per capita* income, whether measured in monetary terms (exchange-values), or in kind (use-values), then the survival of a particular resource may not have been an important issue. Indeed, it may have made sense according to the 'law' of comparative advantage to obtain it elsewhere. Even 'degradation' in an energetic sense – the production of fewer calories per unit of land over time – may not have appeared detrimental to users if this output became sufficiently valuable to offset losses in quantity.

These considerations also make clearer why it was possible for long-lived and apparently effective modes of exploitation to become the subject of condemnation in the second half of the eighteenth century, leading to the widespread dissolution of the commons. A 'stable' product from a given area of land or could have become much less acceptable as the agrarian system shifted towards higher levels of productivity through new technologies such as the introduction of sown fallows, new fodder crops and year-round stall-feeding. This altered the structure of opportunity costs, making the old regime appear as a case of *under-exploitation*, and at the same time could prove an incentive to disregard the old regulatory order and hence lead to an increased level of transgressions. This could be regarded as instigating *over-exploitation* relative to the previous criteria of management, but in fact was the end result of the idea that commons were being under-used. Indeed, in the agronomists' critique of the commons, it often not clear whether the commons are being condemned for under- or over-exploitation of their resources. The double standard of assessment, by which the commons could appear simultaneously under- and over-exploited as a result of the same process, may have been one reason for this. Equally some critics were happy to employ any kind of argument against the commons as it suited them, whether logically consistent with their previous statements or not. This underlines the importance of carefully measuring contemporary criticisms, and modern applications of the 'Tragedy of the commons' thesis against historical circumstances and the interests of users. It is also likely that some of this confusion arose because of the difficulty in measuring the actual value of the commons in those economies that remained relatively unmonetized and where the differentiated bundle of common resources themselves remained resistant to commercialization. This remains a problem for those historians, who have measured productivity gains via changes in the rent before and after enclosure (Clark, 1998; McCloskey, 1972; Mingay, 1995: 97–101; Thompson, 1963: 222–226; Turner, 1984: 39–46). Yet it is unclear in some cases whether this represented an increase in rent-taking or a genuine rise in productivity. Given that the produce of common lands often fed only indirectly into the rental system (via fertiliser spread on privately held fields, or the value of livestock) rather

than being reflected in the direct output of common lands, a genuine 'before-and-after' comparison is probably impossible. Any 'post-enclosure' rent rises may simply represent the ability of particular kinds of property-holders to appropriate local resources in a form more suited to their modes of operation. It hardly requires repeating that both the opportunity costs and the results of privatization could be wildly different for different users.

All the contributors have sought to address this range of issues, which requires a broader perspective on the social, political, economic and demographic changes taking place during this era. We have, however, chosen to focus on a narrower range that brings together the regulatory institutions, management strategies and types of resources. In identifying these relations and how they altered over time, we may not have achieved an effective assessment of the 'success' or 'failure' of commons management, which in any case, as outlined earlier, must be set against differing and possibly incommensurable criteria. This does, however, allow us to assess whether regulatory authorities proved *capable* of performing their tasks under particular conditions. We are, unfortunately, still short of the necessary data to be able to answer these questions with any conviction for many areas, but the following chapters contain many preliminary observations, and some rather more than that. This in itself should provide a significant contribution to the 'Tragedy of the commons' debate.

The means by which we have made these evaluations are provided by Elinor Ostrom in her book *Governing the Commons*. Here she lists eight 'design principles' for the successful management of a 'Common Pool Resource' or CPR (see Table 1.1). While these should not be regarded as definitive, they allow us to test a widely recognized set of principles against 'real' conditions, although we recognize that the principles themselves were inductively derived from a number of particular studies. They provide a useful starting point, that in addition to aiding comparisons within this volume, should make the results and conclusions presented here accessible to the wider community interested in research on the historical and contemporary commons.

However, we have not accepted Ostrom's principles entirely uncritically. The degree of abstraction that makes possible their broad applicability as a model of good management makes them rather remote from the real conditions and opportunity costs of economic behaviour in particular societies, the factor on which we have laid such stress in this introduction. After all, a set of institutions that function one year may not prove equal to their task the next.

Ostrom's book was written in opposition to the negative assumptions of Hardin and others. While she dedicates a large section of her work to a consideration of failures, principally of water basins and fisheries, she does not deal with the processes of privatization, enclosure or the degradation of agrarian common lands, many of which conform fairly closely to her principles for institutional success. Her work therefore provides only limited guidance as to the circumstances which led to the failure and dissolution. We too must guard against cherry-picking, as examples of 'success', those places where the Ostrom principles seem to hold over long periods, given that it is highly likely that examples of 'failures' with a similar institutional framework have disappeared from the record.

Table 1.1 Design principles illustrated by long-enduring CPR institutions

1.	*Clearly defined boundaries* Individuals or households who have rights to withdraw resource units from the CPR must be clearly defined, as must the boundaries of the CPR itself.
2.	*Congruence between appropriation and provision rules and local conditions* Appropriation rules restricting time, place, technology, and/or quantity of resource units are related to local conditions and to provision rules requiring labor, material, and/or money.
3.	*Collective-choice arrangements* Most individuals affected by the operational rules can participate in modifying the operational rules.
4.	*Monitoring* Monitors, who actively audit CPR conditions and appropriator behavior, are accountable to the appropriators or are the appropriators.
5.	*Graduated sanctions* Appropriators who violate operational rules are likely to be assessed graduated sanctions (depending on the seriousness and context of the offense) by other appropriators, by officials accountable to these appropriators, or by both.
6.	*Conflict-resolution mechanisms* Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials.
7.	*Minimal recognition of rights to organize* The rights of appropriators to devise their own institutions are not challenged by external governmental authorities.
	For CPRs that are parts of larger systems:
8.	*Nested enterprises* Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organised in multiple layers of nested enterprises.

Source: Ostrom, 1990: 90, Table 3.1

Thus, the best way to apply such theories is by no means clear cut. The importance of Ostrom's work above all lies in the identification of these themes as key areas for analysis, rather than establishing that their presence or absence within local institutional frameworks for managing the common was sufficient to ensure its effective and sustainable exploitation.

Even within north-west Europe, where 'enclosure' and 'privatization' have long been recognized as a significant and worthy object of the historian's attention (for a recent overview, see Brakensiek, 2000), there remains relatively little detailed examination of the functioning of the commons themselves, especially within the more quantitative and inter-disciplinary approaches developed since the Second World War. Consequently, we can hardly claim to be in a situation to respond adequately to most of the problems posed above. Nevertheless, the following chapters represent a significant step forward in presenting the available information and arguments of recent research within a context that allows comparison and even some tentative conclusions. If, in doing so, they promote the understanding of the commons, such an essential aspect of European agriculture for so many centuries, then this book will have succeeded in its aims, and future research can be undertaken in a broader context and on a much firmer footing than has hitherto been the case.

Bibliography

Allen, R. (1992) *Enclosure and the yeoman. The agricultural development of the south Midlands 1450–1850*, Oxford.

Aristoteles (1995) *Politics*, Book II, Chap. 3, Oxford.

Brakensiek, S. (ed.) (2000) *Jahrbuch für Wirtschaftsgeschichte. Gemeinheitsteilungen in Europa. Die Privatisierung der kollektiven Nutzung des Bodens im 18. und 19. Jahrhundert*, 2, Berlin.

Bromley, D.W. (1989) 'Property relations and economics development: the other land reform', *World Development*, 17, pp. 867–877.

Bromley, D.W. (1991) *Environment and economy: property rights and public policy*, Oxford.

Bromley, D.W. (ed.) (1992), *Making the commons work. Theory, Practice and Policy*, San Francisco.

Clark, G. (1988) 'Commons sense: common property rights, efficiency, and institutional change', *Journal of Economic History*, 58, I, pp. 73–102.

Engels (1973), *De oorsprong van het gezin, van de particuliere eigendom en van de Staat*, Amsterdam.

Feeny, D., Berkes, F., McCay, B.J. and Acheson, J.M. (1990) 'The tragedy of the commons: twenty-two years later', *Human Ecology*, 18, 1, pp. 1–19.

Gibson, C.C., McKean, M.A. and Ostrom, E. (eds) (2000) *People and Forests. Communities, Institutions, and Governance*, London.

Hammond J.L and Hammond, B. (1911) *The village labourer 1760–1832*, Gloucester.

Hardin, G. (1968) 'The tragedy of the commons', *Science*, 162, pp. 1243–1248.

Hardin, G. and Baden, J.A. (1977) *Managing the commons*, San Francisco.

Gordon, J.S. (1954) 'The economic theory of a common-property resource: the fishery', *Journal of political economy*, 62, pp. 124–142.

Lloyd, W.F. (1968) *Lectures on population, value, poor-laws, and rent. Delivered in the University of Oxford during the years 1832, 1833, 1834, 1835 and 1836. Reprints of Economic classics*, New York.

Marx, K. (1987) *Capital. The process of capitalist production*, New York.

McCloskey, D.N. (1972) 'The enclosure of open fields: Preface to a study of its impact on the efficiency of English agriculture during the eighteenth century', *Journal of Economic History*, 32, I, pp. 15–35.

Mingay, G.E. (1997) *Parliamentary enclosure in England: an introduction to its causes, incidence and impact, 1750–1850*, London.

National Research Council (1986) *Proceedings of the conference on common property resource management*, Washington D.C.

Neeson, J.M. (1993) *Commoners: common right, enclosure and social change in England 1700–1820*, Cambridge.

Netting, R.M. (1976) 'What Alpine peasants have in common. Observations in communal tenure in a Swiss village', *Human Ecology*, 4, pp. 135–146.

North, D.C. and Thomas, R.P. (1977) 'The first economic revolution', *Economic History Review*, 30, pp. 229–241.

Ostrom, E. (1990) *Governing the commons, the evolution of institutions for collective action*, Cambridge.

Overton, M. (1996) *The agricultural revolution: the transformation of the agrarian economy 1500–1850*, Cambridge.

Runge, C.F. (1992) 'Common property and collective action in economic development', in D.W. Bromley (ed.), *Making the commons work. Theory, practice and policy*, San Francisco, pp. .

Scott, A.D. (1955) 'The fishery: the objectives of sole ownership', *Journal of Political Economy*, 63, pp. 116–124.

Tawney, R. (1912) *The Agrarian problem in the sixteenth century*, London.

Thirsk, J. (1964) 'The Common Fields', *Past and Present*, 29, pp. 3–25.

Thompson, E.P. (1992) *Customs in common*, London.

Thompson, E.P. (1968) *The making of the English working class*, London.

Thompson, F.M.L. (1963) *English landed society in the nineteenth century*, London.

Turner, M.E. (1984) *Enclosures in Britain*, 1750–1830, London.

2 Upland commons in northern England[1]

Angus J.L. WINCHESTER, Lancaster University

The historic counties of Cumberland (hereafter Cu), Westmorland (We), Northumberland (Nb), Durham (Du), Lancashire (La) and the North and West Ridings of Yorkshire (YN and YW) contain between them the most extensive uplands in England: the Pennine hills and the mountains of the Cumbrian Lake District (Figure 2.1). The character of the two upland ranges differs: the Lake District 'fells', while never attaining heights of over 1,000m, are steep, rocky and mountainous, while the Pennine chain is characterised by wide, peat-capped moorlands at around 600m. Arable cultivation in both areas was limited by both relief and climate to the valleys which penetrate deep into the hills, and livestock rearing has been the predominant agrarian pursuit since the medieval period. Such corn as was grown – predominately oats, with smaller quantities of 'bigg' (a barley) – served household needs, the hill farmer's income deriving from cattle, sheep and involvement in rural industries. By the seventeenth century there was some specialization in livestock-rearing, with cattle becoming increasingly important in many areas. Industrial employment enabled upland families to remain on the land. Lead-mining in the north Pennines; woodland industries in parts of the Lake District; and woollen textile manufacture all generated a non-farming sector in the rural economy and a growing population of landless householders (Thirsk, 1987: 51–53).

I. Resources held in common: types of common land in northern England

In this upland environment the bulk of common land took the form of unimproved rough grazings on the fells and moors. However, common arable and meadow were to be found in the valleys, particularly in the late-medieval centuries, before their silent demise in a process of piecemeal enclosure, mostly during the sixteenth and seventeenth centuries.

I.1. Common arable and meadow

Open arable fields and common meadows were found widely in the uplands, though their extent was often modest and dwindled from the sixteenth century. In general, open fields were found in association with nucleated settlements, where the local topography provided sufficiently large stretches of cultivable land. Many villages around the edges of the hill country, in the Eden valley in Cumbria or the Lune valley in Lancashire, for example, possessed extensive open fields. Open fields were also found on the floors of the wider valleys in the uplands, such as those associated with the villages of Mickleton

[1] This chapter is based on and summarises the findings of the author's published work on pastoral farming in upland northern England (Winchester, 2000), where full references to the material discussed below will be found.

Figure 2.1 The uplands of northern England, showing the boundaries of the historic counties and the county abbreviations used in the text

and Cotherstone in Teesdale (YN), or Buttermere (Cu) and Grasmere (We) at the head of valleys in the Lake District. Most open fields in the uplands disappeared before 1700 and few surveys or plans survive to enable accurate estimates to be made of their extent. In lower Wensleydale (YN) the common arable and meadow of each township covered around 100–125 acres (40–50 ha) in the seventeenth century, accounting for under 10% of the good land in the valley bottom (Fieldhouse, 1980: 171–172). Similarly, common arable in settlements in Lancashire rarely covered more than 150 acres (60 ha) and represented only a small fraction of the cultivated land. There is little indication of the regular crop rotations found in the 'Midland' system: most open fields in and around the margins of the northern hills were intensively-cultivated 'infields' or 'townfields',

often shared by only a small number of tenants (Youd, 1961: 10, 31–32). Meadow land, so vital to the pastoral economy of the uplands, generally lay on wetter land on the floors of the valleys. Again, shared, common meadows were associated more with nucleated settlement than with dispersed farmsteads and, like the open fields, common meadows declined across the early modern period as a result of piecemeal enclosure.

I.2. Waste

By far the most extensive category of common land in the uplands was the unenclosed waste beyond the limit of enclosure and stretching to the tops of the hills. Thousands of hectares remained as unimproved stretches of semi-natural vegetation, much of it rough grassland or heather moorland. In Cumberland alone, almost 109,000 acres (44,000 ha) (11% of the land surface) remains today as common waste, to which must be added the 257,776 acres (104,320 ha) (26.5% of the surface) which were enclosed during the great wave of Parliamentary Enclosure between 1760 and 1870 to arrive at an estimate of the extent of waste in the early modern period (Hoskins and Stamp, 1963: 110; Turner, 1980: 60, 178). The figures in Table 2.1, showing that almost one quarter of the six northern counties (excluding the lowland East Riding of Yorkshire) was waste before c.1750, do not give a true picture of the significance of waste in the uplands. First, they underestimate the extent of waste, as they do not include areas of waste enclosed in the seventeenth century, such as the lowland wastes enclosed in Durham and Lancashire or the 10,000 acres (4,000 ha) of moorland in Bowland (YW) enclosed between 1587 and 1621 (Hodgson, 1979; Porter, 1978). Nor do they include waste enclosed at the same time as open field arable (Chapman, 1987). Second, the county figures mask the contrast between upland and lowland areas. Whereas in the lowlands of northern England unenclosed waste accounted for around one quarter of the land surface, the proportion in the heart of the uplands was much higher. In the manor of Alston Moor (Cu) in the

Table 2.1 Northern England: common waste as a percentage of total land area

County	Surviving Waste[1]	Waste enclosed by Act of Parliament[2]	Total
Cumberland	11.2	26.6	37.8
Co. Durham	9.9	16.1	26.0
Lancashire	2.8	7.0	9.8
Northumberland	2.0	15.3	17.3
Westmorland	25.9	21.1	47.0
Yorkshire, North Riding	16.7	12.3	29.0
Yorkshire, West Riding	6.5	13.0	19.5
Total	9.1	14.8	23.9

Sources:

[1] From Hoskins and Stamp's revised schedule of common lands, 1962 (Hoskins and Stamp, 1963: 110).

[2] From Turner, 1980: 178–179.

north Pennines the wastes, enclosed in 1820, extended to over 20,500 acres (8,350 ha) or 56% of the parish, while the proportion was even higher in the Lake District manors of Lorton and Loweswater (Cu), where the waste accounted for 72.5% and 62% of the land surface respectively (Dilley, 2000: 226, 230).

Such 'fell' or 'moor' land formed an integral part of the agrarian economy of the uplands, complementing the enclosed farmland in the valley bottoms. Its principal value lay in providing extensive grazing for cattle, sheep and horses during the summer months. Turning the livestock out to graze the common waste in spring enabled crops of corn and hay to be grown free from the hungry teeth and tongues of the beasts. As in the English lowlands (see Neeson, 1993: 158–177), the wastes also yielded a variety of other resources, the most significant of which were peat and turf, available to upland communities through the exercise of the common right of turbary. Peat was a major component of domestic fuel supply and turf and sods served a variety of purposes, including roofing and the repair of hedge banks. Upland communities had usually turned to peat by the sixteenth century in the face of scarcity of available woodland for fuel, but an element of coercion was found in the royal forest of Bowland, where woodland was seen as the preserve of the game and tenants were specifically required to burn peat rather than wood (Winchester, 2000: 126). Other resources gathered from the open hillsides included thatching materials such as bracken (*Pteridium aquilinum*), heather (*Calluna vulgaris*), and rush (*Juncus sp.*) – particularly important in a pastoral economy where little straw was available.

I.3. Shared pasture closes

A third category of land, the shared enclosed pastures on the lower slopes of the hills, were tantamount to common grazings, though the legal basis of grazing rights in many such pastures placed them outside the modern legal definition of common land (see below). Such pastures were especially numerous in the central Pennines, where they provided summer grazing for particular categories of livestock, notably milk cows, horses and oxen. Many were huge communal enclosures, covering several hundred acres of unimproved hillside, the grazing rights shared by the farmers of a particular hamlet or group of farms. By 1614, for example, enclosed cow pastures covered over 7,700 acres (3,116 ha) on the southern slopes of upper Wensleydale (YN), each of the eleven hamlet communities on that side of the valley having its own pasture. Although some enclosed pastures had their origins in the medieval centuries, many were enclosed during the sixteenth and seventeenth centuries. They formed a category of land of considerable importance in the rural economy, providing secure grazing on comparatively good pasture.

II. The legal basis of common right

In discussing the legal framework within which common resources were exploited in northern England, it is necessary to draw a distinction between the ownership of land over which common rights were exercised and the nature of the common rights themselves. Each of the three categories of land outlined above had a different legal character.

II.1. Common arable and meadow

Common arable and meadow consisted of land in separate ownership, each tenant's strips in the open field or shares in the common meadows being clearly known and used separately during the growing season; only after the crop of corn or hay was cut were such areas subject to common rights.

II.2. Common waste

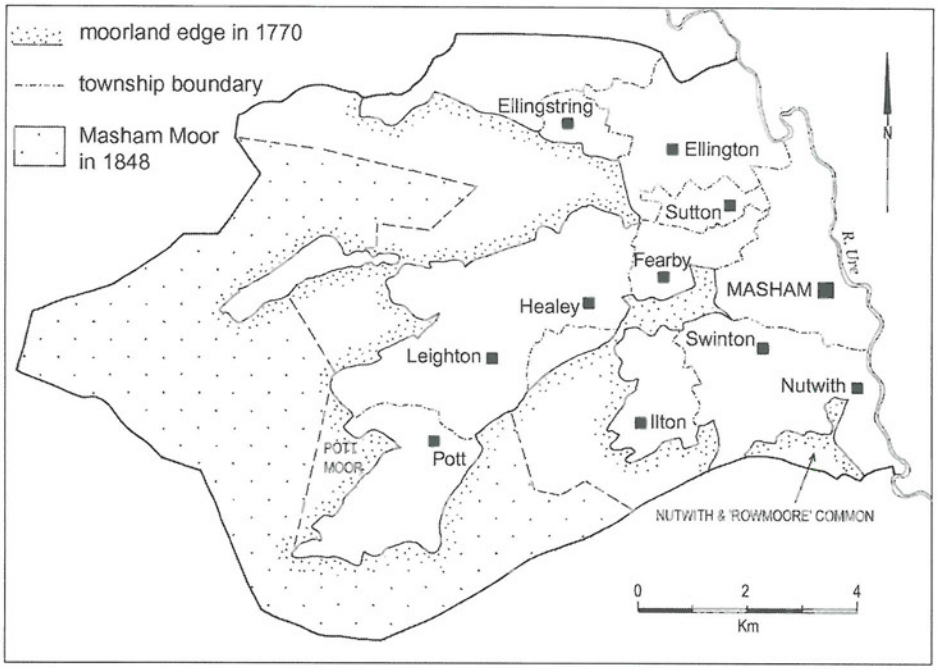
By the sixteenth century, the unenclosed rough grazings of the fells and moors generally had the status of 'manorial waste', a legal category that can be traced back to the thirteenth century. By enabling the lord of a manor to enclose land from the waste (as long as he left sufficient pasture for his free tenants), the Statute of Merton of 1236 confirmed that the lord owned the rights in the soil of the manor's wastes.[2] Technically, therefore, wastes belonged to the lord but, in practice, these manorial property rights were encumbered by the common rights exercised by the tenants of the manor, of which the most significant were common of pasture (the right to graze livestock on the waste), common of turbary (the right to cut peat and to strip turf) and common of estovers (the right to take wood and to gather other vegetation).

In looking at the long-term development of rights over the manorial waste, there was a general tendency for ownership rights to become more closely defined across the centuries. While the Statute of Merton marked the point at which ownership rights were linked to the manor, vestiges of extensive overlordship over hill wastes survived in parts of northern England in the form of moors which were intercommoned by settlements around their edge, ownership being vested in a superior lord. Even in the examples documented in the later middle ages however, separate blocks of common had come to be assigned to each settlement and treated as manorial waste belonging to the lord of each manor. For example, parts of Masham Moor (YN), the waste belonging to the overlordship of Mashamshire on the eastern edge of the Yorkshire Pennines, were acknowledged by 1610 to consist of separate sections, 'commonly named the moors or wastes of such towns and villages whereunto they are next adjoining', though part remained as intercommoned waste until the nineteenth century (Figure 2.2) (Winchester, 2000: 27). We hear of such cases as a result of disputed ownership, but they were exceptional survivals of earlier systems of extensive lordship: most common waste was manorial by the later middle ages.

At the other end of the spectrum of ownership rights, sections of the manorial waste could sometimes be said to 'belong' to individual settlements in the often extensive manors of the uplands. The scattered settlement pattern of the upland valleys meant that moorland adjacent to a hamlet community tended to be used exclusively by that group of tenants, so that usage rights merged into proprietary rights. In the Bowland fells each of the medieval vaccaries (demesne stock farms) in Over Wyresdale (La), and of the hamlets which succeeded them, contained within its bounds a defined section of moor-

[2] Statutes, 20 Hen. III, c. 4.

Figure 2.2 Masham Moor, Yorkshire North Riding, England



land running back to the watershed on the crest of the fells. On the former Fountains Abbey property in Langstrothdale Chase (YW), the fells had been physically divided between individual hamlet settlements by the later sixteenth century. In these cases, the division of the hill pastures may have been a legacy of demesne stock farming, whether by monastic houses or by lay lords. But similarly acknowledged boundaries were found elsewhere. In Redesdale (Nb), for example, there were 'marches' (boundaries) between the commons of individual settlements within the manor by 1633. The recognition of exclusive usage rights such as these was a necessary prelude to the enclosure of the lower fell sides as shared pasture closes by hamlet communities, particularly in the Pennines (Winchester, 2000: 30–32).

II.3. Shared pasture closes

The legal status of that third category of land, the enclosed shared pastures, depended on the basis on which shares of the grazing were held. Most of the enclosed pastures were 'stinted', that is, a numerical limit was placed on the livestock grazing them. In origin, many enclosed pastures resulted from communal enclosure, a group of tenants separating a block of pasture from the waste and paying rent for it, holding it jointly from the lord of the manor. Modern legal commentators (and the Commons Registration Act of 1965) agree that many stinted pastures are not, strictly speaking, common land. One line of argument suggests that few such pastures were true commons: where the

owner of the soil (the lord of the manor) had granted away his entire right and did not hold a share of the pasture (as was generally the case in such pasture closes), rights of common did not exist (Gadsden, 1988: 12–13, 22–23). Another, more specific, argument states that where stints had become detached from a holding of farmland or were held 'on terms analogous to a lease' they ceased to be common rights (Harris and Ryan, 1967: 18–19). Certainly, stints in shared pastures were being bought and sold independently of farmland in sixteenth-century Yorkshire (Sheppard, 1973: 167) and eighteenth-century Cumbria (e.g. in 'Grainlussock' (now Scales), Buttermere) (CRO, D/WM/11/122 *et seq.*). Despite these legal niceties, the shared use of stinted pasture closes made them, for all practical purposes, essentially similar to other common land.[3]

II.4. Common Rights

In English law common rights were generally viewed as adjuncts to holdings of land within a manor, subsidiary rights or 'appurtenances' which were enjoyed by virtue of holding a house or land. In general, therefore, a right of common was restricted to those holding land from the lord of a manor. Moreover, as common rights were appendant to the holdings of land, the benefits of those rights could only be used to support a tenant's farm. Therefore, produce from the common (whether grazing for livestock or peat for fuel) could not be sold to people outside the manor. While common of pasture enabled the community's livestock (the mainstay of the upland economy, bred ultimately for sale) to be fed, livestock from outside the manor could not be brought into a manor to graze on the common. Similarly, the common right of turbary could only be exercised in respect of houses within the manor. This was a live issue in manors close to urban settlements with their insatiable hunger for fuel. The same principle governed the exercise of that cluster of common rights, grouped in law under the heading common of estovers, which permitted the cutting of bracken, gorse, heather, rushes and other vegetation. Again, exploiting the resources of the common waste for sale or, more generally, beyond the necessary needs of a holding within the manor, was prohibited (Harris-Ryan, 1967: 34–46; Gadsden, 1988: 100).

The manorial framework within which common rights operated did not necessarily mean that all rights of common were available to all members of the manorial community. First of all, a common right might be restricted to certain tenants. This was particularly true of rights in the common arable and meadows, where rights were generally restricted to those holding plots of ploughland or meadow in the fields or meadows in question, and of rights in enclosed, shared pastures, where grazing rights were restricted to those with a share in ownership. Conversely, rights on a manor's waste could sometimes be held by people from outside the manor, notably where adjacent settlements intercommoned a tract of fell or moor without demarcation of shares between them. Sometimes inhabitants of a nearby settlement claimed a common right by reason of 'vicinage', that is by dwelling as neighbours whose land abutted the common land in another manor.

---

[3] I should like to record my thanks to Eleanor Straughton, a doctoral research student in the Department of History, Lancaster University, working on the management of common land in northern England since 1800, for advice on the legal status of stinted pastures.

III. Manor courts and the management of common land

The central institution governing the use of common land was the manor court, a body meeting in the name of the lord of the manor, presided over by his steward, and attended by those holding land in the manor (Harvey, 1999: 41–68). Although the lord's court, a manor court acted as a forum where members of the local community could meet to determine matters of common concern, which included the management and use of common land. Decisions were taken by a jury drawn from the tenants, who were obliged to attend the court. The jury upheld the rights and privileges of the lord, but also aimed to preserve 'good neighbourhood', friendly relations between members of the community. However, the oligarchic nature of the manor court juries meant that 'neighbourhood' and 'community' tended to be defined quite narrowly. Juries were composed largely of the wealthier members of the community, the larger yeoman farmers, leading inevitably to a tendency for them to uphold the interests of their own sort against those of others, particularly the landless. From the jury bench in the manor court, the concept of 'neighbours' in the manorial community often appears to have excluded cottagers.

The term 'manor court' is a short-hand embracing two principal types of court. The *court baron* was the basic manorial institution, dealing largely with internal matters on the estate, including infringements of the lord's rights and prerogatives, agrarian disputes between tenants and changes of tenancy. Some manorial lords also had the right to hold a *court leet with view of frankpledge*, which was required to meet twice a year and had a wider remit as an arm of royal justice dealing with minor breaches of the peace and public order and administering the provisions of a series of Tudor statutes. In surviving records, the proceedings of manorial courts are often headed simply by the phrase 'the court of ...', particularly in the fifteenth and early sixteenth centuries. In northern England, the legal terms 'court leet' and 'court baron' are uncommon until the seventeenth century, when printed treatises on court-keeping had begun to circulate. Where the legacy of forest administration survived, as in the bishop of Durham's forest of Weardale (Du) or the royal forests of Lancaster and Bowland, we find 'forest courts' or 'swainmotes' in which conserving the lord's forest prerogatives of 'venison and vert'(preservation of game and tree cover) was paramount (Winchester, 2000: 33–37).

The frequency with which courts were held varied from place to place. The common pattern in the early modern period was for agrarian business to be dealt with at the 'head court' (*curia capitalis*), generally a court leet, held twice each year, usually in April or May (the Easter court) and in October (the Michaelmas court). At the head court, a jury presented and 'amerced' (fined) individuals who had broken byelaws and orders of the court, and confirmed, amended or made new byelaws, or 'paines' (*penae*)[4] as they were usually termed. The court also appointed officers to supervise the byelaws and orders between sittings of the court. Many manors appointed 'burlawmen', 'barleymen' or 'bylawgreaves', often four in number in northern England, who had general responsibility for upholding 'good neighbourhood' and for bringing offenders to court. In some manors, more specific tasks were allotted to particular officials. The onerous but vital responsi-

[4] Paine: the vernacular term for a byelaw or order of the manor court, breaches of which rendered the transgressor liable for a fixed 'amercement' (fine).

bility for ensuring that fences were kept in repair was laid on officials called by a variety of names, including 'hedge viewers' or 'hedgelookers' (*visores hayas* or *(super)visores sepium*), 'fencelookers', 'yerdeslokyrys', 'frethmen' and 'punders'. Others were appointed to oversee turbary rights ('mosslookers'; *supervisores turberie* or *visores de le mosse*), pasture rights on the moors ('moregreves') and in the common arable ('field keepers'), the control of pigs ('swinelookers': *(super)visores porcorum*) and the upkeep of houses ('houselookers': *plebisciti domorum*).

Many head courts in the uplands had jurisdiction over wide territories, as upland manors often embraced whole valleys. Where jurisdiction was so extensive, separate juries often brought in presentments for the constituent townships and drafted orders for their own communities. The forest court of Weardale (Du), for example, had separate juries for Stanhope, Stanhope park, the forest, Roughside, Wolsingham park, and Bollihope, while Harbottle court, covering the whole of the vast liberty of Redesdale (Nb), received presentments from no fewer than nine separate juries. In the fifteenth and sixteenth centuries the court leet of Derwentfells (Cu) in the Lake District received presentments from each of its eleven constituent townships but there were also local courts (Winchester, 2000: 42). In all these examples, the institutional structure implies the existence of corporate deliberations at local level. The separate township juries functioned independently, returning separate 'verdict sheets', papers recording decisions ('verdicts') made locally in advance of the formal sitting of the head court.

The management of common land through the manor courts thus took place at two levels. The local farming community had power to draw up regulations but these had to be confirmed by the head court jury, presided over by the steward, who was the lord's representative and usually a trained lawyer, and who might also preside over other manors. We might expect that the increasing professionalization of manorial stewardship, accompanied by the dissemination of printed legal treatises, would lead to greater uniformity in the regulatory framework across the Early-Modern centuries. However, much of the body of local law governing the exercise of common rights appears to have evolved from customary rules which can be traced back to the late-medieval centuries and were embedded in the grassroots assemblies of local groups of farmers.

We know little about many of these assemblies of the local community, beyond their existence, implied in manor court records. Some, however, had an independent and more formal existence as local courts, sometimes termed 'byrlaw' courts. In the seigniory of Millom (Cu), for example, there were five local courts, usually referred to in the sixteenth century as the 'court or byrlaw' (*curia sive birelagium*) of the place in question, held in the days immediately following the spring and autumn meetings of the head court for the whole seigniory.

Rendered *plebiscitum* in Latin, the term 'byrlaw' (and its variants, such as 'birlie', 'burlaw', 'bireley' and 'barley') derived from the Old Norse *byjar-log*, a 'law community' or 'law district'. It had a widespread distribution in Yorkshire, Lancashire and southern Cumbria, but appears to have been comparatively uncommon in northern Cumbria and Northumberland, re-appearing north of the Border, where 'byrlaw courts' were part of the lexicon of Scottish law. The remit of byrlaw courts north of the Border was spelt out

by the sixteenth-century lawyer Sir John Skene, who wrote: 'Laws of Burlaw are made and determined by consent of neighbours, elected and chosen by common consent, in the courts called the *Byrlaw* courts; in which cognition is taken of complaints between neighbour and neighbour'[5] (quoted in Dickinson, 1937: cxiii, cxiv. For Scottish byrlaw courts, see Dodgshon, 1981: 166–170; *OED*, s.v. 'Byrlaw'). They were, essentially, community courts settling local disputes.

The authority of the byrlaw was reinforced by the head courts. In fifteenth-century Yorkshire, tenants on Fountains Abbey's manors were required to attend the byrlaw each year and to adhere to the orders (*consuetudines*) agreed there. The formal charge to the jury included the query whether 'there be any man that will not come to your birelawres when he is warned and will cast him to break your paines' (BL, Additional MS 40,010, ff. 7v., 15, 31v., 186.). Court rolls from the Pennines abound with presentments for 'breaking a byelaw (*plebicetum* or *birelagium*) made between his neighbours', confirming not only that local groups of neighbours decided matters for themselves, but that such decisions had the weight of law in the manor court.

Although not all the regulations agreed by byrlaw meetings are preserved in writing, it was inherent in some manors that they should be brought to the manor court to be endorsed. On the Yorkshire estates of Fountains Abbey the final clause of the charge to the jury of the court baron was that they should present by their oaths 'all manner of paines byelaws 'constitions' (*sic*) or uses that you have agreed upon amongst you for good rule and profit of yourselves' (BL, Additional MS 40,010, f. 186v.). Exactly this is recorded in Cumbria when the head court of Millom seigniory (Cu) confirmed awards made by the byrlaw jury of Bootle. Such procedures were essentially the same as those in courts serving large territories, where individual hamlet juries brought in 'paines' to be entered in the court record. In the records of the court of Langstrothdale (YW) in the later sixteenth century, for example, phrases such as 'the inhabitants of Cray lay a paine by us the jury', 'common agreement or byelaw amongst themselves', and 'a paine laid in by all the neighbours of the Kyrgyll' make it clear that each hamlet possessed a degree of autonomy, exercised through local meetings of neighbours at which decisions were taken before they were brought before the formal meeting of the court. Surviving lists of byelaws, such as those from Halton Gill in Littondale (YW) and Outhwaite in Roeburndale (La) (printed in Winchester, 2000: 172–175), show that each community could have its own set of specific rules, tailored to local circumstances.

IV. The corpus of rules (paines) governing the upland commons

Such local paines enabled a body of local law to evolve and change, but they were built on the solid bedrock of a core of customary regulation that was common to many manors. By comparing byelaws from different manors it is possible to identify this corpus of customary law in the pastoral communities of upland northern England, to complement Warren Ault's collection of orders from open-field farming areas of lowland England (Ault, 1965; 1972).

[5] This and other quotations from contemporary sources have been rendered into modern English for ease of comprehension.

IV.1. Common arable and meadows[6]

Regulations governing the exercise of common rights over arable land and hay meadows after the crop had been taken fall under three headings:

IV.1.1. Setting the date for the opening and closure of land to commonable beasts

During the 'closed' season, or 'several time' of the year, the fences had to be kept stock-proof until the crops were gathered. Once the hay or corn had been harvested, 'foggage' or 'edish' time began, when animals were allowed (in limited numbers) to graze the aftermath of the meadows and the stubble and rough grass of the corn fields. Manor court orders and local byelaws set the date in spring after which animals were excluded from the fields and meadows. Three dates are most commonly encountered: Lady Day in Lent (25 March), 'mid April day' (15 April), and 'Ellenmas' – the feast of St Helen or the Invention of the Holy Cross (3 May). The last was the beginning of the summer half-year in northern England, after which, traditionally, livestock were sent to the common hill grazings. Most common arable must have been closed by 'mid April day', when the 'bigg' or barley would be sown. Common meadows were closed at around the same time to allow the grass to grow: dates of 1 April and mid-April day are recorded in Cumbrian manors. The re-opening of arable and meadow for grazing in foggage time was determined, ultimately, by the weather and the completion of harvest. Hay-time in the uplands took place in late July or early August, and byelaws specifying dates for the re-opening of the meadows use feast days ranging from 'Maudlenday' (22 July), or Lammas (1 August), to 15 August. The corn harvest generally took place in September and many court orders used Michaelmas (29 September) as the date after which the common arable was to be thrown open to grazing livestock.

IV.1.2. Controlling tethered stock during the growing season

From seed-time to harvest the presence of livestock in the common arable had to be strictly controlled, the general rule being that loose stock was forbidden but that animals might be tethered on the grass baulks between the arable furlongs. The number of orders and presentments concerning tethering suggest that this was a practice fraught with potential conflict and therefore hedged about with restrictions, as in lowland England (Ault, 1965: 102). Tethering could be restricted to a tenant's own ground; the number of tethers allowed might be limited; animals were not to be tethered in the fields at night; and, as harvest approached, tethering might be banned altogether.

IV.1.3. Limiting the numbers of livestock grazing in the common fields and meadows

Where the extent of common arable was small, as was generally the case in upland northern England, only a limited number of cattle could be accommodated and a means had to be found to determine a fixed numerical limit or 'stint'. Such arrangements were of considerable antiquity: as early as 1373 the court at Edmundbyers (Du) appointed individuals to decide how many beasts could be sustained in the township's fields and

[6] See Winchester, 2000: 54–56, 61–68.

to fix a certain number of animals as the right of each tenant, while the court at Mickleton (YN) outlawed the keeping of more cattle 'than the number fixed of old' in the field there in 1433. Stints were sometimes determined by the rent paid for holdings, as in Roeburndale (La) in 1580, where the rate was 12 'beastgates' for every 10 shillings rent. Foggage time was the preserve of cattle and horses, sheep generally being forbidden until the start of the mating season in October or November.

IV.2. Shared pasture closes[7]

Most shared pasture closes were 'stinted', that is, grazing rights were controlled by a fixed numerical limit, set to reflect the carrying capacity of the enclosure. Manor court orders governing the exercise of rights in stinted pastures are dominated by concerns comparable to those governing the open fields and meadows: agreed dates for the commencement of grazing and regulation of the number and categories of livestock allowed.

IV.2.1. Setting dates for the closure and opening of pastures

A central aim in the management of stinted enclosed pastures was to allow the grass to begin to grow in spring before livestock were allowed in. This was achieved by closing the pasture ('haining' 'freeing' or 'keeping frith') in March or April and delaying the start of grazing until May, a closed period of four or five weeks being typical.

IV.2.2. Controlling grazing number

The unit of currency in which stints were expressed was the 'beastgate' or 'cattlegate', that is the right to graze one horned beast, and formulae were used to convert these measures into expressions of rights for other types of livestock. Common rates of exchange in Cumberland were for example one horse for two cattlegates and between five and ten sheep for one cattlegate (cf. Dilley, 1991: 300). Close definitions could be important to prevent disagreements, and orders are found stipulating at what age young beasts were to be treated as consumers of a full cattlegate and specifying how many younger animals could be grazed for one cattlegate. The number of cattlegates assigned to each commoner seems often to have been determined by the ancient yearly rent paid for each holding. In Roeburndale (La), for example, the tenants of Outhwaite had nine beastgates in their summer pasture for every mark (13s. 4d.) rent; at Bowes (YN) stints were allocated at the rate of nine beastgates for every 20 shillings rent, when a new pasture was enclosed in 1614 (Winchester, 2000: 174, 72).

IV.2.3. Restrictions on the categories of livestock which could be grazed

The use to which the stinted pastures could be put was dictated by communal control. Many pastures were specifically for milk cows but there were also ox pastures, 'stirk pastures' (for young beasts) and calf pastures in the forests of Trawden (La) and Bowland (YW/La) by the early sixteenth century. Byelaws aimed to protect the pastures for their particular purpose during the summer months, in particular preserving cow pastures for

[7] See Winchester, 2000: 68–73.

milk cows during the dairying season by forbidding other cattle (oxen and younger animals, for example) and other species: sheep, horses, geese, and swine. Most pasture closes were used for different categories of animal at different times of year: pastures grazed by cattle and horses in the summer grazing season typically being used for sheep in winter and during lambing time in the spring.

IV.3. Common of pasture on the fells and moors[8]

IV.3.1. Controlling livestock numbers

Two distinct approaches were taken to limiting the number of livestock grazing the common pasture: a pasture right might be 'without number' (yet nevertheless limited), or it might be limited by a numerical ceiling or 'stint'. In both cases, the courts controlled numbers by imposing penalties for 'overpress' (over-charging the common with livestock) or 'overstint' (breaking a numerical limit). Pasture 'without number' was governed by the rule of levancy and couchancy, which stated that no more animals were to be put on the common in summer than could be kept across winter on the produce of the farm. The rule aimed to match the size of pasture right to the size (or, more precisely, the productivity) of a holding, thus ensuring equity between neighbours. It was incompatible with agistment (the practice of selling grazing to stock from outside the manor), with the wintering of livestock (particularly young sheep) on pastures elsewhere, and with the buying in of fodder for the winter – all practices recorded in Early-Modern northern England. It also effectively debarred cottagers from exercising pasture rights, as their holding of land would rarely have been large enough to enable them to feed stock over winter.

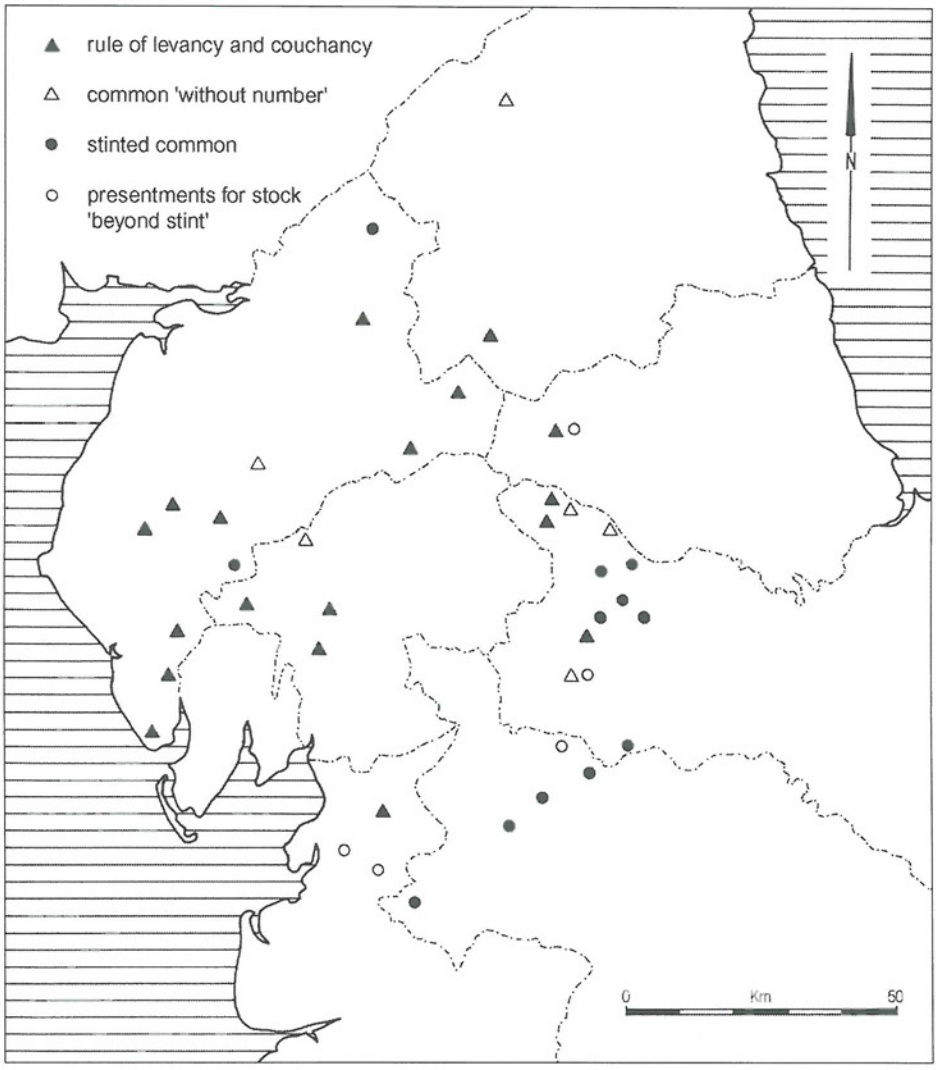
Setting a numerical 'stint' offered an alternative means of limiting stock numbers. In this system, an individual's 'stint' determined the size of his grazing right without necessarily requiring that the animals he put to graze had been wintered on his holding. Stinting was thus more able to accommodate practices which went hand-in-hand with market-oriented stock-rearing, including the movement of stock through purchase and sale.

The relationship between stinting and the rule of levancy and couchancy appears to be complex. Stinting has generally been interpreted as a symptom of pressure on grazing reserves, where shortage of grass required an absolute limit to be put on stock numbers. Indeed, in several recorded cases stinting was seen as the solution to disputes over the size of pasture rights, as in a long-running dispute at Sadgill, at the head of Longsleddale (We), where stinting was imposed by Exchequer decree in 1584 and again suggested as a solution in the 1630s. However, the geographical distribution of the two methods of controlling numbers suggests that other factors might also have come into play. It is striking that almost all the explicit references to the rule of levancy and couchancy come from manors in the Lake District and the North Pennines, whereas references to stinting on the open commons in the fifteenth to seventeenth centuries come largely from the Central Pennines (Figure 2.3). The contrast may preserve the memory of the contrasting histories of these areas in the medieval centuries, stinting being associated

[8] See Winchester, 2000: 78–90, 103–116.

with the private upland forests where most land was retained in hand in the form of demesne stock farms (vaccaries). Where stinting was found on the Lake District fells, it appears to have been a legacy of the status of the wastes as private hunting forest on which the tenants paid a separate sum of rent for grazing their stock (Winchester, 2000: 84; Parsons, 1993: 115). Stinting may thus have evolved where lords insisted on treating the hill grazings as forest land or private pasture, the tenants' flocks and herds originally being pastured by agistment rather than by common right.

Figure 2.3 The distribution of stinted and unstinted commons in northern England. Based on evidence from the period 1400–1700



IV.3.2. Allocating sections of the waste for specific purposes

The practical needs of stock management sometimes prompted the manor courts to formulate regulations which effectively subdivided the commons into a number of separate grazing units. Sections of the unenclosed fells were allocated to different species and condition of animal, having the effect of imposing a spatial limitation on the pasture rights of individual tenants, despite the legal theory that common of pasture extended across the whole manorial waste. For example, manor court awards of 1587 and 1664 conceived the hill grazings of the vast Lakeland manor of Eskdale, Miterdale and Wasdale Head (Cu) as being divided into three separate sections, defined principally by the quality and hence carrying capacity of the land. First, and most jealously guarded, were the lower hillsides, immediately behind the farms. This land, well-drained, comparatively sheltered and close to the dwellings, provided the vital pasturage for milk cattle. Second was 'the moor', a comparatively low saddle in the hills surrounding Burnmoor Tarn, which was reserved as summer grazing for the 'geld goods' (animals without young, such as bullocks and heifers) and horses of all holdings in the manor. Finally, there were the high fells, which were the preserve of sheep, where each flock had its own 'heaf' a distinct bank of fellside on which the animals grazed and settled overnight. The natural instinct of sheep to keep to one such heaf led almost inevitably to different sections of the fells being recognised as the customary grazing places of particular flocks of sheep and, hence, the preserve of different farms. The open fells could thus be divided into communally-accepted (but not necessarily physically separated) sectors, allocated to different members of the community for particular purposes.

IV.3.3. Seasonal restrictions

Some particular aspects of the exercise of pasture rights were hedged around with seasonal restrictions. Two areas stand out:

- *'tupping time'*, that is the period when the rams ('tups') were put to the ewes. The courts regulated the start of tupping time (and hence, of course, the start of lambing the following spring) by specifying dates before which rams were to be kept apart from the ewes. At Michaelmas (29 September), or soon thereafter, rams were either to be prevented from mating by being 'sewn' or 'clowted' with a piece of cloth as a crude contraceptive device, or removed altogether. In lowland northern England, they were allowed to mate from St Luke's Day (18 October), resulting in lambing in mid-March. In the fell country, where spring arrived later than in the lowlands, lambing was timed to take place in April by starting tupping time in November, on the feasts of Allhallows (1 November) or Martinmas (11 November) for example.
- *removal to summer shielings.* Where transhumance to summer pastures at a distance from the permanent settlements continued to be practised into the sixteenth and early seventeenth centuries (as was the case along the Anglo-Scottish Border and in parts of the North Pennines), the courts determined the date at which the community was to remove its stock to the shieling grounds and the date at which they might return for the hay harvest. In the North Pennines, for example, the shieling season at Alston Moor (Cu), recorded c.1500, ran from within one month of St Helen's Day (3 May) to 1 August; that in the forest of Lune (YN), specified in an order in Mickleton court in 1588, ran from 27 May to 14 August.

IV.3.4. Restricting animals likely to cause nuisance

A wide range of orders were made to restrict, if not to forbid outright, the grazing of livestock that might cause damage to other people's goods. Three were almost ubiquitous and were part of the standard litany of farming byelaws:

- 'riggalds', incompletely castrated rams, were to be kept off the commons during the time when the rams were put to the ewes, the closed period often stretching from Michaelmas (29 September) until St Andrew's Day (30 November), to ensure that the ewes were served by good rams.
- diseased horses, specifically scabbed animals and stock suffering from farcy, a contagious disease of the lymphatic system, were to be removed from the common and kept on the owner's own ground until they had recovered.
- pigs were to be kept ringed (to stop them from grubbing) and, in many places during the summer months, 'yoked' or 'bowed', by having around the neck a triangular wooden collar with projecting ends, to prevent the animal wriggling through gaps in fences.

IV.3.5. Livestock management

In an attempt to preserve 'good neighbourhood' on the common grazings, the courts laid ground rules for managing livestock where stock grazed in common. The practices of cutting the ears or burning the horns of sheep and cattle, to produce a distinctive and permanent mark of identification, and of daubing or otherwise marking the hide or fleece, were ubiquitous. Sheep marks were firmly linked to the farm, rather than the owner, as is made clear by phrases such as 'house mark' and 'house smite'. The courts required the use of such marks and made orders to differentiate between house marks in cases of uncertainty. They also upheld accepted standards for herding and driving livestock on the common grazings. These were governed by a set of clear conventions. Straying livestock were to be turned back quietly and peaceably, without hurting them: they were to be 'lovingly and easefully rechased and driven again' in the words of an agreement from Craven (YW) in 1499 (Michelmore, 1981: 65). Within manorial boundaries, the accepted convention was that all the tenants' stock should be free to graze quietly 'horn by horn' where they wished, and that no individual was to 'staff herd' his own stock or to 'bait or slate' the stock of another. 'Baiting and slating' (setting dogs on livestock to drive them out) was viewed as a serious offence on the commons, as was driving animals away with rattles. 'Staff herding', actively turning animals back with staves, was allowed only in specific circumstances, principally along the boundaries between manors.

IV.4. Turbary[9]

The distribution of peat is reflected in the orders controlling access to it. On the Pennine moors the blanket of peat cover provided an almost limitless supply of fuel and, therefore, required less need for careful conservation and regulation of its exploitation. In contrast, peat deposits in the Lake District were less widespread and the manor

[9] See Winchester, 2000: 126–133.

courts in the area made numerous detailed orders concerning turbary rights, particularly in the seventeenth century, suggesting that the comparatively limited beds of peat on the Cumbrian fells were by then under pressure and in danger of being worked out. Peat-cutting was clearly a source of potential conflict within the community and many courts appointed special officers called 'mossmen', 'mossgraves' or 'mosslookers' to supervise the peat banks.

The basic rule governing turbary rights was that peat and sods could be dug for use only on tenements within the manor, and were not to be sold, as illustrated in an order from Millom (Cu) in 1603:

'no manner of person nor persons may grave or dig any more peats yearly or cause or suffer in any of their rooms (*sections of peat moss*) to be graved or dug but only to the necessary use of their own fires. And neither to give sell or any otherwise to suffer them to be used converted or bestowed, upon paine of 20s.' (CRO, D/Lons/W8/12/9, p. 17).

Within this framework, access to turbary was hedged about with further restrictions on many manors:

IV.4.1. Seasonal restrictions

Many courts specified a date in May, after which peat could be cut. May Day (1 May) appears to have been the most common date in Cumbria, though dates later in May are found in some lowland manors, perhaps reflecting a desire to ensure that all ploughing and sowing was complete before peat digging started in manors with more extensive arable fields. (Dilley, 1967: 143). Other byelaws aimed to ensure that cut peat and turves were removed by a specific date, ranging from 31 May at Tatham (La) in 1649, to Michaelmas (29 September) at Watermillock (Cu) in 1693.

IV.4.2. Quantitative limitations

Limiting the quantity of peat or turf which could be dug implies scarcity, and it is striking that most (but not all) such restrictions appear to have applied to turf-stripping rather than peat-digging. Restrictions were expressed in terms of capacity (numbers of cart or waggon loads) or of time spent digging ('dayworks'), or might be in proportion to the size of the holding (as when turf-cutting rights in an enclosed pasture at Airton (YW) in 1651 were assigned to each inhabitant according to 'their proportion and parts of oxgang').

IV.4.3. Spatial limitations

The allocation of defined sections of the turbary grounds ('peat pots') to individual houses appears to have been widespread and to have carried the weight of the courts' protection, as a series of orders from Millom (Cu) illustrates: no one was to carry turf from his neighbour's turbary (1540); nor to allow anyone else to dig peats in his own turbary (1551); nor to dig peat except in his own 'room' (1566).

IV.4.4. Limiting environmental damage

Stripping turf and digging peat caused real or potential environmental damage: flooding within the diggings; destruction of pasture; and erosion and downwash of soil as a result of the removal of vegetation cover. A general requirement was that those cutting peat should draw off the water and replace the vegetation (termed 'bedding the peat pot') after removing fuel, to prevent flooding and to preserve the vegetation cover, but some courts also placed a limit on the depth to which peat could be cut, usually one or two peats' depth. In an attempt to prevent turf-stripping from land on the edges of the waste, where animals would gather, be driven, or be fed in winter, orders forbade turf cutting within a specified distance of hedges (60 yards at Staveley (We) in the later seventeenth century) or within three yards of roads or paths.

IV.5. Estovers[10]

Comparable responses were made to the challenge of ensuring access to the various species of vegetation gathered under the common right of estovers, including the allocation of defined areas to individuals and the restriction of the right to specified seasons. Manor court orders governing the exploitation of bracken (*Pteridium aquilinum*) on the fells of the Lake District in Cumbria are particularly numerous and serve to illustrate the regulation of these rights.

Bracken was valuable as a thatching material, as winter bedding for stock, and as a source of potash. The exercise of a common right to gather bracken for burning into ash is a rare exception to the rule that common rights could not be exploited for sale, as the main market for ash was soap or glass manufacturers. Competition for bracken lies behind the numerous orders controlling its use. Bracken 'rooms' 'dales' or 'dalts', defined stands of the plant, were allocated to individual commoners and protected by the weight of the courts' authority. Seasonal restrictions on the cutting of bracken reflect competition for the plant from different, and not necessarily compatible, uses. Several seventeenth-century byelaws draw a distinction between the cutting, pulling or shearing of bracken fronds (for thatching), which was allowed from late August or mid September, and the wholesale mowing of brackens (for bedding or burning into ash), usually forbidden until around Michaelmas, as illustrated in a particularly detailed order from Wythburn (Cu) in 1677:

'Item we find that no tenant or occupier within Wythburn shall mow any brackens before the day after Michaelmas day (*29 September*) or pull any brackens before the day after St. Bartholemew day (*24 August*) unless such as shall build houses & cover the same with brackens, such may pull for the covering of the same. And if any stands need of 'stadleinge' (*building a base for a haystack etc.*) with brackens or brackens for baking with, such may cut with a sickle, & not mow before the said day & to have one scythe mowing for one toft (*house*) & no more upon the said bracken day. And for every tenant or occupier that shall do contrary the paine is 6s. 8d. within any of the bracken banks in Wythburn.' (CRO, D/Van/Wythburn court baron, 1677)

---

[10] See Winchester, 2000: 133–138.

The complexity of this and similar orders speaks of intense competition over bracken, perhaps fanned by the market for bracken ash. The restriction to one scythe per tenement was repeated elsewhere, and some courts also specified that mowing was not to start before daybreak on the appointed day. The cutting of bracken for thatching was only allowed before the specified date where a new or 'bare' house needed covering. As bracken thatch gave way to slate from the later seventeenth century, the conflict between thatching and burning would decrease. Regulations stipulating a single 'bracken day', usually at Michaelmas or the day following, recorded in orders from the late seventeenth century, may reflect the decline of the earlier harvesting of bracken for thatch.

V. Managing access to common resources in a changing world

Assessing the changing pressures on common land in the hill country of northern England across the late-medieval and early-modern centuries is not easy but two areas of increasing pressure can be identified. First is the widespread evidence for growing commercialization and specialization in livestock rearing by the later seventeenth century, involving an increase in the numbers of animals grazing the commons. Second is population growth, both in the demographic surge of the later sixteenth century and in the increasing numbers of industrial workers in the seventeenth. The manor court juries were thus confronted by increasing demand for the resources of common land, whether from cottagers for fuel from the peat mosses, from urban markets for potash from bracken, or from drovers and graziers for pasture for increasing numbers of cattle. One response to social and economic change, and the consequent pressures on the local environment, was to formulate new or amended regulations which sought to accommodate new demands. The seventeenth century saw many of these, such as the paines governing the digging of peat and cutting of bracken, noted above. However, the number and frequency of presentments in the court rolls show that there was a constant tension between the courts' authority and the actions of individuals.

It is noticeable that the courts placed particular restrictions on cottagers. As pressure on reserves of fuel grew, particularly in the seventeenth century, the courts increasingly differentiated between the rights of the farming and cottager communities, placing tight restrictions on the exercise of turbary rights by the landless. Some limited the cottagers to a certain quantity of peat or made orders specifying a later date than the farmers for the start of their peat-digging (3 May at Lorton (Cu) in 1682 and 6 May at Loweswater (Cu) in 1677, both Lake District manors in which the farming community could dig peat from May Day). The primacy of the rights of the landed is also illustrated by orders directing cottagers to dig in places which were 'convenient' to the farming community, as at Bootle (Cu) in 1609, where all cottagers were to 'grave or dig their peats in some convenient room where none of the ancient tenants nor freeholders use commonly to grave, known to be any of their rooms' (CRO, D/Lons/W8/12/9, p. 490), or in the lead-mining district of Alston Moor (Cu), where the court ordered in 1677 that 'no landlord shall tolerate or suffer any cottager about or adjoining to the village of Alston to cut or grave any turbary upon the common without the leave of adjacent neighbours' and insisted that cottagers' turbaries should be at least one mile from their houses (PRO, ADM 74/1/10, m. 1).

The courts also sought to restrict cottagers' ability to gather raw materials from the commons as a source of additional income. Gathering wool from bushes on the common grazings appears to have been the pastoral equivalent to gleaning corn grains in the open fields, providing raw material for the spinning and carding of wool, which was a mainstay in the employment of the poor, particularly in the textile regions. Orders were made controlling wool gathering, presumably in an attempt to prevent wool pulling from living sheep (a constant temptation). None were to collect wool on the common pasture, nor in his neighbours' fields, until the whole community had clipped their sheep (Bootle (Cu), 1546); nor in the fields before the stock had gone forth (Giggleswick (YW), 1564); wool was not to be gathered on the common before sunrise (Shap (We), 1578). Across the sixteenth century, several Lakeland manors attempted to forbid, rather than merely to control, wool gathering 'in the fields or in the mountain'. However, continuing presentments against those (particularly children) gathering wool suggest that the poor continued to glean wool, whether legally or illegally, during the decades of growing poverty when population pressure rose across the late sixteenth and early seventeenth centuries (Winchester, 2000: 119).

Bracken-burning offered another possible source of income for the poor and one which might jeopardise the rights of the farming community to a resource for which there were competing demands. Hence, at Braithwaite (Cu) in 1690 the court ordered that cottagers were to wait until three days after the bracken day before starting to mow.

VI. Sustainability

It remains to assess the extent to which the manor courts, as they functioned in upland northern England, exhibited the seven design principles which Elinor Ostrom identified as contributing to success in sustaining common resources over the long term (Ostrom, 1990: 89–101). A reflection of the workings of manor courts in the light of Ostrom's principles suggests that, with some reservations, they did:

1. *Clearly defined boundaries,* both of the common resource and of the body of individuals who have a right to take resources from it. The legal framework of land law and common rights generally ensured that the boundaries of the waste and the body of commoners were both clearly defined: the boundaries of the manor defined the waste, and possession of land in the manor defined the commoners. However, disputes over boundaries across featureless open moorland and the related issues of inter-commoning and 'overleap' (where stock from one manor wandered on to the wastes of a neighbouring manor) show that these definitions were not always clear-cut.

2. *Congruence between appropriation and provision rules and local conditions.* In other words, the rules governing use of the common resource should be well-tailored to the locality. The rules policed by the manor courts often originated in the local customary law of the 'byrlaw', and the body of local law continued to evolve largely as a result of local juries – sometimes operating at the level of the individual hamlet community – making new or modified 'paines'. The essentially local nature of rule-making by manor court juries drawn from the local community enabled rules to be tailored to local con-

ditions. Again, such a conclusion needs to be qualified, since some aspects of agrarian practice were governed by statutory rules imposed from above, such as those governing the minimum height of stallions and the latest date on which heather moorland could be burnt, imposed by statutes of 1540 and 1609–1610.[11]

3. *Collective-choice arrangement:* most individuals affected by these rules should be able to participate in modifying them. At first glance, the role of the manor court as a village assembly, and particularly the existence of byrlaw courts at very local level, would ensure that most commoners could participate in making and modifying paines. However, the oligarchic nature of the manor court jury leads one to question the extent to which those in possession of smaller common rights had influence in decision-making. Moreover, the scope for manoeuvre by the manor court jury might be limited by the lord's legal interest in the manor's wastes, articulated through the presiding influence of the steward, backed up by his legal treatises.

4. *Monitoring:* those monitoring the common resource and its use should be accountable to the users of the resource, or be users themselves. The officers appointed by the courts to oversee specific aspects of common rights (the moorgreaves, mossmen, hedgelookers, etc.) are clear examples of such accountability.

5. *Graduated sanctions*: users who violate the rules should be subject to graduated sanctions which are imposed by the users themselves or by officials accountable to them. The 'amercements' (fines) levied by the courts fulfil the second part of this requirement. Penalties tend to be expressed in terms of a fixed sum per unit (of cattle held over stint, for example) for each infringement (*totiens quotiens* – 'as often as (it occurs)'). Although graduated in the sense of being related to the 'size' and frequency of the infringement, there is little evidence for progressively increasing penalties for persistent offenders. It should also be noted that the fixed penalties imposed by the courts were often reduced by the 'affeerors', officials who could mitigate the sums imposed by amercement, in cases of poverty (see Harvey, 1999: 49–50).

6. *Conflict-resolution mechanisms*, particularly low-cost, local systems, should be in place to resolve conflicts over use. The manor courts themselves were low-cost arenas, 'self-help' institutions where disputes were settled by the jury itself or by the appointment of arbitrators, without involving professional lawyers. Indeed, the customary law of many manors ruled that tenants were not to sue each other in other courts and this, though formulated to protect the lord's income from his manor court, presumably discouraged individuals from seeking redress elsewhere.

7. *Recognition of rights to organize.* The rights of users to devise their own rules should not be challenged by external governmental authorities. Manor courts were part of the judicial and local government machinery of the state and, as such, were not only tolerated by government but fully recognised as law-making bodies. The right of commoners to regulate the use of common land through orders made by the manor courts was thus protected.

[11] Statutes 32 Hen. VIII, c.13; 7 Jas. I, c.17.

If the manor courts fulfilled most of Ostrom's criteria for providing a successful management framework to enable sustainable use of common resources, why did they fall into disuse? In order to begin to answer this question, it is necessary to examine the chronological pattern of regulatory activity by the courts. The studies of manor court byelaws in northern England by Robert Dilley and the present author (Dilley, 1967, 1973, 1991; Winchester, 2000) have noted a clear chronological pattern in the frequency and number of byelaws recorded in manor court records. Court rolls of the fifteenth century contain comparatively few 'paines', yet it is clear that a body of local customary law existed then. The nature of that corpus of custom can be discovered from fifteenth-century documents such as the *oneracio curie* from Fountains Abbey's manors in Yorkshire and the 'charge of the court of Windermere' (We), both of which list matters into which the courts were to enquire.[12] From the early sixteenth century the volume of orders and paines recorded in the court rolls increases and newly laid paines and reiterations of 'ancient' byelaws remain common through to the later seventeenth century, though not all courts exhibit the same torrent of orders. Some courts continued to record 'paines' well into the eighteenth – and a few into the early nineteenth – century, but the overall trend was one of decline. Robert Dilley's sample of Cumberland court leet records between 1630 and 1870 contained a scatter of presentments for infringements of grazing and turbary rules throughout the eighteenth and into the early nineteenth centuries, though the number dropped steeply after 1720 (Dilley, 1967: 138).

The explosion in the number of byelaws and orders appearing in the court rolls from *c.*1540 seems to signify a resurgence in the importance of the manor courts. Christopher Harrison has suggested that the desire of new, post-Dissolution landlords to maximize revenue from their courts; the growth of population generating greater judicial activity; the 'unprecedented outburst of law-making' from 1529, which laid statutory duties on the manor courts; and a recognition on the part of village communities that disputes could be resolved in a manor court speedily and cheaply, all contributed to this revival (Harrison 1997: 49–50). A court which was 'active' in terms of recording paines enabled the yeomen families from whose ranks the court jury was drawn, to extend their economic dominance over the poorer elements of society into the judicial sphere. As a result, what had been the lord's court of the medieval centuries, with its accent on amercing tenants for breaching the lord's prerogatives, increasingly became a local parliament, in which management of common land on behalf of the farming community featured prominently.

Why, then, did the role of the courts decline from the early eighteenth century? The scrappily-written verdicts of eighteenth-century court juries stand in marked contrast to the fine parchment rolls of the sixteenth and early-seventeenth centuries, which convey a sense of the vigour and power of the courts. Charles Searle has suggested that the machinery of the Cumbrian courts collapsed during the early eighteenth century in the face of increased flouting of manorial regulations as livestock numbers rose with the advent of commercial stock farming (Searle, 1993: 136–141). Certainly, Dilley's figures for the number of agrarian presentments in Cumbrian courts leet show a surge between 1660 and 1720 and a collapse thereafter (Dilley, 1967: 138). Such evidence should

[12] The Fountains Abbey *oneracio curie* is in BL, Additional MS 40010, ff. 185v.–187v.; the Windermere jury charge is printed in Winchester, 2000: 152–159.

perhaps be treated with some caution, however, as earlier court rolls often contain equally strong evidence of the flouting of local byelaws. My impression is that presentments for overcharging the common grazings, for keeping anti-social livestock (such as unringed swine or scabbed horses), and for failing to maintain stock-proof hedges are as much a feature of fifteenth-century court rolls as of later ones. The nature of offences might change but the evidence for an increasing disregard for local law is less clear. However, the dwindling numbers of presentments after 1720 and the numerous examples, cited by Searle, of the failure of manor courts to act as effective regulators of common pasture rights during the eighteenth century leave little doubt that the courts had by then ceased to provide effective control of common rights.

Behind the decline of the manor courts lay subtle developments in law and concepts of property. As E.P. Thompson suggested, the traditional perception that rights on the waste belonged to 'the inhabitants' was progressively eroded in the higher courts across the eighteenth century, as the dominant concern shifted from customary use to the property rights of individuals (Thompson 1991: 97–184).[13] That changing perception may not have been unconnected with the increasing preference for professional justice across the eighteenth century. This was witnessed, for example, in the decline of local arbitration as the courts of common law attempted to regulate and control it (Holdsworth, 1964: xiv, 187–197). Although inter-manorial disputes over common rights had been taken to the courts of equity since the sixteenth century, intra-manorial disagreements which would traditionally have come before the manor court jury were being resolved by recourse to external justice by the later eighteenth century. For example, a dispute over pasture rights on Stockdale Moor (Cu) and a claim that enclosure of a fellside 'intake' in Eskdale (Cu) infringed a neighbour's common rights were heard at Carlisle Assizes in 1769 and 1795 respectively (Searle, 1993: 143–144; CRO, D/Ben/3/735 *et seq.*). A shifting intellectual climate, away from the centrality of custom and community and towards individual property rights, may have hastened the decay of the manor court as a forum for settling disputes over common land. In his study of Parliamentary enclosure of wastes in Cumbria, Charles Searle considered that the failure of the manor courts to act as effective regulatory bodies after c. 1720 paved the way for enclosure and the demise of many thousands of acres of common land (Searle, 1993: 149–150).

[13] In the context of upland northern England, it should be noted that pasture rights had been clearly linked to the holding of landed property since the middle ages. Thompson's suggestion is more relevant to rights of turbary and estovers, which may have been conceived of as belonging to all the inhabitants.

Abbreviations

BL British Library
CRO Cumbria Record Office
Cu Cumberland
Du Co Durham
La Lancashire
Nb Northumberland
OED Oxford English Dictionary
PRO Public Record Office
We Westmorland
YN Yorkshire, North Riding
YW Yorkshire, West Riding

Bibliography

Manuscript sources

British Library (BL), London, Additional MS 40,010

Cumbria Record Office (CRO), D/Ben/3/735 et seq.; D/Lons/W8/12/9; D/Van/Wythburn court baron, 1677; CRO, D/WM/11/122 *et seq.*

Public Record Office (PRO), ADM 74/1/10, m. 1

Printed and secondary sources

Ault, W.O. (1965) *Open Field Husbandry and the Village Community: a study of agrarian by-laws in medieval England*, Philadelphia. (Transactions of American Philosophical Society; new ser. 55, pt.7).

Ault, W.O. (1972) *Open Field Farming in Medieval England: a study of village by-laws*, London.

Chapman, J. (1987) 'The extent and nature of Parliamentary enclosure', *Agricultural History Review*, 35(1), pp. 25–35.

Dickinson, W.C. (1937) *Court Book of the Barony of Carnwath*, Edinburgh. (Scottish Historical Society; 3rd ser. vol. 29).

Dilley, R.S. (1967) 'The Cumberland court leet and use of the common lands', *Transactions of Cumberland & Westmorland Antiquarian & Archaeological Society*, new series 67, pp. 125–151.

Dilley, R.S. (1973) 'Common land in Cumbria, 1500–1850', Cambridge. MPhil. thesis University of Cambridge.

Dilley, R.S. (1991) 'Agricultural Change and Common Land in Cumberland 1700–1850', Hamilton (Ontario). Ph.D. thesis McMaster University.

Dilley, R.S. (2000) 'The enclosure awards of Cumberland: a statistical list', *Transactions of Cumberland & Westmorland Antiquarian & Archaeological Society*, new series 100, pp. 225–239.

Dodgshon, R.A. (1981) *Land and Society in Early Scotland*, Oxford.

Fieldhouse, R.T. (1980) 'Agriculture in Wensleydale from 1600 to the present day', *Northern History*, 16, pp. 169–195.

Gadsden, G.D. (1988) *The Law of Commons*, London.

Harris, B. and Ryan, G. (1967) *An Outline of the Law Relating to Common Land*, London.

Harrison, C. (1997) 'Manor courts and the governance of Tudor England', in C. Brooks and M. Lobban (eds), *Communities and Courts in Britain 1150–1900*, London, pp. 43–59.

Harvey, P.D.A. (1999) *Manorial Records*, London

Hodgson, R.I. (1979) 'The progress of enclosure in County Durham, 1550–1870', in H.S.A. Fox and R.A. Butlin (eds), *Change in the Countryside: essays on rural England 1500–1900*, London, pp. 83–102.

Holdsworth, W. (1964) *A History of English Law*, vol. 14, London.

Hoskins, W.G. and Stamp, L.D. (1963) *The Common Lands of England and Wales*, London.

Michelmore, D. (1981) *Fountains Abbey Lease Book*, Leeds. (Yorkshire Archaeological Society Record Series; 140).

Neeson, J.M. (1993) *Commoners: Common right, enclosure and social change in England, 1700–1820*, Cambridge.

Ostrom, E. (1990) *Governing the Commons: the evolution of institutions for collective action*, Cambridge.

Parsons, M.A. (1993) 'Pasture farming in Troutbeck, Westmorland, 1550–1750', *Transactions of Cumberland & Westmorland Antiquarian & Archaeological Society*, new series 93, pp. 115–130.

Porter, J. (1978) 'Waste land reclamation in the sixteenth and seventeenth centuries: the case of south-eastern Bowland, 1550–1630', *Transactions of the Historic Society of Lancashire & Cheshire*, 127, pp. 1–23.

Searle, C.E. (1993) 'Customary tenants and the enclosure of the Cumbrian commons', *Northern History*, 29, pp. 126–153.

Sheppard, J.A. (1973) 'Field systems of Yorkshire', in A.R.H. Baker and R.A. Butlin (eds), *Studies of Field Systems in the British Isles*, Cambridge, pp. 145–187.

Thirsk, J. (1987) *England's Agricultural Regions and Agrarian History, 1500–1750*, London.

Thompson, E.P. (1991) *Customs in Common*, London.

Turner, M. (1980) *English Parliamentary Enclosure: its historical geography and economic history*, Folkestone.

Winchester, A.J.L. (2000) *The Harvest of the Hills: rural life in northern England and the Scottish Borders 1400–1700*, Edinburgh.

Youd, G. (1961), 'The common fields of Lancashire', *Transactions of the Historic Society of Lancashire and Cheshire*, 113, pp. 1–41.

3 The management of common land in the lowlands of southern England circa 1500 to circa 1850[1]

Leigh SHAW-TAYLOR, Jesus College, University of Cambridge

I. Introduction

This chapter provides a broad overview of the management of common lands in the lowlands of southern England from c.1500 to c.1850 in order to facilitate a comparison with the range of practices in other European regions. Inevitably this entails simplification at the expense of a full description of intra-regional variation. Whilst some allusion will be made to the range of variation it cannot, in a short account, be explored in any detail.

Two themes run through this chapter, one is ecological, the other social. Garret Hardin identified a major potential problem with systems of resources held in common – that the interests of each individual would lead them to overuse the system, thus leading to the degradation of the resource and common ruin. Hardin termed this 'the tragedy of the commons' and saw the solution as private property (Hardin, 1968). However, Hardin overlooked the collective regulation of common resources which as Elinor Ostrom has shown could prevent such an outcome for enduring historical systems (Ostrom, 1990). One obvious correlate of private property is inequality of access to resources. But it would be naïve to simply assume that common property systems did not also entail some degree of inequality. Regulation of access to common resources necessarily involves some degree of exclusion which may well be socially differentiated. It would be equally naïve to assume, as Hardin does, that private property necessarily avoids environmental degradation. In circumstances where the destruction of resources is profitable this is indeed likely to take place – unless some wider regulation of the rights of private property prevents this. Here the concern is how, and how successfully, was common land managed to prevent the tragedy of the commons? And what degree of social exclusion did this entail?

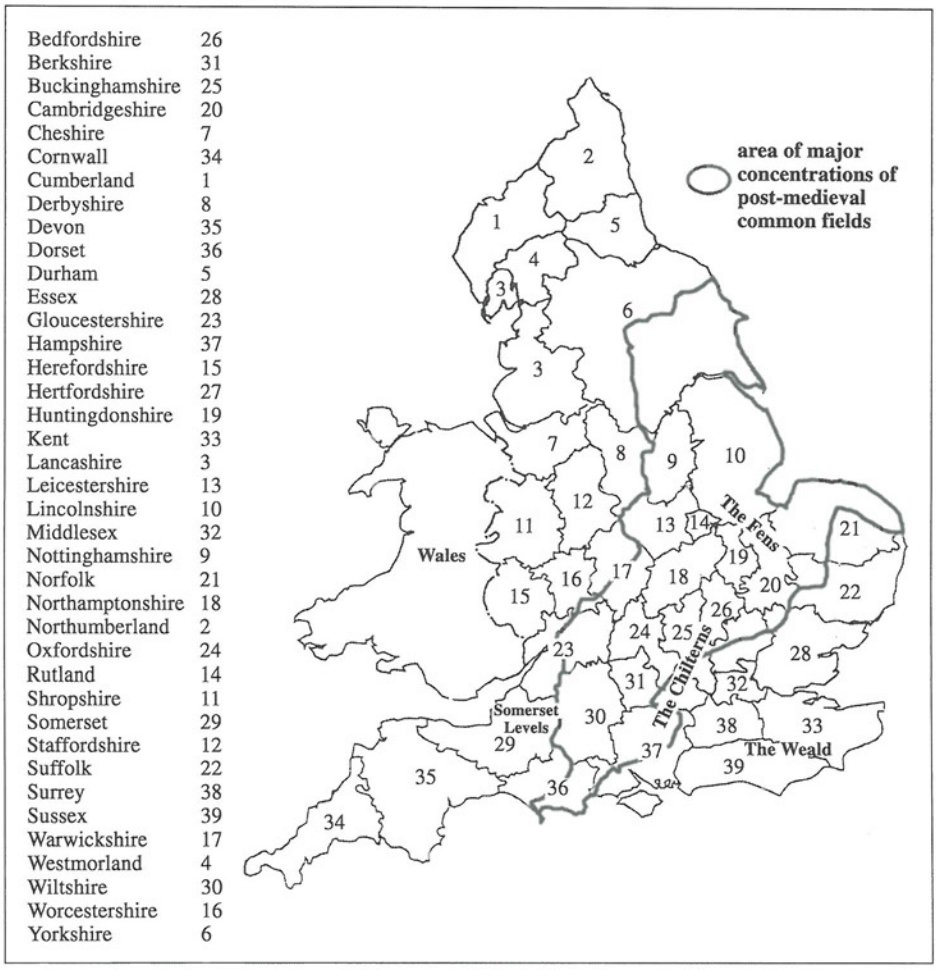
My own research has been primarily concerned with the social distribution of common pasture rights in the eighteenth century (Shaw-Taylor, 2001a; 2001b). In writing this account of wider issues over a longer period I have drawn predominantly on the writings of other historians, though in places this is supplemented with some evidence drawn from the preliminary stages of a wider study of the regulation of common land. The existing literature is extensive but fragmented. For the period before 1550 the best introduction to the management of common land remains the long essay and accompanying collection of by-laws published by Ault (Ault, 1972). The most detailed account for southern England is Neeson's eighteenth century study (Neeson, 1993). Winchester's recent account of common lands in the northern uplands in the early modern period is perhaps the

[1] In writing this chapter I have benefited greatly from discussions with and detailed comments from Chris Briggs, David Hall, Steve Hindle, Martina De Moor, Richard Smith, Paul Warde, Angus Winchester and Jane Whittle. The usual disclaimers about authorial responsibility apply.

broadest English study (Winchester, 2000). Despite the sizeable English literature on aspects of this subject, many questions addressed in this chapter are poorly understood, and in places little more than plausible speculation or tentative hypotheses can be offered.

The management of common land can be usefully divided into two aspects. One is the actual physical division of land into different types of common land. The other comprises the various regulatory mechanisms which determined how those types of land could be used. Most of this paper will be concerned with the latter but it is first necessary to begin with the nature of the land itself.

Figure 3.1 English counties and common field areas



Source: After Rackham, 1986: 3

II. The Nature of Common Land

If one excludes the upland areas of the south-western counties of Devon and Cornwall then southern England is topographically low lying. It contains relatively little land over 200 metres and almost none over 300 metres above sea level. To the east most land lies below 100 metres above sea level. To the west most land lies between 100 and 200 metres above sea level. Long before Domesday (1086), England was not a well wooded country and by 1500 no more than 10% of England was woodland. Some localities remained well wooded such as the Weald of Kent and the Chiltern plateau. But elsewhere many villages lacked woodland altogether. In particular much of the Midlands was devoid of woodland, though again there were local exceptions (Rackham, 1986:75–88). The lowest lying land was often fen – land which was subject to seasonal or permanent flooding. Much of it was therefore suitable only for summer grazing. Far and away the largest area was the 'great level of fen'. This covered almost 300,000 hectares in southern Lincolnshire and northern Cambridgeshire as well as the northern tip of Northamptonshire, the western edge of Norfolk and parts of north western Suffolk. There were other fen-like areas scattered around southern England, the most extensive of which was the Somerset levels.

Common land refers essentially to land over which individuals other than the owner, tenant or occupier had use rights known as 'common rights'. Who had common rights and what these consisted of will be discussed further below. For the moment it will be sufficient to note that not everyone enjoyed the various common rights. Common land needs to be distinguished from 'enclosed' land which was free of common rights and usually, though not invariably, was physically enclosed by a hedge, ditch, fence or wall. Almost all land in England is now enclosed and hence free of common rights. Approximately 3% of England (430,000 hectares) remains as common land today (Hoskins and Stamp, 1963: 3). But in 1500 at least half of the land in England was common land of some kind (Wordie, 1983). The conversion of common land to enclosed land is known as 'enclosure'.

Three principal types of common land need to be distinguished: common arable, common meadow and common waste.[2] Farmers cultivated and harvested their own crops on their portion of the common arable. The common arable was organized at up to three spatial levels. Individual farmers generally held their land in long thin strips. These were typically about five to ten metres in width and perhaps 200 metres in length, though there was considerable variation. Groups of parallel strips formed the second level of spatial organisation and were known as 'furlongs'. In turn furlongs were often grouped together to form larger units known as fields. In much of the Midlands nucleated villages organised their common arable into two or three large open fields which served as rotational cropping units, one of which would be left fallow each year. Over time most, but not all, two field systems gave way to three field systems. In Northamptonshire, the county which has been subject to the most systematic examination, the two field system was dominant in the thirteenth century but had largely given way to the three field system by the fifteenth century (Hall, 1995: 52). In other areas, most notably East Anglia

[2] I have used the term common arable in this paper rather than the more usual term open-field. This is because in some areas, e.g. Kent, open-fields (i.e inter-mixed strips without internal boundaries) were not subject to common rights. In general though the two terms are inter-changeable.

(principally Norfolk and Suffolk), the furlongs were not formed into larger fields but themselves consituted more numerous and hence more flexible rotational units.[3] After the harvest and in fallow years the common fields were open to grazing by those with common rights.

The second principal type of common land was common meadow. This was often low lying land by a stream or river. It was used both for the production of hay and as common pasture after the hay harvest. Two main forms of organisation may be distinguished. In one form, which mirrors the arrangement of the common arable, individual plots within the meadow belonged to particular individuals. They or their tenants were entitled to harvest the hay that grew thereon. In the other form individuals owned the right to harvest a certain acreage of hay each year but the location was determined by lot each year. Either way the meadow was thrown open to common pasture after the hay harvest. Where this was Lammas Day (1st August before 1753 and 13th August thereafter) the land was often known as Lammas Land.

The third major type of common land was common waste or more simply 'the common'. The term waste is sometimes used to denote land which was entirely unimproved. All that is meant here is the uncultivated common land. Whilst common waste was usually grassland, it might also be wooded or partially wooded, or it could be heathland or fen pasture liable to seasonal flooding. Those with common grazing rights were, at certain times of year, entitled to pasture their animals on the common pasture. Common wastes might also contain vegetation used for fuel such as gorse, heather or bracken. If in a fen area it might contain peat which could be dug for fuel and sedge which could be used for thatch.

One major distinction which needs to be drawn here is between common wastes which were attached to a particular village, manor or parish and common pastures which were intercommoned by more than one settlement or manor. It is possible that in the early medieval period most wastes were intercommoned. Over time many intercommoned pastures were divided up and individual manors or settlements came to have exclusive rights over these pastures. According to Hoskins and Stamp this process was largely complete by the thirteenth century (Hoskins and Stamp, 1963: 34–35). Harvey implies a slightly later date when he identifies the thirteenth century as the high water mark of the partitioning of wastes between townships (Harvey, 1984). Whatever the precise chronology, by the sixteenth century most wastes were partitioned between individual townships (Thirsk, 1964: 4). Nonetheless some intercommoned pastures survived, though usually only in areas where commons were extensive (Hoskins and Stamp,1963: 35). In the southern lowlands such areas tended to be restricted to remaining forest areas, some heathlands and certain fen areas.[4] Dyer has suggested that much medieval partitioning of intercommoned wastes took place to resolve breakdowns in management consequent upon conflict between different settlements (Dyer, 1999).

---

[3] The fullest description of regional variations in field systems is Baker and Butlin, 1973. On East Anglia see also Campbell, 1981.

[4] Forest here is a legal term which does not necessarily imply woodland. Technically they were royal hunting grounds, though they could be in non-royal hands. They were governed by forest law and overseen by their own administration and were subject to common rights.

In many manors or settlements, especially in the Midlands, common arable, common meadow and common waste all survived until enclosure in the nineteenth century. Elsewhere wholesale enclosure came earlier. But in many places one or two elements existed without the second or third either because one or two of the other elements were enclosed at some earlier date or because one or more of the elements had never existed. Thirsk defines a common-field system as one with all three elements and cites central Suffolk and most of Essex and Hertfordshire as areas which had never known a fully developed common-field system (Thirsk, 1964: 24). Kent had open but not common fields as did the south Lincolnshire fens (Thirsk, 1964: 5). Although eastern Norfolk had common fields they were they were relatively lightly regulated (Campbell, 1981). Outside the fens the regulation of common wastes isolated from field systems in southern England has attracted little attention. The discussion which follows in the rest of the chapter will therefore, for the most part, be restricted to areas with at minimum common fields but which may or may not have had common wastes or meadows. This kind of countryside, often known as 'champion', in which large open fields and nucleated villages predominated, dominated the central belt of southern England roughly defined by a triangle running down the Yorkshire coast to Norfolk and then across to the Dorset coast in the south and then back up to Yorkshire (see Figure 3.1). To the west along the Welsh borders and to the south east – especially Essex, Middlesex and Kent – hamlets and small enclosed fields were more common, though there were still plenty of common wastes.

III. The institutional framework

Most of the evidence concerning the communal regulation of common land is to be found among the surviving records of manor courts. From the thirteenth century the formal records of manor court proceedings were usually written on manor court rolls. By the eighteenth century these had mostly been superceded by manor court books. These documents contain three kinds of pertinent evidence. Firstly and most importantly, they contain statements of by-laws (variously described as ordinances, statutes, paines, or orders). These are formal statements of rules and regulations governing, amongst other things, the use of common land, usually with a statement of the fine (amercement) for each offence.[5] Secondly they contain presentments of individuals who have broken the rules often with a record of any fine imposed. Thirdly they record the appointment of various officers to enforce the regulations.[6]

The earliest surviving court rolls date from the mid thirteenth century (Razi and Smith, 1996: 41–42). Early by-laws are not easy to find. Court rolls covering a hundred year period may contain no by-laws – though they may contain presentments of individuals who have broken by-laws (Ault, 1972: 19). In my own experience this is frequently true of court books from the seventeenth to nineteenth centuries. Thus by-laws were not always regularly recorded in the formal proceedings of the court. Whilst the number of

[5] By-laws in print include: Cunningham, 1910; Ballard, 1913; Orwin and Orwin, 1938: 172–181; Barley, 1938; Hallam, 1963; and for the period before 1550 Ault, 1972. There is a bias in print towards fen and fen-edge locations.

[6] The fullest description of these officers and their activities is Neeson, 1993: 134–157.

surviving by-laws increases over the thirteenth to fourteenth centuries the most complete and informative by-laws come from the period after 1500 (Thirsk, 1973: 246). Yet as Thirsk notes 'it is rarely possible to find a set of bylaws for a village that is complete for any one period or year' (Thirsk, 1973: 246). Often only a handful of regulations are recorded at a given time. Even where very full sets of by-laws, running to thirty clauses or more, are recorded, they are clearly incomplete accounts of how the system was regulated. Equally many years can go by without either the recording of presentments or the appointment of officers. However, as will become clear later, it does not necessarily follow that the making of orders, the fining of offenders and the appointment of officers, did not take place on a regular basis. If they did not it is hard to imagine that the system could have operated effectively.

In the medieval period surviving preliminary notes and drafts of court rolls are rare. After 1540 these are increasingly common (Harvey, 1984: 64). These and the working documents produced by jurors and court officers have attracted relatively little attention. This is unfortunate because the two studies which have made extensive use of such records shed a different and a fuller light on the workings of the system than the formal court records alone (King, 1980; Neeson, 1993: 110–157), as discussed below.

A fundamental question to ask of any social institution is where does power lie? The regulation of access to common resources implies the power to restrict or deny access. But which social groups had the power to create the by-laws and shape their enforcement? The exact relationship between the manor court and the 'village community' in this context is far from clear. The term 'village community' is doubly unsatisfactory. Firstly, because the unit referred to might be a hamlet or scattered settlement rather than a village. Secondly and more importantly, because the term 'community' might be taken to imply some cosy unity of interests between the individuals concerned. The term is too deeply imbedded in the literature to be excised but it should be understood that neither of these connotations is intended in my use of it here.

At the outset it is important to clarify the legal nature of the institution. The manor was an institutional legacy of feudalism. Although serdom had virtually disappeared in England by 1500 manor courts were to survive for another four centuries (Whittle, 2000: 28–29). Manor courts were private courts belonging to the lord of the manor (Harrison, 1997: 48). They could take various forms of which two will concern us here. The most fundamental was the court baron. The court baron had legal authority to regulate the use of common land within the manor and also dealt with tenurial matters between the lord and his tenants. By the fifteenth century the existence of a court baron was essentially the definition of a manor (Harvey, 1984: 2, 44–46). Many manors also held courts leet. These were 'royal courts in private hands' and had public functions for the dispensation of royal justice. They were held annually or biannually and exercised limited non-felonious jurisdiction. (Harrisson, 1997: 48; Harvey, 1984: 46–47; King, 1980: 309, n. 25; King, 1982: 699).

In practice the distinction between courts baron and courts leet was not rigorously maintained (Harvey, 1984: 47). King notes that 'one need only contrast the difference between the court leet and court baron described by Tudor-Stuart writers and the lack of

difference in practice' (King, 1980: 309). Harrison reports that he has 'yet to come across a court leet record which exactly replicates the contemporary lawyer's view on what these courts did' (Harrison, 1997: 46). King has found presentments for overcharging the commons at courts leet (King, 1982: 703). According to Winchester the terms court baron and court leet were not widely used in the north of England before the seventeenth century (Winchester, 2000: 35). The fifteen manors belonging to the Leconfield estate in Cumbria, studied by Dilley, appear to have made all their agrarian decisions at the court leet (Dilley, 1967). In my own experience by-laws are as likely to be found in court leet records as in court baron records. In short the functions of the two major types of manor court were thoroughly muddled up in practice. We can however usefully distinguish between court baron functions, which are the concern of this paper, and court leet functions which are not. It should be further noted that court leet functions probably declined from the late sixteenth century in some places and everywhere from 1660 (Harrison, 1997: 50–51). Whittle finds court leet functions being taken over by the quarter sessions (public courts held at the county level) as early as the fifteenth century in north-east Norfolk (Whittle, 2000: 53–58, 83).

Manorial courts were not then village courts in the European sense, they were seigneurial courts. However, villagers played a major role in the court. The court was called and presided over by the lord's legal representative, the steward. But the jury was composed of men drawn from among the manorial tenants or inhabitants. It is generally considered that it was the jury who laid down the by-laws and presented and amerced those who had broken them – though the lord's assent was presumably required. Additionally many other individuals were required to attend the court. At a court baron this was all the manorial tenants, collectively described as the homage (Ault, 1972: 64). All males over twelve resident within the precinct of a leet except gentry and clergy were required to attend a court leet (Harrison, 1997: 51, Whittle, 2000: 46). Given the confusion between the two types of court it is not entirely clear who was required to attend and no doubt in practice it varied from one manor to another. I will return below to any role those attending the court may have played in decision making.

Given the central role of the jury it is obviously critical to know whether they were drawn from a restricted portion of the village community. For the medieval period Warren Ault had no doubts on this score: 'the principal landholders must have been the predominant group in the community of the vill. Landless labourers would not account for anything, even share-croppers had little voice. In a village assembly in medieval times "there was almost certainly no counting of heads."' (Ault, 1972: 58). Brown's study of Elton in the thirteenth and fourteenth century found the manorial jury dominated by the larger tenants (Brown, 1999: pp. 22–24). Most early modern studies incline to the view that jurors were mostly drawn from the more substantial manorial tenants (Harrison, 1997: 50; Kerridge, 1992: 93; King, 1980: 308; Winchester, 2000: 40–42). But in the absence of any systematic study this must remain a tentative judgement.[7] However, if,

[7] This would be a simple enough matter for the seventeenth century where hearth tax listings can be linked to jury lists and for the late eighteenth century where jury lists can be linked to land tax assessments and I intend to do this. In contrast with the views of the historians cited above, Whittle in her study of Hevingham in Norfolk found that almost all manorial tenants, even cot-

as seems likely, the decisions made by juries were made by an oligarchic minority, then it is quite possible that juries could function, if they so chose, to exclude the poorer inhabitants from access to common resources, a point to which I shall return later.

Medievalists are in agreement that in general only those who were tenants of the manor (those holding land from the lord of the manor) served as jurors. Sub-tenants did not therefore normally serve as jurors. By the late eighteenth century most land in southern England was farmed by labour-employing farmers who rented their farms from owners who were not necessarily the Lord of the manor. In the manorial sense these farmers would have been sub-tenants rather than tenants unless they were also owner-occupiers within the manor. If the situation were unchanged from the middle ages then the largest cultivators in many manors would not have been serving on manorial juries. In some cases the jury would then have been controlled by small owner-occupiers who were typically rural craftsmen rather than by the larger farmers who held most of the land. This seems inherently unlikely. It is more likely that by the eighteenth century the link between serving on a manorial jury and being a direct tenant of the manor had been broken or at least modified. But in the absence of any research on this point this remains a speculative hypothesis.

King's study of seventeenth century leet jurors is based not on the final court records but on the 'dirty' documentation produced at earlier stages of the proceedings (King, 1980: 307). This suggests that the presentments recorded in the final court record had already been sifted by the jury and that many of the presentments were originally made not by the jury but by officers of the court. King suggests the importance of jurors may therefore be exaggerated and that 'perhaps the question should not be whether jurors were oligarchs but whether presentment officers were.' (King, 1980: 308–311). Nevertheless the officers were essentially reporting to the jury and it seems likely that both questions are important. Nothing in King's study suggests that appointed officers rather than the jurors would have been drawing up by-laws.

But did the homage (all the manorial tenants present in the court) have any real power in making decisions? The wording of some by-laws might be taken to suggest this. Thus at Great Horwood in Buckinghamshire in 1538: 'It is ordained by the assent of all the tenants that...' (Ault, 1972: 142, doc. 191). Similarly at Newton Longville, Buckinghamshire in 1545 'It is ordered by the assent of all the tenants...' (Ault, 1972: 143, doc. 193). Such phrasing is common enough. Kerridge on the basis of similar phrases culled from court rolls concludes 'that the by-laws were made by common consent or majority voice is everywhere apparent' (Kerridge, 1992: 88). This interpretation requires a highly literal reading of the evidence and the utopian view of village democracy implied is difficult to credit. Dyer expresses scepticism about such a reading even for the middle ages and Beckerman argues that the involvement of the whole homage had become a 'fictional relic' as early as 1400 (Dyer, 1994: 421; Beckerman, 1992: 242).

---

tagers, served on manorial juries at least once though larger tenants tended to serve more frequently (Whittle, 2000: 57 and personal communication).

At this point another fundamental question needs to be raised. Was the village in fact a self-governing community which only sometimes resorted to the manor court? If so this would explain why by-laws, the presentment of offenders, and the election of officers, are not recorded every year in extant court rolls and court books. The best known proponent of this view is Warren Ault: 'like the enrolment of by-laws and the election of wardens the presentment of offenders was never a routine item in the agenda of a manor court. ... One can only conclude that the enforcement of the by-laws, like the election of wardens and the by-laws themselves, was not a manorial matter' (Ault, 1972: 62). This argument rests on a close reading of suggestive clues in the court records which imply that at least on some occasions villagers were meeting outside the court and deciding matters amongst themselves (Ault, 1972: 64–78). If this were generally the case then the records we can study in the manor court rolls and books would only allow us the occasional glimpse of a much more active system of communal regulation when for some particular reason the villagers brought items to the lord's court. It is arguable that this would happen only when the regulations were being broken or some new and contentious regulation was being introduced for which the higher authority of the manor court was desired.

Hall cites two early modern examples of by-laws being compiled outside the manor court. At Newnham in Northamptonshire in 1587, ten property owners were responsible for agreeing and promulgating by-laws. At Grendon in Northamptonshire in 1734 'freeholders and commoners' drew up by-laws two days before the manor court met (Hall, 1995: 30). To this may be added a set of draft by-laws agreed in 1633 'by and with the general consent of the Commoners of Woodford [Northamptonshire] to be ordered the next Court Baron of St Roland St John Knight of the Bath to be holden for his mannors there' (NRO: 2B 823/7). Again I think we should be cautious before attributing any genuinely democratic meaning to the opening phrase. But these three examples do suggest that in at least some early modern Northamptonshire manors by-laws were drawn up outside the court. Whether or not this was the normal practice remains to be demonstrated.

Winchester's study of the uplands of northern England and southern Scotland, where manor courts frequently had jurisdiction over large areas encompassing widely scattered settlements each of which supplied its own jury, provides direct evidence of manorial tenants setting by-laws outside the manor court. Their juries often drafted orders for their own communities (Winchester, 2000: 42). On many manors a highly institutionalised system for managing communal agriculture outside the manor court existed in the form of local assemblies known as the 'byrlaw'. The powers of the court baron were effectively devolved on to the local community. However the legal authority still lay with the lord's court and by-laws were often taken there for ratification. (Winchester 2000: 42–45). In Winchester's view the officials charged with policing the system, the 'burlawmen', who he describes as constituting 'a standing committee of the court', were drawn from the more substantial tenants of the manor (Winchester, 2000: 44, 47). He suggests that those who ran the system did so in their own interests rather than those of landless labourers or artisans (Winchester, 2000: 48).

The clearest, and most dogmatic, statement comes from Kerridge. He claims that since at least the thirteenth century by-laws were generally produced biannually and always originated in village meetings which were 'fundamentally democratic'. This putative democracy was apparently compatible with the fact that those with 'no stake in the land were not entitled to vote' and that 'leadership came from the few' (Kerridge 1992: 87, 93). The nature of the evidence on which Kerridge's view of village government is based is opaque.

If by-laws were generated outside the manorial structure and only sometimes ratified there then that would explain why they appear so infrequently in the formal record of the manor court. Neeson's study of the eighteenth century by-laws of twenty-four Northamptonshire manors may suggest another possible, though not incompatible explanation. She states that 'Northamptonshire stewards bundled up the field orders with the first drafts of the court proceedings. They rarely enrolled them with the fealties, surrenders and admissions that formed the other business of the court. At best they copied them into books. ... courts made [orders] at least twice a year.' (Neeson, 1992: 111).

By-laws may then have been generated by village meetings and only sometimes taken to the manor court, generated by village meetings and always taken to the manor court or actually produced by the jury in court. Whichever method was used, and it is hard to believe practice was actually uniform across manors, the question still remains did the wealthier villagers have the predominant voice in determining the content of the by-laws? Adequate evidence is lacking. But is it plausible that in a profoundly unequal society where no other decisions we know of were taken in a manner which gave equal weight to all, this one area would have been an exception? The only credible answer is no.

The institutional discussion so far has involved a major simplification, in so far as it has been assumed that the area covered by manor, settlement and field system were coterminous. Often this was in fact the case especially in the Midlands. But it was not always so. Some manors, perhaps particularly in areas of hamlet settlement, covered more than one settlement and field system. This made little difference: in such cases each settlement supplied its own jury to the manor court. More importantly some settlements, especially in East Anglia, had divided lordship, i.e. more than one manor. It is sometimes suggested that in such cases management was likely to be in the hands of the villagers themselves (Hall, 1992: 30). Thirsk argued that in such cases 'agreement might be reached' at a village meeting at which all tenants and lords were either present or represented. Kerridge suggests that in such cases village assemblies would have sought ratification in each manor court (Kerridge, 1992: 87–88). Divided lordship is often associated with manorial weakness and a sub-manorial level of communal agrarian regulation (Williamson, 1993: 166, 173–175).

The poor law legislation of the late sixteenth century led over time to the emergence of a civil parish administration, usually spatially coterminous with the ecclesiastical parish. By the early eighteenth century the parish had taken over many of what were formerly court leet functions. Where manors collapsed or had been dismembered, regulation often devolved upon the parish. Accordingly, by-laws are sometimes found preserved in vestry books. While the vestry meetings which ran parish affairs were

sometimes open to all, parish governance was no more likely to be democratic in nature than manorial juries.

I want now to deal briefly with the role of 'custom' and 'customary law'. The term 'customary law' has been used by medievalists to describe the law made in the manor court (Bonfield, 1996: 103, 105). Decisions in manor courts were sometimes resolved by reference to custom (essentially precedent). Usually declarations of custom would have been a straightforward account of previous practice. But on occasion they may have been invented as convenient legal fictions. Bonfield therefore suggests that pronouncements of custom by the manor court jury are best regarded as a form of legislation (Bonfield, 1996:106–107). 'Custom' may have been easier to change if it had not yet been written down (Bonfield 1996: 112). A similar view of custom as local manorial law was put forward by Thompson when he wrote of the eighteenth century that 'custom is local, *lex loci,* and may except the locality from common law. ... At one extreme custom was sharply defined, enforceable at law, and (at enclosure) property: this is the business of the court roll, the manorial courts, the recitations of customs, the survey and of village by-laws' (Thompson 1991: 97–98).

But Thompson went on to suggest a wider meaning, that in addition custom was 'a lived environment comprised of practices, inherited expectations, rules which both determined limits to usages and disclosed possibilities, norms and sanctions both of law and neighbourhood pressures' (Thompson, 1991: 101). More specifically 'Custumals and village by-laws should not be taken to be an exhaustive accounting of the actual practice of common right usages, especially where these bear upon the fringe benefits of the common, waste, the herbage of lanesides, to the landless inhabitants, or the cottager. For these documentary sources are often partisan briefs drawn up by the lord's steward, or by the substantial landholders on the in-coming of a new lord; or they are the outcome of bargaining and compromise between several propertied parties in the manorial court, in which the cottager or the landless had no voice on the homage' (Thompson, 1991: 100). There can be no doubt that village by-laws provide an incomplete account of agrarian regulation or that the poor played little part in drawing them up. Equally the breaking of rules by the poor or others would imply some disjunction between by-laws and actual practice. However, if it is being suggested that there was some other level of regulation, underneath and in contradiction to the rulings of the manor court then we are on much more controversial grounds.

Neeson, appears to suggest just this, when she argues that the lord's steward may have deliberately omitted to record the rights of small commoners and that the officials charged with enforcing by-laws acknowledged a wider set of rights than the manorial court (Neeson, 1993: 78–79). Some kind of dual system seems to be being suggested here. It is hard to see how this could have worked. By-laws were drawn up by juries who were almost certainly drawn from village elite but ultimately derived their authority from the lord's court. Exactly how the various officials were appointed remains unclear but in the end they were responsible to the jury in the manor court. There is no doubt that the regulations recorded in the manor courts are often fragmentary or incomplete and therefore frequently fail to record all forms of common right and that the less valuable rights are the least likely to be recorded. But to move from the partial glimpse of the

system provided by by-laws to the suggestion that they are a systematic distortion of actual practice requires a leap of faith.

IV. Grazing rights

Many by-laws are concerned with general matters of communal management having no direct bearing on controlling and limiting access. These cover such essential matters as the scouring of drains, the repairing of gates or hedges, 'knobbing' the horns of animals which might otherwise be dangerous, and controlling infection. Others were designed to maintain the fertility of the land within the manor by banning the export of organic matter of various kinds. But my concern here is with those by-laws which controlled access to common resources. This section of the chapter contains a consideration of grazing rights. In the two sections which follow, fuel resources and the building of houses on common land will be considered. Space does not permit a discussion of other less economically valuable resources. The most comprehensive account of the various uses of the waste will be found in Neeson's book (Neeson, 1993: 158–184). Gleaning, the gathering by the poor of fallen grain after the harvest, is also outside the scope of this chapter. Although its regulation in by-laws was widespread since it was also practised on enclosed land and frequently survived enclosure it is not clear it should be viewed as a common right. The best treatment of the subject is contained in a series of papers by King (King, 1989; 1991; 1992).

Easily the most valuable resource was pasture for animals. This could be on the common waste, on the arable after the harvest, on parts of the arable left uncultivated or fallow for a season, on parts of the arable which had been put down to grass temporarily or permanently or on the common meadow after the hay harvest. Those with land in the common meadow could also harvest hay to keep their animals through the winter. Varying degrees of communal regulation governed which individuals could use the common pastures, the type and number of animals they could pasture, as well as which pastures those animals could use at particular times. The most important animals were cows, horses and sheep. Destructive animals such as geese and pigs were often subject to more stringent restrictions, and there is virtually no evidence of goats being kept.[8]

Historically two main methods of restricting the numbers of animals on common land were employed. One was the principle of levancy and couchancy: that no commoner should put more animals on the common pastures than could be fed over the winter on the commoner's own holding. By-laws to this effect date from the thirteenth century and this was a widely accepted convention from at least the fourteenth century (Hoskins and Stamp, 1963: 37; Thirsk, 1973: 249). The other major form of control was through 'stinting'. A stint was a precise numerical allowance of specified animals. In the densely settled east Midlands stints can be found as early as the thirteenth century. At Bescaby in Leicestershire in 1256 'common pasture rights had been rationed to two horses, four

[8] Winchester has found evidence of goats being steadily eliminated from northern upland commons due to their destructive behaviour (Winchester, 2000: 104). For a rather different view of geese and pig keeping, especially by the poor, see Neeson, 1993: 66–68.

oxen and cows, thirty sheep, four pigs and five geese, with all their offspring, for every yardland of arable that a man held in the open fields' (Hoskins and Stamp, 1963: 36–37).[9] On most, but not all, common pastures in southern England levancy and couchancy tended to be replaced over time by stinting. In many places stints were introduced for the first time in the sixteenth century in response to population pressure (Thirsk, 1967: 205). Hoskins and Stamp thought it probable that almost all lowland commons were stinted by the end of the sixteenth century (Hoskins and Stamp, 1963: 50).

The interpretations attached to levancy and couchancy in practice are not entirely clear. What did it mean to overwinter an animal on your own holding? Did it mean you had to grow your own hay? In the northern uplands Winchester found examples of by-laws prohibiting the import of hay into a manor (Winchester, 2000: 81). On the face of it any strict definition would have precluded those without meadow land of their own from pasturing animals on the common. This seems unlikely since in the eighteenth century many otherwise landless individuals in southern England had cottage stints. Again with respect to the northern uplands Winchester and Searle found that levancy and couchancy was held to be incompatible with agistment – the pasturing of animals belonging to someone else (Searle, 1993, 131; Winchester, 2000: 81, 98). The same may well have been true in the southern lowlands.

By contrast the interpretation of stints is straightforward. Where there were common fields, stints were normally fixed in proportion to the size of any holdings in the common fields or as a set number attached to a dwelling (or sometimes to the site on which a dwelling had once stood). Thus at Little Gransden, Cambridgeshire in 1795 'It is ordered that no man shall keep above two Cows for a Cottage and two Cows for twenty acres of land' (CRO, 87/M2). So an individual with only a cottage could keep only two cows whereas a farmer with one hundred acres (40 hectares) could keep ten.

By the eighteenth century common rights attaching to building were usually, though not always, attached only to particular dwellings specifically described as 'ancient' or 'commonable'. Thus at Wood Ditton, Cambridgeshire in 1702 the stint on Ditton common was 'for every antient commonable Tenement one Cow' (CRO, R571 15B/6(e)). Neeson found that commonable dwellings comprised between 20% and 75% of the housing stock in the Northamptonshire villages she examined and concluded that perhaps half the housing stock in the eighteenth century had common right (Neeson, 1993: 60–61, 64). My own findings are in the same range (Shaw-Taylor, 2001b: 651). But how did some buildings come to be described as commonable and others not? This question has not received much attention from historians. One possibility is that at some particular date in a village all buildings then standing, or standing by some previous date, were decreed to be commonable. No subsequently erected building would be commonable. I have only come across one clear example of this taking place. At Hitchin in Hertfordshire an early eighteenth century by-law declared that 'no Cottage or House built since the thirty first year of Queen Elizabeth [1589] hath any right of Commoning on any of the Green Commons of Hitchin, neither shall the Occupant presume to use the same on pain to forfeit to the Lord of the manor Twenty Shillings for every such Offence.' (HRO,

[9] A yardland might vary between 18 and 30 acres – 7.5 to 12.5 hectares (Adams, 1976: 11).

87805). It is intriguing to note that 1589 was the year in which the statute against erecting cottages with less than four acres of land was enacted and this may not be coincidental.[10]

At Elton in Hampshire in 1527 it was decreed that 'no cottager shall keep many cows henceforth' (Ault, 1972: 140 document 197). If taken literally this appears to be a stint on cottage inhabitants not on particular buildings. I have not seen enough fifteenth and sixteenth century examples to know if this was general. But those few I have seen all refer to cottagers not cottages (Ault, 1972: 140 document 187, 142 document 189, 143 document 192; Hall, 1992: 13, 46). If this were generally the case then two rather different intepretations could be placed upon this depending on the exact meaning attributed to 'cottager'.

Firstly, in a medieval manorial context 'cottager' would usually mean a tenant of the manor with no land beyond that attached to his or her dwelling.[11] But most cottage inhabitants would have been either sub-tenants or squatters rather than manorial tenants. If this is the sense in which 'cottager' is used in these by-laws the implication would be that those cottages which constituted a manorial holding had common-rights but those belonging to sub-tenants and squatters did not. And this would be the origin of the 'ancient commonable' cottages of the eighteenth century.

Secondly, 'cottager' in its everyday early modern sense meant someone who lived in a cottage – as opposed to a farmhouse. If this were the sense used in the by-laws it might imply widespread pasture rights for all inhabitants before 1600. Following the legal judgement in Gatewards case of 1607, rights by inhabitancy were ruled indefensible at common law (Thompson, 1991: 121–122, 130–135; Manning, 1988: 85–87). This does not mean they could not continue at the local level if those who framed the by-laws permitted it. However villages where the rights inhered in the residents appear to have been few in number by the eighteenth century. They were rarely mentioned by contemporary observers. Neeson cites perhaps ten examples to which I can add three more (Neeson, 1993: 68–69, 73; Shaw-Taylor, 1999: 209).[12] Is it possible that these villages were the last vestiges of what was once a much more widespread system of commoning by right of inhabitancy? And if so was this gradually extinguished by the modification of stints, especially after 1607 so as to gradually reduce 'cottage' rights to particular cottages and hence a form of property? In this context the comments made by Thomas Andrews are interesting. Writing in 1738 he claimed that many of the poor had been excluded from common pasture at some earlier date. Lords of the Manor and richer freeholders had deprived many of the 'Meaner Sort of People' of access to remaining common pastures by changing stints: 'the poor are, in so many *Uninclosed Commons*, excluded by *Stints*, whereby their antient privileges are taken away and given to the Rich' (Andrews, 1738: 38, 40). Clearly more research is needed to ascertain whether

[10] I am indebted to Steve Hindle for drawing this 'coincidence' to my attention.

[11] I am grateful to Chris Briggs for enlightening me on this point.

[12] It is possible that in the fens this was less unusual. In the 1590s the fen by-laws of Spalding and Pinchbeck apparently allowed common pasture, though not peat rights to all married male inhabitants (Hallam, 1963:42, 50). In my own work I have found that the poor were much more likely to keep stock on fen commons than elsewhere (Shaw-Taylor, 2001a: 116).

there is an unwritten history by which many of the poor were excluded from common pasture by the simple expedient of redefining stints.[13]

This second interpretation should not be pushed too far for two reasons. Firstly because the first interpretation of 'cottager' as a manorial tenant is probably the correct one. And secondly because medievalists tend to be highly sceptical of any general access to common pastures by the poor, although this is not a question which has received detailed attention.

By the end of the eighteenth century most common pasture rights were attached to land in the open fields and most of the rest were attached to common-right dwellings. As is well known by that date most land was owned by landlords and was rented by labour-employing tenant farmers (Allen, 1992: 73 table 4-4, 74 table 4-5, 81 table 5-1). It therefore follows that the largest holders of common rights were in fact capitalist farmers. I have investigated the social distribution of common rights deriving from holdings in the open fields and from common-right cottages for a group of ten villages in the south and east Midlands in the late eighteenth and early nineteenth centuries. Landlords and farmers, as was to be expected, dominated the ownership of open-field land. Farmers occupied the great bulk of the land in the common fields and their attendant common rights. Landlords and farmers between them owned 80% of the commonable dwellings and farmers held 60% of the tenancies, many of them holding multiple cottages. Less than one trader or artisan in ten owned land. About one trader or artisan in ten rented land beyond a garden. But perhaps around one-third of them rented or occupied a common-right cottage. About one agricultural labourer in twenty owned a common right cottage and around 15% held the tenancy of a common-right cottage (Shaw-Taylor, 2001b). The social distribution of common right at the end of the eighteenth century was thus highly polarised. Since land-holding was less polarised in earlier centuries and many common rights were attached to holdings in the open fields it follows that common-rights attaching to land were more evenly distributed at earlier periods. We lack data for the distribution of cottage rights at any earlier period but it would be surprising if these too were not more widely distributed in previous centuries. In the case study villages, and in the villages Neeson examined, perhaps as many as one half of dwellings had rights. Population levels had tripled since the early sixteenth century (Wrigley and Schofield, 1989:208–209). It is, therefore, at least possible that in the early sixteenth century, if the engrossment of cottage rights were less pronounced than in the late eighteenth century, the vast majority of households could have had common rights. If this were the case then this favourable position was subsequently eroded by a combination of demographic growth and engrossment.

I want now to consider the extent to which the major common pasture rights in lowland England had become private property by the end of the eighteenth century. In villages where residence gave a right of common, common rights could not be bought, sold, engrossed, rented out or sub-let. In this sense they were not 'property'. No amount of social polarisation could deprive the poor of such rights – though demographic growth could reduce their value, another un-property-like characteristic. In some other European

[13] Thompson hints at, but draws back from, such an argument (Thompson, 1991: 121–178 *passim*).

regions right by residence appears to have been the *de facto*, if not the *de jure* position for the propertyless. But in eighteenth century England villages with rights by residence were unusual. Lesser benefits such as gleaning and perhaps squatting and sometimes fuel collecting were the patrimony of the resident poor. Property they were not. Common pasture rights on the other hand for the most part adhered to real property in land and buildings. As such they could be bought and sold. They were subject to the same engrossing tendencies as other forms of real property. They could also be rented out to tenants. There is one important potential qualification however.

Neeson has argued that manorial courts prevented landlords from retaining control of the common rights attached to common-right dwellings when the dwellings had been let to another party. Courts did this, she argues, by insisting that such rights could not be separated from the actual occupiers of the building. This is important. If it is correct then farmers who owned or rented multiple common-right dwellings, as many did, would not have been able to use the rights. These would have been retained by the dwelling occupants who were most likely, *a priori*, to have been agricultural labourers. However Neeson's evidence for this is limited. It is derived from five eighteenth century by-laws (Neeson, 1993: 84–85). This is a rather slender evidential base on which to build a general argument. Contradictory evidence is, in any case, abundant. Nearly all my case studies contain evidence either of letting the dwelling to one person and the right to another person or of actually selling the right separately from the house to which it was nominally attached. Many by-laws explicitly condone agistment, the taking in of stock not belonging to the holder of the common right. Unless commoners were allowed to agist stock belonging to anyone except their own landlord, and such by-laws have not been discovered, then there would have been little protection afforded to tenants whose landlords 'requested' them to agist stock (Shaw-Taylor, 1999: 138–142).

I would tentatively conclude that by the end of the eighteenth century common pasture rights in lowland England were usually very close to private property – albeit of a rather peculiar form and subject to certain collective restrictions as to usage – and with some variation from one manor or village to another. As private property they could be accumulated and let to tenant farmers and the distributional patterns I have found are, in that light, entirely unsurprising. To be more precise the fact that common rights were in certain key respects private property explains their social distribution. In parts of Europe where common pasture rights had not become private property they would have formed a substantial bulwark against proletarianisation. How English common rights evolved into private property, and it is possible they were not always private property, is another matter. The history of the evolution of English common rights has yet to be written.

One caveat to the foregoing discussion should be made. Access to common pasture on large intercommons may have been much wider in consequence of weaker regulation (see section VI below). However, only a small minority of southern English settlements bordered on such areas (Shaw-Taylor, 1999: 194–196).

Finally it is necessary to assess the value of common pasture rights. The economic value of keeping stock on common pasture would have varied with: the numbers of animals of particular kinds which an individual or household was entitled to keep; the

proportion of the stocks' food needs which could be met from the common; any costs entailed in making use of the common pasture; the opportunity or financial costs of any attendant labour; and the market values of the various animal products thus produced. Since some of these factors would vary from individual to individual, from place to place and from one year to another no straightforward assessment of value can be given. However, it has been estimated that cows kept on common land by poor people in the late eighteenth century could produce dairy products worth £7–10 per annum. This was between 40% and 50% of what a fully employed agricultural labourer would have earned in a year (Humphries, 1990; Shaw-Taylor, 1999: 18). In terms of food value these cows may have produced about 70 kilograms of butter in year (Shaw-Taylor, 1994: 13). This was probably less than the output expected by contemporary commercial farmers (Shaw-Taylor, 1994: 14). If this were similar to the butter I buy (7,400 calories per kilogram) this would translate into 1,400 calories per day – half or more of daily adult needs. As Warde notes in his chapter poor people with such rights could have greatly increased the calorific value of such produce by trading it for grain. In the early nineteenth century grazing rights for a single cow on the extensive and fertile fen commons at Willingham in Cambridgeshire were being sold for the equivalent of £50 each, perhaps two years' wages for a labourer (Shaw-Taylor, 1999: 140–141). In short common pasture rights could be very valuable indeed.

V. Fuel gathering

The right to gather fuel may have been much more widely distributed than grazing rights for cows and fuel rights may have been less prone to take on property-like forms. Henry Homer, writing in 1766, thought that the great loss for the poor at enclosure was the loss of fuel rights and that 'the poor inhabitants of open-field parishes frequently enjoy the privilege of cutting furze [gorse: *Ulex Europeanus*], turves and the like on the common land; for which they rarely have any compensation made to them at enclosure.' (Homer, 1766: 22). Fuel included peat, turves, dried dung, gorse, heather and wood. Fuel-rights in the late eighteenth century could have been worth between £2–5 per annum or 10–20% of the earnings of an agricultural labourer (Humphries, 1990: 53; Neeson, 1993; 165 Shaw-Taylor, 1999: 18). However these figures are upper bounds since they are calculated by assuming that all household fuel needs could be met in this way and calculating their value at market rates. But whilst we know that some poor people were able to gather a certain amount of fuel we do not, at present, have any evidence as to the proportion of their household needs that could be met this way. There is no reason to assume that households with access to fuel on common lands met all their fuel needs in this way.

Neeson claims that although in forest areas wood rights were often attached to ancient cottages, 'most inhabitants could get fuel of some sort.' (Neeson, 1993: 160–161). Outside forest areas she argues that the poor were often able to gather furze (Neeson, 1993: 164–165). Malcomson suggests widespread rights to gather furze and peat by the poor in the eighteenth century (Malcomson, 1981: 27). At present we lack a systematic study of the physical availability and social distribution of common fuel resources. Clearly the availability of fuel resources must have varied. England was not a well wooded country.

Thirsk has suggested that the absence of regulations concerning fuel rights from many Midland villages outside fen and forest areas indicates that in many areas no fuel was available from the waste (Thirsk, 1973: 249).

By-laws governing fuel resources are indeed much harder to find than those governing grazing rights. My own work on this subject is at too early a stage to do more than present some examples. Occasionally by-laws appear to have operated to restrict access to common fuel resources to the village poor. Thus in the 1790s, at Bensington in Oxfordshire, furze could be cut on Gowls Heath but it could not be taken away on a wheeled carriage, only 'in burthens' (ORO, Benson Court Book, SI/i + ii, 1796).[14] Presumably only the poorest villagers would have been inclined to carry such a thorny harvest home on their backs. In a similar vein at Willingham in Cambridgeshire in the 1790s commoners (i.e those with common pasture rights) were explicitly forbidden from gathering dung and dyes on the common. Poor inhabitants however, were allowed to gather dung in a sack but not in a cart (CRO, R.59.14.5.9 (i)).

Other by-laws, however, restricted fuel rights to the better off villagers. Thus at Needham, Gazely and Kentford in Suffolk in the 1740s furze was restricted to those with commonable houses: 'we amerce all persons that shall dig, stub or carry away more than two [cart] loads of Furze to each House the Sum of Ten Shillings for every Offence to be paid to the Lord of the Manor. No house that hath no right of common shall have any Furze off the Heath upon paine of 10s for the first Offence' (SRO, 2000/330). At Cavenham, Suffolk in the 1740s, 'every Commonable house to have 2000 of Turf to be dug in The Turf Pits' (SRO, 2000/330). On the manor of Worlington Abergavenny in Suffolk in the 1770s peat digging was emphatically restricted to those with common rights. However, peat extraction was restricted to meeting household needs 'we do agree that every comonable Tenant shall dig in the Old Fen ... 3 Cart Loads or 2 Waggon Loads of firing for their own use only. And if any such person shall digg above the said quantity he or they shall forfeit to the Lord of the said Manor 5s. and 2/6 to the Fen Reeves for every load above ... any person not having a Commonable right shall dig or cause to be digged any Firing ... shall Forfeit to the Lord of the Manor 20s. and 5. To the Fen Reeves for every load so digged and the Fen Reeves are hereby impowered to put them into the Pitts or otherwise destroy [sic – get rid of?] them' (SRO, 1375/3). At Great Milton in Oxfordshire the right to gather furze was restricted to those who paid poor and church rates, thus excluding the poor from access (ORO: Misc Glos IX/1–2).

Thus some by-laws turned fuel rights into a restricted property right whilst others prevented it from becoming a property right. Currently I do not have a sufficiently large sample of by-laws relating to fuel to present any general conclusions. Whilst I would not wish to dispute that fuel rights were probably more widely distributed than pasture rights and less likely to take on property-like forms, the existence of such by-laws should caution us against any easy assumptions about the general level of access to fuel by the poor. For the moment I should just like to advance one tentative hypothesis. Where peat, easily the most valuable common fuel right, was available, access was particularly

[14] For an essentially similar by-law at Chipping Norton in Oxfordshire in 1769 see Ballard, 1913: 137. For one at Ryton-Upon Dunsmore in Warwickshire see Thompson, 1991: 145.

likely to be restricted to those with formal common rights. If correct this would correspond with Dilley's finding that peat digging was far less strictly regulated in the Cumbrian uplands than in the lowlands where demand was more likely to outstrip supply (Dilley, 1967: 135–136). In the uplands, where there were vast tracts of peat and low population densities, the commons were 'free-for-all' to dig turf where they liked. In the lowlands, where the peat to population ratio was less favourable, holders of common rights had their own specified location for digging (Dilley, 1967: 144–145). Relatively unfavourable peat to population ratios would also have been characteristic of most fen areas in the southern lowlands. In due course I hope to be able to test this hypothesis against a larger set of by-laws.

VI. Squatting

Squatting in this period refers not to the unlicensed occupation of an existing building but to the enclosing of a piece of common waste and the erection of a dwelling thereon. It could be characterised as a form of enclosure from below. We know relatively little about the level of squatting, how it was regulated or what geographical patterns it may have had. The main purpose in mentioning it here is simply to draw attention to an important area for further research. Squatters paid no rent, though they might have to pay a token annual fine to the lord of the manor. Such payments were usually no more than one shilling per year. In the late eighteenth century cottage rents were generally between £2 and £5 per annum. When rent had to be paid on a cottage it would therefore have absorbed between 10% and 20% of a labouring household's family income (Shaw-Taylor, 1999: 18).

The Hammonds suggested that squatting was 'generally sanctioned. A common rule in one part of the country was that the right was established if the settler could build his cottage in the night and send out smoke from his chimney in the morning' (Hammond and Hammond, 1911, 1995: 31). This appears to refer to the welsh custom of 'Ty Un Nos' (Adams, 1976:163). I have no sense of the extent to which this was in fact normal practice in Wales.[15]

No historian today would, I think, suggest this was 'generally sanctioned' in England, though both Broad and Everitt have suggested that it was a widespread popular belief that this was a right (Everitt, 1967: 411, Broad, 2000: 154). Whilst there is some discussion in the sixteenth and seventeenth century literature of squatting and attempts to control it, mainly in forest areas, there is very little written on the eighteenth and nineteenth centuries. Mention should be made of the case study by Samuel of the extra manorial squatters' settlement at Headington Quarry just outside Oxford in the late nineteenth century (Samuel, 1975) and of Brown's work which contains some interes-

[15] Despite my scepticism about the actual prevalence of this custom it is very striking that van Zanden finds virtually the same custom in operation in the eastern Netherlands (Van Zanden, 1999: 134). This suggests the need to modify Thirsk's argument that any similarities between agrarian by-laws in different regions arose not from a common cultural root but evolved independently as a result of communities facing similar environments and problems (Thirsk, 1964).

ting material documenting extensive squatter settlements in the eighteenth and nineteenth centuries (Brown: 1992, pp. 227–234). In well regulated areas squatting must have entailed the consent of the manor court. At Willingham in Cambridgeshire in the early nineteenth century squatting was very tightly regulated. Only very small encroachments were permitted and only small numbers of resident labourers appear to have been permitted to erect cottages on the Lord's waste. Interestingly the squatters immediately became owners of their houses as evidenced by their tendency to sell them to richer men in the decades that followed construction. From 1589 the Quarter Sessions (public courts held at county level) had the effective power to pull down newly erected houses with less than four acres of land. Until the repeal of this legislation in 1775 (15 Geo. III. c.32) this suggests a potential dual control over squatting. Additionally any squatting by those from outside the parish would have been subject to parochial control of in-migration under the laws of settlement (Styles, 1963; Hindle, 1996).

On large inter-commoned heaths and in forests squatting was probably less tightly regulated than on village wastes. Much of the literature on squatting in the sixteenth and seventeenth centuries emphasises forest locations – especially royal forests (Everitt, 1967: 412; Thirsk, 1967a: 95–80; Sharp, 1980: 156–174). Arthur Young's extensive discussion of squatting in 1801 drew largely on examples from large inter-commoned heaths (Young, 1801). Squatting may have been particularly prevalent in mining areas where manorial lords, who owned the mining rights, probably looked favourably at squatting by miners who worked the mines. Furthermore, mining areas together with ports and fishing villages were exempt from the 1589 statute (Broad 2000: 156). Of all the uses of common waste, squatting remains the most under-researched.

VII. The effectiveness of regulations

I want now to address the question of how well this system of regulation worked. Ault has documented the careful regulation of southern English common fields and wastes from the thirteenth through to the sixteenth centuries (Ault, 1972). Thirsk's work on the Midlands takes this through to the sixteenth and seventeenth centuries (Thirsk, 1972). Winchester's more comprehensive work on the regulation of the large wastes of the northern uplands in the early modern period also suggests careful control (Winchester, 2000). In any period it is possible to point to examples of problems and conflicts, but before the eighteenth century, there is no suggestion of any general problem or crisis.

By the late eighteenth century, widespread denunciations of the management and state of common land became frequent, particularly by pro-enclosure pamphleteers and the writers of the various county reports published by the board of agriculture around the close of the eighteenth century. The Earl of Winchelsea claimed that nine out of ten commons were overstocked (Winchelsea, 1796: 236). John Boys described the cattle on commons in Kent as 'half-starved' (Boys, 1805: 61, 148). Pennington claimed that 'all the laws, formerly made to enforce the necessary regulations in such circumstances, are so obsolete and uncoercive, the execution of them so expensive, and the evasion of them for the most part so easy, that the most spirited and resolute of the advocates for open fields and unstinted commons are often heard to complain themselves' (Pennington, 1769:

44). Hoskins meditating on the disparity between the careful regulation evidenced by sixteenth and seventeenth century manorial records and the bleak descriptions of the board of agriculture reports remarked that 'It is indeed possible that during the course of the eighteenth century the management of the lowland commons had in fact seriously deteriorated, and that the picture drawn by the reporters is not far from the truth. ... in many places, manors had been dismembered and sold off, the manor courts had ceased to exist, and there is no doubt that in these places the old machinery for regulating the use of the commons had broken down more or less completely. The whole subject of the regulation of commons and its subsequent breakdown remains one upon which much further work remains to be done' (Hoskins and Stamp, 1963: 60).

In the north of England the pessimistic view has been affirmed by historical research. Dilley found evidence of manorial authority collapsing in Cumbria from the late seventeenth century: 'whole townships are presented for failing to send their turnsmen to the court, officers are refusing to perform their duties, or even to take up their posts and the courts' pronouncements are being widely ignored' (Dilley, 1967: 132). Searle too found manorial authority collapsing from the early eighteenth century under the impact of agrarian capitalism. The wealthier peasants were increasingly integrated into a national livestock market. These individuals, formerly the backbone of the manor court, withdrew support from and undermined the authority of the courts and grazed the commons bare (Searle, 1993: 135–144). In an echo of Pennington's remarks Searle cites the tenants of Dalston in 1752 who declared that the manor court 'has for many years been greatly Disregarded and ... becomes Despised' (Searle, 1993: 149).

What happened in southern England? Neeson's work on eighteenth century Northamptonshire is the most painstaking reconstruction to date of how a well managed system actually functioned. She examined the by-laws of three manorial estates covering twenty-four Northamptonshire manors, all of which set stints and fined offenders (Neeson, 1993: 117). Orders were made regularly and officials appointed to enforce them. Officials who did not enforce the rules were presented in court and fined (Neeson, 1993: chapters 4 and 5). No failure of regulation occurred in her case study parishes (Nesson, 1993: 155).

Whereas the studies of the north of England have confirmed the pessimistic accounts of many late eighteenth century observers, they are contradicted by Neeson's Northamptonshire study. One question which arises is how representative were the manors Neeson selected for study? These manors made orders 'at least twice a year' (Neeson, 1983: 111) In this respect these three sets of manors appear rather unusual. They also appear to be exceptionally well documented. Manors with unusually good documentation are undeniably the best place to how a really well run system operated. But they may not be a good guide to the practice on manors for which such good documentation has not survived. An absence of such records elsewhere may have arisen either from subsequent destruction of documents or from a failure to produce the documents in the first place in what were less well regulated manors.

What are we to make of this conflicting evidence? The pro-enclosure bias of many contemporary observers is, of course, beyond dispute. But it can hardly be concluded from this that all their observations are a tissue of self-interested lies. Some of their

accounts may be exaggerated but too many of them are highly specific accounts of named places for it to be credible to dismiss this evidence in its entirety as the disingenuous testimony of deluded pro-enclosure ideologues. Recent research has brought to light some dramatic failures of regulation. John Chapman and Sylvia Seeliger have found cases in Hampshire and Sussex where neglect of open-field regulation in the eighteenth and nineteenth centuries went so far as to constitute *de facto* enclosure (Chapman and Seeliger, 1995: 91; 1997: 4).

Focussing on the denunciations of pro-enclosure contemporaries, and declaring late eighteenth century commons to be universally of the Hardin type characterised by over-exploitation and environmental degradation and low productivity, is clearly inadequate. But nor should we focus entirely on examples of comprehensive sets of field orders documenting indisputably well regulated commons and declare all commons to be universally of the Ostrom type: well ordered, productive and sustainable. There is ample evidence that common land of both types was manifestly present in significant quantities in southern England at the end of the eighteenth century. The relative distribution is simply unknown and no doubt much common land lay somewhere on a spectrum between the two extremes sketched here. Clearly more research is needed to assess the extent of any failure of regulation during the eighteenth century.

One provisional hypothesis, which needs further testing, can be put forward here. Davis, the first Board of Agriculture reporter for Oxfordshire, wrote of Otmoor, a large fen-like intercommon, that 'the abuses here *(as in the case of most commons where many parishes are concerned)* are very great, there being no regular stint, but each neighbouring householder turns upon the moor what number he pleases' (Davis, 1794: 22, my italics). The second reporter, Arthur Young, specifically identified Otmoor as in a 'scandalous state' and the produce of the common as 'contemptible' (Young, 1809; 228). It is my impression, though I have not documented this systematically, that contemporaries were disproportionately likely to identify large intercommons rather than divided commons as being degraded by over-stocking (Shaw-Taylor, 1999: 194–203). On this basis I would tentatively hypothesise that large intercommons were much more likely to suffer from the 'Tragedy of the commons' than settlement-specific wastes. That is, of course, probably why most intercommons had been partioned before 1500. If this line of reasoning is correct, it may go some way to explain the disparity between the contemporary denunciations of the late eighteenth century and the careful regulation uncovered by Neeson's study of partitioned wastes.

There can be no doubt that conflict over common rights and the breaking of regulations was most widespread in forests. As Thompson noted 'if all the agricultural lands of England and Wales had been as open to rip-offs as the royal forests or as beset with disputes as Charnwood, then they might have served as illustrative proofs for the glum theses of Garret Hardin in "The Tragedy of the commons"' (Thompson, 1991: 107). Conflicts in forests date back to at least the thirteenth century (Birrell, 1987). Why should this have been so? Like other intercommons these tended to be large and insofar as they were wooded detection of abuses was more difficult. But another obvious difference was that forests were not village wastes subject essentially to self-regulation by the village community. Both royal and private forests had their own administration,

though often subject to common rights by neighbouring villages. Two key resources in forests, game and timber, belonged either wholly or in part to the owner of the forest, not to the commoners. This was in sharp contrast to the grass on village wastes, which did belong to those villagers with common rights. The village elite therefore had a much reduced interest in, and were not in any case responsible for, the good regulation of forests and woods. The peaceful management of other wooded commons may have foundered on divergent interests between the lord of the manor and the village community. For instance, the destruction of Caddington wood in Hertfordshire may have been a case of 'environmental destruction' for the lord of the manor, the dean and chapter of St Paul's, who owned the timber. The villagers, however, not only benefited directly from any illicit timber felling but those with common pasture rights would have benefited further from the increase in the amount and quality of grazing available as a result of the destruction of the forest (Hindle, 1998).

VIII. Concluding remarks

In surveying the management of common land in the English lowlands over four centuries much has inevitably had to be omitted or dealt with too briefly. Surprisingly no general survey has yet been published. Parts of this chapter represent no more than provisional speculations, some of which will no doubt need revision. The exercise may be justified in three ways. Firstly, that the chapter provides a provisional account as a starting point for making international comparisons. Secondly, that it draws attention to under-researched aspects of the English case. Thirdly, in the hope that it will elicit responses from other English historians which may reduce the areas of uncertainty. Finally, I was struck as I read the pre-eighteenth century literature in preparation for this writing this chapter, by the extent to which the subject has been partitioned between the medieval period, the early modern period and the period after 1700. Much, I think, can be learned from peering over these artificial divides.

Bibliography

Manuscript sources

Cambridgeshire Record Office (CRO): 87, M2; R571 15B/6(e); R59.14.5.9(i).

Hertfordshire Record Office (HRO): 87805.

Northampton Record Office (NRO), 2B 823/7.

Oxford Record Office (ORO): Benson Court Book, SI/i+ii, 1796; Misc Glos IX/1–2.

Suffolk Record Office (SRO): 2000/330; 1375/3.

Printed and secondary sources

Adams, I.H. (1976) *Agrarian landscape terms: a glossary for historical geography,* London.

Allen, R.C. (1992) *Enclosure and the yeoman. The agricultural development of the south Midlands 1450–1850,* Oxford.

Ault, W.O. (1972) *Open-field farming in medieval England: a study of village by-laws,* London.

Baker, A.R.H. and Butlin, R.A. (eds) (1973), *Studies of field systems in the British Isles*, Cambridge.

Ballard, A. (1913) 'The management of open-fields', *Transactions of the Oxfordshire Archaeological Society*, 59, pp. 131–144.

Barley, M.W. (1938) 'The Barrow on Humber town book', *Lincolnshire Architectural and Archaeological Society Reports and Papers,* II, I, pp. 13–33.

Beckerman, J. (1992) 'Procedural innovation and institutional change in medieval English manorial courts', *Law and History Review*, 10, 2, pp. 197–252.

Birrell, J (1987) 'Common rights in the medieval forest', *Past and Present*, 117, pp. 22–49.

Bonfield, L. (1996), 'What did English villagers mean by "customary law"', in Z. Razi and R.M. Smith (eds), *Medieval society and the manor court*, Oxford, pp. 103–116.

Boys, J. (1805) *General view of the agriculture of the county of Kent,* London, 2nd edn.

Broad, J. (2000) 'Housing the rural poor in southern England 1650–1850', *Agricultural History Review*, 48, II, pp. 151–170.

Brown, D.G. (1992) *Enclosure and improvement. An investigation of the motives for parliamentary enclosure*, Wolverhampton. Unpublished Ph.D. thesis Wolverhampton Polytechnic.

Brown, S. (1999) *The village elite before the black death in the manor of Elton, Huntingdonshire, 1279–1432*, Cambridge. Unpublished M.Phil. thesis University of Cambridge.

Campbell, B.M.S., 'The regional uniqueness of English field systems? Some evidence from east Norfolk', *Agricultural History Review*, 29, pp. 16–28.

Chapman, J. and Seeliger, S. (1995), 'Open fields and their disappearance in the eighteenth and nineteenth centuries: the evidence from Sussex', *Southern History*, 17, pp. 88–97.

Chapman, J. and Seeliger, S. (1997) *Formal and informal enclosures in Hampshire 1700–1900*, Winchester.

Cunningham, W. (1910) *Common rights at Cottenham and Stretham in Cambridgeshire*, London.

Davis, R. (1794) *General view of the agriculture of the county of Oxford,* London.

Dilley, R.S. (1967) 'The Cumberland court leet and the use of common lands', *Transactions of the Cumberland and Westmorland Antiquarian and Archaeological Society*, New Series, 77, pp. 125–151.

Dyer, C. (1994) 'The English medieval village community and its decline', *Journal of British Studies*, 33, pp. 407–429.

Dyer, C. (1999) *Conflict over commons in the later middle ages*, Paper given to the British Agricultural History Society Winter Conference, London.

Everitt, A., (1967) 'Farm labourers', in J. Thirsk (ed.), *The Agrarian History of England and Wales*, Vol. 4, Cambridge, pp. 200–255.

Hall, D. (1995) *The open fields of Northamptonshire*, Northampton.

Hallam, H.E. (1963) 'The fen bylaws of Spalding and Pinchbeck' *Lincolnshire Architectural and Archaeological Society Reports and Papers,* X, I, pp. 40–56.

Hammond, J.L and Hammond, B. (1911), *The village labourer 1760–1832*, Gloucester.

Hardin, G. (1968), 'The tragedy of the commons', *Science*, 162, pp. 1243–1248.

Harrisson, C. (1997) 'Manor courts and the governance of Tudor England', in C. Brooks and M. Lobban (eds), *Communities and courts in Britain, 1150–1900*, London, pp. 43–59).

Harvey, P.D.A. (1984), *Manorial records,* London.

Hindle, S. (1996) 'Exclusion crises: poverty, migration and parochial responsibility in English rural communities, c. 1560–1660', *Rural History*, 7, 2, pp. 125–149.

Hindle, S. (1998) 'Persuasion and protest in the Caddington common enclosure dispute 1635–1639', *Past and Present*, 158, pp. 33–78.

Hoskins, W.G. and Stamp, L.D. (1963), *The common lands of England and Wales,* London.

Humphries, J. (1990) 'Enclosure, common rights, and women: the proletarianization of families in the late eighteenth and early nineteenth centuries, *Journal of Economic History*, L, I, pp. 17–42.

Kerridge, E (1992) *The common fields of England*, Manchester.

King, P. (1989) 'Gleaners, farmers and the failure of legal sanction in England 1750–1850', *Past and Present*, 125, pp. 116–150.

King, P. (1991) 'Customary rights and women's earnings: the importance of gleaning to the rural labouring poor', *Economic History Review*, XLIV, III, pp. 461–476.

King, P. (1992) 'Legal change, customary right and social conflict in late eighteenth century England: the origins of the great gleaning case of 1788', *Law and History Review*, X, I, pp. 1–31.

King, W.J. (1980) 'Leet jurors and the search for law and order in seventeenth-century England: "galling persecution" or reasonable justice?', *Histoire Sociale – Social History*, XIII, 26, pp. 305–323.

King, W.J. (1982) 'Untapped resources for social historians: court leet records', *Journal of Social History*, 16, pp. 699–705.

Manning, R. (1988) *Village revolts: social protest and popular disturbances in England, 1509–1640*, Oxford.

Neeson, J.M. (1993) *Commoners: common right, enclosure and social change in England 1700–1820*, Cambridge.

Orwin, C.S. and Orwin-Lawry C.S. (1938) *The open fields*, Oxford.

Ostrom, E. (1990) *Governing the commons, the evolution of institutions for collective action*, Cambridge.

Pennington, W. (1769) *Reflections on the various advantages resulting from the draining, inclosing, and allotting of large commons and common fields,* London.

Rackham, O. (1986) *The history of the countryside*, London.

Ravensdale J. (1974) *Liable to floods*, Cambridge.

Razi, Z. and Smith, R.M (1996), 'The origins of the English manorial court rolls as a written record: a puzzle', in Z. Razi and R.M. Smith (eds), *Medieval society and the manor court*, Oxford, pp. 36–68.

Samuel, R. (1975) 'Quarry roughs: life and labour in Headington Quarry 1860–1920. An essay in oral history', in R. Samuel (ed.), *Village life and labour*, London.

Searle, C.E. (1993) 'Customary tenants and the enclosure of the Cumbrian commons', *Northern History*, XXIX, pp. 126–153.

Shaw-Taylor, L. (1994) 'Common right, parliamentary enclosure and proletarianisation', (upub. M.Sc. thesis, Univ. of Oxford).

Shaw-Taylor, L. (1999) *Proletarianisation, parliamentary enclosure and the household economy of the labouring poor, 1750–1850*, Cambridge. Unpublished Ph.D. thesis University of Cambridge.

Shaw-Taylor, L. (2001a) 'Labourers, cows, common rights and parliamentary enclosure: the evidence of contemporary comment c. 1760–1810', *Past and Present*, 171, pp. 95–126.

Shaw-Taylor, L. (2001b) 'Parliamentary enclosure and the emergence of an English agricultural proletariat', *Journal of Economic History*, 63, 3, pp. 640–662.

Sharp, B. (1980) *In contempt of all authority: rural artisans and riot in the west of England, 1586–1660*, Berkeley.

Thirsk, J. (1964) 'The common fields', *Past and Present*, 29, pp. 3–25.

Thirsk, J. (1967a) 'The farming regions of England', in J. Thirsk (ed.), *The agrarian history of England and Wales*, Vol. 4, Cambridge, pp. 1–112.

Thirsk, J. (1967b),'Enclosing and Engrossing', in J. Thirsk (ed.), *The agrarian history of England and Wales*, Vol. 4, Cambridge, pp. 200–255.

Thirsk, J. (1973) 'Field systems of the east Midlands', in A.H.R. Baker and R.A. Butlin (eds), *Studies of field systems in the British Isles*, Cambridge, pp. 232–280.

Thompson, E.P. (1991) *Customs in common*, London.

Whittle, J. (2000) *The development of agrarian capitalism: land and labour in Norfolk 1440–1580,* Oxford.

Williamson, T. (1993) *The origins of Norfolk*, Manchester.

Winchelsea, Earl of (1796) 'On the advantages of cottagers renting land', *Annals of Agriculture*, XXVI, pp. 226–246.

Winchester, A.J.L. (2000) *Harvest of the hills: rural life in northern England and the Scottish borders, 1400–1700*, Edinburgh.

Wordie, J.R.(1983) 'The chronology of English enclosures 1500-1914', *Economic History Review*, 2nd Series, 36, V1, pp. 483-505.

Wrigley, E.A. and Schofield, R.S. (1989) *The population history of England 1541–1871: A reconstruction*, Cambridge.

Young, A (1801) 'An inquiry into the propriety of applying wastes to the better maintenance and support of the poor', *Annals of Agriculture*, XXXVI, pp. 497–658.

Young, A. (1809) *General view of the agriculture of the county of Oxfordshire,* London.

Zanden, J.L. van (1999) 'The paradox of the Marks: the exploitation of commons in the eastern Netherlands 1250–1850', *Agricultural History Review*, 47, part II, pp. 125–144.

4 The use and management of commons in the Netherlands. An overview

Peter HOPPENBROUWERS, University of Amsterdam

I. Introduction

Whenever Dutch historians discuss 'commons' (*gemene gronden*) they refer to the terminological category of 'common pasture/(common) waste', never to common pasture on open fields (which are by all means an important structural feature of the Dutch agrarian-historical landscape), nor, as far as I know, to common meadows (in the German sense of *Wiesen*). The 'commons' concept does however often include commonly maintained infrastructure such as roads, bridges, village squares, specified dike stretches and ditches (Leenders, 1987).

Restricted as the meaning of 'commons' in Dutch may be, even at the beginning of the nineteenth century such common lands extended over a considerable part of the surface area of the (present-day) Netherlands, both in absolute and relative terms. Table 4.1 offers an overview of the extent of waste lands in all Dutch provinces in 1833, after the first cadastral survey had been completed, as compared to the situation on the eve of the First World War. What remained by then, an ample 500,000 ha, would further decrease to some 225,000 ha around 1955 (Hofstee, 1957: 29, Table 9). In Table 4.2 more detailed figures have been presented from four different years between 1833 and 1938 for the five provinces with the largest amount of waste land at the beginning of the nineteenth century.

What Table 4.1 does show is the enormous variation in residual waste land between all the Dutch provinces, which also determined the variation in the functioning of commons. The most essential difference is between the coastal areas and the inland areas of the Netherlands. In the former, largely coinciding with reclaimed peat lands and salt marshes, commons in the above sense are absent in the historical record. According to some, this is because they were never there. During the medieval peat reclamations individual farms were parcelled out, and from the start they were provided with private pasture land.[1] Even in that scenario it is probable that before the reclamation the peat moors were used as commons by adjacent settlements on the 'old land', but how exactly this happened – within which agrarian system or legal-political framework – we just do not know.[2]

---

[1] Comparable are the private heath lands ('*heiblokken*', '*heidehoeven*' or '*heidekampen*') annexed to certain farmsteads in the western part of North-Brabant. See Leenders, 1996: 46 and 471–472.

[2] That in the Utrecht river area there must have been commons that were partitioned at an early date in settlements on the fringes of unreclaimed peat moors has been demonstrated by Dekker (1983: 150–161, resumé). On the presence of common pasture lands in peat-and-clay areas of Westfriesland, De Cock (1965: 92–102). Henderikx (1987: 58–60) has pointed to the toponym –

Figure 4.1 Residual waste land in the Netherlands, c. 1850

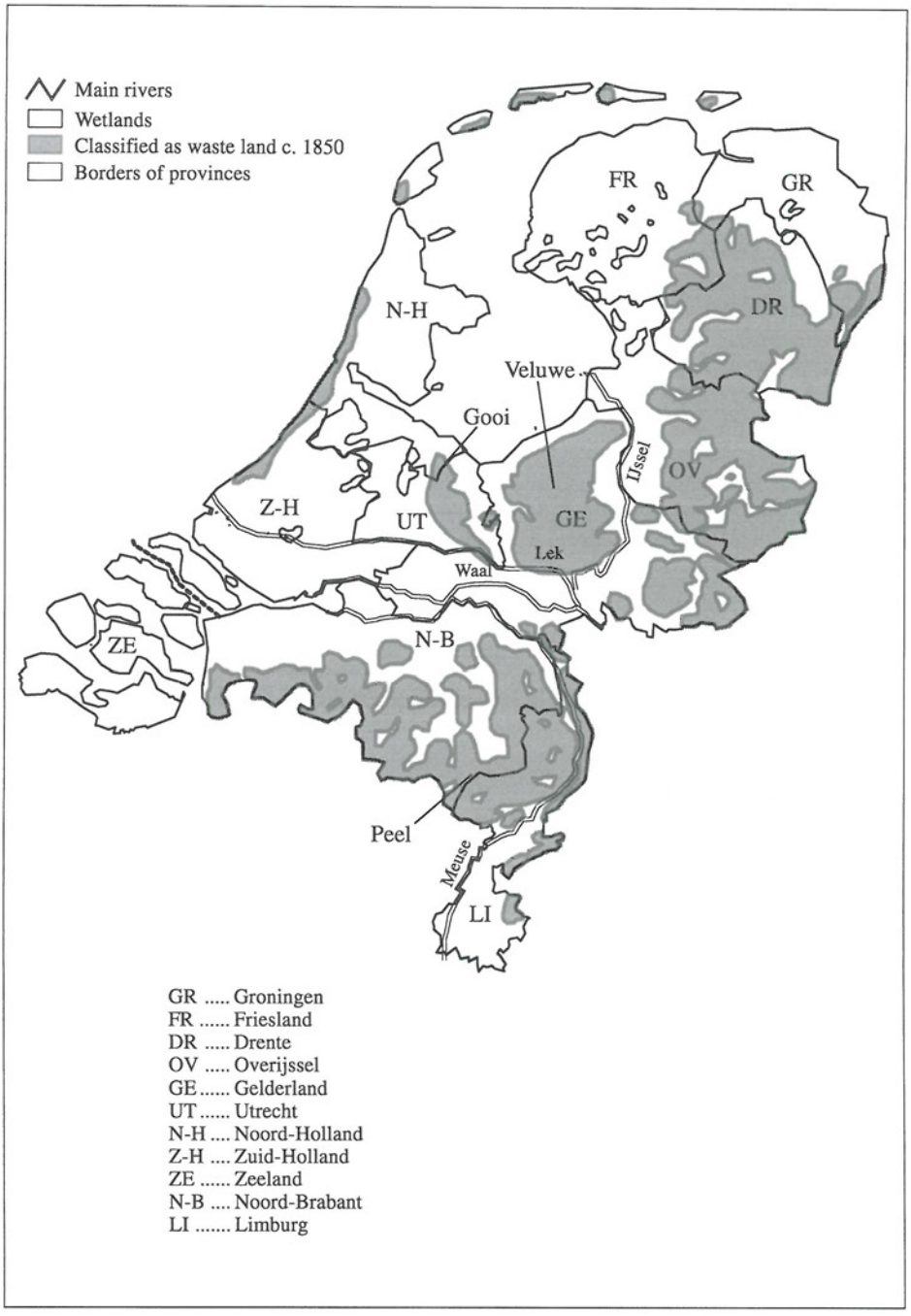


Table 4.1 Surface area of waste land in ha between 1833 and 1911 (all provinces), percentages of the total area of land in brackets (figures from 1955)

Year/Province	1833	1911
Groningen	37,629 (17)	17,166 (8)
Friesland	37,963 (12)	23,387 (7)
Drenthe	179,748 (69)	121,301 (46)
Overijssel	150,198 (46)	91,055 (28)
Gelderland	164,659 (33)	93,601 (19)
Utrecht	16,369 (12)	6,637 (5)
North-Holland	38,727 (15)(°)	27,236 (10)
South-Holland	13,388 (5)(°)	8,498 (3)
Zeeland	16,414 (10)	2,850 (2)
North-Brabant	181,049 (37)	111,247 (23)
Limburg	70,362 (32)	30,829 (14)
Total Netherlands	906,506 (28)(°)[1]	533,807 (17)

(°) Percentages slightly distorted – overestimated – by polder reclamations in the second half of the nineteenth century).
Note: [1] Demoed (1987: 76, Table 3) gives a total of 834,211 ha for the Netherlands in 1833, which was 26% of the total surface area.
Sources: Blink and Smid, 1913: 228; Hofstee, 1957: Table 1.

Table 4.2 Surface area of waste land in ha between 1833 and 1938 in the five provinces with the most waste lands around 1800 (absolute and relative (index) figures) (1833=100)

Year/Province	1833	1885	1918	1938
Drenthe	179,748 (100)	135,760 (76)	115,167 (64)	60,075 (33)
Overijssel	150,198 (100)	99,765 (67)	86,864 (58)	36,371 (24)
Gelderland	164,659 (100)	105,353 (65)	84,909 (52)	49,121 (30)
Noord-Brabant	181,049 (100)	122,325 (68)	100,509 (56)	52,233 (29)
Limburg	70,362 (100)	37,003 (51)	27,342 (39)	14,258 (20)

Sources: Thissen, 1993: 265 (Table 12.1); Demoed, 1987: 76 (Table 3).

veld ('field') as an indication for early medieval common pasture lands on low lying lands in the western part of the central river area. Relatively well-documented is the case of the Mastebroek, a huge marshland in the combined delta of the rivers Guelders IJssel and Vecht. It measured more than 8,600 ha, which were in use as a common until 1364 when the Mastebroek was partitioned and reclaimed (Zeiler, 1987). For more general information on the management of commons in the coastal provinces (Buis, 1985, I: 121–124) and ibidem (173–175) for South-Limburg, another area with few commons, due to its natural fertility.

The inland areas largely consisted of sandy soils. (The levee and river clay soils bordering the great rivers (IJssel, Rhine, Meuse) that separate the sand plateaux of the Netherlands will be dealt with at the end.) The area of sandy soils is where, according to generally accepted opinion, extensive common waste lands were of crucial importance to the maintenance, or even survival, of a typical mixed-farming system. The core of this system was the 'permanent' cultivation – that is to say cultivation without any fallowing – of (winter) rye, supported by animal husbandry (sheep and cattle) that first and foremost had to supply manure. As captured in a classical Dutch statement, animals were kept 'in the service' of arable farming. This system originated in the twelfth-thirteenth centuries and would remain in function throughout the early modern period, both in landscapes dominated by open fields (German: *Esch Akkerbau*) and in landscapes dominated by individually reclaimed and enclosed plots of arable (German: *Kampenwirtschaft*) (cf Bieleman, 1992: 76–100, 181–206).

II. Uses of common 'waste' lands in the Netherlands

Common waste lands were needed for two principal purposes: they had to provide for grazing opportunities, and they had to supply heath sods (German: *Plaggen*), used to compost with manure, which was badly needed to fertilize the poor arable lands. This system only gave way to a new one at the end of the nineteenth century, which in a certain way was its exact counterpart. Now that animal production was the primary economic goal, arable agriculture, i.e. the cultivation of fodder crops, became subsidiary. This process of re-orientation, as we shall see, was the main force behind the partitioning and abolition of commons in the inland areas.

The story of the compelling relationship between the persistence of commons on the one hand and a particular agro-system that could not do without them on the other hand is an old one. It has been 'upgraded' to present-day concerns, so to speak, in Jan Luiten van Zanden's article in the 1999 issue of *The Agricultural History Review*. In short, Van Zanden assigned the commons an important place in a 'peasant moral economy', that was aimed at assuring subsistence by avoiding an overexposure of peasant households to the risks of the market. This implied a sort of collective/communal moral obligation as well as ecological concern to '[conserve] these natural resources in order to pass them on to future generations' (Van Zanden, 1999: 131), although Van Zanden was the first to admit that the commons' part of this moral economy did not always work as it should (see below). Apart from that, critics of the general view just outlined point to the commercial value of livestock. As crucial as suppliers of manure sheep and cattle may have been in a finely-balanced subsistence economy, in addition they were sources of money income that may not have been negligible. For if in the sandy regions of the Netherlands there will hardly have been any export of inland grain outside the region, there was at times – dependent on a number of economic, demographic and fiscal circumstances – a substantial trade in cattle, sheep and wool from among others Drenthe, eastern Brabant and northern Limburg, not only to the towns of Holland and Brabant, but also further away, to England and France (Renes, 1999: 185–187 (see also below); Bieleman, 1987: 353–378).

Table 4.3 Uses of common waste lands according to ecotype/landscape

	Wood-land	Heath land	Peat bogs	Grass lands	(low) Moor peats	Drift sands
Building materials	timber	sods for roofing	clay (bricks)			
Fuel	firewood	peat, wood			peat	
Pasture	pigs, cattle, horses	sheep, cattle		cattle, horse		
Manure	leaf-litter	dung, sods	grass-sods	grass-sods, dung	peat-litter	sand
Other agriculture	fence-wood, hop-poles			hay		
Meat, fish, other food	pigs, game, nuts	sheep, cattle game	game (birds), fish	sheep, cattle, game	game	rabbit
Trades	wood, charcoal, reeds & rushes	heather (brooms), juniper berries, wool	iron, clay (brick making, pottery), sand		peat	sand
Other	Upkeep of roads, bridges, embank-ments etc. (wood for-)	bee-keeping, flax-retting				

Sources: based on Renes, 1999: 182; Coopmans, 1987: 152; Vera, 1996: 218–219.

Obviously, there were substantial regional differences in the actual agrarian and non-agrarian use of commons, but certainly for the period from the Late Middle Ages onwards there was a clear common denominator consisting of two parts: the grazing of sheep (and to a lesser extent cattle and horses) and the cutting of sods used for the preparation of manure.[3] Only where the commons still encompassed larger tracts of woodland – which was already quite rare by the start of the early modern period – could the keeping of pigs be of importance.[4]

[3] On the phenomenon of semi-wild horses kept in certain woodlands of the eastern Netherlands until into the fourteenth century: Renes, 1999: 184.

[4] Dirkx, (1997: 43–44) gives examples of the putting of pigs out to pasture in oak woods in parts of Overijssel from as late as the eighteenth century. Renes (1999: 183) of pigs being fed on acorns on the roads in wooded areas of northern Limburg (fifteenth century). Renes (ibidem) also mentions that in the early fourteenth century in northern Limburg the value of certain wood lands was measured in the number of pigs that could be pastured on it.

In addition to this general primary agrarian goal, mark and village byelaws show that certain secondary areas of use of common land existed everywhere. Dependent on the type of natural resources at hand, they varied from the collection – and possibly basic working – of building materials (wood, loam, sand, reed for thatching), fuel (peat, wood, charcoal) and limited hunting, fowling, bee-keeping[5] and fresh water fishing, to the extensive slash-and-burn cultivation of buckwheat and the gathering of wild honey, fruits and vegetables, nuts and chestnuts (see Table 4.3).

III. User organizations and management

III.1. *Marken, meenten* and *maalschappen*; a note on terminology

There is some terminological confusion even in modern literature as to how to name the organizations that existed in the Netherlands for the use of common lands. The customary general name both for corporations of people entitled to the use of specified common waste lands, and for such lands themselves, is marks (Dutch: *marken*), even though its historical use in the *first* of the above meanings is mainly limited to the present-day provinces of Overijssel and Gelderland.[6] In wooded areas, where common land use still involved substantial tracts of forest, marks were called *maalschappen* (*maal* refers to woodland vegetation) (Buis, 1985: I, chapter 2). Outside Overijssel and Gelderland the standard term for both waste lands in common use and user corporations was *(ge)meenten* (litterally 'communities'), but there were also places where there was no specific name since there was no specific institution. For clarity's sake I have chosen to make use of a simple, binary distinction, which, although not entirely orthodox, does cover basic historical reality.[7] I shall speak of marks (or *markgenootschappen*) to indicate user corporations that were set up and initially operated separately from general local government. Their members were called *markgenoten* (*genoten* meaning 'fellows', 'associates'). When speaking of *(ge)meenten*, I shall refer to the same sort of organizations that were closely linked to general local government. Members of a *meent* are called *meentgenoten*. On the basis of this simple distinction we can divide the provinces with the highest amount of common lands (see Table 4.2) as indicated in Table 4.4.

It must be underlined that the dichotomy between *marken* and *meenten* in the above sense is over-schematic, because in regions where *marken* predominated their boards sooner or later tended to infringe upon general village administration, especially by

---

[5] Renes (1999: 185, Table 14) gives numbers of bee hives in one municipality in northern Limburg, Venray, ranging from 450 to as many as 950 during the last quarter of the nineteenth century.
[6] The ultimate blame for this confusion can be put on Dutch legislation in the nineteenth century, in which the quite regionally specific concept of 'mark' was applied to common waste lands in general.
[7] Maybe not entirely orthodox, but neither entirely new. In fact, the distinction was first made by Jan Kops, the first Dutch Minister of Agriculture, who in a report from 1800 tried to distinguish between *meenten* ('commons') and *marken* ('marks'); the former being owned by all villagers with a share in the common lands, and governed by the local authorities; the latter being property of the *markgenoten* and being governed by their own board of directors (Demoed, 1995: 126–127). Note that my distinction is slightly different.

Table 4.4 The predominance of 'marken' or 'meenten' in Dutch provinces with large amounts of common lands

Province	*Marken* or *meenten* predominant?
Drenthe	Meenten
Overijssel	Marken
Gelderland	Mixed
Utrecht/Gooi	Meenten
North-Brabant	Meenten
Limburg	?

providing byelaws for things that had nothing to do with the use and management of common lands in a stricter sense. In such cases the difference between village communities taking measures for their common lands, and *markgenootschappen* taking general administrative measures for villages, is rather blurred. For instance, of the sixty extant byelaws of the Veluwe region (the north-western part of the province of Gelderland) in the early modern period, twenty-two were promulgated by *markgenootschappen*, nineteen by *maalschappen*, and nineteen by village communities (*buurschappen*) (Verstegen, 1989: 78–80 and 182–183 (note 5)). It has to be stressed, though, that *marken* and *meenten* were organizational units separate from village communities. By implication neither *markgenoten* nor *meentgenoten* ever fully coincided with the members of village communities (*buren*). This was not even the case in Drenthe, where, as we shall see, the management of common lands remained in the hands of village boards. Even there, not all *buren* had access to the commons – or at least not equal access – whereas on the contrary outsiders could have.

If one wants to understand the functioning of *marken* and *meenten* within village society at large, it is imperative to identify the *markgenoten* or *meentgenoten*, and establish how use-shares or stints (*waardelen*, *waren* or *scharen*) were divided among these *gewaarden* (the holders of *waardelen*; another common name for *markgenoten* or *meentgenoten*).

III.2. Medieval origins and social property relations

According to a well-known theory of the famous Dutch agricultural historian Bernard Slicher van Bath the formation of *marken* and *meenten* – as corporations of users of common waste land – do not go further back in time than the apex of the 'internal expansion' of medieval Europe, in other words, somewhere around the twelfth and thirteenth centuries. This was contested by, among others, Heringa, who preferred to believe that rules for the common use of waste lands – and with them, user corporations – were as old as settlements themselves; they only started to show up in written sources from the thirteenth century onwards (cf. Dirkx, 1997: 25–26). Whatever the truth, there is no doubt about the historical appearance of large numbers of *marken* and *meenten* in the centuries before the closing of the Middle Ages – almost 300 in the present provinces of Drenthe, Overijssel and Gelderland alone (Table 4.5).

Table 4.5 Mentions of (different) *marken* or *meenten* in the provinces of Drenthe, Overijssel and Gelderland in written sources from before 1500

Region/district	Number of mentions before 1500
Drenthe	66
Land van Vollenhoven (prov. of Overijssel)	8
Salland (prov. of Overijssel)	89
Twente (prov. of Overijssel)	29
Graafschap Zutfen (prov. of Gelderland)	34
Veluwe (prov. of Gelderland)	60
Total	286

Source: based on B.H. Slicher van Bath, 1978: 242 (Table 10).

At that point, the interference of lords in the constitution of administrative institutions in town and countryside was general and hardly avoidable. However, lordly interference with the organization of *marken* and *meenten*, so far as we can see, could have two quite different roots. On the one hand, it may have sprung from the large-scale landownership of aristocrats and religious institutions, much of which was probably organised in *curtes* (manors) until about the thirteenth century.[8] A special sub-category originated from landed estates owned by (future) territorial princes. Such 'crown lands' – including the woods and waste lands that went with them – became state property after the constitution of the Dutch Republic, which did not always make them public property open to collective/public use. Examples from the province of Utrecht – part of the medieval prince-bishopric of Utrecht – include the marks of Maarne, Elst and Amerongen, which after the foundation of the Dutch Republic were directly governed by the (Provincial) States of Utrecht.

On the other hand, the predominance of lords over common lands may go back to the exercise of *ius forestense*, the originally regal or 'banal' right to all woods and waste lands that 'had no lord'. During the tenth and eleventh centuries this right, by royal gift or otherwise, had come into the hands of counts, dukes and bishops – the territorial rulers of the region to be – but sometimes also lesser, local lords. Needless to say, these are two quite different origins, the former more lying in the sphere of private law; the latter undoubtedly having something of the nature of a 'public authority', later to evolve into a state prerogative.

[8] It should be stressed that the relationship between early medieval *curtes*/manors and later medieval marks cannot always be proved for want of sufficient documentation. A good example is the *villa Lisiduna*, i.e. the *curtis* of Leusden (prov. Utrecht), already known from a charter of 777. But the oldest byelaw of the Leusden common only dates from 1561, and does not mention any lordly influence whatsoever. Probably the bishop of Utrecht did originally possess the lordship rights over the Leusden common lands, but somewhere during the later Middle Ages lost them or ceded them to the villagers of Leusden (Buis, 1985: I, 139–142).

With regard to this entire development, it is important to see that in the Netherlands, unlike in England, the 'classical period' of the 'manorial system' had passed just when the 'time of marken' (or rather, the documented time) was starting. But the dissolution of the classical manorial system of course did not put an end to aristocratic and religious land-ownership of large-scale holdings, nor did it preclude the existence of marks or *meenten* that were entirely dependent on landed estates. A typical example is the mark of Maarsbergen, a large estate in the province of Utrecht that was acquired by the premonstratensian abbey of Berne in the second half of the fifteenth century. Most of the land of this grange was granted to farmers on short-term leases. This meant that most *markgenoten* were tenants of the abbot of Berne; that the government of the mark was composed of none other than the abbot's provost at Maarsbergen; and that all mark regulations came from or had to be authorised by the abbot of Berne (Buis, 1985: I, 142–144).

More generally it must be made clear that aristocratic or urban-patrician large landowners in the time of the Dutch Republic could and did have an important say in the use and management of common lands, as well as in the trial of infractions in two ways: first, in regions of *marken,* as important *markgenoten* because of the large amount of use-shares they would possess; second, in regions of *meenten* by acquiring leading public offices in villages (especially hereditary justiciar positions). Therefore, I would argue, there is little point in trying to distinguish between 'free' and 'lordly' marks along the lines set out by Slicher van Bath, unless local social property relations and power structures are carefully taken into account.[9] I shall get back to this point below, when discussing regional particulars.

III.3. Management regimes

Both in *marken* and *meenten* the effective management of common lands was left to special officials, usually called *gezworenen* (literally *jurati*) in Brabant. Their task was to establish, in agreement with village communities and their administrators, byelaws and fines for infringements. For the daily supervision, *schutters* were appointed, named after their primary task of locking up (*schutten* in Middle Dutch) animals that were found on the common while belonging either to people who had no use-right or to those who had a right but herded more animals than they were entitled to. In many *gemeynten* in Brabant, *schutters* also had to keep out vagabonds and beggars and other unwelcome folk roaming the woods and heaths in early modern times.

---

[9] For Slicher's original statement, see Slicher van Bath (1944: 99–107). In fact, Slicher's interpretation comes close to the German distinction between 'autonomous' (*unabhänglich (..) von hoheitrechtlichen Bindung*) and 'dependent' marks (dependent on *irgendeine andere staatliche oder grundherrliche Gewalt [die] (..) ein entscheidendes Übergewicht besitzt*), the autonomy and dependence referring to the absence or presence of any institutionalised intervention by either private landlords or territorial princes/state organs in regulating the management of commons, including the administration of justice that could be connected with it. German quotations taken from Venner (1985: 309–311) who himself proposed to distinguish between independent (*zelfstandige*) and dependent (*onzelfstandige*) marks. In his historical typology of common lands in the Netherlands Renes (1998) departs from a somewhat simplistic dichotomy between 'ownership' and 'use'.

In wooded areas, policing officials were called foresters (*vorsters* or *forsters*). In the Meinweg woods in northern Limburg they numbered two, later, from the second half of the sixteenth century on, three. They had to take action against trespassers or against any infringements of byelaws. They were also responsible for security against highwaymen and other criminals, and for sounding the fire alarm and acting as game keepers (the latter for the use of the noble lord of Wassenberg, the only one with hunting rights in the Meinweg) (Venner, 1985: 160–173).

Whether the appointment of *gezworenen* and *schutters* was sufficient to warrant an *active* as well as *effective* management, is difficult to say. Most of what we know is based on normative sources, byelaws in particular (called *markerechten, markereglementen* or *(mark)wilkeuren*), that have been handed down in substantial numbers from the late sixteenth century onwards (for Gelderland and Overijssel: Dirkx, 1997: 22–23; Van Zanden, 1999). These byelaws commanded the holders of use-rights to do certain things while at the same time prohibiting other things. These obligations and prohibitions would have reflected the various uses of common lands that are presented in Table 4.3. By far the most were related to sheep-herding (how many sheep could each *gewaarde* herd where and in what periods of the year?)[10], the cutting of sods (how many cart loads were *gewaarden* allowed to cut?), or, in wooded areas, the cutting of timber. There were also quite general obligations to keep open drains, ditches and waterways; to maintain (sandy) roads, bridges, culverts, and the like as well as gates, fences, hedges and turnstiles that were put up on access roads to commons. More specific, and depending on local circumstances, were prohibitions regarding such things as the grazing of geese, the mowing of grass in excess of certain amounts and the cutting of timber or peat to be sold (e.g. Van Asseldonk, 2002: ch. 10).

Indications of a more *pro-active* management policy aimed at (ecological) preservation are rather few. One example is what in Brabant was called *voorpootrecht*, the right granted to peasants to plant trees and shrubs on common waste lands in front of their farms, so that they had their own supply of timber and fuel. In some areas the same measure had the additional goal of preventing the further expansion of sand drifts. From the end of the seventeenth century in the Meierij of 's-Hertogenbosch – the Bailiwick of Bois-le-Duc – regulations were published to *oblige* peasants 'with land to plough' to plant trees, preferably oak or beech. Rather than ecological concern, fiscal motives were behind this measure: the central government at The Hague hoped to raise income from Brabant by re-enforcing an old right of the Dukes of Brabant, the so-called timber tax on felled trees. As Leenders has recently demonstrated, the remarkable main effect of this effort was the laying out of poplar fields in certain villages, which went to serve as raw material for a specialized village industry, clog making (Leenders, 1998).

[10] Dirkx (1997: 95–104, especially 99–101) calculated by way of regression analysis that in the provinces of Gelderland and Overijssel on average 2,26 sheep were allowed to graze per hectare of common waste land during the early modern period. There is far less information available on cattle and pigs. To give some idea: Dirkx gives numbers of about 1 head of cattle per hectare and of 1 pig per three ha.

In the commonly used Meinweg woods, from at least the beginning of the seventeenth century, measures were taken to prevent further degeneration. During the entire spring and summer seasons all cutting of wood was strictly forbidden; and after cutting, trunks had to be left untouched for eight to ten years. In the same area we know of the sowing of acorns in special acorn fields (*eikelkampen*) from the early-eighteenth century onwards (Venner, 1985: 223–227 and 184–185 respectively). From Gelderland we know of so-called 'pacifications' (*in vrede leggingen*) of woods for as long as forty to sixty years – although to no avail (Dirkx, 1997: 43–46).

Taken together, byelaws give some idea about the set goals of the management of common lands, which, as the above shows, were quite limited. In order to check whether they were indeed effective, a more detailed study of court records is required. Trespassers generally were prosecuted before special *marken* tribunals in regions where marks predominated, and before common village courts in regions with *meenten*. But as yet little progress has been made with the systematic exploration of the surviving documentation.

For the present, therefore, it remains a matter of debate whether all such restrictions and regulations of the use of common waste lands as well as a more or less active management did indeed succeed in preserving the functional variety of common land use, and thus retaining a (precarious) ecological balance. A 'paradox' is how Van Zanden chose to qualify the operation of marks in the eastern Netherlands through the early modern centuries – but I think his observations equally hold for the *gemeinten* of North-Brabant. According to Van Zanden the weak spot of the marks was in the absence of efficient enforcement mechanisms. There was little if anything to really compel peasants or other users of commons to obey the rules (although these were in themselves strict enough). The relative malfunctioning of marks, especially during the protracted period of war from the end of the sixteenth until the middle of the seventeenth century, and during the following decades, when population started to grow fast, invited exactly the thing that was contrary to their very *raison d'être*: unregulated (over)exploitation. (There you have the paradox). It not only led to an ecological degradation of common waste resources by the further disappearance or thinning out of woodland as against the expansion of heath moors and sand drifts, but also to its counterpart, the extension of (individual) reclamations. Needless to say, both developments were threatening to a peasant economy which was so dependent on the presence and availability of large tracts of common waste land. But the marks showed a remarkable resilience. According to Van Zanden they recovered and a 'new balance was struck' somewhere between the end of the seventeenth and the middle of the eighteenth century. Mark regulations were imposed with more strictness; measures were taken against further reclamations; good-quality pasture land was partitioned; and users of commons often had to pay for grazing their animals.

IV. Regional variation

Our basic distinction between *marken* and *meenten*, when crossed so to speak with various forms of lordly (non-peasant) interference such as mentioned, produces a widely varying array of arrangements by which during the later medieval and early modern periods common waste lands were controlled, governed and managed. In order to taste some of this variety, it is worthwhile taking a closer look at a number of regions which have received specific scholarly attention on our subject during the last decades.

IV.1. Veluwe (province of Gelderland)

The leading work on *marken* and *meenten* in the Veluwe region remains Slicher van Bath's (Slicher van Bath, 1944: I, chapters III and IV; Slicher van Bath, 1978). In the Veluwe area, marks are already mentioned in early Carolingian documents, but according to Slicher *marca* there means village territory (as it still did much later in Drenthe; see below). Neither did Slicher, faithful to his conviction of a late institutionalization of user organizations, see the earliest references to *scaras* ('use-shares', *scharen*) in the woods of Putten and Ermelo from around the middle of the ninth century as proof of the existence of *markgenootschappen*. In any case the oldest extant mark byelaw (*markerecht*) in the Veluwe area, that of Wekerom near Ede, is to be dated to the year 1349. The probable occasion for its being granted by the duke of Guelders was his sale of the common lands of Wekerom to the 'common *maalgenoten* and their cottagers' of Wekerom. In this manner the duke exercised his banal right to waste land in a way quite similar to what his Brabantine colleagues were doing from the end of the thirteenth century onwards (see below). All later *markerechten* from Gelderland lack this formal link with the duke-prince, but they all date from the fifteenth century. At that point in time the dukes had either lost a direct (financial or other) interest in waste lands or lacked the power to interfere with something that they accepted as a fait accompli: that *markgenootschappen* and *meenten* were local organizations that were fairly autonomous in their regulation of the use and management of commons. From that point on, lords, the Duke included, only had a say in things to the extent that they were *markegenoten* themselves. Early examples are the Abbot of Prüm in the *maalschap* of Arnhemmer wood and the Commander of the Utrecht House of the Teutonic Order in the *mark* of Dieren (Slicher van Bath, 1978: 252). In both these cases the position of these powerful and high-ranking prelates was regarded as so elevated that the right to appoint the *markrichter* (mark justiciar) had been 'naturally' put in their hands. Nevertheless, in all *marken* and *meenten* on the Veluwe all villagers – whether (small) landowners or cottagers or others (e.g. village artisans and shopkeepers) – always preserved their right of access to common lands as well as to general meetings of the mark or *meent* that regulated their use. Around 1800, when the partition of common lands and the dissolution of marks arose as a political issue, the politicians and officials involved had forgotten about the public-'banal' origins of the marks. There was the clear impression that common lands were *private property*, i.e. belonging to all villagers in places with *meenten*, or to the *markgenoten* in places with marks.

IV.2. Utrecht and Gooi (province of North-Holland)

A similar development can be traced in more detail in the sandy region of Utrecht as well as in the south-eastern corner of the province of North-Holland, a region called Gooi, which in fact is a spur of the elevated sandy soils of the Utrecht ridge. The secular lord (prince) of Utrecht until 1528 – when the Habsburg Emperor Charles V took over – was the bishop of Utrecht, who granted the exercise of many of his lordship rights to the handful of chapters connected to the episcopal see. Apart from his interference with common lands as a territorial ruler, the prince-bishop also seems to have considered the property of many woods as belonging to his demesne ('crown') lands. But in Utrecht, as was the case elsewhere, marks and *meenten* had formed somewhere in the Later Medieval Period, and the bishop and his chapters had to deal with them, whether as large landowners (manorial lords) or as wielders of banal power (i.e. as possessors of local lordships) (in short: Buis, 1985: I, 124–154). The impression is that they often had little consideration for peasant interests, especially in cutting timber and in grazing cattle, sheep and horse in (semi-open) woodlands. This did not prevent the disappearance of most of Utrecht's woodlands by the middle of the early modern period.

In Utrecht – as in Brabant – we see not only peasants acting as *markgenoten*, but towns as well. In such cases, when it came to conflicts, bishop and chapters could reckon on more determined resistance. For instance, shortly after 1390 the growing town of Amersfoort clashed with the cathedral chapter over the use of common lands and woods around the town. Because the town government had succeeded in buying a large number of *waardelen* (use-shares), it could make a firm stand. Still, it had to recognize the formal lordship of the chapter: whenever it wanted to partition common lands for reclamation purpose, it needed the chapter's permission (Buis, 1985: I, 133–135).

The *meent* of Gooi has one of the longest documented histories in the Netherlands.[11] The first undeniable reference to its functioning is in a charter from 1326; the oldest extant byelaws are from 1364 (regulations of the use of woodlands) and 1404 (regulation of the use of heath and pasture lands). From these byelaws it appears that the use of woodland was liable to far more restrictions than the use of heath and pasture lands, evidently because by then woods were already a scarce resource, and represented a higher economic – as well as social – value. The woodland part of the *meent* organization was neatly guarded by the representative of the Count of Holland, the noble family of Nijenrode, which was in hereditary possession of the *holtrichter* office (justiciar of the wood).

Around the middle of the fifteenth century the *meentgenoten* started to define themselves as *erfgooiers* (literally, 'hereditary people of Gooi') by declaring their property rights to the common lands as hereditary while at the same time restricting the exercise of those rights to adult males in possession of a farm (Kos, 1999: 94). This was not acceptable to the Burgundian authorities and in the years 1470–1474, during the reign of Duke Charles the Bold, the legal question of who 'owned' the common lands of Gooi

[11] There is abundant literature. The more recent overviews are: De Vrankrijker, 1968; Moorman van Kappen, 1980; Buis, 1985: I, 154–161; Van der Linden, 1988; Kos 1997; 1999.

was put before the high courts of justice of the Burgundian-Habsburg Low Countries: in the first instance to the Council of Holland at The Hague, then, in appeal, to the High Council of Malines. The outcome was that the High Council formalized the legal distinction between 'naked' property on the one hand, and (eternal) use-rights on the other hand. The latter, it was decided, belonged to the *meentgenoten*, represented by the town of Naarden and the four villages of Gooi. Their right got assimilated to the Roman legal figure of *emphyteusis* (hereditary tenure). The prince, i.e. the Count of Holland, on the other hand, was now legally recognized as the holder of the superior, 'naked' property right, which could not be annulled by *non-usus*.[12]

The High Council's verdict did not prevent new conflicts arising within decades around the use of the Gooi woodlands. The tense relationship between naked property and full, eternal use was only solved in the first half of the nineteenth century through a compromise by which the erfgooiers gave up their use-rights to about one third of what had remained of the undivided common lands of Gooi in exchange for full property rights, recognised by Dutch civil law, of the remaining two thirds – by then about 3,200 ha of pasture and woodland. After another sale in the 1930s the Association of Erfgooiers finally abolished itself in 1979.

IV.3. Northern Limburg (former Duchy of Guelders)

The northern part of the present-day Dutch province of Limburg belonged to the medieval duchy of Guelders (Gelderland). Until well into the nineteenth century it had large tracts of woodland (along the river Meuse) as well as heath land and peat moors, where it bordered the east-Brabant Peel. Local organizations for the use and management of commons are clearly discernible in written sources from the fifteenth century onwards. Of the woods most is known about the so-called Meinweg (which means either 'common pasture' or 'common road') to the south-east of the town of Roermond and reaching over the Guelders border into Jülich territory (crossing the present-day Dutch-German border) (especially Venner, 1985). This common woodland measured about 2,400 ha at the beginning of the nineteenth century. From the fifteenth century onwards two towns and twelve villages in two different principalities had use-rights in the Meinweg; the size of individual use-rights varied with the number of horses and wagons owned.

The common waste lands at the Peel side of northern Limburg were used as pasture for sheep and cattle. Most farms had only limited numbers of sheep – rarely more than forty – so that flocks that included all the sheep of a hamlet were herded by shepherds who worked for all the sheep owners. The size of such combined flocks could be considerable. In the village, later municipality, of Venray between the middle of the eighteenth and the middle of the nineteenth century it ranged from about 2,300 to about

[12] Modern judgement on the High Council's verdict is divided. To Buis, 1985: I, 157, it is based on a 'correct judgement of local circumstances', whereas Van der Linden (1988: 184–185) thinks that the verdict has seriously – and unjustifiably – undermined the strong rights of the *meentgenoten*.

8,000 head. In addition to manure and meat, sheep supplied wool that, although of mediocre quality, served as raw material for a modest local textile industry. There was also a limited export of wool, either raw or already spun, to England, and in the first half of the nineteenth century substantial numbers of sheep from the Venray region were exported for their meat by special trading companies first to France and later to England (Renes, 1999: 185–187).

IV.4. North-Brabant

The divergent pattern in Brabant goes back to the medieval prehistory of common land regulations as well. Within a relatively short span of time, that is to say the decades around 1300, the Dukes of Brabant sold their direct property rights, though not their superior, 'public'/ownership right, to the waste lands in large parts of the north-eastern corner of the duchy – the so-called Meierij of 's-Hertogenbosch (Bailiwick of Bois-le-Duc); at present the eastern half of the province of North-Brabant – to the inhabitants of the villages. In their wake, some major noble lords in the possession of high jurisdictional rights – *smalheren* ('small lords') – followed (for a survey: Leenders, 1987: 68, Table 2; Van Asseldonk, 2002: ch. 10, Table 3). The background to this action is not entirely clear. Undoubtedly it had partly to do with the increasing financial needs and the political aspirations of the dukes. In addition, in this part of Brabant the greatly increased peasant population evidently wanted to control the use of common lands in accordance with changes in the agricultural system (as indicated above). Consequently, they wanted to have their traditional use-rights legally and, if need be, territorially circumscribed. They also wanted to have their rights protected by the territorial prince, and to prevent the latter from arbitrary selling plots of waste land to third parties.[13]

The legal construction that was thought out to redefine the relationship between the territorial prince and his peasant subjects – and in fact to establish the *gemeynten* – was outlined as follows: the financial part of the agreement stipulated the one-time payment of a substantial *prelevium* (*voorlijf* in Middle Dutch) in the year of the agreement, as well as a yearly *census* – a form of ground rent – afterwards, as a lasting recognition of the lord's superior right. Secondly, regulations were made for the transmission, rather than delegation, of princely – or let us call it 'public', as many legal historians do anyway – authority (especially Coopmans, 1987: 143–150). In the earlier sales this authority was most often limited to the right to appoint a *(vee)schutter*, a constable with the task of

[13] On this issue most recently: Van Asseldonk (1999; 2002: chapters 10 and 21). Also important are Leenders (1987) and, because of its careful legal definitions, Coopmans (1987) who prefers to see the rights of *smalheren* as entirely based on private land ownership rather than on 'public' rights to waste land that at some point in time had been acquired or usurped. Coopmans (1987: 143), produces one piece of evidence that cannot be easily disregarded: the double 'sale' of the commons of Someren on 21 December 1327. First, the *smalheer* Arnold the dean of Wassenberg transferred the common land of Someren to the villagers – in fact the 'liberty' (*vrijheid*) – of Someren. This is the private, civil law aspect. Later on the same day the Duke of Brabant, at the special request of Arnold, assigned them the right to appoint a constable (*schutter*). This is the public, princely law aspect. Editions of the main charters up to 1312 can be found in Camps (1979); later pieces in Enklaar (1941 and 1948).

sequestering cattle or sheep that did not belong to members of the community owning the commons. From the fifteenth century onwards the *gemeynte*'s authority was often enlarged with the right to plant new trees – for use in construction.

But in the end, the Duke started to grant a *keurrecht* (a more general right to make local byelaws) which in practice extended over the entire local administration, and not just the common waste lands. The earliest instances can already be found from the very start of the fourteenth century (for a list: Coopmans, 1987: 147–148). Since the authority to make byelaws could only be based on ducal grant, they were only valid for a period of one year, and each year they had to be formally renewed in front of the entire community and in the presence of the Duke's local or regional representative. After 1648, when the ducal authority over northern Brabant had been transferred to the Estates General of the Dutch Republic, the legal form of the byelaws was altered into *reglementen* ('regulations') which had to be approved by the Estates General or the Republic's State Council in The Hague.

In sum, the situation that grew from the later medieval 'sales' of commons in this part of Brabant implied that the administration of *gemeynten*, not unlike in Drenthe (see below), coincided to a large degree with the general administration of the village communities. It has to be underlined, though, that this coincidence certainly did not need to be a one-to-one relationship, since common lands under the authority of a *gemeynte* could extend over several village territories or, the other way round, one village territory could comprise more than one *gemeynte*. In all such cases the *gemeynte* boards operated apart from the general village administrations. Only when the borders of the *gemeynte* coincided exactly with the village territory were the *gemeynte* board and the village magistrates hardly distinguishable, and sometimes the village magistrate indeed just acted as the *gemeynte* board.[14] During the period of the Dutch Republic the management of commons and general village administration became even more entangled than they had been before. This facilitated, as we shall see, the incorporation of *gemeynten* into the new-styled municipalities, called *gemeenten* ('communities'), after 1813.

The major difference between Drenthe and the Meierij region of Brabant consisted in the right of access. Unlike Drenthe, in the Meierij all inhabitants had a principle right of access to the commons, in other words were recognized as *meentgenoten*. This did not mean that there were no *waardelen* (use-shares). In practice, *waardelen* were sometimes made dependent on the possession of a house, in other instances on the property of land – the former was called *haardstederecht* ('right connected to the hearth'), the latter *ploechrecht* (plough right). Outsiders could rent certain use-rights, such as the right to use a brick kiln for specified periods of time; this was called *aardrecht*, i.e. 'right in a common' (Vera, 1996). In other instances, newcomers had to pay an entrance fee (Van Asseldonk, 2002).

Gemeynten in the Meierij could sell commons or parts of commons to private or legal persons for reclamation or other purposes, but in each case ducal permission was

[14] For clarity's sake: villages in which for whatever reason no formal *gemeinten* were constituted, could of course still have the right to make byelaws (Leenders, 1996: 47).

required. In fact, the sale of commons by the Dukes, and the constitution of *gemeynten*, can be regarded as the continuation of a long-term process of 'individualization' of common land use by individual reclamation along new lines.[15] In north-eastern Brabant this process had started as early as the thirteenth century or even before (but further back in time the view is too blurred), and it went on continuously until the nineteenth century. Its pace was largely dependent on demographic pressure, partly also on financial needs – around 1300 many village communities had to sell tracts of waste lands in order to be able to pay their *prelevium*. Van Asseldonk estimated that between circa 1180 and 1340, that is to say at the top of the central medieval expansion wave, between 16,000 and 20,000 ha of formerly common waste land were divided and sold to private owners (which is not exactly the same as reclaimed). In the eighteenth century, according to Kappelhof, this would have been more than 12,500 ha (Van Asseldonk, 1999: 61–67; Kappelhof, 1985). Nevertheless, taken as a whole this process of 'individualisation' cannot be classified as really dramatic. As Tables 4.1 and 4.2 show, at the beginning of the nineteenth century enormous tracts of common waste land were still left.

In the western half of North-Brabant the situation differed from the Meierij, because during the entire later medieval period this area belonged to two semi-princely lords with rights of high jurisdiction, the lords of Breda and Bergen-op-Zoom. Like the Duke of Brabant and some *smalheren* in the east, these two lords were seen as the ultimate owners of all commonly used waste lands – or *wilderts*, as they were called here. But unlike the Duke they never were prepared to cede full use-rights. So concessions of *wildert* in the Breda and Bergen op Zoom territories were limited to grants of hereditary use against *census* payments. For the rest, the lords of Breda and Bergen op Zoom chose to remain in firm control, which meant that each and every change in the actual use regime, or each and every sale of common land, for that matter, was dependent on their consent, unless they explicitly parted with their right, as they occasionally did in the case of major towns, such as Breda (Vera, 1996: 223; Leenders, 1987: 49–50). In this way in western Brabant a distinction arose between the common waste land that was granted in *census* and organised in a *gemeynte* on the one hand, and the *vroente*, comprising all the waste land (*wildert*) that had not yet been given out to local communities on the other hand.[16] On these – very extensive – *vroenten* the neighbouring peasants certainly could exercise customary use-rights, for which they had to pay, but these were not protected by any formal, chartered grant. What happened with the *vroenten*, who could use them to what extent and to what purpose, and whether parts of them be sold and when, was in the last resort solely determined by the lord-prince and his Treasury Office.

---

[15] I would prefer 'individualization' to 'privatizing' in the sense of 'removing from the public sphere of action', because it is not at all clear whether one should regard *meenten* and *marken* legally as 'private' or as 'public' institutions at this stage.

[16] Within the *gemeynten* Leenders (1987: 55) further distinguishes as a separate category *aarden*, the usual early modern name for the smaller *gemeynten*. They had no legal basis; therefore the lord-prince could abolish them at will. *Vroente* literally means 'land of the lord', derived from the old-Frankish prefix vro-/fro- = lord.

IV.5. Overijssel

Overijssel was the 'land of marks' par excellence, and moreover the *markgenootschappen* were, more than anywhere else in the early modern Netherlands, dominated by non-peasant landowners, in particular members of the landed nobility and the urban patriciate. In 1600, no more than about 8 (as in the district of Salland) to 15% (district of Twente) of the cultivated area of Overijssel was owned by peasants, percentages that would only alter radically after 1750 (Van Zanden, 1984). This meant that the typical early modern Overijssel peasant was a tenant farmer, who did have access to common waste resources, but more often than not had no say in *markgenootschappen*, since he was not in possession of *waardelen*. Only after the beginning of the nineteenth century did this start to change drastically; finally, in most parts of Overijssel, village communities and *marken* started to coincide, the more so because at the same time *keuters* (cottagers) were given a voice in the marks as well. Before 1800 cottagers sometimes did have limited use-rights, but often none at all.

IV.6. Drenthe

The province of Drenthe was in many respects the exact opposite of Overijssel. There were no *markgenootschappen* existing apart from village communities (*buurschappen*), because from of old the village communities regulated the use of all common lands through byelaws, and saw to their observance (Heringa, 1985: 398). This had a double background: one the absence of strong princely authority (formally, the prince-bishop of Utrecht was the secular ruler of Drenthe, but his effective influence in Drenthe was small), the other the virtual absence of a landed nobility (or real towns, for that matter).[17] For these two reasons, Drenthe has often been called a 'peasants' republic'; in any case already in the central Middle Ages the free land-owning peasantry (the *eigenerfde boeren*) were the backbone of Drenthe society. And although common waste lands in Drenthe were usually called 'marken' in contemporary sources, Drenthe was typically a land of *meenten* in the technical sense used in this article. This again did not mean that membership of *meent* and village community (*buurschap*) completely coincided. On the one hand, people from outside the village sometimes were in possession of *waardelen* and therefore had access to the commons; on the other hand, not all villagers had (equal) access to the commons; in particular cottagers, although qualified members of the *buurschap*, had only limited use-rights in the common waste lands or in some villages even no rights at all (Beekhuis-Snieders, 1992: 62–63).

So, seemingly paradoxically, but in fact quite in agreement with the pattern prevailing in north-western Europe, the access to common waste lands for local people who owned no farms or possessed little or no cultivated land, turned out to be far more restricted in a region without any lordly pressure to speak of, than it was in areas where territorial rulers always had held firm control over the 'public' lordship rights involved in governing the commons.

---

[17] In addition, the bishop somewhere between 944 and the thirteenth century ceded the use of his *ius forestense* in Drenthe – which had been granted to him by the king of Germany in 944 – to the village communities in return for the yearly payment of a special tax in kind on *waardelen*, the so-called *schuldmudde* (Blok, 1985).

The contrast between Drenthe and North-Brabant in this respect is startling. Both were provinces of *meenten*, not *marken*. But whereas in Drenthe non-peasant inhabitants had only (very) limited access to common waste lands, and few woods and heath lands had been 'individualized' and reclaimed before the start of the nineteenth century, in Brabant, on the other hand, all resident inhabitants of villages (and towns) had a right to participate in the use of the *gemeynten*, and, as we saw, this led to regular (though not dramatic) individualization and private reclamation of common waste land during the late medieval and early modern periods. In parts of Gelderland where *meenten* prevailed, there was often a midway position between what happened in Drenthe and what happened in Brabant: in such cases all members of the village community (*buurschap*) had a say in how the common waste lands had to be used and managed, but the actual use was limited to specified categories of landowners (some examples in Slicher van Bath, 1978: 252). Where *marks* prevailed, as in Overijssel, the actual access of non-land owning classes largely depended on the nature of their relationship with the (large) landowners. As we saw, large landowners from the Overijssel nobility usually allowed their peasant tenants, or their serfs – in Overijssel serf status survived till the end of the eighteenth century! – ample use-rights on the commons.

The firm control which the peasant farm owners of Drenthe kept over the access and use of common waste lands during the entire late medieval and early modern period was closely related to their possession of use-shares (*waardelen* or *waren*). According to a generally accepted idea the number of full (complete) *waren* would have corresponded to the original number of farmsteads in settlements – an attractive idea from an historical-demographical point of view. Inheritance practice and the emerging land market would then have caused both an accumulation and a splitting up of *waren*. Equally, where cottagers and the like got (limited) access to common land, the degree of their access was expressed in (parts of) *waren*. In 1561 in the village of Ruinen (province of Drenthe), for example, a 'full *gewaarde*', that is to say, a farmstead with a full use-share, could graze thirty-five head of cattle and six horses on the common, whereas at the other extreme there were four categories of cottagers, with shares varying from three head of cattle to as many as 15 head plus three horses (Van Zanden, 1999: 129)! How comprehensive the contents of full *waardelen* could be, is also evident from the following statement for the village of Anloo, covering the period 1632–1726:

Table 4.6 The contents of full *waardelen* (use-shares) in the common waste lands at Anloo (Drenthe), 1632–1726

Year	No. of cartloads of peat sods allowed to cut	No. of sheep allowed to graze	No. of cattle allowed to graze
1632	–	40	26
1669	–	52	26
Circa 1700	8	52	16
1726	24	52	12

Source: Bieleman (1987: 613, Table 6.11).

The partitioning of use-rights into *waren* or *scharen* was by no means limited to the eastern and north-eastern Netherlands. Comparable systems are known from North-Brabant. In some villages there was a basic distinction between 'plough rights' and 'cottager rights' and both were freely transferable separate from the farmsteads and cottages to which they were originally linked. In the village of Boxtel a plough right was four times as much as a cottager right. In Veghel in the seventeenth century there were 'whole' and 'half' plough rights. Holders of the former were allowed to graze thirty-one sheep on the common, holders of the latter twenty sheep (Van Asseldonk, 2002).

V. The partitioning of common waste lands, and the abolition of *marken* and *meenten* during the nineteenth century (pace and legal framework)

The 'regeneration' of the marks in the eighteenth century could not stop their final disintegration after 1800. The issue of the partitioning of commons, which was less of an issue in Brabant than it was in the north-eastern Netherlands anyway, is usually described as a clash of two ideologies: the liberal ideology of the non-peasant, aristocratic (large) land-owners who favoured partition versus the pre-socialist ideology of the spokesmen for the mass of small peasants, of small non-peasant landowners as well as of the poor and the landless, all of whom were against partition, although the landless and poor often had only limited use-rights to common waste lands. As Gérard Béaur argued some time ago in the case of France, the actual decision-making process was far more complicated because in practice the supposed opinions of opposing groups were shaded. Among the lower classes in particular, so far as they had access to commons at all, there was no clear agreement on the issue of partitioning because benefit versus damage was often difficult to weigh, and anyhow very much connected to locally specific situations (Béaur, 2000). For the north-eastern Netherlands, Van Zanden has pointed to the probably decisive shift in opinion of the important category of '*gewaarde* farmers', who switched over to supporting partition when relative prices for agrarian products were changing in favour of more intensive forms of animal husbandry (aimed at the production of butter, cheese, pig meat, poultry), while at the same time the general increase of grain production stimulated the substitution of peat sods with straw in the preparation of manure, and land prices – also for waste land – were rapidly rising. All such factors, in their turn, promoted the selling of the more barren parts of common wastes and a reinvestment of the proceeds in the improvements of grass-land and more generally in improvements in infrastructure. So, in the end agronomic and economic motives, and not ideological preference proved to be decisive for speeding-up the partitioning of commons (Van Zanden, 1999: 141–143; 1985: 158–165).

The legal framework for the partitioning of common waste lands in the Netherlands was created first by legislation in 1809–1810, at the time of the Bonapartist Kingdom of Holland, and subsequently by the Royal Decree of 24 June 1837 (Demoed, 1987: chapters 3 and 4; Van Zanden, 1985: 152–158). The 'French' legislation's main goal was to expand the cultivated area of the kingdom by reclamation. In order to reach that goal the laws of 1809 and 1810 provided for the exemption of land tax payments for freshly reclaimed lands as well as the partitioning of common waste lands. The former measure has to be

seen in light of another one, that was enforced in 1811 and was going to cost *marks* and *meenten* lots of money, namely to subject all land, including wastes, to taxation. This certainly put pressure on the partitioning of commons, although not immediately. A problem which the laws of 1809–1810 raised, was that the question of whether commons were to be partitioned or not was left to democratic majority decisions in either *marken* or *(ge)meenten*. It will be clear that under these circumstances radical changes were easily blocked by short-term considerations or highly divided opinions. Hence, although the law of 1810 compelled governing boards of *marken* and *meenten* – the latter now in reality congruent with municipal councils – to at least put the issue of partitioning to the vote, there was only a lukewarm response. In the province of Gelderland, for instance, only about twenty out of a total of about 130 *marken* and *meenten* did in fact comply with the law of 1810. In three of them there was a majority vote for partitioning, but in the end in only one – the mark of Oerken – the partitioning was carried through (Demoed, 1987: 47–48)!

So far as common waste lands were partitioned before 1837 (see Table 4.7), this most often did not happen in direct response to the legal measures just mentioned. Actual partitionings mainly concerned the best and commercially most valuable pasture lands in regions with significant large landownership and where sheep had smaller importance than cattle. Most commons situated directly along the river IJssel, for instance, consisting of comparatively rich pasture and hay lands, were indeed partitioned in the decades after 1810.[18]

Table 4.7 Number of partitionings of marks in the three eastern provinces, 1819–1879

Period	Prov. Overijssel	Prov. Gelderland	Prov. Drenthe	Total
1819–1829	5	10	0	15
1830–1839	6	16	0	22
1840–1859	77	31	58	166
1860–1879	12	14	34	60

Source: Demoed (1987: 65, Table 1).

In face of this almost total failure of the 'French' legislation, as well as of quite radical changes in the structure of local and provincial government, which soon had made many institutional concepts from the French period obsolete, it is surprising that the Dutch government decided to return to the laws of 1809–1810 when the issue of the division of common waste lands surfaced again around 1835. Instead of designing a completely new legal framework, the government in the end decided to revive the French laws, and only insist by royal decree on their strict observance. The same decree also prescribed that all divisions to which the boards of *marken* or *meenten* had legally decided, should be approved by the King – i.e. in practice by the Provincial Governor – before being carried out. The Decree of 1837 was complemented three years later with a special law, regulating the fiscal exemption of land that was improved by reclamation.

[18] The same reasoning holds in a way for Drenthe, where no commons were divided before 1840, but where, on the other hand, most of the most valuable meadow and hay lands had by then already long been partitioned (Van Zanden, 1985: 162–163).

Unlike the French legislation, the legal measures taken in 1837 and 1840 proved to be quite successful. As one of the direct reasons, Demoed has mentioned the completion of the oldest cadastral survey of the Netherlands, some years before 1837 (Demoed, 1987: 65–66). Only now it was possible to know *exactly* how extensive common waste lands were, and where *precisely* they were located. This exact kind of knowledge was a pre-condition for any serious discussion about partition. In addition, as Van Zanden has pointed out, the cadastre classified and valued land. This made it possible to express the value of both *waardelen*, and the common wastes themselves in amounts of money that were indicative of their commercial value (Van Zanden, 1985: 156). However, since the legislation of 1837 and 1840 took some time to really take effect, the main reasons behind the break-through in the division of commons must be looked for in long-term economic and social developments, as has been done by Van Zanden (see above). Such long-term developments can also help to explain the considerable provincial – and intra-provincial as well – differences in the pace of divisions even at this stage, although they partly rest on sheer coincidence. For instance, in Gelderland quite a number of commons had eventually been partitioned before 1837, so the issue of division was less urgent here. Overijssel, on the other hand, happened to have a governor, count Van Rechteren, who as a large *gewaarde* in three *marken* in Gelderland that had been partitioned with success at an early date, was very much in favour of divisions, and became their staunch promoter (Demoed, 1987: 62–63). But far more important were structural features – such as social-property relations, agrarian systems and types of lordship – that took shape in the early modern period and that I have tried to outline in the first part of this article. These primarily determined whether the abolition of *marken* and *meenten* eventually happened early or lagged behind.

VI. Epilogue: lonely survivors

The modernization of Dutch agriculture as well as state pressure to get rid of legal oddities from the Ancien Régime, such as *marken*, that fit ill into modern public law, have taken away the ground under the existence of *marken* and *meenten*. Still, small remnants of common woods and waste lands, owned by corporations of either land owners or resident villagers have survived until today (some examples in Ketelaar, 1978: 95–96 and 164–167). Undoubtedly one of the most remarkable of these lonely survivors is the Wijkerzand near the village of Wijk in the Land van Heusden (province of North-Brabant), an outdike basin area (*uiterwaard*) along the Meuse river, measuring about 70 ha, that from at least the fourteenth century onwards has served as common summer pasture.[19] Known today as its legal owners are all 'who emit smoke from a chimney in the village of Wijk', that is to say all the registered heads of households, whether they are born at Wijk or migrants from elsewhere. But whoever departs from the village loses his right, which is not transferable. At present, there are some 560 rightful proprietors. These have the right to use the Wijkerzand as common pasture. To this end the Wijker-

[19] The following section is based on Hoppenbrouwers (1993) for the later medieval period, as well as on material – archival sources, interviews and secondary literature – compiled by me in preparation of an article, to appear next year, which will continue the story of the Wijkerzand into the twentieth century.

zand's yearly potential for pasture is from of old divided into between 180 and 190 *scharen* (from the old Dutch *inscharen*, that is putting animals into a marked-out space). The number of 180–190 goes back to the fifteenth century and is related to the supposed number of cattle that can be grazed on the Wijkerzand during the late spring and summer season. At present, only a minority of the proprietors of Wijkerzand utilize their pasture rights, and if they do, it is to graze sheep. Most of the Wijkerzand is rented to cattle farmers. The total income from rented pasture and other sources (mainly the digging of clay by brick factories) after expenses is equally divided among the resident villagers every year. The Regulations for the government, use and management of the Wijkerzand that are still in force today, were drawn up and approved in 1852. By that time, the collective use of the Wijkerzand had long been governed by a special board of *schaarmeesters* (*schaar*-masters) – at present numbering four – which operated independently from the local magistrate of the village of Wijk, in other words the Wijkerzand operated more as a *mark* than as a *meent* – even if in contemporary sources from the Late Middle Ages on, it is consistently called a *gemeent*.

However, despite the assertions of the nineteenth-century defenders of the administrative autonomy of the Wijkerzand, this autonomy did not go back to medieval times, but was the consequence of the relatively recent purchase of the ownership of Wijkerzand by the village community of Wijk from the Province of Holland at the end of 1724, shortly after the Province had sold the lordship (*ambachtsheerlijkheid*) of Wijk to the Rotterdam patrician Maarten Vlaardingerwout. Before 1724 this supposed independence was non-existent. Until that year a system was in force in which the indigenous and resident villagers of Wijk only had a preferential right to lease *scharen*. The net proceeds went to the treasury of the Demesnes of the Provincial States of Holland as the legal successor to the Count of Holland. This arrangement went back to 1458, when the villagers of Wijk sold their property of the *uiterwaard* to Duke Philip the Good of Burgundy as Count of Holland for complete fiscal exemption, including freedom of toll payment all over Holland. On that occasion Philip had granted the villagers of Wijk a preferential right for the yearly lease of pasture shares against a fixed price.[20] The Duke also promised never to have the *uiterwaard* used as arable and never to offer more than 180 *scharen* for lease. Strangely enough, what clearly had been a sale, was later – from at least the middle of the seventeenth century – falsely seen and represented as a purchase! This general conviction may have helped the villagers of Wijk to get their supposedly historical ownership rights back in 1724.

From the preceding it will be clear that soon after 1800 the Wijkerzand arrangement came under double attack. For one thing, in the newly formed province of North-Brabant – into which the Land van Heusden was incorporated – with its strong and special tradition of *gemeinten* (see above), the *gemeinten* were almost automatically absorbed into the new type of local government, the municipality. However, the Wijkerzand, as we saw, was a *mark*-type of common, so there was bound to be opposition to its treatment

[20] From the start a number of *scharen* were set apart as perquisites for, among other, the castellan/*drossaard* – the Duke's governor in the town and country of Heusden – the lord of Wijk and the local church as well as its vicar and its sexton; also there were two *scharen* as a reward for the gate-keeper and for each of the two 'overseers'.

as a municipal institution. For another thing, much as the legal measures of 1808–1810 offered a means for the Wijkerzand's partitioning, this still met with strong resistance. The Wijkerzand issue was further complicated by the early merging of Aalburg the villages Aalburg and Wijk into one municipality, Wijk-en-Aalburg. The village of Aalburg also happened to have a common *uiterwaarde* which however from the eighteenth century onwards at least had always been rented out to the profit of the *meentgenoten*. In a word, the stage was set for a number of drawn-out lawsuits. These are of great interest because the defenders of the autonomy of the commons in both Aalburg and Wijk repeatedly appealed to history and historical documents, and moreover, they did not always do this – wilfully or not – in a way that would pass the historian's muster. Somewhat unfairly – but who says history is fair? – the villagers of Wijk got away with their version of the local past, whereas the villagers of Aalburg did not. The common *uiterwaarde* of Aalburg was abolished shortly after 1900, but the Wijkerzand still exists as a common today.

Bibliography

Asseldonk, M. van (1999) '*Census domini ducis*. De cijnzen van de hertog van Brabant in de meierij van 's-Hertogenbosch, 1340–1351', *Noordbrabants Historisch Jaarboek*, 16, pp. 33–95.

Asseldonk, M. van (2002) *De Meierij van 's-Hertogenbosch. De evolutie van plaatselijk bestuur, bestuurlijke indeling en dorpsgrenzen, circa 1200–1832*, Tilburg. (Bijdragen tot de geschiedenis van het Zuiden van Nederland).

Béaur, Gérard (2000) 'Über eine mehrdeutige Diskussion. Gemeinheitsteilungen, Eigentumsfrage und agrar-ökonomische Fortschritt (Frankreich im 18. und 19. Jahrhundert')', *Jahrbuch für Wirtschaftsgeschichte*, 2000/2 (Sonderheft *Gemeinheitsteiluingen in Europa. Die Privatisierung der kollektiven Nutzung des Bodens im 18. und 19. Jahrhundert*), pp. 33–43.

Beekhuis-Snieders, J.W.T.M. (1992) 'Bestuurlijke ontwikkeling van Diever (1600 tot 1795)', in J. Bos [et al.] (eds), *Geschiedenis van Diever*, Zuidwolde, pp. 59–83.

Bieleman, Jan (1987) *Boeren op het Drentse zand, 1600–1910. Een nieuwe visie op de 'oude' landbouw*, Wageningen.

Bieleman, Jan (1992) *Geschiedenis van de landbouw in Nederland: veranderingen en verscheidenheid*, Meppel.

Blink, H. and Smid, J. (1913) 'Landaanwinning', in *De Nederlandsche landbouw in het tijdvak 1813–1913* [presented by the Directie van den Landbouw], 's-Gravenhage, pp. 228–242.

Blok, D.P. (1985) 'De Vroege Middeleeuwen tot ca. 1150', in J. Heringa [et al.] (eds), *Geschiedenis van Drenthe*, Meppel/Amsterdam, pp. 141–170.

Buis, J (1985) *Historia Forestis. Nederlandse bosgeschiedenis*, 2 vols, Wageningen.

Camps, H.P.H. (ed.) (1979), *Oorkondenboek van Noord-Brabant tot 1312. Deel 1. De Meierij van 's-Hertogenbosch (met de heerlijkheid Gemert)*, 2 vols, The Hague, 1979.

Cock, J.K. de (1965) *Bijdrage tot de historische geografie van Kennemerland in de Middeleeuwen op fysisch-geografische grondslag*, Groningen.

Coopmans, J.P.A. (1987) 'De betekenis van de *gemeynten* voor de dorpswetgeving in de Meierij van 's-Hertogenbosch (1250–1650)', in C. Streefkerk and S. Faber (eds), *Ter recognitie. Opstellen aangeboden aan Prof.mr. H. van der Linden bij zijn afscheid als hoogleraar in de Nederlandse rechtsgeschiedenis aan de Vrije Universiteit*, Hilversum, pp. 139–154.

Dekker, C. (1983) *Het Kromme Rijngebied in de Middeleeuwen. Een institutioneel-geografische studie*, Zutphen.

Demoed, H.B. (1987) *Mandegoed, schandegoed. De markeverdelingen in Oost-Nederland in de 19de eeuw*, Zutphen.

Demoed, Hendrik B. (1995) 'Marken en maalschappen', in J. Bieleman [gen. ed.], *Anderhalve eeuw Gelderse landbouw. De geschiedenis van de Geldersche Maatschappij van Landbouw en het Gelderse platteland*, Groningen, pp. 122–141.

Dirkx, G.H.P. (1997) *'..Ende men sal van een erve ende goedt niet meer dan een trop schaepen holden..' Historische begrazing van gemeenschappelijke weidegronden in Gelderland en Overijssel*, Wageningen. (Rapporten DLO Staring Centrum; 499).

Enklaar, D.Th. (ed.) (1941), *De gemeene gronden in Noord-Brabant in de middeleeuwen*, Utrecht, with a supplement in *Verslagen en Mededeelingen der Vereeniging tot Uitgaaf der Bronnen van het Oud-Vaderlandsche Recht*, 10 (1948), pp. 226–236.

Henderikx, P.A. (1987) *De beneden-delta van Rijn en Maas. Landschap en bewoning van de Romeinse tijd tot ca. 1000*, 2 vols, Hilversum.

Heringa, J. (1985) 'Zelfstandig gewest in de Republiek, 1603–1748', in: J. Heringa [et al.] (eds), *Geschiedenis van Drenthe*, Meppel/Amsterdam, pp. 373–442.

Hofstee, E.W. (1957) *Rural life and rural welfare in the Netherlands*, The Hague.

Hoppenbrouwers, P.C.M. (1993) 'Een meent en haar mythen. De vroegste geschiedenis van het Wijkerzand (15de–16de eeuw)', *Historische Reeks Land van Heusden en Altena*, 3, pp. 41–65.

Kappelhof, A.F.C. (1985) 'Ontginningen in de Meierij van Den Bosch', *Noordbrabants Historisch Jaarboek*, 2, pp. 199–222.

Ketelaar, F.C.J. (1978) *Oude zakelijke rechten, vroeger, nu en in de toekomst*, Leiden.

Kos, H.A. (1997) 'Van der scharinge. De middeleeuwse schaarbrieven van de Gooise marke', *Tussen Vecht en Eem*, 15, pp. 147–153.

Kos, Anton (1999) 'De goede luden van Gooiland. Over de oorsprong van een marke', *Madoc. Tijdschrift over de Middeleeuwen*, 13, pp. 88–99.

Leenders, K.A.H.W. (1987) 'Van gemeynten en vroonten', *Jaarboek De Oranjeboom*, 40, pp. 44–78.

Leenders, K.A.H.W. (1996) *Van Turnhoutervoorde tot Strienemonde. Ontginnings- en nederzettingsgeschiedenis van het noordwesten van het Maas-Schelde-Demergebied (400–1350)*, Zutphen.

Leenders, K.A.H.W. (1998) 'Landscape-change, rural industry and tax policies in the eastern part of the province North-Brabant, the Netherlands (18th century)', in P. Sereno and M.L. Sturani (eds), *Rural landscape between state and local communities in Europe, past and present. Proceedings of the 16th session of the Standing European Conference for the Study of the Rural Landscape, Torino 1994*, Alessandria, pp. 131–144.

Linden, H. van der (1988) 'De Grote Raad van Mechelen en de Gooise meent', in J.M.I. Koster-van Dijk and A. Wijffels (eds), *Miscellanea forensia historica. Ter gelegenheid van het afscheid van Prof.mr. J.Th. de Smidt*, Amsterdam, pp. 163–189.

Moorman van Kappen, O. (1980) 'Ongedeeld ten eeuwigen dage. Enkele rechtshistorische kanttekeningen bij de geschiedenis van de Erfgooiers', *Tussen Vecht en Eem*, 10, pp. 8–25.

Renes, Johannes (1998) 'Dutch commons: variety and change', in P. Sereno and M.L. Sturani (eds), *Rural landscape between state and local communities in Europe, past and present. Proceedings of the 16th session of the Standing European Conference for the Study of the Rural Landscape, Torino 1994*, Alessandria, pp. 85–93.

Renes, J. (1999) *Landschappen van Maas en Peel. Een toegepast historisch-geografisch onderzoek in het streekplangebied Noord- en Midden-Limburg*. 2 vols, Leeuwarden/ Maastricht.

Slicher van Bath, B.H. (1944) *Mensch en land in de Middeleeuwen. Bijdrage tot een geschiedenis der nederzettingen in Oostelijk Nederland*, 2 vols, Amsterdam. [reprinted Arnhem 1977]

Slicher van Bath, B.H. (1978), *Bijdragen tot de agrarische geschiedenis*, Utrecht/Antwerpen.

Thissen, P.H.M. (1993) *Heideontginning en modernisering, in het bijzonder in drie Brabantse Peelgemeenten 1850–1940*, Utrecht.

Venner, G.H.A (1985) *De Meinweg. Onderzoek naar rechten op de gemene gronden in het voormalige Gelders-Gulikse grensgebied circa 1400–1822*, Assen/Maastricht.

Vera, H.L.M. (1996) 'Gemene gronden', in J.G.M. Sanders (gen.ed.), *Noord-Brabant tijdens de Republiek der Verenigde Nederlanden, 1572–1795. Een institutionele handleiding*, 's-Hertogenbosch/Hilversum, pp. 214–230.

Verstegen, S.W. (1989) *Gegoede ingezetenen. Jonkers en geërfden op de Veluwe tijdens Ancien Régime, Revolutie en Restauratie (1650–1830)*, Amsterdam.

Vervloet, J.A.J. (1984) *Inleiding tot de historische geografie van de Nederlandse cultuurlandschappen*, Wageningen.

Vrankrijker, A.C.J. de (1968) *Stad en Lande van Gooiland. Geschiedenis en problemen van de Erfgooiers, 968–1968*, Bussum.

Zanden, J.L. van (1984) 'De opkomst van een eigenerfde boerenklasse in Overijssel, 1750–1830', *A.A.G. Bijdragen*, 24, pp. 105–128.

Zanden, J.L. van (1985) *De economische ontwikkeling van de Nederlandse landbouw in de negentiende eeuw, 1800–1914*, Wageningen.

Zanden, J.L. van (1999) 'The paradox of the marks. The exploitation of commons in the eastern Netherlands, 1250–1850', *The Agricultural History Review*, 47, pp. 125–144.

Zeiler, F.D. (1987) 'Toegeslaghen, gemeten ende gedielt. Een bijdrage tot de discussie over de ontginning van Mastebroek', in C. Streefkerk and S. Faber (eds), *Ter recognitie. Opstellen aangeboden aan Prof.mr. H. van der Linden bij zijn afscheid als hoogleraar in de Nederlandse rechtsgeschiedenis aan de Vrije Universiteit*, Hilversum, pp. 237–250.

5 Common land and common rights in Flanders

Martina De Moor, Ghent University

I. Introduction

Common land, commoners and the enclosure of common land have not been a popular topic in Flemish historiography. During the nineteenth century, common land was the subject of historical research due to the government's attempts to dissolve the last common land and other forms of common property. During the twentieth century only a few local studies shed light on the internal organization of common land. The lack of interest in the study of common land of Flanders, is in contrast with the elaborate research on the famous Flemish agro-system. The area of present Flanders was known for its highly progressive and advanced agriculture and this might have conveyed the impression that common land was either absent or unimportant in this area. Though in some regions common land had completely disappeared by the early modern period, in this overview of the literature on common land in Flanders it will become clear that up to the nineteenth century common land still played an important role in the Flemish village community.

II. Description of the area

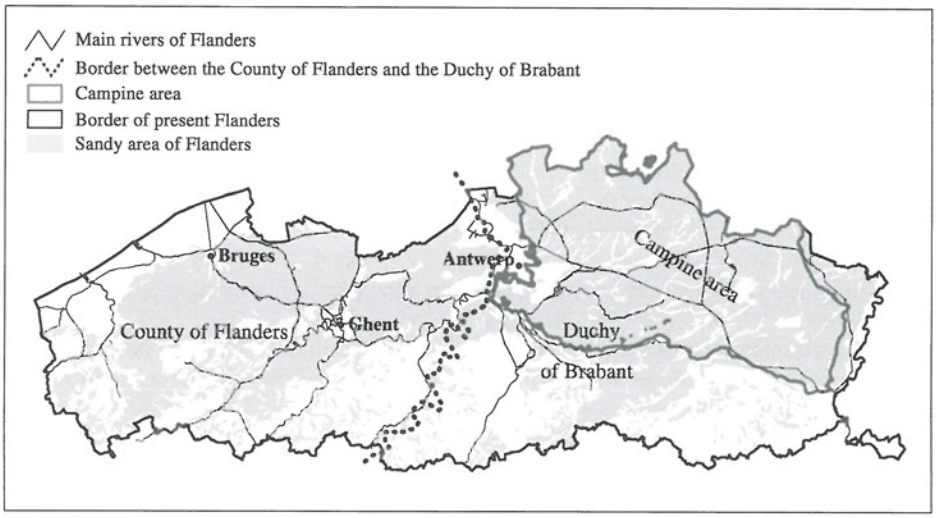
The focus of this study is the northern part of the southern Netherlands, an area indicated by Hopcroft (Hopcroft, 1999: 92) as having fewer commons in the form of open field systems, compared to other regions of the Low Countries. This northern part covers more or less the present district of Flanders, one of the two main parts of Belgium. Bordering the North Sea from France to the river Schelde, the low-lying plain of Flanders has two main sections. Maritime Flanders, extending inland for five to ten miles (eight to sixteen kilometres), is a region of newly formed and reclaimed land (polder) protected by a line of dunes and dikes and having largely clay soils. Interior Flanders comprises most of east and west Flanders and has sand-silt or sand soils. At an elevation of 80 to 300 feet, it is drained by the Leie, Schelde, and Dender rivers flowing north-eastwards to the Schelde estuary.

The Campine area (Kempen in Dutch, La Campine in French, historically Taxandria) is a plateau region of north-eastern Belgium occupying most of Antwerp province and northern Limburg province. It is a rather dry, infertile region of sandy soil and gravel, with pine woods interspersed among meadows of thin grass and heather. Poor drainage, especially in the lower, western part, has produced marshes where reeds and alder trees shelter abundant waterfowl. Although market towns and abbeys on the plateau date from the Middle Ages, settlement there was moderate until the nineteenth century.

From the institutional point of view, our main interest goes to the county of Flanders and the duchy of Brabant, both parts of the northern part of the southern Netherlands. The county of Flanders encompasses the western part of the selected area, whereas the

duchy of Brabant corresponds more or less with the eastern area, the Kempen. The county of Flanders has been particularly renowned in history for its highly advanced methods of agriculture. This county did indeed contain less common land than the wooded regions on the southern and eastern borders (part of southern Artois, Hainault, southern Brabant, Namur, southern Liège, Limburg and Luxemburg) of the southern Netherlands. The macro-study of Hopcroft does however obscure regional variations. During the eighteenth century and even later on thousands of hectares used and managed as common land could still be found in the Kempen and to a lesser extent in the area between Bruges and Ghent, the so-called northern field zone (Vandenbroeke, 1975: 45). This common land was rarely woodland, but was common waste – mainly heathland – that could be used for pasturing, cutting of peat and turf, digging of loam, gathering of small wood, ... The soil in this area is sandy, mainly of the wet and loamy type (see Figure 5.1). Apart from heathland, meadows could also be found as common land.

Figure 5.1 Map of present Flanders showing the sandy soil area, main rivers and towns and the border between the former County of Flanders and the Duchy of Brabant



It is difficult if not impossible to estimate the total amount of common land in this area, at any point in history. This is for sveral reasons. Firstly, in the sources available for the study of agricultural land tenure or productivity, common land was mostly not counted as such (in the tithe lists for example) because of its minor fiscal importance. Moreover, its legal status was mostly very unclear. As a consequence common land was sometimes regarded as the private property of a group of people and then recorded as such (for example in the cadastral records). Common land used and owned by a whole community which was also an administrative unit was recorded as community property. It is impossible to distinguish between community property which was used as common

land or that was private land. Often the total amount of common land was estimated by calculating the total extent of waste land.[1] Though there is a relationship between waste land and common land, it cannot be said that waste land was always common land and common land was always waste land.

Secondly, sources measuring common land, such as specific censuses, are very few in number and moreover completely unreliable. The local variation in common land (and consequently toponomy) made it impossible for the central or provincial government to calculate the total area. The central government had hardly any understanding of this type of land use. For example, when the Dutch government (1815-1830) asked the local communities to report the names and extent of the *marken* in their community, many communities asked what a *marke* exactly was. As a *marke* was a typical Dutch name for a specific type of common land (see Hoppenbrouwers, this volume) many local governments simply did not known which type of land they were supposed to report on. Moreover, it could very well be that the total surface area of the local commons was unknown to the local government, as these were often vast plots of land shared by several communities.

The reason for the lack of research on the subject of common land in Flanders is intertwined with the relatively few commons in the whole of Flanders – notwithstanding regional concentrations in the northern sandy part – compared to, for example, England, by the end of the *Ancien Régime*. The early disappearance of most common land must undoubtedly be linked to the advanced agriculture for which Flanders has been so renowned. Several related aspects of Flemish agriculture are likely to have exercised great pressure on common land, both waste and arable.

To begin with, there is the early disappearance of the three-field system in most parts of inland Flanders. Agriculture in this region during the (second) reclamation period of the twelfth and thirteenth centuries was rather extensive with regional specialized production systems, whereby larger farms dominated.[2] The more intensively cultivated and manured areas were tilled according to a three-course system. The arable land of the sandy soils of inner Flanders were often divided into an 'infield' and 'outfield'. The infields were heavily manured and permanently ploughed, whereas on the less cultivated outfields, the common practice was 'up and down husbandry' or convertible husbandry. After a few years of usage as arable land most likely for oats, the outfield was converted into pasture.

From the second half of the twelfth century, the intensification of cultivation methods started at a gradual pace. During the thirteenth and fourteenth centuries the difference between infield and outfield diminished as many soils became permanently tilled owing to population increase. Though agriculture intensified, long periods of fallow and short-

[1] Estimates of the total surface of waste land reclaimed during the nineteenth century in Belgium can be found in: Clicheroux (1957), Dejongh (1996) and Goossens (1993).

[2] Verhulst discerns three periods of reclamations (Verhulst, 1957b: 11–39): the first was during the Neolithic, the second during the Middle Ages (1100–1350) and the third from the middle of the eighteenth till the end of the nineteenth century.

term cultivation of land *(dries)* did not completely disappear. In inland Flanders, the switch to four-crop rotations was made in the fourteenth century, but the practice of long fallow periods was not completely abandoned until the seventeenth century. The use of fallow periods would be especially continued by large estates, rather than by the smallholdings. Small peasant farms practising mixed farming and a rich variety of crops, became the trademark of the densely populated and urbanized regions of Flanders (Dejongh and Thoen, 1999: 34–45). Although the technical aspects of Flemish agriculture would receive most of the credit, it was primarily the high labour input per land unit enabled by farm fragmentation that was responsible for the higher productivity. The maximization of output these peasants tried to achieve was not primarily oriented towards the market but towards self-sufficiency, what Thoen calles the 'commercial survival economy' (Thoen and Vanhaute, 1999: 291–292). This was more the case in the area of inner Flanders than in the Campine area. In the latter, wasteland in the form of common land would not lose its important role until the nineteenth century. This, however, does not imply that agriculture remained hopelessly backward compared to the agriculture in the county of Flanders: the availability of sods on the common in combination with stall feeding enabled the farmers in this area to manure their plots of land heavily (Van Houtte, 1977: 70). This was the general practice until the end of the nineteenth century (Thoen and Vanhaute, 1999: 272). Agriculture in this area was however certainly less commercially oriented than in inner Flanders, operating within a more closed commercial circuit, indicated by, for example, a rather low share of production dedicated to industrial crops and a better land-pasture ratio (Thoen and Vanhaute, 1999: 292).

The second aspect, the introduction of green manuring and especially clover, in arable agriculture, is likely to have quickened the expulsion of cattle from the arable commons. It is assumed that clover was already used in Flanders during the sixteenth century, though evidence of its use can only be found in sources from the third decade of the seventeenth century onwards (Dejongh and Thoen, 1999: 49). From the second decade of the eighteenth century onwards, in addition to the qualities of clover as pasture, its advantages when combined with other crops were discovered. It enriched the soil through its nitrogen-binding capacities, and as with other fodder crops such as turnips, spurry, carrots and leguminous plants, it contributed to the elimination of fallow and the triple-rotation scheme. The third factor, the increase of stall feeding both in inner Flanders and the Campine area, is a logical consequence of the increasing use of fodder crops. Both clearly contributed to a higher manure production (Dejongh and Thoen, 1999: 49–56). This possibly led to a diminished need for pasture land and common land.[3] The farm techniques which made Flemish agriculture so progressive were later on adopted by other countries, primarily the northern Netherlands and England.

Considering the progressiveness of Flemish husbandry, it should not be surprising that waste land in general and consequently waste land held in common, had largely disappeared in the whole of Flanders by the end of the *Ancien Régime*. As will be shown later, this process was not entirely natural, but had been encouraged by the central

[3] Thoen and Vanhaute showed in their comparison of two villages – one in the inner Flanders, the other in the Campine area – that fodder crops had to make up for a lesser availability of pasture land in inner Flanders (Thoen and Vanhaute, 1999: 288).

government. The northern part of the whole region, especially around Bruges and the Campine area, was an area where the largest amount of common land had survived. The declining importance of common land in general is probably also responsible for Flemish commons being so badly documented, expect for a few particular cases. The Flemish situation also shows that common land should be approached as part of regional agro-systems, whereby the different components of the system – such as the field system, the livestock system, the farm household, ... – interact and influence one another (Bieleman, 1999: 237–247).

III. The nature of common land

A great diversity of types of use-rights could be found until the end of the *Ancien Régime* and common rights can be regarded as a group of these. It is possible to identify two major groups of this type of use-rights.

Concerning management of common lands, the stress in this chapter will be on the common rights on uncultivated (waste) land, not on the rights which could be found on arable land. The latter were used on land that has been and will be farmed again. The rights could be exercised during certain periods before and after the growing season, and so could not be taken advantage of continuously. Due to the fact that these rights are based on a custom which is permitted by the person who owns or rents the land and the fact that a title has not been conferred to other users, there is little question of common management. The owner or user was only obliged by local custom to allow the locals to use his land during certain periods of the year, without allowing these locals to decide upon the further management of the land.

Several types of common land will be distinguished on the basis of the predominant resource that could be found on the commons. It is, after all, most likely that that type of resources (wood, water, highly nutritious feed or poor feed) – due to varying economic values – exerted a strong influence on regulation, though ecology can certainly not be regarded as the only influential factor (see: Hopcroft, 1999: 28). Besides, it will be clear that irrespective of the ecology of a common, regional variations surface.

III.1. Common waste

By common waste one should understand uncultivated land, often too poor to turn into arable land without great efforts (especially in the case of heathland). Below, three types of common land are identified. Each type was especially prevalent in a certain area. This does not however mean that that particular type could not be found elsewhere as well.

III.1.1. Common pasture

In the Kempen, nearly every neighbourhood (*herdgang, buurtschap*) had its own common (often referred to as *aard*), which could be very extensive, possibly measuring thousands of hectares. The sandy soil produced poor grazing. The surface was removed to use as stable litter (*aardheide*); peat, turf and loam were cut wherever available. In

some cases, the villagers were allowed to plant some trees on the *aard* in order to have more firewood. The continuous grazing of sheep, cows etc. prevented the heathland from turning into woodland. The word *aard* could have divergent meanings: from the division of the arable land in the three-course system to 'manor'. The toponym *aard* could however be frequently found alongside the words *vroente* or *gemeynte*, making it clear that a common was meant (Van Osta, 1989: 110). In the west of Flanders, the heathlands were normally not called *aarden* but *velden*, literally fields, sometimes qualified by the adjective *gemene*, meaning 'common', in order to make the distinction with other non-communal fields (Lindemans, 1952: 315).[4] At the first sight, there are no reasons to presume these *gemene velden* would deviate strongly from their counterparts in the east, except for terminology. A closer look at their actual management will however show some important differences.

III.1.2. Common meadow

Another type of common pasture was the *broek*, which is a kind of marsh. This common land could be found on the low-lying wet and marshy lands, especially along the banks of the many rivers that cross the area of study (alluvions). This common land was often drained by artificial watercourses, and densely overgrown with highly nutritious grasses. Due to their typical characteristics, the number and extent of the *broeken* was smaller than that of the common fields. Furthermore, they differed in economic value, and to a certain degree in organization and management from the previously described types of common land. Contrary to the *vroenten*, the *gemene broeken* were (physically) enclosed by a fence. In places where hay was taken from the common, a sign *(veken)* was hung at the entrance, mostly on a certain day. As soon as this sign was hung, the *broek* could no longer be used by the whole community (Lindemans, 1952: 318–320).

Here again, a distinction can be made between the *broeken* where a limited number of people had pasture rights and the *broeken* where every inhabitant of the whole community could pasture their cattle after the hay harvest. In the first case, the authorized persons were very limited in number and were in some case inheritors of previous benefices or inhabitants of a well-defined hamlet, mostly those people living around the common arable *(aangelanden)*. The landlord had acknowledged their use of the *broek*. They formed an autonomous community that managed the *broek* by itself (Lindemans, 1952: 321). The *Vrijbroek* of Mechelen (Malines) for example was donated by Wouter Bertoud in 1260 to twenty-eight 'good men' *(goede lieden)* whose names were mentioned in the deed of gift. These persons and all their lawful heirs would have the right to use the land, at the price of *2 schellingen Lovens* (local currency) a year (Vos, 1949: 30, 63). A similar arrangement could be found for the *Gemene en Looweiden*, a pasture east of Bruges, which is still managed and used as a common to this day.

In the other case, every member of the community had the right to pasture on the aftermath of the meadows. This right was mostly based on nothing more than tradition. Sometimes it was a long-established seigniorial right. Villagers were not supposed to

[4] The literal translation of *gemene velden* would be 'common fields'. This would however be too confusing with common arable.

send more cattle than they could feed with their own resources during the period the meadow was closed, i.e. after the harvest.[5] The 'unuseful' animals were kept out of the *gemene broek:* these were animals that were not useful for the family economy, i.e. that did not bring in meat, dairy or pulling power. Sheep for manure were let on the pasture, but not the breeding sheep. Male animals reserved for breeding were regarded as unuseful and were thus kept out of the pasture. This rule could however be found in other types of common land as well (Lindemans, 1952: 334–336).

In the byelaw of the Vrijbroek of Mechelen, it was also mentioned that whoever wanted to put cattle on the *broek*, had to have bought these cattle before Candlemass; otherwise they could have been bought just before the opening of the pasture. One could put a goose on the *broek* with as many goslings as a goose could hatch out at a time. If a horse or cow died, the user could by another one and put this one on the *broek* (Lindemans, 1952: 333). Every year the users had a meeting before the second half of March and they elected four men among them who would be responsible for the management of the *broek* (De Vos, 1949:31). Similar stipulations could be found for other *broeken.*

III.1.3. Common woodlands

Because of the high value of woodland, the local lords were more concerned about use-rights in woods than in non-wooded properties (Godding, 1987: 201). After the massive wood clearances during the tenth and eleventh century, woodlands had become rather rare in our area of study. Owing to this lack of woodlands, local lords in Flanders had severely limited the locals' use-rights. In the southern part of the southern Netherlands woodland was less scarce and more open to the use of villagers. In these areas, communal woodlands would remain pivotal to economic life until deep into the nineteenth century (Lindemans, 1952: 337). Such common woodlands could however hardly be found in Flanders where most woods were private property.

In the south two broad categories of use-rights in wood can be identified: firstly, the *prélèvements*.[6] The *prélèvements* are an amalgam of all kinds of rather limited rights such as the right to collect dead wood, to chop wood, to collect humus (*strooisel*); the right to mow grass for the cattle in the byre (*faucillage*); and on the other hand the more important usages, such as the right to collect firewood and construction wood of all kinds (*affouage).*

Secondly, the right to put one's cattle out to pasture in these woods. The pasturing of the cattle was called *pacage, champiage* (for horses), *panage, paisson* (for pigs). However, this caused a lot of damage to the woodland. From the Middle Ages onwards these use-rights became more and more regulated. From the reign of Charles V (1500–1555) the central government tried to stop the abuses in the woods with many ordinances. The measures especially concerned the prohibition to pasture the cattle before the end of a certain period, mostly a period of five to seven years after clearing the wood, in

[5] Lindemans (1952) refers to the *Placaeten van Brabant* (Lindemans, 1952, II: 135).

[6] As common woodlands could mainly be found in the south of the southern Netherlands, the terms are often only known in their French forms, which will be used here.

order to protect the young trees. This period could vary strongly according to place and to type of animal, for example five years for horses and ten years for cattle. During the eighteenth century regulation became stricter because of rising wood prices (Godding, 1987: 202).

The users could only take wood for themselves and had to make their demands known to the forester, who would indicate the trees which could be cut down (*délivrance*). It was prohibited to cut more wood than necessary for housekeeping, construction works or repairs. Firewood (*feuille*) was limited to a certain amount per household (not including the dead wood). It was prohibited to sell wood, give it away or export it (Godding, 1987: 220).

III.1.4. Common arable

Four types of common-right on arable land could generally be found in the area examined in this study. It is important to note that the arable land was not possessed in common by a group of people, but by an individual. Arable land in fallow is also to be distinguished from common waste. Moreover, in Flanders the right to use common waste land was not linked to one's other possessions (e.g. a farmstead or land) or on one's rights to pasture cattle on the common arable.

After the harvest, the village poor were allowed to glean the ears (*lezen van de aren, glanage*). The farmers were obliged to grant this right to the village poor where the harvest was mostly done with a scythe. The after-harvest could also be done using a wooden rake (*naharking*). Hereafter, the villagers could let their cattle pasture on the stubble of the grains which had been harvested (*stoppelgang*), during a certain period of time. This period could not start before the farmers had removed all their grain from the field. This rule was mentioned in most village byelaws, which proves that *stoppelgang* was a general use. Contrary to the pasture on the fallow, the *stoppelgang* only lasted for a few weeks. The fields, which would be sown again, had to be enclosed from a certain date onwards, depending on the type of grain (winter or summer). A handful of straw (*strowis, wiffa* or *vreewis*) indicated where the cattle could not enter (Lindemans, 1952: 352–353). The introduction of certain types of turnips and clover, caused the *stoppelgang* to disappear in Brabant and Flanders gradually after the end of the sixteenth century.

In general, the whole village community could pasture cattle on the arable land that lay fallow.[7] Any aftermath on the arable was considered as a common good. This was the case for the fields after the grain harvest, after the hay harvest and in the woods after the woodcutting. (The pasturing of the fallows disappeared with the introduction of the two-course system.) This right was called *droit de vaine pâture* or *vrijgeweide* and was based on a tacit agreement among farmers and cattle owners: the cattle could pasture from harvest until the land would be sown again without having to take the limits of private property into account (Ruwet, 1943: 189). The pastures along the riverside were often subjected to *vaine pâture* after the first mowing. An area of the grasses could be

[7] The term fallow is used here to indicate that this was land that had been used as arable land before (as distinct from waste land).

reserved for animals (horses, cattle) that needed a rich feed; in that case the animals were not let into the pastures until August.

Wherever this right existed, a clear difference was made between the strictly private arable land and other parcels of private arable land where kinds of common pasture were allowed during certain periods of the year. The most important restriction on pasturing on arable land during its fallow season was the *vreetijd*, i.e. that period of the year when the fields were no longer accessible for the cattle because they were cropped. It means literally 'the period during which the land is free [of cattle]'. This period was announced in church and started mostly from the beginning or the second half of March and ended after the harvest. During the *vreetijd* the *veken* was hung.

Owing to the growing culture of fodder crops, pasture on fallows was abolished in many villages at the end of the Late Middle Ages. In Flanders this right had already been severely reduced during the Middle Ages. But in Haspengouw, Limburg, the southern parts of Brabant, Hainault and Namur, this practice would remain important until the nineteenth century. In the eighteenth century, tenants tried to introduce the cultivation of clover but experienced strong opposition from other villagers against this novelty. The villagers claimed to have the right to pasture their cattle on the clover. A decree of 1730 subsequently allowed the tenants to sow two 2 *bunders* of clover and prohibited pasturing on these plots. From then onwards, more decrees would follow, restricting the pasturing on the fallow in order to protect the – continuously extending – culture of clover. The province of Luxemburg, where a very large amount of common land could be found, prohibited this type of grazing as late as 1770 on enclosed fields, or fields sown with clover or lucerne (Lindemans, 1952: 350–352). The areas where the *vaine pâture* did not disappear until the beginning of the twentieth century can be found in the south of the Southern Netherlands (areas such as Entre-Sambre-et-Meuse, de Condroz, Haspengouw, Famenne and Ardennes).

In some – but few – regions the right to pasture on growing grain was exercised. During the winter until early spring the sheep and pigs could enter the grain fields. This usage was severely limited from the sixteenth century onwards. In 1711 a decree was promulgated by the Prince-Bishop of Liège, forbidding pigs to enter fields with growing grains in Haspengouw and surrounding areas for the period from 1 November to 1 March. Because this decree was ineffective, it had to be repeated in 1725. Only lambs and a few ewes were now allowed. A few years later in 1734, the government probably had to concede to the resistance of the villagers and allowed pigs in the grain fields from mid-November until 1 March. Lambs were allowed to pasture on rye until the second half of April and until 1 May on wheat and spelt (Lindemans, 1952: 354).

IV. The evolution of the legal basis of common land

Over the past two centuries, (legal) historians have puzzled their heads over the origins of common land. Especially in the context of disputes on the property rights of common land at the end of the eighteenth and during the whole of the nineteenth century, the question became particularly relevant when the government tried to privatize and clear

all common land in order to raise the national agricultural output, and increase the population. At that time so little was known about its juridical character that in 1757 the government was obliged to renounce the decision to sell common land in the region of Hainault (province south of Flanders) because they were not sure whether they had the right to decide upon this or not (Recht, 1950:9). Gaining insight into the genesis of common land is however not insignificant since it informs us about the relationship between commoners and external actors.

Theories which claim that common land as it could be found during the Middle Ages descended from the old Germanic joint-ownership are outdated. These theories relate common land to the Germanic concept of moveable (personal) property (e.g. clothing, jewellery); these were seen as goods that formed an individual's wealth. Non-moveable goods, however, could not be subjected to personal appropriation, but only to collective appropriation; based on the principle that the grass, the air, the water and woods were free gifts of nature that should be freely available for use to all men (Gilissen, 1981: 598-599; Engel, 1934). In pre-feudal times the collective use of the *wastina* – or uncultivated land – by the members of the rural communities did not pose many problems. The low population density allowed everybody to provide for his needs.

Others believe that common land dates from the domainial structure in the Early Middle Ages. The Merovingian domain was a territorial unit in the hands of one single person and was exploited by *mancipia* – persons without a farmstead-, or *servi casati* – who owned a *casa* or house. Besides arable and pasture land, this domain consisted of woodlands and wasteland. In exchange for their services to the lord, the *servi* received the use-right to the woodlands and wastelands: the so-called *communia* (Verhulst, 1957a: 93; Verhulst, 1981: 169–178; Lindemans, 1952: 308). During the Early Middle Ages, the area of study where heathland is later found consisted mainly of woodlands. The transition to heathland was a consequence of a degeneration process spread out over several centuries, by the pasturing of cattle in the woods. This process became typical for the area of the Kempen and Inner Flanders. The heathland without trees is probably a phenomenon dating back only to the fifteenth century (Verhulst and Blok, 1981b: 116–135).

During the Early Middle Ages however, with the rise of the seigniorial system, the lords claimed the common land of the communities, on the pretext of 'no land without a lord'. The uncultivated land of the village that the inhabitants used in common were called *vroengronden* from then onwards, which literally means 'land of the lord'. *Vroente* became a widespread toponym for this type of land, especially in the Kempen/duchy of Brabant where the toponym *gemeynte* could also frequently be found (Lindemans, 1952: 307). *Vroente* refers directly to the *ownership* of the land, not to a specific type of resource; so it could refer to any kind of natural resource such as pastureland, heathlands, marshes or meadows. Otherwise – especially in the county of Flanders – common land could be designated by a combination of the type of land (marsh, meadow) and the commonly used adjective *gemene*, which literally means 'common'. *Gemene* could be found in combination with words designating the natural state of the good in the Kempen as well: the words *aard, heide, wildert* all referred to a type of land which could be a common.

From the eleventh and twelfth centuries onwards much uncultivated land was reclaimed. These reclamations had to compensate for the population growth during the tenth and eleventh centuries. In the first stage of reclamation the villagers dealt with small woods close to their settlements. The landlords did not interfere, as their interests were not at stake. From the second half of the twelfth century onwards, cultivation concentrated on the extensive, uninhabited areas where privileged reclamation villages were formed. There, the lords allowed and often encouraged *hospites* willing to cultivate large parts of the *vroente*. Extensive areas were the lords' property either because they had belonged to their Carolingian predecessors, or because they claimed the property rights (Van Looveren, 1983a: 12). Having a dire need of money, the lords did not hesitate to sell pieces of these *vroentes,* in particular from the thirteenth century onwards. Van Houtte is not convinced the commons in Flanders and the Walloon region were vestiges of primitive agrarian communism, but places their origin in the thirteenth century, being a reflection of the many changes that rural life was going through at that time. It is indeed true that many byelaws which describe the regulation of common land date back to this period. Van Houtte's assumption that new regulations had to be made because the increased numbers of users required some supervision of tree-felling, grass-mowing or pasturage, can explain this (Van Houtte, 1977: 14).

In this period, conflicts arose between the lords and the villagers about the rights on the common land, the latter often gaining their suit. The inhabitants of Oostmalle (Kempen–duchy of Brabant), for example, had to defend themselves against the claims of the lords of the village, Willem van Berchem and Floris de Bie. These had used the common land for their own needs without the approval of the villagers. On 14 January 1430 the mayor, aldermen and councillors of Antwerp, where the villagers gave notice of appeal, decided to reprimand the lords. Philip, duke of Burgundy confirmed this judgement in 1432 (Moeskop, 1985: 17).

In Inner Flanders and the Kempen these conflicts often led to written agreements between the lord and villagers concerning the use of the common (Verhulst, 1966, 101; Verhulst, 1980a: 13). Whereas custom law had thus far regulated the use and management of the common land, written law would now become dominant. The villagers would often demand a written acknowledgement of their use-rights, even if they had to reduce their claims and accept to pay the lord yearly a *cense (cijns)* as a recognition of his sovereignty. Such a written agreement was often the result of the settlement of a conflict. When handing over the the letter containing the agreement *(vroentebrief)*, the villagers had to pay a sum of money (*voorlijf*). Verhulst, Van Houtte and others regarded such an agreement as a confirmation of a situation existing since immemorial times (Van Houtte, 1964: 62). Others regarded the abolition of serfdom as the eventual cause of the confirmation of common land as a common good. From the moment the peasants received freedom in exchange for the obligation of paying taxes (levy), a clear split in the relationship between farmsteads and wastelands was caused (Droesen, 1927: 30). According to Slicher van Bath, the population growth also caused a tendency towards a stricter and clearer described regulation of the use of the common land (Slichter van Bath, 1960: 85).

It is often difficult to conclude on the basis of the expressions used in the byelaws whether these agreements concerned actual transfers of property by sale or donation or

whether it only concerned a transfer of use-rights. Several elements however indicate that it should be regarded as a transfer of use-rights. The contribution – regardless of its magnitude – must be regarded as the repetitive confirmation of the lord's sovereignty. Moreover, the commoners had to request the lord to confirm the sale or letting out of parts of the common. The village of Mol (Kempen) for instance requested the sale of the *vroente* in order to pay off war debts and taxes. For each piece of common land sold the village had to pay a sum of money to the duke (Moeskop, 1985: 18). Many other examples of requests for selling pieces of the common can be found.

The explicit mention in the byelaws that the lord would no longer make free use of the land is another element. This promise would be meaningless if a complete property transfer (sale) was the case (Droesen, 1927: 26–29). This deal assured the commoners an undisturbed and (more or less) exclusive use of a well-defined area and protection against any usurpation by foreigners. However, the property rights of the lord on the *vroente* were limited: he could no longer change the use of it. The lord could not reclaim the land, afforest it or sink ponds in it. He would however keep the *altum dominium* of the common. The lord would also delegate his bailiff (*baljuw* or *schout)* as the representative of the sovereign power. He had to make sure disputes among commoners and other parties were solved and that the lord would receive a part of the imposed fines. The lord and bailiff were supposed to protect the commoners against the claims of others (Lindemans, 1952: 309).

Agreements between lords and commoners could however vary. Not all agreements can be regarded as a simple transfer of use-rights. Instead, the lord could also lease the land to the community for a certain term (*vrointepacht*) (Godding, 1987: 204). The inhabitants of Westmalle and Zoersel (Kempen) rented their *vroente* from 1682 onwards from the abbot of the Saint-Bernard abbey for a term of nine years. The abbot reserved however the right of about thirteen *bunders* – a *bunder* being a little more than one hectare – for the use of the abbey. The commoners were also obliged to plant trees in the *vroente*, without however having the right to use the wood. Neither could they use the peat nor the loam. Their rights were limited to pasturing their cattle, cutting turf (*schadden steken*), making hay and using the acorns (Lindemans, 1952: 310). In other cases the lord and the villagers came to an agreement whereby the villagers could use part of the woods, by means of a *cense*, while the lord appropriated the other part (*cantonnement*) (Godding, 1987: 204–206).

However, examples can be found however of actual purchase of the common by the community so that the community received the full property rights (*de facto* and *de jure*). Duke John III sold the common land of Turnhout and Arendonk (Kempen) in the fouteenth century. In 1666, the community of Beerse bought the Abtsheide from the Cloister of Saint-Michaels (Moeskop, 1985: 19). The removal of the annual *cense* indicates the complete independence from the lord from then onwards. Such cases are however rare.

Just as historians cannot always clearly interpret the agreements and relationships between lords and commoners in the past, so these agreements were not always clear to contemporaries. Ownership of the common land was often a subject of discussion. Agreements could be renewed or adjusted as a consequence of disputes. Renewals were

made in any case from time to time because old documents had become unreadable. These renewals also formed an occasion for both parties to reassert their rights and to adjust some parts of the agreement which needed to be changed, owing to for example natural circumstances.

After the agrarian depression of 1650-1750, the growth of the population led to a new rise of grain prices. Higher earnings could be expected, rents and land prices rose. It became more profitable to cultivate land of a lesser quality (Slicher van Bath, 1960: 247). Under the influence of these changes and of the physiocratic ideas that flourished during the eighteenth century, the Austrian government moved to promote agricultural development and population growth by enacting ordinances for each province on the reclamation of infertile land. Raising the productive capacity of agriculture in order to exceed subsistence level became a matter of prime importance.

Before the second half of the eighteenth century common land and the rights of commoners had primarily been threatened by local rulers, who acted independently. Thus far the central government had only played a rather passive role in the history of the common land. The Austrian government was however not inclined to maintain what they regarded as remnants of feudalism. Common use of land was regarded as an obstacle, no longer fitting into the picture of a modern and rational agricultural policy: the government was convinced it limited intensification of agriculture and prevented personal initiative. The central government often acted in co-operation with or according to the demands of the provincial authorities, thereby encouraging reclamation of waste land. Stimulated by some prematurely acclaimed reclamation successes on the poor sandy soil by a few private enterprises, the Estates of Brabant became interested in promulgating an ordinance to stimulate the reclamation of wasteland, as had been done before for the region of Hainault (Willems, 1962: 47–90). Though an inquiry among the officials of the whole of Brabant on the desirability of such an ordinance showed that reclamation of common land would lead to great deprivation for many peasants and possible disputes between lords and peasants, the Estates of Brabant nevertheless decided to present their request to the central government (Tilborghs, 1988: 10–14). The ordinance of Maria-Theresia of 25 June 1772 exempted uncultivated land from public charges and exonerated their possessors from paying tithes on the produce of these goods to the duchy of Brabant. Infractions committed on reclaimed land would be punished with a doubling of the normal fines. Measures to achieve the forced sale of all uncultivated land, even that belonging to private persons, were taken. Whereas in other provinces the initiative was taken by the provincial institutions, this was certainly not the case in the county of Flanders. On the contrary: several members of the Provincial Estates opposed the proposition of the government to promulgate an ordinance similar to that of Brabant, which indicates the importance common land still had, even in an area with one of the most progressive agro-systems in Europe (Vandenbroeke, 1975: 45–48; Vanhoutte, 1977: 243).

The revolutions, wars and heavy resistance of commoners prevented the ordinance of Brabant having significant results. In nearly the whole of the Noorderkempen the ordinance was ineffective (Willems, 1962: 206). Neither communities nor private persons succeeded in successful reclamations. Of a total of 25,000 hectares of heathland,

only 3,500 to 4,000 were eventually cultivated. Villagers reacted fiercely against this ordinance because of the economic value the heathland still had for them. On the basis of their use since times immemorial they claimed property rights on common land. These claims formed the most important obstacle to cultivation (Willems, 1962: 167–174).

During the last years of the Austrian reign (which ended in 1794) a lack of experience in reclamations, technical problems, transport problems and the war would prevent any more attention being paid to reclamation (Van Looveren, 1983: 192). The new revolutionary French régime did not favour the nobility and clergy. The dissolution of convent communities brought an end to some important reclamations going on under the direction of the clergy (Vliebergh, 1906: 149). The nobility lost all feudal claims on common land; the full property of these goods was assigned to the municipalities (Tilborghs, 1987: 18). In 1796 the French laws had become legally binding for the former southern Netherlands. Consequently the French law of 10 of June 1793 (*Décret concernant le mode de partage des biens communaux*) became applicable for the area in question. Due to this law, common land was assigned to the municipalities, and fell from then onwards under the auspices of the municipality. The law also stimulated municipalities to sell and reclaim their common land. Some municipalities used these facilities to pay off their debts. In the Code Civil – introduced in 1804 – 'communaux' (the word normally used to refer to common land) was explained as goods *à la propriété ou au produit desquels les habitants d'une ou plusieurs communes ont un droit acquis* (art. 542). Common land thus had to be regarded as the collective property of the users, the inhabitants. But, as the Code Civil no longer acknowledged that form of property, it had to be transformed into a classic individual property (art. 544 and following) and was as such attributed to the municipality as a legal person. The property rights of the inhabitants as formulated in art. 542 were thus reduced to a usufruct in common (De Page and Dekkers, 1975: 677). Some common lands however were – on the basis of documents proving their title for centuries – not absorbed by the municipality. These became private property in joint ownership, a legal status that was and is characterized by a very limited legal security but which did allow the commoners to use and manage the common as during previous centuries.

Under the Dutch reign (1815-1830), apart from the foundation of a few unsuccessful large-scale colonies of reclaimers, reclamation activities would be limited to the local level. In Brecht (Kempen) for example a large area of the common heathland was sold. In 1789 this municipality contained 1,756 ha of arable land while in 1835 this had already increased to 2,300 ha (Vliebergh, 1906: 154–155).

The impasse in government interference in reclamations ended a few years after the foundation of the Belgian State in 1830. After a few critical years, the Belgian economy entered upon a phase of expansion from the years 1833–1835 onwards. Grain prices went through a boom from 1834 to 1839; land prices rose quickly (Bublot, 1957: 42). An institution such as common property, regarded as a feudal remnant, appeared to be a stumbling block to the young Belgian state. New tools to stimulate – thus far only measures such as the exemption of taxes had been used – privatization and reclamation were introduced: the emphasis fell on the construction of roads, irrigation, canalization and transport facilities. In particular the backward economic and agricultural condition

of the Kempen seemed an eyesore to the ambitious government. Several laws were enacted in order to encourage the reclamation of the Kempen and to create a favourable investment climate. The crisis during the 1840s and the growing liberal dominance would accelerate this process.

The law of the 25 June 1847 on the reclamation of uncultivated land (*Loi sur le défrichement des terrains incultes*) was promulgated in a period of deep crisis and was undoubtedly the most effective of its kind.[8] The law stipulated the forced privatization of wastelands owned by municipalities or communities (in joint ownership) and their alienation by the state in order to sell these lands. A sum of 500,000 Belgian francs was set aside by the government to encourage irrigation works. The state decided upon the terms and conditions of sale. By that time, no longer did all municipalities resist the sale of their common land. However, in some municipalities resistance of villagers to the sale of their common land would remain strong until the end of the nineteenth century (in some parts of the Kempen, but especially in the south of Belgium) (Van Looveren, 1983: 121).

In the province of Antwerp (formerly part of the duchy of Brabant) many communities proceeded to sell their property. The law of 1847 in combination with other laws on irrigation and canalization – whereby high subsidies were promized – made the sale of thousands of hectares of wasteland in this province a speculative business. For instance, in the north-east of the province of Antwerp, the area of Turnhout, where large parts of common land could still be found at the foundation of the Belgian State, the prices for heathland boomed after the law of 1847 (Bublot, 1957: 43). Consequently, the lands were predominantly bought by non-residents who were not active in agriculture (urban bourgeoisie). These high prices and the fact that the heathlands were sold in large parts prevented local peasants from participating in the sale. In a few municipalities the urban bourgeoisie remained absent because the local council decided to sell in very small parcels, to the advantage of the locals (Tilborghs, 1988: 310–312). After these sales, nearly all common land would disappear gradually during the second half of nineteenth century. Only a handful of commons could survive until the present day, and this is the result of the stubbornness of their users and defenders.[9]

---

[8] Around the 1840s a linen crisis broke out in Flanders. A few years later, during 1845–1847, several bad harvests threw Belgium into an even deeper crisis. See: Jacquemyns, 1929.

[9] At present at least one common in the area of study has survived, namely the *Gemene en Looweide* in Assebroek and Oedelem (east of Bruges). It measures about 100 ha of pasture; more than 1,000 commoners are still entitled to and claim their use-right (by inheritance, see elsewhere in this chapter). Only a few of them however actually use the common. In Limburg another smaller common of the eastern type has survived.

V. Management of common land in Flanders[10]

The internal regulation of common land was organized on the basis of local byelaws (*keuren, aardbrieven* or *vroenbrieven).* These byelaws were drawn up in the presence of and with the approval of the villagers. They were published again annually in the church or attached to the church door (*kerkgebod*). During the public reading of the byelaws proposals could be made to change or add articles. Whenever the document had become unreadable, it was copied. Apart from the byelaws, other regulations could be added in resolution books (*resolutieboeken)* and in other sources such as court rolls. The management of common land as explained hereafter is essentially of a theoretical nature. The actual implementation of the rules must be derived from other sources – for example, accounts – of which only few have survived the ravages of time and none have so far been completely studied.

The common land in the West had its own regulations, unlike the *aarden* in the Kempen, where for the most part a general ruling for all the common land in an extensive area was drawn up for the whole jurisdiction, comprising several villages. The common land of the communities of Mol, Balen and Dessel (Kempen) for instance was subject to the same byelaws; the byelaw of Westerlo was valid for several communities that were part of the *vrijheid.* The specificity of the byelaws was dependent on the autonomy of the local communities. In Kasterlee (Kempen), for example, each hamlet had its own byelaw for its common (Moeskop, 1985: 25-40; Lindemans, 1952: 316).

These byelaws allow us to unravel the way in which common land was organized: they mentioned the administrative and geographical borders of the common, they ordered and prohibited whatever was deemed neccssary and tried to prevent misbehaviour by linking orders and prohibitions to fines. Hereafter, the regulation of the non-forested common land (*velden* and *broeken*), in particular in the most northern sandy part of Flanders (the Kempen and the northern field zone), will be analysed on its compliance with the Common Pool Resources (CPR)-attribute-list of E. Ostrom (see glossary; Ostrom, 1990: 90). The common land as described above in general complies with Ostrom's definition of a Common Pool Resource. The rules mentioned hereafter date mostly from the early modern period. Owing to the lack of comparative study of the regulation of common land as a whole and these attributes in particular, it is difficult to point out certain trends in the regulation of common land. Several hypotheses and possible solutions will be given on the basis of literature and my own research.

V.1. Boundaries of common land

Ostrom stresses that the boundaries of the CPR as well as the individuals or households who have rights to withdraw resource units from the CPR must be clearly defined. In the west, the boundaries of the common land were clearly described in the byelaws. Apart from referring to the border of another village, the byelaws also referred to farm-

[10] Only the attributes of common waste will be discussed here. The use and management of common woodlands was too different and would hardly be relevant for the area considered in this chapter.

steads, castles, roads and other landscape elements in order to make the boundaries of the common clear. Compared to common land in the east (the Kempen), the surface of the common was limited and delimited: some hundreds of hectares, often fenced in, compared to several thousands of vast heathlands without any physical boundaries in many villages in the east. While in the east, practically every village, or even hamlet, had its own common, they were not so frequent and widespread in the west. Not only the boundaries of the common, but also the area wherein the products of the common could be consumed were often clearly defined. Prohibitions on export of milk from a cow that had pastured on the common or peat cut on the common restricted commercialization of the common goods. In some cases the sale of products was even absolutely forbidden.[11] This prohibition can be an indication that one tried to prevent over-exploitation, being aware of the risks of boundless commercialization.

The numerous conditions for access to common land mentioned in the byelaws can be subdivided into 'basic conditions' and 'supplementary conditions'.

V.1.1. Basic conditions of access to the common

I have found two types of basic conditions relevant for the area in question so far, namely place of residence and (direct or indirect) descent from entitled persons. These basic conditions are absolute: either you were an inhabitant or a descendant, or you were not.

The place of residence was the most commonly mentioned condition for use of common land. As mentioned above, a distinction must be made here between the common land in the east of the area of study (Kempen/duchy of Brabant) and that in the west (around Bruges/county of Flanders). Whereas being entitled to use the common in the Kempen was mostly limited to the inhabitants of one or several, clearly defined, hamlets or villages, in the west commoners had to live within a certain area (*vrijdom)* which was drawn around the common. Many of these commoners lived literally around their common, which in most cases was not very extensive anyway. In the Kempen the common was in most cases so extensive that circumscribing a *vrijdom* would have been meaningless. Prevention of over-exploitation could also be found in the prohibition of taking someone else's cattle to the common.

It should be stressed however that in the county of Flanders common land where the inhabitants did not have to belong to a *vrijdom* but simply to a hamlet of a village could be found as well. In many cases the inhabitant also had to be a resident for a certain period of time, for instance three consecutive and full years, before being allowed to take up the right. In other cases an immigrant had to pay a sum of money before being

---

[11] E.g. Vrijgeweid of Donkt (Beveren-Oudenaarde): *Belovende oec deselve gasten dat, zoo wye van huerlieder beesten voeren sal up deselve meersch om van dien melc te vercoopen sonder oerlof... deselve sal verbueren de peine van III s., ende dat sal men niemende gedoghen, ten es dat de selve zoe cleine es van werlijcken goede dat behoert van zijne, anghesien de baerlijcke armoede ende necessiteit* (Lindemans, 1952: 333). E.g. Maleveld, 1717: the peat dug at the common could not be sold nor transported out of the jurisdiction. After breaking this rule three times, the commoner would even loose his right. (Errera, 1891, II: 215–216)

allowed to claim his right to the local common (Van Looveren, 1983a: 37; Moeskop, 1985: 64). Fines for non-residents who used the common land illegally were much higher (mostly double) than for residents for the same offences (Moeskop, 1985: 64).

Being a direct descendant of an entitled person was in some cases a condition of being allowed to use the common. For instance, in the *Gemene en Looweide* in Assebroek and Oedelem (East of Bruges) both the sons and daughters of entitled persons could claim the right, but the daughters could not take up their right personally, they could only pass it on to their husbands and children. When the wife died, the husband lost his rights; the children however remained entitled. To be registered as a new user when claiming your right, one had to pay a sum. A similar system could be found in the 'Vrijboek' in Mechelen where names of the persons to whom the common was originally granted were mentioned in the deed of donation. All their lawful heirs would be entitled to use the common thereafter, on the condition of paying an annual *cense* (Vos, 1949: 30). It is probably not a coincidence that these two cases are examples of the so-called *broeken*, pastures where nutritious feeding could be found for the cattle. The strict limitation of the number of users of the common can indicate here again that the scarcity of an asset leads to a more restricted management system.

V.1.2. Supplementary conditions for access to common land

These basic conditions can, however, have other 'supplementary conditions' added to them. These conditions are relative as they refer to variables that have to be supplemented with a quantitative specification; for example, a certain amount of money had to be paid before the person became entitled. Socio-economic conditions and financial conditions are the two main types that could be found in this area.

In general socio-economic conditions can be subdivided into possession of land, possession of cattle/small livestock (Godding, 1987: 201; Moeskop, 1985: 63) and other socio-economic factors (paying taxes for example). Socio-economic conditions could be to the advantage of the rich as well as the poor. Both types can be found in the area of study.

The poor could merit usage on the basis of their poverty. Many cases referred to this condition. But what is poverty? Evaluating the degree of poverty or wealth of commoners can only be done in the light of the general socio-economic circumstances of the direct surroundings of these commoners. A proof of the relativity of poverty could be found in the regulation of the Maleveld (east of Bruges, county of Flanders): only poor households (*aerme huisgezinnen*) could use the field for pasturing their cattle. The persons who we could consider as being the real poor, i.e. those without any cattle, were not allowed to use the resources (Errera, 1891: 307). This example shows that minimal limits could be set in order to keep the poorest of the village out of the common. The wealthier among the inhabitants were identified by the fact that they possessed horses. Examples can be found where that those who had horses could not claim any common rights.[12] In many cases the poor and the rich could both use the same common.

[12] E.g. A regulation of 1717 for the Maleveld (East of Bruges) stipulates that those who had a horse would be excluded from the use of the common (Errera, 1891, II: 307–311).

When meeting all basic conditions and supplementary conditions, one could still be asked to meet several purely financial conditions. Here we should distinguish between the once-only contribution when being accepted as a commoner and the yearly contributions that depended on the number of cattle pasturing on the common. The management of a common did cost money: paying the taxes (the yearly *cense*), digging ditches, repairing fencing, ... In several cases new commoners paid a small, once-only sum of money when they claimed their rights. Often a yearly contribution per number of head of cattle (with different sums for each kind of cattle) was demanded.

The major difference between the *aarden* in the Kempen/duchy of Brabant and the *gemene velden* which could be found in the county of Flanders, was the demarcation of the area where persons entitled to use the common resided. Whereas in the Kempen practically every village had its own common and in general all inhabitants could use the resource, in the county of Flanders many cases can be found where the users of the *gemene velden* had to live within a *vrijdom*. This *vrijdom* was an area around the common, without necessarily taking the borders of the villages or parishes into account. The inhabitants of several hamlets of different villages could be entitled to use the common. The inhabitants of Oedelem and the neighbouring villages of Beernem and Oostkamp for example could use the Beverhoutsveld in Oedelem (east of Bruges). The users of this common land were called *aangelanden* which means 'those who live at the border of [the common]', referring directly to the *vrijdom* which had been demarcated.[13] In some cases the common could only be used by heirs of the original inhabitants (i.e. at the time when the common was donated) of the *vrijdom*. Considering these stricter entry rules, it is not surprising then that one could find many of these commons enclosed with fences, without however being actually privatized. The reason for this stricter demarcation may be the extent (and thus availability) of the common. In the Kempen the extent could be as large as several thousands of hectares, whereas in the west, the *velden* would not exceed some hundreds of hectares.

Entitlement to use of the common was not however, always taken advantage of. In my research on a case study in Flanders, the *Gemene and Looweide* in Assebroek and Oedelem (east of Bruges), it turned out that several persons who had paid the once-only contribution to claim their right as a commoner, did not put any cows or horses on the common. It is most likely that they did not use other resources either, at least not in significant amounts. This conclusion - so far however only for one single case - introduces the possibility of choosing to participate in the common or not. A person's choice was probably a consequence of the location of their dwelling or of their socio-economic situation which might for example entail an insufficient number of cattle to put on the common. Living in a distant village or having a limited number of cattle may have caused the relative economic cost to rise and thus make the common unattractive.

[13] Another name is 'aanborgers'. It is however not clear whether this name indicates 'those who live nearby the common' or 'inheritors of the right to use the common'.

V.2. Regulation of the use of common land

The rules regulating the actual use of common land were numerous and consisted of three major elements: the type of resource the rule referred to, an order or a prohibition concerning the use ('do's' and 'don'ts') including specifications of the time, place, technology and quantity of resource units, and finally the fine which would be imposed if the order or prohibition was ignored.

The cutting of peat – used as fuel – was strictly regulated. Each household could cut a certain amount of pieces during a certain time. In the *Maleveld* for example a maximum of 8,000 pieces a year for each household or two households with one fireplace was stipulated.[14] Before one could start cutting the peat, the local manager (*hoofdman*) had to be informed. Peat cut in a common could not be sold to strangers though the peat cutting itself could be leased out (Moeskop, 1985: 33). Turf was another resource that was intensively used by the locals for roofs or as stable litter.[15] The reclamation of sand (for road construction), and loam (for floors, walls, brick making) was regulated in a similar manner to peat but regulations could not be found as frequently as for peat.

With regard to cattle breeding, the common had a double function. On the one hand it provided feed for the animals. Depending on the type and condition of the common, some animals were allowed and others excluded. For example, no horses older than one year, nor oxen above two years were allowed.

In the Kempen heathlands were predominant. The grasses that grew on heath made especially good feed for sheep, and thus sheep were ubiquitous. In the west however sheep were rare and in some cases even forbidden.[16] Only those animals that had been in the stables of the commoner during winter-time were allowed. If this was not the case, it was assumed that the animals were not the property of the commoners (Errera, 1891: 334–335).

On the other hand, the cattle produced valuable manure, which was gathered. The cattle spend the nights and winter times in stables where the manure was absorbed by stable litter and turfs which had been gathered and cut at the common. This phenomenon was typical for the Kempen area and referred to as *potstal* (Lindemans, 1952: 349). This valuable compost was introduced to the poor soil, making it more productive. Sheep played the leading part in this process and in the Kempen economy overall, as they provided wool for the proto-industry.

Pigs were generally not welcome on the common because they rooted up the ground. A ring through their nose served to prevent this. Pigs and geese might have to wear a *kennef* too, a kind of harness made out of three wooden sticks around the neck of the animal which would prevent them from breaking into the surrounding enclosed properties.

---

[14] SAB, Heerlijkheid en baronnie van Male, 3, Register met notulen en resolutiën van Stad, Park en Baronnie van Male, 1707–1726, fol. 68, nr. 1.

[15] Turf stands here for peat.

[16] On the Maleveld sheep were forbidden. SAB, Idem (art. 5).

Next to the more general prohibitions, many supplementary rules were needed to prevent the cattle from damaging the common and surroundings. The cattle had, for example, to keep a certain distance from neighbouring lands.[17] Animals infected with certain diseases could not pasture on the common (Lindemans, 1952: 334). Cows that had not calved that year or had become sterile could not enter the common (Berten, 1904).Only animals that could serve a useful purpose (milch cows) could be pastured. The commoners could not make any new gangways when harvesting hay on the common.

Ever-recurring elements in the regulation of the common land are the rules preventing commercialization. On the Maleveld (Flanders) it was forbidden to transport peat dug on the common out of the jurisdiction of the seigniory (Errera, 1891: 310). In Donckt (Flanders) it was forbidden to sell the milk of animals pastured on the common without the approval of the priest and the other managers (Errera, 1891: 338).

Limitations on personal use such as mentioned above would have been ineffective if the total use remained unregulated. Strict conditions of access to the common in combination with limitations of personal use could be unsatisfactory under the pressure of a fast-growing population. Therefore not only the rules concerning individuals might have to be changed from time to time but also the total number of resources permitted to the commoners could be cut back. In Mol (Kempen) for example in 1631 the total number of sheep was limited to 100 (Knaepen, 1982: 265).

V.3. Managers and monitors of common land

The commoners realized that management and monitoring was essential to the survival of the common. As managers, I mean here those people who took care of the long-term well-being of the common. Managers were supposed to set out strategies, make plans and make sure these plans were carried out. Monitoring is interpreted here as the day-to-day control of what is happening on the common. A monitor is empowered by the managers to interfere whenever the regulations are not met and to take measures if needed. As will be noticed hereafter management and monitoring tasks were divided among a great number of people. In both east and west several persons and groups of people could act as managers. In the surroundings of Bruges, the actual management was taken care of by a group of people elected among the commoners (Godding, 1987: 200). Varying from place to place, these managers were elected by the commoners themselves or in consultation with the local rulers. They were called *hoofdmannen, regeerders, donkmeesters, heirnismeester,* etc. and could vary widely in number: whereas the management of the Beverhoutsveld (east of Bruges) was taken care of by thirteen people (each of the three involved villages had the right to send a number of men proportionate to their share in the common), the nearby smaller Maleveld, managed to do this with three men.[18] The number of managers needed, was dependent especially on the extent of the common. Their term of service varied from one to three years.

---

[17] Ibidem.
[18] SAB, Idem (art. 13).

In the east the bench of aldermen also played an important role in the management of the common land. In both west and east they were involved in formulating the rules. The managers in the Kempen were the *gezworenen*, delegates from each hamlet who were members of the community corpus. They were chosen by the aldermen of the community and had to take an oath before the bailiff. As elsewhere they had the right to change regulations at their own discretion (Moeskop, 1985: 45).

The managers in both east and west had to swear an oath to the lord and had to report problems to the bailiff. They swore:

1. To keep the common in a good state of repair and defend on all occasions the rights, privileges and liberties of the users.
2. To observe the laws, customs and usages of the domain.
3. To do justice and pass equitable judgement on all delicts and misdeeds. To fine delinquents and to do everything that is supposed to be the duty of good and loyal administrators.[19]

These managers took care of the 'general management' of the common land. They kept an eye on the carrying capacity of the common: if the common was in danger of being used too intensively, they put a limit on the total number of resource units (cattle, peat, etcetera) that could be used that year. The managers were mostly compensated in kind for their efforts.[20] The managers of the *Maleveld* (east of Bruges) for example received 2,000 peat cuts more than the other users.[21]

Yearly the bailiff would come around and go an inspection (*schouwdag*) with the managers in order to check whether the agreement with the lord was observed. The managers also had to organize a yearly meeting of the commoners. The meeting was on the one hand meant for registration and tally of the cattle each commoner would pasture on the common the forthcoming year. On the other hand it also was an opportunity – as was the yearly inspection round in some cases – to propose changes in the regulation (Lindemans, 1952: 320; Moeskop, 1985: 58). This meeting was not merely a formality to the commoners: it could be explicitly mentioned in the byelaw that the yearly meeting was meant to assure the good maintenance of the common.[22] Commoners could clearly influence operational rules, although the managers who had a mandate from the commoners and the agreement of the lord to do so probably introduced most of the changes.

Other persons (*rendant or zavelmeester*) dealt with the administration. They oversaw the accounts of the common land, which had to be submitted to the commoners and the delegate of the lord for inspection and they could summon the commoners for compulsory labour.

---

[19] See for example the *Beverhoutsveld*, van Speybroeck, 1884: 177.

[20] By the end of the eighteenth century, payment in kind is often substituted by a sum of money (See, *Gemene en Looweide*, Assebroek and Oedelem).

[21] SAB, Idem (art. 13).

[22] In the keure of the Gemene and Looweide of Assebroek and Oedelem one could read ... *ende dat ghemeene dinghen niet goedelickx en moghen onderhouden syn ende bewaert, sonder daerinne te stellen ordine en policie, hebben van alle tyden hier voortytd ghewoont hemlieden te vergaderen eens t'siaers* ... (Andries, 1897: 151).

As Ostrom writes: 'The presence of good rules ... does not ensure that appropriators will follow them, nor does the initial agreement explain the continued commitment', (Ostrom, 1990: 93), commoners and lords realized that a system of rules was only the basis of a well-functioning common. Monitoring of common land was complemented by a system of sanctions. The monitoring varied little from region to region. The policing of the common land was undertaken by a *schutter* or *veldwachter* who had the right to lock up (*schutten*) every animal that was illegal on the common land. They were appointed by the managers (*hoofdmannen, gezworenen)* and received a salary (Moeskop, 1985: 47-48) and/or part of the fine. They could be fined if they were found to neglect their duties but could on the other hand count on the protection of the lord as well. Anyone trying to hinder the monitor in his work, or offending him or threatening him, would be fined (Moeskop, 1985: 52). In some cases the *schutter* was accompanied by a *vorster (sargant)*, a law officer who would take care of setting the fine. In small communities the *schutter* and *vorster* were the same person. It is possible that these *vorsters* had the function of bailiff as well.

Dependent on the form of the rule, offenders had to pay a sum of money but could also loose their rights on the common or were led before court. Sanctions were graduated depending on the type of infringement and in some case on the repetitiveness of the infringements too. For example, the commoners of the *Maleveld*, who exported peat out of the jurisdiction of Male would receive a fine of four pounds on the first infringement, six pounds on the second, and would lose their rights on the third. Bringing in illegal animals or too many animals would result in a fine that had to be paid each time the infringement took place, varying for each kind of animal (the fine for small livestock was less than for cattle). The monitors locked the animals in a cage (*schutte, bocht* or *schutkooi)* until the guilty party had paid the fine plus the costs of locking up the animal and payment for the damage caused. These costs varied depending on the animal involved and sometimes on the time of the year. Examples can be found of common land where a higher (double) fine had to be paid during the period of the collection of the tithes. When the infringement was found at night, the fine would be double. If the culprit refused to pay the fine, his animals would be kept in the pound cage until an arrangement was made either by mutual agreement or in court. If the animals were released earlier, the monitor had to pay the damage himself. In order to prevent the animals simply being left for too long in the pound, fines were systematically raized. If the owner didn't show up at all, the animals could even be publicly auctioned (Moeskop, 1985: 49–51).

The commoners were also involved in monitoring, as they were supposed to make sure no infringements took place at the disadvantage of the whole community. The commoners were allowed to make accusations *(calengieringen)* (Moeskop, 1985: 59). Indeed, they were probably the best qualified to make sure that no strangers from other villages used the common.

V.4. Common land and local powers

Ostrom stresses that the appropriators needed to have the right to devise their own institutions and that external governmental authorities could not challenge this right. As I already pointed out above, the relationship between the local lord and the commoners

was regulated by the byelaws wherein the lord was assigned some rights and the rights of the commoners were established. The commoners recognized their lord's sovereignty (by means of a yearly contribution, the *cense*) while the lord recognized the rights of the commoners. The lord sent his bailiff to keep an eye on the managers. The bailiff would interfere in conflicts and would in many cases claim a part of the fines for his lord. Elaborations on the attributes discussed above have already shown that common land did not escape existing power relations. Though local lords did however not refrain from challenging the commoners' rights from time to time, minimal recognition was mostly guaranteed.

With the strengthening of the central government during the early modern period, common land in general was increasingly under fire and such recognition diminished. While before the eighteenth century this challenge was mainly a matter of rivalry on a local level (between lord and community and in some cases between communities), the centralized government showed a greater interest in converting uncultivated land into arable land from the eighteenth century onwards. From the second half of the eighteenth century especially, the central government exercised great pressure on the provincial administration to promulgate a decree on the privatization and clearing of common land (see section IV).

VI. Conclusions

On the basis of the analysis of common land in the sandy area of (present) Flanders some major conclusions can be made. Firstly, in setting out the attributes of common land in Flanders, I have repeatedly drawn attention to differences between two general types of common land. Drawing on the byelaws, the common land in the area of research was allocated to these two types on the basis of several criteria. Firstly, we noticed a difference in the physical nature of the land: limited plots, often fenced in, versus large, vast plots without physical boundaries. Secondly, there is a difference in access to the land: limited access versus access to all inhabitants of the village. Thirdly, the management was taken care of by people with different positions in the village: managers elected mainly out of the group of users versus managers mainly chosen from among members of the local government. These differences were moreover regionally concentrated, whereby common land in the west showed the characteristics of a 'closed' common as opposed to the eastern type of the 'open' kind. The fact that the managers of the common land in the east were part of the local government enforces the impression that common land was more central to the village economy and political structure compared to the west. In the east the whole community of a hamlet or village was usually closely associated with the common land while in the west a commoner had a more exclusive status. Errera already described the first, 'closed' type in 1891 in his work *Les masuïrs,* assuming these *masuïrs* were somehow related to the Dutch *marken*, without however mentioning that other kinds of common land could be found elsewhere in Belgium/Flanders (Errera, 1891). Droesen did – though briefly – note that there were two types of common land. For him the more open type could be related to the Dutch *gemeynten* (Droesen, 1927: 31–35).[23]

[23] Errera found masuïrs in the Walloon region and in certain areas of Flanders, which he did not

Scarcity of wasteland in an economy still depending on a mixed agriculture must have played an important role in the differences between east and west. As long as uncultivated land played a role in the village economy, it was equally subject to the laws of supply and demand and thus the laws of abundance and scarcity. Apart from being more dependent on common land, the villages in the Kempen area had more isolated economies than those in the county of Flanders. Until the government began to invest in canalization and road construction, transport and communication in the Kempen were limited.

The complexity and variation of common land must however temper Ostrom's model. As Ostrom notes, complexity is a fundamental similarity, shared by all CPRs, variations in natural settings require rules to be tailored accordingly. For Ostrom, the differentiation of regulation is even a necessity for CPRs to be long enduring because they 'take into account specific attributes of the related physical systems, cultural views of the world, and economic and political relationships that exist in the setting.' Having to obey to more general rules which were not adjusted to the setting of the common, would have prevented the commoners from taking advantage of the positive and unique features of their CPR (Ostrom, 1991: 88-89).

A possible explanation for the east west differences can maybe be found in either the differences in local power relations or in the ratio of property-holding to lease-holding. For the nineteenth century, Vanhaute (1993) found a gradual geographical change, from a large proportion of individuals' holdings consisting partly or even completely of leaseholds in the west, to holdings mainly consisting of owned property in the east. The reflection of this in the strategy of farm management might be related to the greater availability of common land (Thoen and Vanhaute, 1999: 278) in the east compared to the west.

The east-west model outlined here is only a stepping-stone to help understand this complexity. Though common lands in the east were clearly more extensive and numerous, this model deserves more research since it can give us a better understanding of the conditions leading to long-term changes in common land management.

Secondly, a rule that could be found everywhere in the area of study (and beyond) was the prohibition of the commercialization of benefits from common land. Despite this, common land may not be regarded as functioning outside the market system. One must consider that common land formed in this area a vital link in the local economic system (agricultural and proto-industrial). Arable land was dependent on the turf and manure from the common; local proto-industry was dependent on the sheep. In fact, the absence of a restriction on the export or sale of wool from sheep pastured on the common suggests that common land did not stand outside the local economy and was more market-related than often suspected. Good management through anticipation of possible over-

---

research thoroughly however. He did not mention a regional concentration of the *masuïrs*. According to Droesen the open type could especially be found in the Kempen and Ardennes (which is rather strange since Errera described the common land in the south as *masuïrs*, which belonged to the group of closed common land), but he did not mention any regional concentration of the other type.

exploitation assured a balance between sustainability and economic/market-related use. Further research on the economic value and importance of common land and its place within the village economy is important to help us understand the regulation of common land.

Thirdly, the division of management and monitoring tasks is striking. Managers had to keep an eye on the long-term strategy used to manage the common. They took care of changing the rules if needed. Others took care of the administration and the bookkeeping. Monitors guarded the common land and ensured that regulations were not violated. Another person imposed the fine and took care of the prosecution of the case. In this complex 'government of the commons' loyalty had to be shown to the lord and his representatives. The actual users, the commoners, played a complementary role in this government. They could suggest changes, turn in miscreants, and by simply using the common, exercise social control. The division of tasks and the possibilities for the commoners to interfere probably created the internal enforcement and assured quasi-voluntary compliance, which Ostrom has referred to as the 'contingent strategy' (Ostrom, 1991: 94-95). The division of tasks suggests that this contingency did not only exist mutually among commoners but also among those who had a specific task. It is not clear whether this division of tasks made management and monitoring costs higher than the exploitation costs of private property.

As a high number of articles on CPRs start with references to Hardin's 'Tragedy of the commons', it would be odd not to mention his metaphor at all. Here I come to my fourth and last conclusion. The question whether the disappearance of Flemish commons was due to a tragedy of the commons must be answered ambiguously. In relation to Ostrom's attributes one can ask whether common land was managed well enough to counteract a possible tragedy. Above I have indicated the kinds of rules that could be found on common land in the area studied, and have presented some examples. I have to remark here that so far, I cannot indicate when and why such rules were in general introduced precisely and how these evolved over time. Only a limited number of cases has been used for the analysis of common land in this paper. The rather positive view on common land management can be a logical consequence of a lack of source material for common lands that did suffer a tragedy. These often disappear in silence without leaving many traces of their existence. Furthermore, Ostrom's design principles of long enduring CPR institutions only focus on positive aspects of common land and are rather vague. These 'principles' certainly need refinement and completion. More research on this topic is needed. Many aspects of common land as dealt with in this chapter remain so far difficult to date precisely. It is clear that the role of population growth and the role of both local and central governments in encouraging reclamation and privatization should be researched in more depth as well.

Bibliography

Manuscript sources

State Archives Bruges (SAB), Heerlijkheid en baronnie van Male, 3, Register met notulen en resolutiën van Stad, Park en Baronnie van Male, 1707-1726.

Printed and secondary sources

Andries, J.O. (1897) 'Recueil de documents tendant à résourdre la question de propriété des gemeene et looweiden situées à Assebrouck et Oedelem les Bruges', *Annales de la Société d'Emulation de Bruges*, 5, 10, pp. 141-186.

Berten, D. (1904) *Coutumes de la Seigneurie de Saint Bavon*, Ghent.

Bieleman, J. (1999) *'Farming system research as a guideline in agricultural history'*, in B.J.P. van Bavel and E. Thoen (eds), *Land productivity and agro-systems in the North Sea area. Middle Ages–twentieth century. Elements for comparison*, Turnhout, pp. 235–250. (CORN Publication Series; 2).

Bublot, G. (1957) *La production agricole Belge. Etude économique séculaire 1846-1955,* Louvain.

Clicheroux, E. (1957) 'L'évolution des terrains incultes en Belgique', *Bulletin de L'Institut de Recherches Économiques et Sociales*, 13, pp. 497-524.

Dejongh, G. (1996) *Krachtlijnen in de ontwikkeling van het agrarische bodemgebruik in België, 1750-1850,* Louvain. (Workshop in Quantitative Economic History. Research paper; 96.01).

Dejongh, G. and Thoen, E. (1999) 'Arable productivity in Flanders and the former territory of Belgium in a long-term perspective (from the Middle Ages to the end of the Ancien Régime)', in B.J.P. van Bavel and E. Thoen (eds), *Land productivity and agro-systems in the North Sea area. Middle Ages–twentieth century. Elements for comparison*, Turnhout, pp. 30–64. (CORN Publication Series; 2).

Droesen, W.J. (1927) *De gemeentegronden in Noord-Brabant en Limburg en hunne ontginning. Eene geschied- en landhuishoudkundige studie*, Roermond.

Engel, R. (1956) 'Le partage des biens communaux dans le Duché de Luxembourg depuis Marie-Thérèse jusqu'à la fin de la domination autrichienne', *Hémecht. Zeitschrift für Luxemburger Geschichte*, 9, pp. 32-55 and pp. 178-205; 10, pp. 72-87; 11, pp. 72-89.

Errera, P. (1891) *Les masuïrs. recherches historiques et juridiques sur quelques vestiges des formes anciennes de la propriété en Belgique*, 2 vols, Brussels.

Godding, P. (1987) *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle*, Brussels.

Goossens, M. (1993) *The Economic Development of Belgian Agriculture: a Regional Perspective, 1812-1846*, Louvain. (Studies in Social and Economic History; 24).

Hopcroft, R.L. (1999) *Regions, institutions and agrarian change in European history*, Ann Arbor.

Houtte, J.A. van (1964) *Economische en sociale geschiedenis van de Lage Landen,* Antwerp.

Houtte, J.A. van (1977) *An economic History of the Low Countries 800-1800*, London.

Jacquemyns, G. (1929) *Histoire de la crise économique des Flandres, 1845-1850*, Brussels.

Knaepen,, R. (1982) *Mol-Baelen-Desschel 1559-1795: de oude keizerlijke vrijheid en haar voogdijdistrict*, Mol.

Lindemans, P. (1952) *Geschiedenis van de landbouw in België*, Antwerp.

Looveren, E. van (1983a) *De gemeentegronden in de provincie Antwerpen: de privatisering van een eeuwenoud gemeeschapsgoed. Een totaalbeeld en vier case studies*, Louvain. Unpublished dissertation University of Louvain (KUL).

Looveren, E. van (1983b) 'De privatisering van de gemeentegronden in de provincie Antwerpen: vier case studies', *Bijdragen Hertogdom Brabant*, 66, pp. 189-219.

Moeskop, G. *Het gebruik van gemene gronden in de Antwerpse Kempen tijdens het Ancien Regime*, Louvain. Unpublished dissertation University of Louvain (KUL).

Osta, W. van (1989) 'De terreinwoorden aard, ort en egert', *Naamkunde*, 1-4, pp. 100-135.

Ostrom, E. (1991) *Governing the commons. The Evolution of Institutions for Collective Action*, Cambridge.

Page, H. De and Dekkers, R. (1975) *Traité élémentaire de droit civil Belge. Tôme V. les principaux contracts usuels II Les Biens I*, Brussels.

Ruwet, J. (1943) *L'agriculture et les classes rurales au Pays de Herve sous l'Ancien Régime,* Liège.

Slicher van Bath, B.H. (1960) *De agrarische geschiedenis van West-Europa (500-1850),* Utrecht-Antwerp.

Speybrouck, A. van (1884) 'Environs de la ville de Bruges. Le Beverhoutsveld situé dans la commune d'Oedelem', *Annales de le Société d'Emulation de Bruges*, 2, 6, pp. 155-268.

Thoen, E. (2001) 'A 'commercial survival economy' in evolution. The Flemish countryside and the transition to capitalism (Middle Ages–19th century)', in P. Hoppenbrouwers and J.L. van Zanden (eds), *Peasants into farmers? The transformation of rural economy and society in the Low Countries (Middle Ages–19th century) in light of the Brenner debate*, Turnhout, pp. 102–157. (CORN Publication Series; 4).

Thoen, E. and Vanhaute, E. (1999) 'The 'Flemish Husbandry' at the edge: the farming system on small holdings in the middle of the nineteenth century' in B.J.P. van Bavel and E. Thoen (eds), *Land productivity and agro-systems in the North Sea area. Middle Ages–twentieth century. Elements for comparison*, Turnhout, pp. 271–296. (CORN Publication Series; 2).

Tilborghs, E. (1987) *Een nieuwe bestemming voor de woeste gemeentegronden: een onderzoek naar het lot van de gedurende 1834-1884 geprivatiseerde gemeentegronden in de Antwerpse Kempen,* unpublished thesis, Louvain.

Tilborghs, E. (1988) 'De privatisering van de gemeentelijke heide in de Antwerpse Kempen gedurende de negentiende eeuw', *Tijdschrift van de Belgische Vereniging voor Aardrijkskundige Studies*, 2, pp. 303-317.

Vandenbroeke, C. (1975) *Agriculture et alimentation. L'agriculture et l'alimentation dans les Pays-Bas Autrichiens. Contribution à l'histoire économique et sociale à la fin de l'Ancien Régime,* Ghent-Louvain.

Vanhaute, E. (1993) *'Eigendomsverhoudingen in de Belgische en Vlaamse landbouw tijdens de 18de en 19de eeuw'*, Belgisch Tijdschrift voor Nieuwste Geschiedenis–Revue Belge d'histoire contemporaine, 24, 1-2, pp. 185-226.

Verhulst, A., (1957a) 'De Boeren I. de Middeleeuwen', in J. Dhondt, J.L. Broeckx and C. Declercq (eds), *Flandria Nostra,* Antwerp, p. 93.

Verhulst, A. (1957b) 'Het platteland', in J. Dhondt, J.L. Broeckx and C. Declercq (eds), *Flandria Nostra,* Antwerp, pp. 11-42.

Verhulst, A. (1964) Het landschap in Vlaanderen in historisch perspectief, Antwerp.

Verhulst, A. (1966) *Histoire du paysage rural en Flandre de l'époque romaine au XVIIIe siècle*, Brussels. (Collection Notre Passé).

Verhulst, A. (1980a) 'De eerste agrarische expansie: de Middeleeuwen', in A. Verhulst and G. Bublot (eds), *De Belgische land- en tuinbouw. Verleden en heden,* Antwerp, pp. 9-11.

Verhulst, A. (1980b) 'Le paysage rural en Flandre intérieure: son évolution entre le IXième et XIIIième siècle', *Revue du Nord*, 244, pp. 11-31.

Verhulst, A., (1981) 'Landbouw', in D.P. Blok and W. Prevenier (eds), *Nieuwe Algemene Geschiedenis Der Nederlanden,* vol. 1, Haarlem, pp. 169-178.

Verhulst, A. and Blok, D.P., (1981a) 'De agrarische nederzettingen' in D.P. Blok and W. Prevenier (eds), *Nieuwe Algemene Geschiedenis Der Nederlanden,* vol. 1, Haarlem, pp. 153-164.

Verhulst, A. and Blok, D.P., (1981b) 'Het natuurlandschap', in D.P. Blok and W. Prevenier (eds), *Nieuwe Algemene Geschiedenis Der Nederlanden,* vol. 1, Haarlem, pp. 116-142.

Vliebergh, E. (1908) De Kempen in de 19de en in 't begin van de 20ste eeuw, Ieper.

Vos, L. F. de (1949) 'Het Vrijbroek en de 'gemeynten' te Mechelen', *Mechelse bijdragen,* 3-4, pp. 30-63.

Willems, H. (1962) *De ontginningen van de Antwerpse Kempen in de achttiende eeuw,* Louvain.

6 The management and use of the commons in France in the eighteenth and nineteenth centuries

Nadine VIVIER, University of Maine

I. Introduction

For a long time, the commons have suffered from a lack of interest by twentieth-century historians. Studies of French commons and use-rights have focused mainly on the end of the *Ancien Régime* (Bloch, 1930) and the Revolutionary Period from 1789 to 1795. This interest was motivated by the way in which commons could be used to demonstrate points in two larger burning ideological debates. The first was the debate about the modernization of agriculture and the comparison with British agriculture, considered as 'the model'. In this approach, enclosure and the disappearance of the commons were viewed as the necessary pre-conditions for progress. The second debate addressed the interpretation of the French Revolution and the role played in it by the peasantry (Jones, 1988). The nineteenth century was neglected, as if in anticipation of the already announced death of the commons, in spite of the fact that commons still cover 9% of the surface of France today. Whether neglected or caught in the middle of ideological debates, the commons have been consistently condemned by twentieth-century historical research, in accordance with the Physiocrats' theories. Influenced either by liberalism or Marxism, historians have considered all use-rights as archaisms, and their survival has been attributed to a backward peasantry opposed to the trends towards capitalism and individualism among the richer farmers.

The area covered by this chapter will be the whole territory of France. This covers a great diversity of environments and institutional arrangements, among which the commons were unevenly distributed. A synthesis has the disadvantage that it prevents us from describing every situation in detail, and in consequence only the main types of situation will be presented here. But such a synthesis is well suited to comparison and provides the tools to reflect upon different forms of management.

This study will focus on the commons, lands possessed by communities of inhabitants. This form of property is difficult to define, as will be seen later. Use-rights over privately owned land were also important: gleaning of grain (*glanage*), gleaning in the vineyards (*grappillage*), and the harvest of the stubble (*chaumage*) which farmers tried to suppress by using the scythe. The most important rights were *vaine pâture* and *parcours* which concerned the pasture of cattle on the common arable land when it lay fallow. (*Vaine pâture* was exercised within a parish, *parcours* on the territory of neighbouring parishes). These rights over private property were given legal force through byelaws. In private or royal forests a third kind of pasture right existed, which was granted by the owner of the forest. This took the form of an agreement between the concerned parties. The rights, often granted centuries earlier by the landlord, were usually exercised for free, or small charges could be levied.

Although commons and use rights over private property were always intertwined, they were disassociated by the French administration during the eighteenth and nineteenth centuries due to their fundamentally different character. Both were regulated by the assembly of the village inhabitants, but they were not necessarily granted to the same group of people. Usually, everyone could enjoy use-rights on private property, more or less, and the poor had access; on the contrary, we will see that the rights to use commons were often restricted to the landowners, and the poor might be excluded. Commons were the landed patrimony of the community. They could be exploited either in a collective way, as common pasture, or in an individual way, by leasing out the common as sub-divided blocks of land. The management arrangements could be varied since the use-rights over the commons were at the will of the joint owners. In contrast the use-rights over private property could not be transformed: either they survived, or they were suppressed. As they were governed by local custom, comprehensive accounts can only be provided for small areas. Hence they will be discussed here only in broad outline. We will focus here on use-rights on the commons. When referring to use-rights on privately owned land, it will be precisely stated.

II. The nature of common land

II.1. Commons and use-rights

The sources concerning commons and use-rights are very abundant but often vague, especially for use-rights which varied from one place to another. It is difficult to estimate the extent of the commons. The terriers (or *compoix*) made during the Ancien Régime, only registered landed property liable to pay property tax, and therefore commons do not appear. Nevertheless, during the eighteenth century, they were mentioned in some terriers made by landlords and some *cadastres*, such as the one made in Savoy (Nicolas, 1978), and the *cadastre* made by the *intendant*[1] Berthier de Sauvigny in the Île-de-France (Touzery, 1991). The inquiries held by the royal government between 1760 and 1780 hardly give any figures as to area, and the few that they do give are completely unreliable. In those inquiries, the local intendants and their *subdélégués* responded to the questions of the Agriculture Secretary Bertin in a rather literary way, qualitatively rather than quantitatively: for example, the assessment mentioned 'very small commons' or 'huge commons' (AN, H 1488–1496). Some respondents acknowledged their ignorance: 'We dare say that regarding the sum of commons and use-rights, their quality, their products, nothing is known precisely' (AN, H 1495, 21).

The description of the commons was often drawn from the agronomists' or Physiocrats' texts, who considered commons to be harmful, and as the crucial obstacle blocking the modernization of agriculture. We should therefore question the reliability of these descriptions. The work of the Comte d'Essuiles, the *Traité Politique et Economique des*

[1] During the Ancien Régime the intendant was the administrator of a '*généralité*', a province. They were 33 in number in 1788. They represented the king and monitored the administration. They had powers over justice, police and finance. A few *subdélégués* helped each intendant in each *généralité*.

Communes, has had the longest-lasting and widest influence. As an adviser to the Contrôle Général des Finances (financial administration), he had to write official documents and to make decisions concerning the partition of the commons in the Soissons area. The Comte d'Essuiles demonstrated how mistaken the statistics could be, because the local inhabitants preferred to keep quiet about common lands rather than declaring them (Essuiles, 1770, 48–51). As his book became well known, the descriptions he gave would be cited many times over the following century: for example, 'The wasteland's surface is dried, hardened by winds and sun, hardly covered by a few exhausted plants', and 'marshlands are huge sewers whose putrefaction spreads countless diseases' (Essuiles, 1770: 54, 59). Other books showed the same picture, sometimes painting it even more lyrically and catastrophically (La Maillardière, 1782).

L'Abbé Rozier, in his *Dictionary*, described each category of commons. Concerning waste lands, pastures and marshes, he wrote: 'Our best lands today looked formerly like commons: through farming they have become fertile... Here is a land, excellent in itself, lost for agriculture and of no value for cattle.' And about the woodlands: 'Show me, in the whole realm, only one piece of wooded commons in a good state, unless directly managed by the Forestry Commission'. The following statement written in a report of the Agricultural Society of Bourges, in 1767, sums up the prevailing opinion among the elite: 'The title of commons itself refers to the most neglected land'. Clearly, common use was condemned. In the works of the years 1760–1780 we find the same idea expressed in Hardin's theory today: the tragedy of the commons is unavoidable.

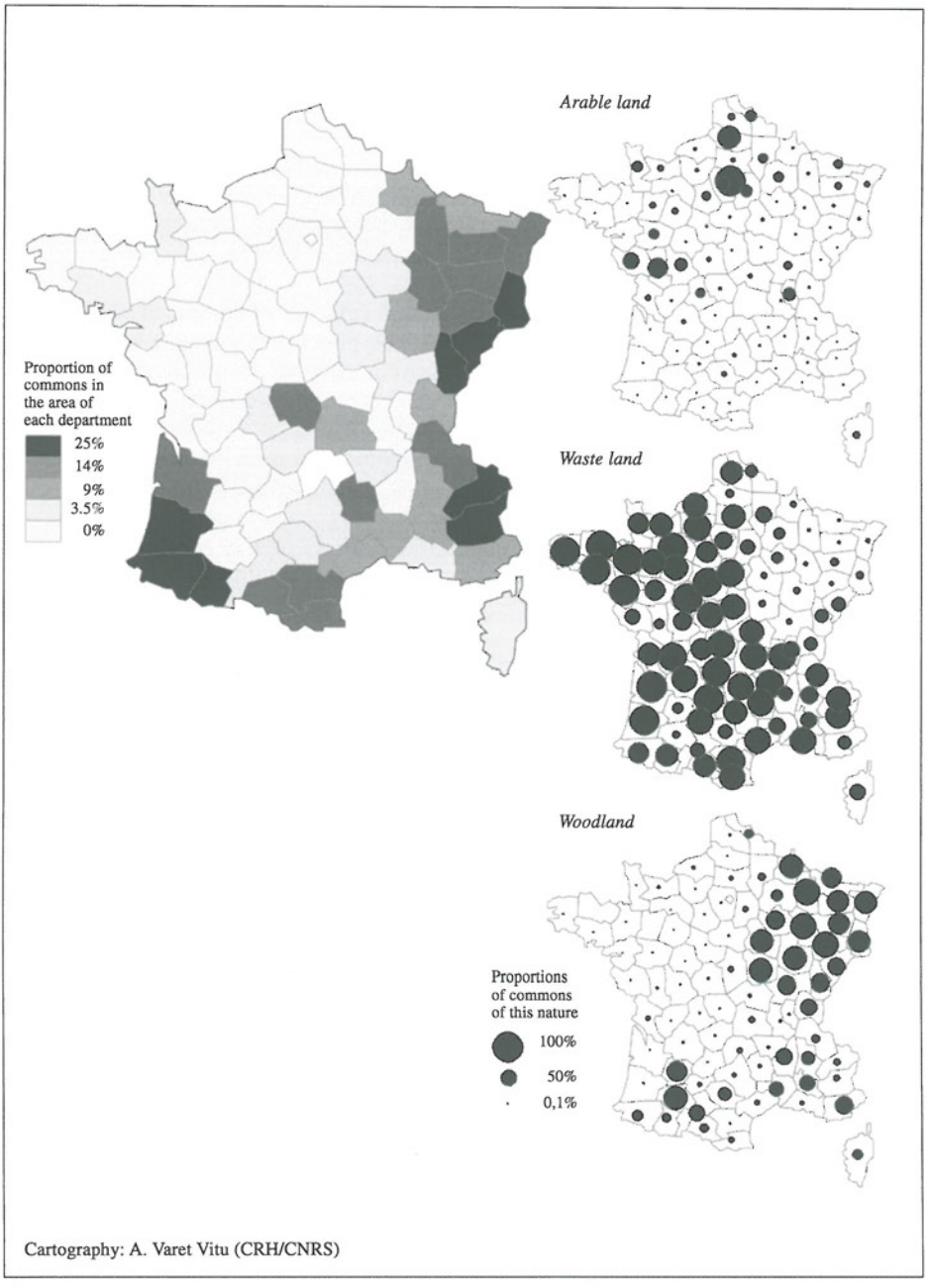
During the French Revolution, some commons were shared out, according to the law of 10 June 1793, and other parts were usurped and taken out of common use. It is difficult, perhaps impossible, to gauge the extent of these practices. Even during those years, the administrative authorities were not able to gather this information reliably and many records have been lost. It is only with the cadastre ordered by Napoléon in 1807 that all the land was recorded in the census. Completed in most of the communes between 1820 and 1845, it provides rather more reliable data about the extent and nature of the lands and their value. The Chamber of Deputies also asked for national surveys of commons in 1846 and 1859. Of course, the figures given for each *département*[2] contain errors: unintentional errors in the sums, and deliberate errors intended to mislead the taxation authorities with the intention either of paying less by concealing a part of the land, or alternatively of adding to the land over which property rights were claimed. The estimated value of commons was low, but it is notable that some commons reached a good price when they could be utilised as good arable land or as valuable timber forests. This indicates variation even within the stereotype of unproductive commons.

The commons are presented here using the data from the statistics of 1846 (AN, C 913).

---

[2] The *département* is the main administrative division in France. Eighty-three *départements* were created in 1789, increasing to 89 during the nineteenth century. The *préfet*, representative of the State, is at the head of the administration in the *département.*

Figure 6.1 Area and nature of commons in France, 1846



Source: AN, *C 913*.

II.2. Regional Descriptions

The kinds of commons and the resources available from them varied considerably from one region to another. Here, only a summary picture of the main regions of France can be drawn. The focus will be mainly on the northern part of France.

II.2.1. The Paris Basin

In the plains around Paris and the Île-de-France, including Normandy, Beauce and the northern provinces (Flanders, Artois, Picardy), one finds an area of large-scale farming, similar to the sheep-corn system of England. The arable land was devoted to cereals, and some specialized crops (such as flax or hemp) which provided work for many day-labourers, employed on the big farms. Cattle-breeding was secondary, providing manure and draught power. Horses were fed with the oats cultivated and sheep, in limited numbers, were fed on the fallow of the open fields, on the cultivated fields after the harvest, and on common meadows. This right of *vaine pâture* was vital for the sheep. Farmers were encouraged by the agronomists to enclose parts of their estates in order to sow clover. They were legally authorized to do this, and often encouraged by intendants, with the result that this frequently occurred.

The commons here were relatively unimportant. They disappeared long before collective tenure was considered an obstacle to progress. The villages sold their lands to pay debts in the sixteenth and seventeenth centuries. Landlords tried to absorb them into their own estates, and some inhabitants usurped commons, brutally in some cases when they were sufficiently powerful, or surreptitiously, bit by bit. On the plateau, where large farms predominated, commons disappeared entirely, but they survived these pressures in the valleys where small estates were more numerous. The small commons which remained aroused cupidity. They can be described as falling mainly into three categories:

– common pastures: some wastes and some wet lands in the valleys, especially along rivers (*prairies humides*). Towards the west, in Normandy, common meadows and some common pastures survived which butchers tried to obtain, especially those butchers who supplied the Parisian market.

– marshes or swamps (*marais*) where drainage would have been too expensive, especially in Picardy and the Somme valley. Some attempts at drainage occurred in the eighteenth century, at a time when the price of land was rising, but without success (Rosenthal, 1992: 39–70). In the northern provinces of France, there were also important peat-bogs. Their exploitation provided fuel for the inhabitants (see the chapter by Martina de Moor in this volume).

– arable land possessed by the community could be rented or leased out in small plots for cultivation. In areas of high population density, a small field could be productive: manure was provided by the town (horses, night soil) and high yields were achieved by specialised production geared for sale in urban markets. The allotment of commons was frequent in Flanders, where a highly productive agriculture, following the 'Flemish system', could feed a family on a small-holding. (The average extent of the commons in Flanders was about 5% of the surface area).

II.2.2. The north-east of France

In this region commons covered huge areas. In some districts agriculture followed the Flemish model, such as on the loess plain in Alsace and around Nancy in Lorraine. But other regions, where sandy or chalky soils were poor, were the classic areas of open-field farming and the three-field system. On the common fields, use-rights were numerous, highly restrictive and strictly regulated. Three main types of land utilisation were to be found on these huge commons:

– arable land divided into small plots and rented or leased to the inhabitants. They were important in Alsace and around a few towns such as Nancy, where the high labour input per unit on small farms led to high land productivity (Boehler, 1994: 1265–1377).

– common waste used for pasture. These could be extensive and of low productivity.

– forests. Here communities possessed woodlands of high value, with mature trees for timber. They provided many resources for the local inhabitants: firewood (*affouage*) and construction wood (*maronage*) were given to the residents; the sale of some felled stands in the woodland generated income for the communal budget; and there was pasture in the underwood for the cattle and horses (*pacage*) and for pigs (*panage, paisson*), as well as the gathering of berries, and the picking of mushrooms, beech-nuts and acorns.

II.2.3. Brittany

In this province of *bocage*, the agrarian system brought together the intensive cultivation of cereals and textile plants with extensive cattle breeding. Collective use-rights over both private fields and commons were nearly non-existent. Abundant cattle were fed on that part of the land which lay uncultivated: wastes, *terres vaines et vagues*, heathland, and fallow. In 1750 this extended over one third of the land. Part of them were the '*communs*', which were juridically considered as quite different from the 'commons' elsewhere in France. They belonged to the domain of the landlord, and his vassals were allowed to exercise use-rights. As early as the eighteenth century, landlords were able to claim and obtain two thirds of these lands as private property free of all use-rights, which they then proceeded to rent to the local inhabitants. The third part was reserved for the inhabitants of the parish, the ancient vassals of the landlord. Determining who were to be the beneficiaries of such a '*commun*' was a real imbroglio. The parishes in Brittany were extensive and made up of many scattered hamlets. The manors were small, their boundaries overlapped and there were often two or more manors in the same parish. Thus when the revolution abolished the rights of the landlords, those inhabitants in favour of the division of those lands came up against great difficulties. As they did not want an equal right to the partitioned land for every inhabitant, but exclusively a right for the ancient vassals, they needed to determine in a court of law who the rightful claimants might be. The cost of legal proceedings was so high that it was generally prohibitive. This is why those lands remained '*communs*', ruled differently from other commons in France, until 1850 when a change in the law simplified procedures. They were then rapidly partitioned as private property.

The 'real commons', possessed by the municipality, were very small, consisting of poor grazing land, sometimes used for the harvesting of plants, or even the gathering of humus to fertilize the privately-held fields.

II.2.4. The mountains

The economy of the mountains was determined, of course, by altitude and climate. While the southern part of the Alps and the eastern Pyrénées are dry, the Jura and northern Alps are wet. Here I will present a brief schematic picture.

In the Massif Central an archaic subsistence agriculture survived. Cereal yields were low, and cattle, fed on common pasture, were a secondary resource providing manure. Commons were seldom well kept, and had very low levels of productivity.

In the high mountains of the Alps, the Pyrénées and the Jura, a specialization towards cattle-keeping emerged and then intensified during the eighteenth century, based on fattening the animals during the summer, and selling butter and cheese. Here the area of commons was considerable and provided the pasture for the cattle. They were principally of three types:

– common pastures in the valleys, often grassland used for the production of hay. The first mowing occurred in June, and was kept in a communal hayloft before being divided or sold to the inhabitants to feed the beasts during winter. A second harvest was sometimes taken. At the end of the summer and in the autumn, the cattle coming back from the high pastures were pastured here for a time before being returned to the byre.

– upland forests. Their value could be high, such as these in the Jura with their beautiful timber trees, or low where they were hard to exploit, as in the Alps. Important local industries often grew up based upon the wood supplies (*tournerie*). The pasture in the underwood was essential to feed the livestock during the spring, when the provisions of hay had been consumed and the mountains were still under snow.

– mountain pastures (*alpages*). These provided a rich pasture after the snow thawed. They were grazed by the cattle of the inhabitants, and when very extensive could be hired out to transhumant sheep flocks.

II.2.5. Southern France

To complete this quick survey, we must say something briefly about the commons in this region:

– marshy districts. Large swampy areas were the property of the communities: non-porous and infertile soils, producing moorland that was flooded in winter and dried-out in summer, and often unhealthy because of insects. The most extensive were the Landes in Gascony, an area of sparse, scattered population and very low productivity. These moors were mainly used by shepherds coming from the Pyrénées during the winter. In 1857, a specific law required their draining and afforestation. This was to be funded partly by the state and partly by municipalities selling parts of their estate.

– on the Mediterranean plains, the surface area of the commons varied greatly. They were mainly garrigue (Mediterranean moor, scrubland) which provided poor grazing land. As much non-cultivated private land existed in the eighteenth and nineteenth centuries, these wastes aroused only slight interest.

This survey shows great diversity: commons covered small areas in the western part of France as early as the eighteenth century and even before. In contrast, the resources

that could be obtained from commons were essential in the eastern part of the country and in the mountains. These consisted of fuel, fodder, stall litter and sometimes reserves of land for temporary cultivation. If it was true that some commons were of low value and badly kept, equally other commons were of high value, as shown by the map.

Except in Brittany where they were almost non-existent, the use-rights exercised on private lands restrained agriculture in the northern half of the country. The scattering of plots in the common fields forced people to follow set rotations of the crops and they were subject to the strict application of *vaine pâture* on every property. In the southern half of France, regulating use-rights seems to have been done in a flexible manner, but as yet no really thorough study of these issues exists. Here an owner could deny the right to another's animals to graze on part of his estates, generally on a quarter of this area. It was easier in Dauphiné than in other regions: the owner was not bound to enclose the land to prevent grazing, as it was enough that he should drive a pole in his field, by way of a signal that it was out of bounds. This system seems flexible, but was it so in practice?

III. The legal basis of common right in the eighteenth century

Under the *Ancien Régime*, communal property was managed according to customary laws. Under the feudal system, local customs were set up in each seigniory and progressively they became laws. Those oral customs were often written down during fifteenth century, at least in the case of the most important ones. There were about sixty customary laws covering a county, and nearly 400 local customs, peculiar to a town, a borough or a very small county (ancient seigniory). In the southern half of France, the 'written law' or 'Roman law' prevailed but some customary laws were nonetheless used. The northern half was the country of customary laws: local customs prevailed, unless it was the custom of Paris, which became more and more important by the will of the royal administration. Every judgement or edict made by the courts had to be taken into account by the *parlements.*[3] Customary laws determined civil law as well as the regulation of agriculture, but they were often dissimilar and were silent on some questions. 'In France, about 450 customs can be counted, general as well as particular and only around 100 of them are concerned with the ownership and administration of these commons' (La Maillardière, 1782: 302). In cases not addressed by the provincial customs, local unwritten byelaws prevailed, defining the rights of property and tenure over commons. These byelaws varied from one parish to the next, hence the considerable freedom left to the discretion of the judges in seigniorial courts during disputes. This created a very complex situation, which was further complicated by ideological debates.

[3] Until 1789, the assemblies called parliaments were the upper courts of justice, courts of appeal. They also registered the laws (*enregistrer les lois*). The members were lawyers who purchased their office (venality of the offices). The parliament of Paris, and even parliaments of provinces, could remonstrate when the king asked for the registration of a law and this gave them a political role.

III.1. The origin of commons

Communes rarely possessed title-deeds for their property rights, but they claimed that these lands had been their property since time immemorial. This was contradicted by the claims of landlords as to the primacy of their property rights.

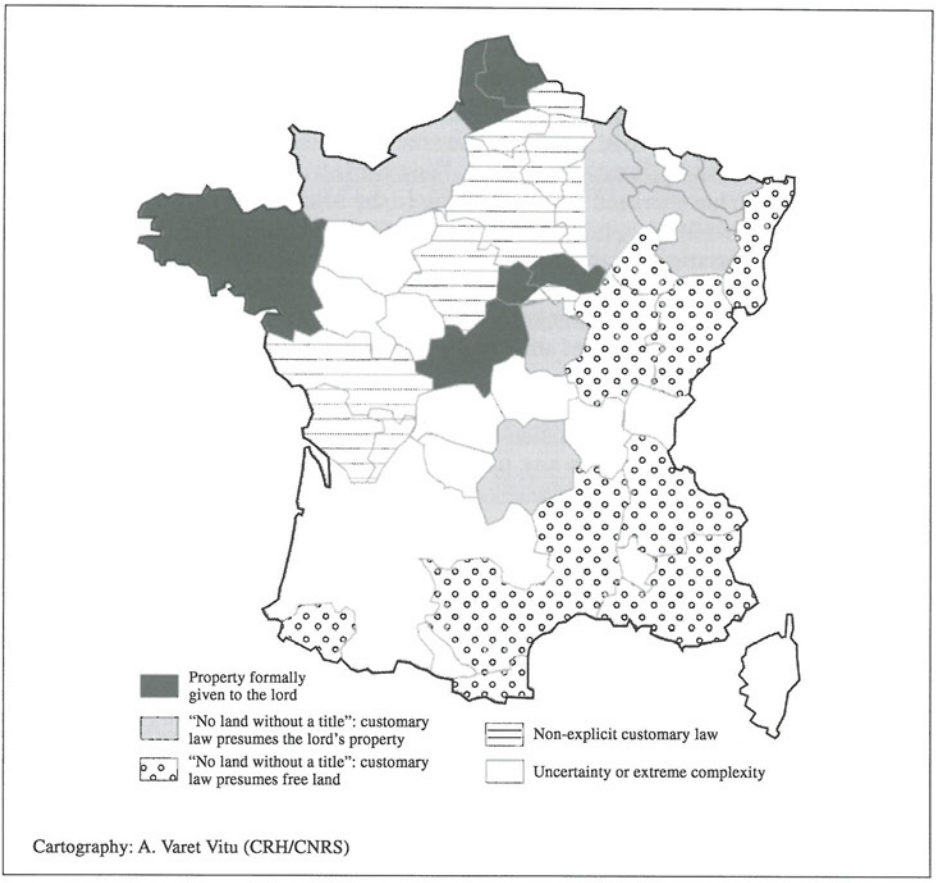
As a consequence, jurists argued for no less than three centuries about the origin of the commons and continued to do so until the beginning of the twentieth century. There were two conflicting theories. Those jurists studying Roman law acknowledged the inhabitants' natural and primary ownership. They considered private property and collective property to have existed since antiquity. In the Middle Ages the landlords were supposed to have seized the common lands and then granted use-rights to the inhabitants. The second theory stemmed from jurists studying feudal law. To them, the Franks arrived during Middle Ages in an almost empty country. The colonisers normally shared out the unoccupied lands, and subsequently landlords granted out use-rights. These two theories were not innocent and neutral, as they had direct practical implications between the sixteenth and eighteenth centuries when the landlords, middle class and peasants all coveted new land and wanted to appropriate the commons. The first theory defended the local community of inhabitants: the lands had been theirs from the beginning, which explained why they did not have any title-deeds, but the landlords had subsequently deprived them of their own property.

The second theory supported the landlord, and was the theory officially adopted by the royal government. The royal edict of 1669 was based on the conviction that commons were part of the lord's concession of use-rights over lands he owned (forests and pastures). The landlord retained the ownership of this land and the inhabitants only enjoyed a use-right. This is the basis of the institution of *triage* which entitled the lord to claim back the full ownership of one-third of this land, free of any servitude, by abandoning any rights over the remaining two thirds, which would be recognized as the community's property. In the eighteenth century, landlords frequently claimed for *triage*. If the inhabitants, considering their property as dating from time immemorial, opposed it, the judges would ask them to prove their rights. This practice corresponded to the Parisian custom. As the villages rarely possessed titles, the landlords usually obtained the *triage*, granted to them by the courts of justice, those *parlements* whose members were landlords. The Parisian custom prevailed in the seventeenth century by the will of the king. This is the reason why in Lorraine, where the *triage* did not exist in the customs, the royal administration introduced it in eighteenth century. The southern part of France remained more resistant to these changes.

As provincial customs were so disparate, we must now look at the different categories of customs in existence.

III.2. Who owned the commons?

Figure 6.2 Property rights over wastes and commons, 18th century France



Sources: Essuilles, 1770: 251–253; La Maillardière, 1782: passim; Glasson,1890.

– Some regions were governed by the maxim 'no land without a lord.' This was the case in the former royal domains, and jurists therefore wanted to establish it as a general rule. They operated on the presumption that the commons belonged to the lord and that the burden of proof of ownership thus fell on the community. The Parliament of Brittany decided in 1630 that the lord enjoyed the ownership of all the wastes.

– The 'no landlord without a legal title' maxim prevailed in the Midi, Provence and Languedoc (regions with a Roman law tradition) and in the east of Alsace (with a heritage of Germanic law). In these regions the land remained free unless the landlord could prove his rights. Thus, the community of inhabitants was the owner of the commons and the lord could not ask for triage. (La Poix de Fréminville, 1760). Furthermore, in these regions, landlords generally left the assembly free to meet and manage their affairs alone.

However, only a few regions succeeded in preserving this status against the assaults of the central administration. Elsewhere, the lord often claimed for *triage*, taking advantage of the confusion between non-cultivated lands and vacant lands (abandoned for lack of an heir). This was the case in Dauphiné, although known to be a province of *'franc-alleu'* (allodial rights), and in Burgundy despite a 1774 *parlement* judgement excluding landlords from the ownership of the commons. This was a very unpopular course of action as the inhabitants believed that they were the owners and felt cheated. Sometimes, the landlord asked for *triage* more than once, some decades apart (as in Burgundy).

The status of communal property was one of extreme complexity, and it is not the intention of this chapter to examine it exhaustively. However, it should be mentioned that the practical consequences of this complexity were the numerous attempts by landlords as well as inhabitants to appropriate the lands for themselves. Both parties were encouraged in this by legal representatives who saw in these never-ending lawsuits an inexhaustible source of revenue.

III.3. The legitimate users

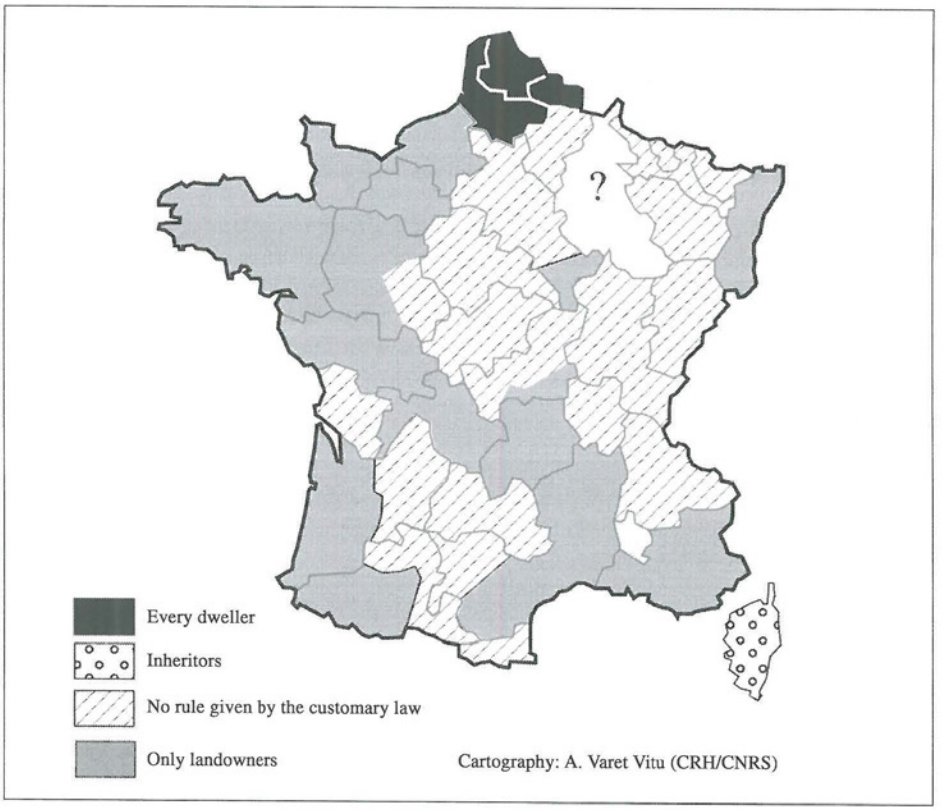
Although the approaches varied greatly from one place to another since use-rights were often determined by byelaws, we can roughly describe the situation and distinguish three cases (Vivier, 1998):

– in the most frequent case, the landowners were the only beneficiaries of the commons. Considered as a dependence of their private property, commons were restricted for the use of the owners or their tenants. Sometimes, help was given to the poor who were allowed to send one or two beasts onto the commons. Most often, grazing rights were granted strictly in proportion to the size of property-holding or tenancy. This was the case in Brittany, Normandy and Anjou. 'The dweller who possesses nothing has no right to the use of commons.' Some other provinces applied more restrictive rules. In Auvergne, the rule of 'straw and hay' or levancy and couchancy, written into the custom of the whole province, was strictly observed and reserved the use of the commons to landowners or tenants who lived in the village: the landless had absolutely no rights, nor had the non-resident, even when an owner. The rule further stipulated that the farmer (whether the owner or his tenant) sent onto the commons only those animals which he had fed during winter with the straw and hay he harvested on his own holding in the village.

In Béarn and Alsace, the rules were even more restrictive. To be a member of the commune, to vote in the assembly and to use the common lands, it was necessary to be a landowner, to reside in the village and to possess the rights of a citizen, either through inheritance as in Béarn (Zink, 1997) or by purchase, the latter granting more limited rights. In the plain of Alsace, all the citizens of the village enjoyed full rights. Limited rights were also given to *manants*, villagers who paid a fee for induction into the community and a fee for the use of the commons. Other people (the poor and foreigners) had no rights (Boehler, 1994: 387–392).

– The second way of allotting rights was radically different: every inhabitant, after a few months of residence, was allowed to send his animals to graze on the common pastures and to have a share of peat or wood. This was only the case in the provinces of northern France (Flanders, Hainaut, Cambrésis, Artois). Grazing was either free or each animal was liable to a charge which provided income for the communal budget.

Figure 6.3 Beneficiaries of use-rights on commons, France, c. 1750 *(droit de jouissance)*



Source: Vivier, 1998: 48.

– In a third situation, the provincial customs were silent and each commune determined its own rules. It is consequently very hard for the historian to determine the precise arrangements because rules were often implicit rather than explicitly recorded. It was usually said that 'everyone' could use the common lands. But this rather imprecise formulation often meant that non-resident landowners and poor people had no rights, and they were restricted to grazing their animals along paths (Burgundy) (Saint Jacob, 1960).

When the assembly of the village was weak vis-à-vis the seigniorial lord and the royal administration, and did not place great value on the commons, there was no genuine regulation (Île-de-France). In contrast, when the community was powerful and the common lands of considerable importance for the local economy, the village assembly decided who was allowed to use them and elected one or more police guards annually. Wood rights were generally shared equally between all households (Corvol, 1981). For pastures, the usual practice can be described as one of minimum access to grazing for everyone, even the landless, limited to a small number of animals, with additional use

being granted in proportion to land owned. For example, each household could be granted free grazing for two animals, cows or sheep, and in addition for a few others per each pound of land tax paid. Above this number, each head of cattle was charged.

Everywhere, commons were conceived of as providing for the vital needs of the community. Commercial exploitation was prohibited unless those vital needs were first satisfied. When commons were large relative to the population, their products could be sold (woodcuttings, timber, or the hiring out of mountain pastures).

It is noteworthy that most of provincial customs gave the poor nearly no use-rights. In contrast, the rules for *vaine pâture* gave the landless everywhere grazing rights for one or two animals. Nevertheless, the royal administration asserted as a principle that commons were also the patrimony of poor.

IV. Management institutions in the eighteenth century

Customs or local byelaws provided the legal framework for use-rights. It was then up to the communities to enforce the rules.

IV.1. Management by the community of inhabitants

In France, the regulation of the commons was not the responsibility of a specially constituted institution but was the responsibility of the local community of inhabitants. Provincial customs usually defined the rules of management as well as the functions of the community which was responsible for the application of these rules. Where provincial customs were silent, the community set the rules itself. This explains why they could vary from one village to the next.

The powers of the local community varied greatly (Jacquard, 1976; Le Roy Ladurie, 1975; Follain, 1999). Usually, the assembly of inhabitants decided upon all important matters: in particular it managed taxation, the vestry and communal property. The parish and village commune were in most cases identical. For the execution of these tasks the assembly elected a *syndic* or mayor [4], as well as the *messiers*, men who surveyed the crops.

The effective powers of the assembly depended on its autonomy relative to the seigniorial lord (whether or not he could choose the mayor, or preside over the meetings for example) and towards the royal power, whose powers increased if the village fell into debt. The community defined the members of its assembly and the people who were allowed to use the commons, although the two groups often consisted of the same individuals.

---

[4] During the Ancien Régime, the assembly of the village elected each year a man accountable for the management of the commune. He was known by various names: in the south, *consul*, *échevin*, in the north, *maire*, *syndic*. From 1790 on, they were called *maire* and held both offices, representative of the administration and representative of the inhabitants.

Aside from the case of management by the village community which was often coincident with the parish, other forms of special status existed: commons might belong to hamlets or be the joint property of a number of neighbouring villages. Hamlets in the Massif Central were the legal owners of the commons: there could be two or three groups of landowners in a parish, and sometimes as many as thirty groups. Those lands were called *communaux des sections de communes* after 1800. In this region of scattered settlement, the feudal structures were also highly fragmented and this preserved the old forms of organization. In this case, it was the assembly of the landowners, chief of households of the hamlet, that was allowed to determine the use of their commons.

Joint commons were frequently found in marshlands, moors, forests and mountain pastures. Of course, their management was complex. In the Pyrénées, they were the joint property of all the villages of a single valley. Those villages formed a kind of federation in order to manage these lands and to be strong enough to resist the lord. Where they suceeded they established valley unions (*syndicats de vallées*), powerful commoners' seigniories (vallée d'Ossau). They managed and strictly monitored their pastures, which ran from the valley floors up to the high mountains (Poumarède, 1984).

IV.2. The role of royal power

The intendant (the highest administrator in each province) kept a close eye on village communities. The local balance of power was an important issue to the royal administration, which especially wanted to protect communities from predatory landlords. In particular the intendant oversaw the village's financial management so as to avoid indebtedness, which might force the community to sell its property.

In the years 1760–1780, the government wanted to promote agricultural progress but feared the disappearance of the commons along English lines. Reports compiled on the English situation showed the smaller farmers being evicted as a result of enclosures and migrating in large numbers to towns. To avoid such a situation, agronomists and members of the government recommend the shared use of the commons which would be allotted equally between all households. The land was to be privately cultivated but the community would retain ownership. In this way, every household would have the use of a plot of land and the poor would not run the risk of losing it to creditors. It is noticeable that the government also wanted equal shares for each household, even though most of the provincial customs reserved rights exclusively to the landholders. This explains why, in many cases, communities who wanted to partition the commons refused to accept these plans because of the equal division advocated by the government.

Every parameter of management varied greatly from one area to another. A table summarizing the most characteristic cases can be proposed (Table 6.1). This complexity explains why the monarchy could not succeed in drawing up a general law to promote enclosure and the sharing out of the commons.

Table 6.1 Characteristics of common land in different regions of France

	General state of agriculture Use of commons	Entitled users	Enforcement of rules Monitoring	The role of the landlord	The role of the intendant and state intervention	The results
Burgundy Bresse	Ancient agriculture, common pasture was essential A shortage of land for cultivation The right to bring a plot of commons into cultivation temporarily by entitled users	'All inhabitants' In reality the community usually gave rights only to landowners social tensions	The rules, and among them, the the stinting levels, were not strict. Monitoring was not efficient	Ask for *triage* The lord presided over the meeting of the community's assembly	The state feared partition because of social tensions. This led indirectly to the maintenance of existing land structures	Over-exploitation, Degradation of commons. Usurpation, short-term management. No preservation of capital
Auvergne		Resident landowners or their tenants	The rules were strictly defined by customs. Monitoring by mutual watch only	Most of the lands were allodial, the lord had no right on them		
Brittany		Ancient vassals		Lords owned the 'communs', leased them and asked for *triage*	Draft bill of division Caution	
Provence	Ancient agriculture Abundance of private waste lands, less tension over commons	Landowners but the poor had a limited use	Monitoring by the provincial assembly and local council with cadastre	No right of landlords. Freehold lands	No interference. Preservation of the community's property	Infertile soil, low income Vigilance stops usurpation
Île-de-France	Modern agriculture Search for land to cultivate Small commons	'All inhabitants': members of the community	No effective monitoring	Asked for *triage*		Social tensions Usurpation and overexploitation
Flanders Trois-Évêchés	Modern agriculture, High yields	Equal rights for all inhabitants	Strict management by communities: they defined the rules and appointed guards	Received *triage* before division	Edict of sharing. The intendant enforced the edict	Good management
Alsace	Commons leased for private use, except woods	Strict definition: the citizens				Preservation of property and the environment
Béarn	Ancient agriculture Cattle-keeping is the only possible wealth	Strict definition: the citizens			Edict of sharing the commons of joint communities	Good management in the mountains, bad management on the plains
High mountain pastures Briançonnais		Definition by the community. Rights for residents and landowners		No right	No interference. communities retained their ancient autonomy	Preservation of property and the environment

IV.3. Case Studies

IV.3.1. Cases of degradation of the commons

In Auvergne, in the central mountains, agriculture retained an archaic form. The main product was cereals. Animals were important to provide manure and they found their fodder on the commons. Consequently, the common pastures were indispensable, as farmers could not keep cattle without them. The custom of the province of Auvergne defined strict rules which were rigorously enforced: only the resident landowners could graze their livestock, consisting of only those animals that they fed during the winter with the straw and hay they had harvested in the village. In so far as these commons were the possession of a hamlet, the assembly of the inhabitants of the whole parish could enforce only these general rules and the few landowners of the hamlet decided for themselves the number of beasts to pasture and the dates when this occurred. In practice, they enjoyed as much grazing as they needed and they did not have an efficient system of policing. Supervision was based on mutual surveillance by all of the residents (Chabrol, 1784; Lemaître, 1981).

The result was degradation of the commons. Over-exploitation was unavoidable, because no kind of regulation really existed. The rule of levancy and couchancy ('straw and hay') was not precise enough and there was no fine for offenders who sent more animals out to pasture than they were permitted to. As the commons did not yield any products directly, they were thought to deserve no maintenance. Hence the soil was poor and unproductive. The royal administration deplored this situation, and advocated the partition of the commons, but in vain because of the demand for an equal division among all inhabitants, in contradiction to the ancient customs.

The situation in Burgundy was similar in some respects, but social tensions were more developed. Landlords were more active and attempted to impose their power on the village. The commons excited their envy as well as the desire of every villager to obtain some of the land. In the context of increasing demographic pressure, competition stimulated everyone (lord, farmers and the landless) to encroach on the commons and enclose their own plots. The woodlands became over-exploited, degraded and diminished in size. Commons were also used to satisfy immediate needs, without any consideration for future requirements

The royal administration always advocated the sharing out of the commons. Partitioning these lands amongst landowners would therefore contradict the administration's own principles while an equal division between all households would have been unacceptable to the Burgundian landowners (Saint-Jacob, 1960; Root, 1992).

In these two cases, Burgundy and Auvergne, commons were indispensable to agriculture but they were used for the sole purpose of cultivating cereals, the main product of these regions. The assembly of the community did not lay down precise regulations for the use of the common lands. They only defined the entitled users. As the poor were excluded and the lords attempted to seize economic and political power, tensions increased and in turn degradation of the commons accelerated.

IV.3.2. Cases of efficient management

In Flanders a royal edict in 1777 commanded the partitioning of common lands and defined the rights thereto. Every household head resident in the village in 1777 received an equal share of the commons. He could keep the use of it as long as he lived there. He was permitted to let it or sell the crops but he could not sell the land itself since he was not the owner. The community owned the land, and organized and monitored its use. When a plot fell vacant, it was given to the eldest waiting head of a newly created household. Every tenant paid a small charge for this right to the community's coffers, and the village assembly kept a close eye on the use, especially because part of the common lands consisted of peat which had to be preserved from over-exploitation.

This edict of 1777 resulted in the parcelling out of the commons and a long-enduring system of use. The reason for this was the Flemish system of intensive agriculture. The farmer produced a higher output from his land when he sowed his fields with fodder crops and stall fed his cattle. With the greater amounts of manure obtained, cereal yields increased. Fallow pasture and common grazing were no longer required and rapidly disappeared. Every resident thus became interested in the division of the commons. Even the poor could get some benefit from a small parcel of land. The high density of urban settlement in Flanders also provided abundant manure in the form of night soils, and the products of intensive market gardening could be sold on the urban market.

The royal administration advocated and enforced the edict. This was a realistic goal as the landlords were also in favour, since they had the right to *triage*. There was a consensus in opinion: rich and poor accepted the equal division because it reflected their local customs (Dallongeville, 1896; Legrand, 1850).

A similar system existed in the province of Trois-évêchés (Metz, Toul and Verdun), based on the Edict of 1769, and in Artois on the Edict of 1779.

In the high mountain pastures of the Briançonnais, where agricultural yields were low, peasants relied on subsistence farming. However, livestock breeding was on the increase and gave the highest returns. Peasants shifted to the production and sale of cheese and meat, and wool that they span and wove themselves. During the winter, they fed cattle and sheep, using their own crops as fodder. As soon as the spring arrived, animals were sent out onto the commons (mostly woodland), where they grazed among the underwood. After the snows thawed they were sent up onto the mountain pastures. At spring fairs, people bought young animals for fattening during the summer and then sold them again at the autumn fairs. Every inhabitant was allowed to send animals to graze on the common lands. A small number of these were free of charge: two cows for landless people, one cow and eight sheep per pound of land tax paid by the landowners. Beyond this, a further charge was levied for each animal. As commons were so extensive, the inhabitants were permitted to introduce animals that they did not feed during winter. In any case, none of them were wealthy enough to make any kind of a large-scale trade out of this practice.

The institution of the village commune applied the rules very rigorously. Every year, the assembly decided on the dates for the use of pastures. The charges for use were fixed and collected. These financed shepherds for the herds and flocks, who were recruited and managed by the assembly and its annually elected consul. Elected watchmen were able to enforce effective controls. This part of the province of Dauphiné succeeded in preserving its autonomy and the royal administration never interfered as long as the royal taxes were paid.

According to the testimony of foreigners, these lands were poor, but all those descriptions reflected the opinions of urban dwellers, who were afraid of high mountains and the hard life of the inhabitants of these areas. However, they were not described as over-exploited. There were two good reasons for this fact. Firstly, the communities took good care of the environment as it was a matter of survival for them. If woodlands and grassland had become degraded, the earth would have been eroded away and villages would become vulnerable to gullying and flooding. The second reason was that no inhabitant was rich enough to possess many animals. A few of them had wealth but they were merchants and, by tradition, they preferred non-agrarian investments, which were more lucrative. There were no landlords, or large landowners (Vivier, 1992).

The main characteristics shared by these examples of enduring self-governing communities were:

- The institutions (the assembly of the village) clearly defined the rights and rules of use.
- Guards monitored and imposed sanctions on users.
- Conflicts existed but there was a social consensus about the use of commons, whether rented to individuals or used collectively .
- The environment was fragile, especially in peaty, wooded and mountainous or alpine areas. This was used as an argument to preserve common ownership and strict management. But this cannot have been the determining factor since some areas, with similar environments, sold their commons or allowed them to be over-exploited.
- Another factor seems important. Exploitation of commons provided a direct inflow of cash thanks to the sale of its products. This gave a real motivation for the maintenance of these lands and respect for the rules.

V. The management and use of commons in the nineteenth century (1789–1914): a centralized management and the progressive decline of common use

V.1. Interlude, 1789–1800: the failure of enclosure

The Revolutionary decade did not alter the management of commons as the members of the various assemblies primarily wanted to achieve enclosure. This period will thus not be covered in depth here. Instead a brief summary of the ideological debate in these years, which is necessary for an understanding of the new situation in the nineteenth century, will be provided (Vivier, 1999a).

During this period, the attacks on the commons increased. A large majority of members of the assembly were convinced that the commons should be partitioned. We can discern three motives for this, whether held jointly or separately.

– Agronomists, large estate owners and members of agricultural societies were numerous in the first national assembly, *la Constituante*. Physiocrats had a strong influence on their conceptions of what a modern economy should look like. Agriculture was to remain the first source of wealth and progress. Arable land had to be expanded and devoted primarily to the production of cereals. Flemish and English methods would give better yields, and the only efficient way to achieve this was thought to be individual farming. Any form of communal farming was considered the main obstacle to progress. Influenced by these ideas, the members of the assembly worked to dissolve common-use rights: any owner was to be allowed to enclose his estates if he so wished. They also wanted to see the common lands cultivated. The actual method of allocation was secondary to these considerations. As they were landowners, they were rather inclined to grant the privatized commons exclusively to the landowners.

– Politicians did not forget social concerns. This preoccupation acquired the first importance among members of the *Convention* in 1793. Desiring justice, some of the members looked forward to a method of sharing out the land which would be in favour of the landless, providing social peace in a tense context. While the rich sought to take advantage of the sale of the Church estates, small peasants were disappointed and yearned for the opportunity to obtain parcels of land.

– Jurists wanted a modernization of the law. They considered only two kinds of ownership to be valid: state and private ownership. Collective ownership was considered to be an archaism, 'a kind of monster', as one of them said.

The desire for enclosure resulted in the passing of a bill on 10 June 1793. This law fixed the rules of division: an equal plot was to be allotted to every inhabitant, male or female, who thereby received the proprietorship and not only the use of the land as had been the case in previous years. This law was also intended to annihilate 'feudal power', so the municipalities were encouraged to claim against the *triages* and expropriations of seigniorial lords. Public awareness of the value of their commons became enhanced, and communities claimed for restitution, while at the same time, landowners had to fight to preserve the rights the old customs had given them. Unrest and petitions over the commons demonstrated that a large part of the population was in favour of enclosure.

But all in all, it seems that the actual extent of division remained limited. We can estimate that the surface area of commons was reduced by about one third between 1760 and 1800. Commons, which previously had tended to vanish through division, sale or usurpation during the last decades of the monarchy, henceforth tended to survive. We can advance the following reasons for this survival:

– Social grounds. A large number of farmers wanted partition, except those who were not wealthy enough to keep cattle with their own resources. A large number of poor people also wanted to obtain a plot of land when it would be more profitable for them than common grazing. But as soon as the rules for division were decided, half of the population turned against enclosure because the owners wanted a division of the commons proportional to the size of their landholdings, and the poor wanted an equal division for all.

– Juridical grounds. The juridical proceedings to define boundaries and to obtain restitution for alleged usurpations were very protracted and in most cases had not succeeded by 1796, when the law fell into abeyance.

– Political grounds. The constitution of Year III created the *municipalités de canton*. The assembly wanted to reduce the powers of local councils, so they grouped into a single council all the assemblies of a former canton (about five to twenty municipalities). Although this measure never came into effect, the local inhabitants would remember this attack against their local powers. As a consequence they clung more tenaciously than ever to every scrap of their autonomy. Property gave the municipality a source of wealth, and thus they reacted strongly each time the administration attempted to interfere.

– Economic grounds. This was particularly true for some areas such as mountain pastures and woodlands where collective use and management were justified. Few regions expressed the necessity of collective monitoring to protect the mountains from erosion (Hautes-Alpes, Roussillon and some Pyrenean valleys). In Jura, the trend towards cattle breeding for cheese production was supported by those who could possess animals. The poor contested this and asked for an equal partition of the commons. They succeeded in a few cases in 1793 but afterwards landowners came back to power and maintained common grazing.

V.2. The rules imposed by central government

After the uncertainties of the revolutionary period, Bonaparte instituted new rules and succeeding governments continued to follow these. Official policy had three essential features: the entitled users of the commons consisted of all the inhabitants, partitioning was forbidden and the leasing out of common lands encouraged (Vivier, 1998: 175–215).

V.2.1. An equal right for every household head

The rule of an absolute equality of rights for every inhabitant whatever his sex or age, which was laid down in the law of 1793, met with so much opposition that it was abandoned. As early as 1796, prevailing opinion was against it, and Bonaparte was not prepared to uphold the measure. However, neither did he want to support the landowners who continued to claim sole rights to use the commons, thus excluding the landless. From 1800 on, the achievement of a compromise became politically imperative. Every resident, or head of a household enjoyed an equal right. The principle chosen by the monarchy was maintained. The granting of timber or firewood was usually made to houses but prefects retained some room for manoeuvre and could influence the shares when many claims arose from old people coming to live with their children and asking for their portion.

In spite of the principle of equality, municipalities tried throughout the century to favour the farmers and to exclude the landless. The reason for this came from the fact that the members of local councils were often landowners, but did not have sufficient land to keep cattle on their own properties. Hence they needed the resources of the commons and wanted to extract more profit from them. Thus some byelaws (or rules decided by the municipalities) granted rights of grazing limited to cattle only and kept out goats, geese and pigs, which were the animals that the poor could generally afford. Their argument in support of this discrimination was that these beasts spoiled the pastures. Members of village councils may also have been acting in their own interests when they refused to charge for grazing.

V.2.2. The prohibition of partitioning

From as early as May 1796 (prairial Year IV) the law of June 1793 was left in abeyance. From 1800, Bonaparte rejected all proposals for partitioning the commons and decided to prohibit the practice. Although this was not officially stated, the Home Secretary imposed this policy change by direct instructions to the prefects. Some of them accepted the change, though with regret, as they had been convinced by the agronomists' theories. Bonaparte's decision was not based on economic considerations but on political reasoning: he wanted to restore social peace and the commons question was one of the keys. In the villages, the disputes were intense. The problem would eventually be solved with the law of February 1804 (ventôse Year 12) which legalised the divisions that had been made legally between 1793 and 1796. As soon as the slightest further claim arose, the prefects henceforth preferred to declare any partition as void, not daring however to remove the previously allotted plots of land from the cultivator in case it triggered riots. They were then able to use the ground against a fee paid to the municipality.

The issue of partition remained a burning one during the first half of the century. Many demands were formulated but most of the time they were retained in the *département* by the prefect *(préfet)* who dared not send them on to the central administration. Politically, the partition was a forbidden subject because it was still referring to the law of June 1793, and therefore back to 1793 and the Terror period. This explains the silence of subsequent governments who refused to consider it. Nevertheless, many people asked for the sale or division of common lands. Although the administration preferred to hear nothing about the matter, it sometimes had to acquiesce, asking however that it be called a 'private sale'. While never actually permitting the general sale of the commons, the government authorized the sale of portions of the commons to pay for special works or acquisitions. This choice was always justified by the need to preserve the integrity of communities' properties and thus their resources, which in turn implied their general productivity.

IV.2.3. The encouragement of leasing

Local councils by now had expenses that they could hardly finance: the maintenance of roads, fountains, public and religious buildings, and the salaries of guards, the schoolteacher and clergyman. The law of 1790 led to an additional land tax on the commons being levied. As a result, the prefects of the First Empire encouraged the generation of revenues from the commune's lands. Through their powers of oversight of communal budgets, they tried to impose the leasing out of these lands. Their leasing policy aimed at giving everybody a fair chance. Leases were to be distributed at public auctions that granted fixed-term leases (most often for nine years), and of small plots only. This really does seem to have been aimed at bringing in income to the community coffers, which could be used for welfare purposes, thus helping the poor to stay in the villages rather than emigrating to the towns.

The State took advantage of this by taxing these revenues, and thanks to the registration of these taxes, it can be observed that the action of the prefects received a mixed response. Eastern regions of France well used to leasing continued to do so, while councils in the Massif Central refused to do so despite the pressure put on them.

In the year 1813, Napoleon was in great need of further revenues in order to finance the cost of the war. The finance law of 1813 forced communities to sell their commons and to give the proceeds to the Treasury. As compensation, they were to receive (but only after a long delay) a stock (with a dividend of 5%). The inhabitants did not quickly forget this expropriation and would hesitate for several decades before leasing out any of the remaining parcels of common. From 1836 on, prefects started a new campaign to convince local councils of the merits of leasing. They encouraged them to create grazing fees and to put commons out for leasing by auction in small parcels.

V.3. A management partly beyond inhabitants' control

We have seen how important the regulation of the central government could be. During the nineteenth century, they controlled the way in which local councils could enforce any rules with even more efficiency than before.

V.3.1. Supervision by the state

The local administrative system was reorganised in 1800. Local councils became entirely subject to central authority. Members of the council were chosen from among the leading citizens, and their meetings added up to a mere fifteen days four times a year. Every resolution of the council implying a change in the use of commons had to be approved by the prefect and then ratified by an ordinance. All powers concerning the sale, partition, leasing, or taxation of the commons were covered by these measures.

However, the control of higher authorities over the local councils decreased under Louis-Philippe. Members of the councils were elected by a vote of all the tax payers' from 1831 on, and by universal franchise from 1848 onwards. The law of 18 July 1837 gave the councils comparative autonomy, but the prefect continued to control the budget and thus retained the capacity to interfere in local administration. The local councils could manage their non-wooded properties. Nevertheless, their powers were limited since the mayor was also charged with preserving the commons. For every sale or division, he had to ask for the approval of the prefect. An inquiry, similar to a modern consultation exercise, had to be carried out among the population and the slightest opposition could be used by the prefect to justify his refusal. In case of a consensus within the village, the prefect could then convey their wishes to the State Council who had to give the final approval. All this, however, only applied to non-wooded properties.

V.3.2. The stripping of the communes' administrative powers over their forests

In May 1827, the Forest Law (*code forestier*) placed nearly all the wooded property of local communities within the jurisdiction of the Forestry administration. It had become necessary to regenerate the forests since their state appears to have been wretched following the devastation of the Revolutionary period and they were needed to provide more timber and firewood for the iron industry. The clauses of the Forest Law restricted or abolished the rights of the inhabitants to use the forest. They were no longer allowed to gather herbs, leaves, mushrooms and fruit (or even acorns and beechnuts). Instead, the right to gather could be put up for sale by auction: this was decided by the Forestry

administration and the receipts were then given to the municipality. Individuals had been ejected from the forests.

The most important resource for the peasantry was the right to pasture in the underwood. The law now reduced the number of permitted animals. Gradually, between 1830 and 1848, the quota was reduced, especially for sheep, in the intent to suppress it entirely. From 1846 onwards, quotas were very weak. The sanctions against infractions were heavy. However, the number of breaches grew and in turn this brought ruination to the local inhabitants. Woodcutting was regulated by the Forestry a dministration and had to be performed by a qualified man who was paid by the community. Wooded districts suffered in their economic life as well as from the loss of local autonomy.

V.3.3. Tightened monitoring, still considered insufficient

Authorities imposed the appointment of forest-rangers and rural policemen on local councils. Many witnesses, particularly among members of the Forestry Administration, testified as to the imperfections of this system. Communal forest-rangers were chosen by the prefect from a list of three men proposed by the local council. Their wages were very low, and often paid only after long delays. As a result, the Forest administration became obsessed by the idea that forest-rangers might be corrupted, or fail to perform their duties. In fact, their job was a difficult one. Often born in the village, they might have had to charge relatives or even a 'notable' who might be in a position to dismiss them. In 1852 the Forestry administration succeeded in getting communal forest-rangers appointed by the prefect, with candidates it had selected. Although still paid by municipalities, they enjoyed higher wages. This was possible as a result of a reduction in their numbers: 5,687 in 1834, but only 4,210 in 1876 (Buttoud, 1985). A few studies about domanial forest-rangers have been undertaken but as yet none about communal forest-rangers. Their life was obviously hard and if it was not impoverished it was because they were usually ex-soldiers with army pensions. Were they able to safeguard the woodlands efficiently? It may have been difficult for them to prosecute people for breaches against a law of which everyone disapproved, even the village mayors. Nevertheless, the number and amount of fines are impressive and did lead to a change in the use of forests. In the end, the Forestry administration obtained what it longed for: in 1919, all forest-rangers were placed under its jurisdiction. Within such a framework, it seems that the directives laid down by the central authorities were the determining factor.

V.4. The Results

Given the two different types of management for the forest and non-forest commons, they need to be analysed separately.

V.4.1. Communal forests: a reconstituted and enlarged domain

– Firstly, between 1827 and the 1850s, the Forestry administration imposed drastic restrictions in order to regenerate the woods that had previously been over-exploited. The resulting productivity was very low. Grazing was greatly restricted. Woodcutting (timber as well as firewood) was only permitted with parsimony. All the statistics, from the

Forestry administration, from the Financial administration as well as communes' budgets show the clear lessening of the number of animals owned in those villages and of the sales of wood. This double reduction of revenues for woodland communities led their economies, already poor, to ruin and accelerated the emigration of peasants. This situation became particularly acute during the crisis of the years 1846–1848, leading to riots in many regions in 1848 where the inhabitants took back their forests, though only temporarily.

– From the 1850s and especially the 1860s, the Forestry administration's policy became more flexible. The forests had been restored and demographic pressure in those regions had weakened. An amendment to the Forestry Law was achieved in 1859, in agreement with the local councils. The authorities could be simultaneously lax and tough: they accepted negotiation over the level of fines levied in order to avoid costly legal procedures, which were burdensome to the poor, especially as the authorities now had control over the recruitment of the guards. Infractions become less frequent. The authorization to graze livestock was expanded but still remained limited to cattle, with all other species being forbidden. The allowance of firewood (*affouage*) to every household increased, and moreover, the central authorities soon had to encourage local councils to undertake more cutting. In fact, the latter hardly dared to exploit the forest any further, having been used for more than thirty years to using it carefully (Vivier, 1999b).

New to the agenda was the preservation of the environment. Eroding slopes were a concern for the administration from 1830. In the year 1856, extensive flooding excited public opinion, the outcome of which was the passing of two laws: the June 1859 law set strict rules for bringing land into cultivation; and the July 1860 law required mountains to be reforested. From 1859 to 1877, communal forests gained 304,968 ha (measured within the boundaries those woodlands had in 1877) and the proportion of commons which were wooded rose from 37% to 47%.

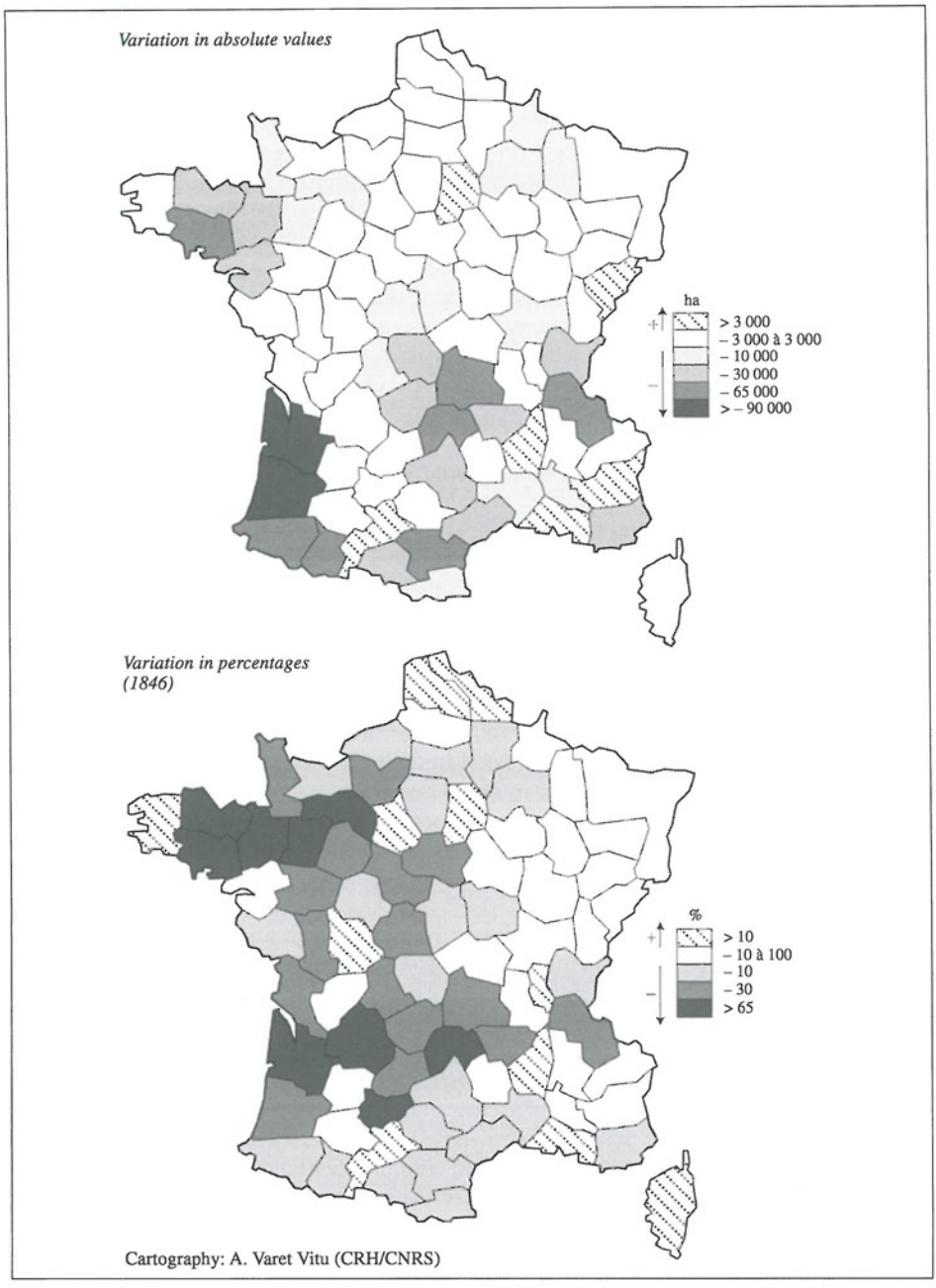
V.4.2. The decline of collective use of non-wooded commons

The different conceptions of the use of the commons that had co-existed under the *Ancien Régime* remained very much apparent during the nineteenth century. Again we find a distinction between the two parts of France.

In the western part of France, commons were considered to be attached to private properties and could be used only by the livestock of the landholders. In the Massif Central, the inhabitants had always refused to lease out resources or pay a fee for grazing, despite the prefects' advice. They made no effort to maintain the condition of their soils and assessments of the commons of the region continued to be negative. Once agriculture had shifted away from a strong emphasis on cereals, the commons lost their utility. Pastoral farming advanced and the area under grass increased. Nevertheless, this did not mean the dissolution of the common arable, despite a law promulgated with this intent in 1889. Opposition forced its abandonment only one year later. *Vaine pâture* survived legally because it could be considered as part of the good management of the common arable in the autumn.

It was precisely at this time of change, that the inhabitants sold their commons to finance public works, or shared them out in a concealed manner, as the central authorities

Figure 6.4 Variation in the area of commons, France, 1846–1877



Source: 1846: AN, *C 913* and 1877: Crisenoy, 1887.

refused permission to partition. In these cases, the commons were divided into parcels and sold off to the inhabitants at a very low price. This death of the commons in the western part of France happened at different times in different regions: as early as the years 1830–40, the sales in the plains paid for roads, bridges and churches: in the 1850s in Brittany and as late as the 1880s in the Massif Central (Jones, 1983).

– In the eastern part of France, from Lorraine to the Alps and Pyrenees, and in the north, the commons survived. In those regions, the inhabitants were concerned to ensure good management, even when they were inclined to an overly intensive exploitation. The official policy was applied here and private illegal appropriation of the common lands came to an end. The carrying out of the cadastral survey between 1810 and 1840 furnished the local councils with an instrument to define precisely the boundaries of the commons. It must be said however that, in some regions, those living on the borders of the commons bribed the surveyors during the making of these maps and used the opportunity to eat into commons, in collusion with the members of the councils. Thereafter, however, the practice stopped.

Commons brought a financial return. When they were left to collective use, grazing fees, and licences for hunting and fishing were created. These concerned marshlands such as the Somme (Vivier, 1996) and mountain meadows (Jura, Alps and Pyrenees). When the demographic pressure eased in the mountains, local councils were able to lease out a larger part of the meadows to the owners of transhumant herds and flocks. By this time the cultivable lands of these regions had already been leased out. The allotments then remaining in Flanders, Lorraine and Alsace also survived. The authorities, holding fast to the desire for commons that would be useful to the poor, encouraged local councils to put small parcels up for auction on nine year leases. There were usually fewer parcels available than the number of families, but large farmers who wished to appropriate the whole of the commons, were not interested in a single plot. Sometimes, two or three small farmers might lease one parcel in partnership.

VI. Conclusion

The story of the use of common lands in France used to culminate as a 'tragedy' when these soils became an element of an obsolete agriculture dedicated only to grazing. They became over-exploited when users did not consider the long-term management of the commons. However, it seems that the Physiocrats' claim that the commons were one of the main obstructions to agricultural progress is far from proven. Commons were not the driving force of the agrosystem, but rather a secondary component, ameliorating the general shortage of fodder. As soon as peasants could obtain better fodder, communal grazing disappeared. I hope that I have shown that as soon as the rural economy changed, these soils were made more productive. Could communities have undertaken this change on their own? It seems that they were able to do so when there was social peace and common interests with respect to the commons. As soon as social groups had differing interests, the process was blocked.

The intervention of the state was determining in this respect. The law treated the communes as minors. The French central administration did not trust the local councils, judging them unable to carry out effective management in the long-term. Therefore it reduced their freedom to manage the commons and put direct or indirect pressure on them in order to ensure a preservation of their property. However, it did not succeed in reducing regional particularisms.

The main distinctive feature of France is the survival of communal property and the centralized management imposed on the inhabitants whose liberty of choice was limited. The most solidly organized communities succeeded in keeping these lands and they were able to use them during the twentieth century to influence the direction of economic change. Some of them encouraged the development of industrial areas on their land, while others would lead and regulate the exploitation of these resources for tourism, especially in the mountains.

Bibliography

Manucript sources

Archives Nationales (AN), Paris, C 913; H 1488–1496.

Printed and secondary sources

Bloch, M. (1930) 'La lutte pour l'individualisme agraire dans la France du 18e siècle', *Annales d'Histoire Economique et Sociale*, juillet 1930, pp. 329–383 et octobre 1930, pp. 511–556.

Boehler, J.M. (1994) *La paysannerie de la plaine d'Alsace, 1648–1789*, Strasbourg.

Bourde, A. (1967) *Agronomie et agronomes en France au XVIIIe siècle*, Paris.

Brakensiek, S. (1991) *Agrarreform und ländliche Gesellschaft*, Paderborn.

Brest, M.A. (1885) *De l'administration des biens communaux*, Paris.

Buttoud G. (1985) *l'État paternel: les gardes-forestiers du XIXe siècle face à leur administration', Jalons pour une histoire des gardes forestiers*, CNRS-INRA, Paris.

Chabrol (1784) *Coutumes générales et locales de la province d'Auvergne*, Riom.

Corvol, A. (1981) 'L'affouage au XVIIIe siècle: intégration et exclusion dans les communautés d'Ancien Régime', *Annales ESC*, mars-avril 1981, pp. 390–407.

Crisenoy, Jules Gigault de (1887) 'Statistique des biens communaux et des sections de communes', *Revue générale d'administration*, juillet, pp. 257–277.

Dallongeville, P. (1896) *Des parts de marais et portions ménagères dans le Nord, Pas-de-Calais et départements formés par les anciennes provinces de Bourgogne et des Trois-Évêchés*, Paris.

Essuiles, Comte d' (1770) *Traité politique et économique des communes*, Paris.

Follain, A. (1999) 'Les communautés rurales en France, XVe–XIXe siècle', *Histoire et Sociétés rurales*, 12, pp. 11–62.

Glasson, E. (1890) *Les communaux et le domaine rural à l'époque franque. Réponse à M. Fustel de Coulanges*, Paris.

Hardin, G. (1968) 'The tragedy of the commons', *Science*, 162, pp. 1234–1244.

Jacquard, J. (1976) 'Réflexions sur la communauté d'habitants', *Bulletin du centre d'histoire économique et sociale de la région lyonnaise*, 3, pp. 1–25.

Jones, P.M. (1983) 'Common rights & agrarian individualism in southern Massif Central', in G. Lewis and C. Lucas (eds), *Beyond the Terror. Essays in French Regional & Social History, 1794–1815*, Cambridge, pp. 121–151.

Jones, P.M. (1988) *The Peasantry in the French Revolution*, Cambridge.

La Poix de Fréminville (1760) *Traité général du gouvernement des biens et affaires des communautés d'habitants,* Paris.

Le Roy Ladurie, E. (1975) 'Un modèle septentrional: les campagnes parisiennes XVI–XVIIe s.', *Annales ESC*, nov. 1975, pp. 1397–1413.

Legrand, P. (1850), *Législation des portions ménagères ou parts de marais dans le nord de la France*, Lille.

Lemaître, N. (1981) *Bruyères, communes et mas. Les communaux en Bas-Limousin depuis le XVIe siècle*, Ussel.

Maillardière, Vicomte de la (1782) *Le produit et le droit des communes et terres vagues, usages et vaines pâtures...*, (Paris).

Neeson, J.M. (1993) *Commoners, common right, Enclosure and social change in England*, New York.

Nicolas, J. (1978) *La Savoie au XVIIIe siècle*, Paris.

Ostrom, E. (1990) *Governing the commons. The evolution of institutions for collective action*, Cambridge.

Poumarède, J. (1984) 'Les syndicats de vallées dans les Pyrénées françaises du Moyen-Age au XIXe siècle', *Revue de la société Jean Bodin*, 43, pp. 385–409.

Root, H. (1992) 'Etat et communautés villageoises dans la France moderne: en Bourgogne aux XVIIe et XVIIIe siècles', *Revue d'histoire moderne et contemporaine*, 39, pp. 303–323.

Rosenthal J-L. (1992) *Property rights, litigation and French agriculture, 1700–1860*, Cambridge.

Rozier, F. (abbé) (1783) *Cours complet d'agriculture théorique, pratique et économique... ou dictionnaire universel d'agriculture...* ('communaux'), vol. 3, Paris.

Saint-Jacob, P. de (1960) *Les paysans de la Bourgogne du nord au dernier siècle de l'Ancien Régime*, Paris. Thèse lettres Université de Paris. [New edition: Association d'histoire des sociétés rurales, Paris, 1995].

Touzery M. (1991) *Le cadastre de Berthier de Sauvigny, les paroisses fiscales de la généralité de Paris,* Paris.

Vivier, N. (1992) *Le Briançonnais rural*, Paris.

Vivier, N. (1996) 'Salariés agricoles et notables face aux usages collectifs en Picardie au XIX° siècle', in R. Hubscher and J.C. Farcy, *La moisson des autres, les salariés agricoles aux XIXe et XXe siècles*, Paris, pp. 201–217.

Vivier, N. (1998) *Propriété communale et identité collective. Les biens communaux en France, 1750–1914*, Paris.

Vivier, N. (1999a), 'Communaux et vitalité communautaire en France à la fin de l'Ancien Régime et pendant la Révolution', *Annales historiques de la Révolution française*, 1, pp. 63–81.

Vivier, N. (1999b), 'La mise en valeur des forêts communales en France au XIXe siècle', *Preactas, IX congreso de Historia Agraria*, Bilbao, pp. 523–530.

Zanden, J.L. van (1999) 'The paradox of the Marks. The exploitation of commons in the eastern Netherlands, 1250–1850', *The Agricultural History Review*, 47, II, pp. 125–144.

Zink, A. (1997) *Clochers et troupeaux. Les communautés rurales des Landes et du Sud-Ouest avant la Révolution*, Bordeaux.

7 Nordic common lands and common rights. Some interpretations of Swedish cases and debates

Kerstin SUNDBERG, University of Lund

I. Introduction

In a Nordic context the idea of 'common lands' for the most part refers to vast areas of wilderness and forests. The greater part of the commons was forest and woodland, but common use of meadows and pastures also existed, integrated into the hamlets' and villages' agricultural systems. In Sweden and Finland the terms used to describe commons are 'allmänningar' and 'samfälligheter'. The term 'common rights' refers to both usufructs of common lands and to those areas of shared-use meadow and pasture integrated into the agrarian economy of villages and hamlets. It is interesting to note that people in the Nordic countries still enjoy access to the mountains, to the forests and woodlands, and also to the cultivated landscape, such as meadows and pastures. Today this 'open access' is usually for recreational purposes. You can go hiking or just stroll, pick wild berries and even stay in the wilderness (for one night) in a tent without any special permission from the landowner if you wish. These activities are in accordance with old traditions and rights called 'allemansrätten' (every man's rights) which are not regulated in any formal law. However, everyone knows that these rights exist and that they are based on the so-called 'sedvanerätt', which can be translated as a form of customary or traditional rights. This widespread sense of a strong informal, but real and general, right to use what can be characterized as 'common land' in its broadest sense, underpins a lasting shared understanding of common rights. Its background can be traced through the long-term development of property rights, ownership of land, and the rights to usufructs in agrarian society.

The existence of 'common lands' should be interpreted by taking ecological, economic, and demographic circumstances, as well as social and political pre-conditions, into consideration. In a comparative European perspective we should note patterns and pre-conditions peculiar to the Nordic countries, as well as explanations for their long-term developments. The most obvious differences between the Nordic countries and the north-west European continent are those of ecology and demography. Simply stated, the Nordic countries have been sparsely populated and the resources of forests and wilderness areas have been large and rich. From these pre-conditions it might be thought that 'common lands' were nearly unregulated and access to them totally free, and that consequently conflicts concerning resources in these wild and as yet unexploited regions seldom occurred. This could also be an explanation for why the sense of 'common rights' lasted for so long and indeed still exists. Another rather obvious difference regarding 'common lands' and 'common rights', in at least the Swedish and Finnish case, is the interference of the state. In comparison with the other West European cases, the state seems to have been a strong agent in Sweden and Finland, and thus conflicts often occurred between local peasant societies, provincial institutions and the state, in medieval times and throughout the early modern period.

During the 1990s explanations for the long-term development of the commons came under renewed scrutiny in Swedish historiography. One interpretation of long-term changes that came to be questioned was the implicit or explicit assumption of a unidirectional development from collective to individual property rights. The dissolution of hamlets and village communities during the agrarian revolution, with the enclosure reforms in Sweden in the years of 1757, 1803–1807 and 1827, has often been seen as the final stage of this unilinear evolution from collective to individual property rights and relationships. But old sources such as Tacitus' descriptions of property rights among the Germanic tribes during the early Roman times, medieval provincial laws, and communal patterns of land-use in hamlets and villages during early modern times, tell another story and can be interpreted in different ways. One can observe that these sources all describe combinations of individual and collective rights and thus cannot be used to prove a simple development from one to the other. The German researcher Peter Donat has, for example, shown that Tacitus' descriptions of property rights over arable land among the German tribes portray a rather complex situation. Under this property system land was continually redistributed among landholders, and the size of the allotted land depended on status (*rank*). This can be interpreted as being a system where the ownership of arable land was in practice individual or connected with specific groups, but limited in time between each redistribution (Widgren, 1995: 5–16).

In the Swedish debate it has also been pointed out that terms such as 'collective' and 'individual' are insufficient as analytical tools when it comes to the investigation of actual arrangements of property rights in different historical periods. It has been suggested that the dichotomy created by these terms simply reflects the ideological and scientific debate in the nineteenth century, more than the complex historical realities and processes. However, it can still be argued that many observations made during the nineteenth century debates retain their relevance. It is unquestionable that after the enclosure reforms new forms of owning land succeeded older forms, and that the common lands were influenced by these processes of change (Sundberg, 1993: 116, 156–160).

Swedish historians have also debated what was really meant by 'open access', 'collective property' and 'property rights'. In accordance with anthropological definitions of property and access one can note that property, for example, 'has no meaning except as the right of an individual or group to exclude others from access to, use of, or control over certain items or commodities. In this sense and viewed in a comparative perspective, property rights are extremely variable and take many different forms. In fact absolute property is rare even in modern society, as there always exist certain legal and administrative limitations as to the manner in which the owner may employ or dispose of that which is owned' (Widgren, 1995: 6, quotation from *Macmillan dictionary of anthropology*, 1986). Thus property and property rights are seen as expressions of social relationships. It is also important to note the difference between vertical and horizontal property rights, and different forms of access to resources (Widgren, 1995: 5–16). The feudal organization of land ownership is one example of the vertical distribution of property rights. It has been well described by Marc Bloch, who recognized that more than one person could claim special rights to a piece of land, whether the tenant, the landlord, the lord of the lord and so on (Bloch, 1965: 115).

The horizontal distribution of property rights to land was expressed in the Swedish case through, for example, different use-rights to the same piece of land, and the organization of that land and resources according to such uses. These included arable land, meadows, outlands, common lands and so forth. Janken Myrdal has noted that both the collective and the individual forms of property-rights developed and became described in more precise terms over time. The organization and creation of the medieval village meant for example that both the individual use of arable land and the collective use of outlands and common lands came gradually to be regulated and described in more detail. This development can be seen in the drawing up of rules for fences, ditches and so forth in medieval laws and those which followed (Myrdal, 1989: 35–49).

We can now turn from the expression of a certain scepticism towards narratives of uncomplicated, unilinear developments, which might be accused of using overly simplified (but analytically clear) dichotomies to provide interpretations of long-term changes, to some more concrete descriptions and aspects of 'common lands' and 'common rights' in a Nordic context, mainly based on examples from Sweden and Finland.

II. Different types of commons during medieval and early-modern times

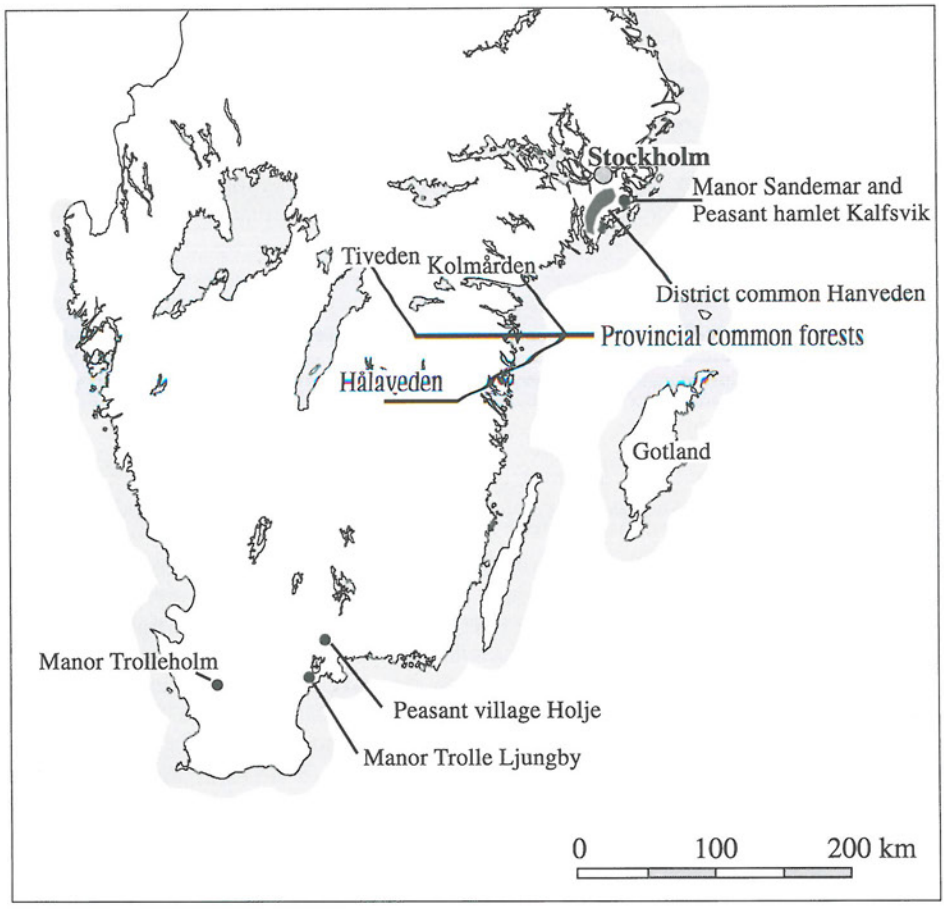
There were several different types of commons in Sweden, including those not formally incorporated into any formal common, such as old forests which are marked on the map: e.g. Hålaveden, Tiveden and Kolmården. (See Figure 7.1) These old forest-regions can be seen as examples of a kind of common land, although with no legal status as such. The formally constituted commons varied in size from extensive wooded commons separating different regions and covering rather wide geographical areas, called provincial commons (*landsallmänningar*), through areas connected with the Swedish administrative district (*härad*) and called district commons (*häradsallmänningar*), to smaller commons used by a few peasants living in a hamlet. These last, the village or hamlet common was often described as the village/hamlet's pastures, village/hamlet's meadows, or forests and outlands belonging to the village. There was also a final category of parish commons. (Villages and hamlets should not be confused with modern communes. The parish was the primary form of social organization on the local administrative level, which in many cases was geographically identical with the modern commune.) From this specification of four different types of commons one can note that 'commons' and 'common lands' existed in many forms. The use of common lands was varied and to some extent generally structured by different laws and regulations, such as the 1734 National Law, forest-regulations from 1647 and 1664, and special byelaws etc. In every specific local case it is important to determine what type of common land it was, how the specific village organized the use of it, and how the use of this particular common land was regulated by relevant laws. There could always, of course, be a gap between norms and realities.

It is also worth noting that the size and structures of villages/hamlets varied. In southern parts of Sweden e.g. Scania (*Skåne*), villages could consist of around thirty farmsteads in the seventeenth century. The settlement pattern in this part of Sweden was comparable with those in Denmark and northern parts of Germany. At the same time a typical

Figure 7.1 Overview map of the Nordic countries (except Iceland), with provinces as mentioned in the text

Source: Henrik Svensson (Department of Culture and Economic Geography, Lund University).

Figure 7.2 Map of parts of southern Sweden, showing locations of special district commons and forest regions discussed in the text



Source: Henrik Svensson (Department of Culture and Economic Geography, Lund University).

seventeenth century hamlet in Södermanland or Uppland (the districts in the vicinity of Stockholm) consisted of three to four farmsteads. Sometimes these farmsteads were of the type called 'double farmsteads', a special arrangement of buildings that formed the structure of rural hamlets in many regions of Sweden. These blocks of households co-residing on a single farmstead means that a hamlet of three to four farmsteads typically had at least six to eight households. In other regions, the settlement pattern was characterized by single farmsteads which meant that there were hardly any villages at all. All these different ways of organizing 'village life', mainly dependent on the size of population and resources, must be taken into consideration in order to understand how commons were used in different parts of the Nordic countries.

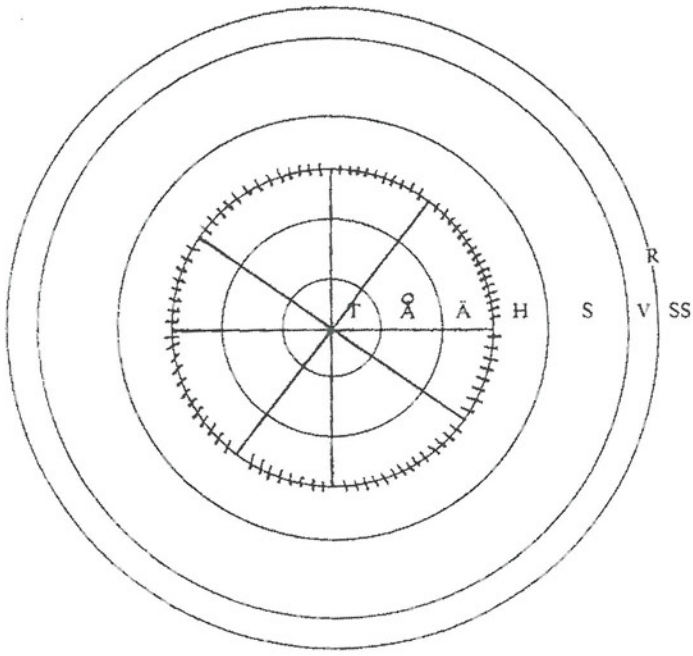
In the northern parts of Sweden and in Finland there were vast areas of wilderness. They were, in a judicial sense, seen as *'res nullius'* (no man's land). When the crown began to expand its interests in the northern regions, the original population, the Saami people, mainly reindeer herders, were overlooked in the juridical discourse. It was during the waves of Swedish colonization of eastern parts of Finland in the fourteenth century that the Swedish crown first claimed that provincial commons (*landsallmänningar*) existed in these wildernesses. Under the medieval provincial law for northern parts of Sweden and Finland (*Hälsingelagen*) colonisers who reclaimed new arable land were welcomed by the crown. The goal was to support this colonization, enlarge the size of the population, and as a consequence of doing so increase the number of farmsteads that could be taxed.

The district commons (*häradsallmänningar*) were medium-sized, and can be seen as an entity subject to both the interests and legal rights of the crown and the inhabitants of the districts. Often several parishes shared a district common together and established special regulations for these lands, e.g. the district common of Hanveden, which will be discussed later in the chapter, was shared by around ten parishes.

The village commons (*byallmänningen*) were very local, covering the common use of adjacent woods, forests, meadows and pastures by hamlets, villages and parishes. They functioned as an integral part of the agricultural system in the early modern period, especially before the enclosure reforms dissolved the older forms of agrarian organization. The typical Swedish-Finnish village had various different kinds of land ownership alongside each other. Farmsteads could belong to the crown, church, nobility, or to freeholders. The use of areas before the enclosure reforms can be described in the following terms: in the centre of the village we have the village square with the farmhouses (*tun* and *gårdstomt*). The arable land was situated close to and around the village square or green. It was often organized in two open fields. The meadows for grazing the livestock also lay in the vicinity of the village. The village square, the open fields and the adjacent meadows formed what in Swedish agrarian history are called the 'in-lands'. The 'in-lands' were often separated from the 'out-lands' with different kind of barriers (made of stone or wood). Beyond the fences were the common pastures (*hage*) common woodlands and common forests (*skog*), and water-resources also used in common by the village. These resources formed the 'out-lands' belonging to the village. In a wider circle surrounding both 'in-lands' and 'out-lands' were the boundaries (*rågång*) of the village.

On the other side of these boundaries, and in wider circles covering larger geographical areas we will find the village commons and in some cases also parish commons (*sockensamfällighet*), the district commons and the provincial commons (Bärnhielm, 1995: 17–36). These commons were used by farmsteads in the villages, in the parishes and, in the case of provincial commons, the entire province. But access to these different types of commons was varied and also very specific to different types of resources. The usage and access to 'in-land' resources was also generally very complex but its principal aspects are described in Figure 7.3.

Figure 7.3 The Swedish-Finnish village: schematic picture of different kinds of land-use before the enclosure reforms



T = *Tun*, village square, with the farmhouses
Å = *Åker*, arable land, usually organized in two open fields
Ä = *Äng*, meadows
++++ = borderline between the 'in-lands' and 'out-lands'
H = *Hage*, common pastures
S = *Skog*, common forests and woodlands
V = *Vatten*, water resources, communal in the village
R = *Rågång*, village boundary
SS = *Sockensamfällighet*, parish commons, district commons, provincial commons; commons for farmsteads in villages, parishes and provinces

Source: Bärnhielm, 1995: 33

The size and geographical position of the farmstead, the actual site of its buildings, was the regulating principle for allotting the farmstead's plots of arable land in the open-field system, which normally consisted of two open-fields. In the south of Sweden, such as in Skåne, however, the three-field system had become more common since at least the agrarian changes of the eleventh and twelfth centuries. In the typical Swedish-Finnish village the rights to use the resources of the common meadows, common pastures, common out-lands and forest belonging to the village or hamlet were also allotted in proportion to the size of the farmstead. There were of course regional variations in the forms of settlements and the size of hamlets and villages. The different sizes have already been mentioned above, along with the typical building patterns such as 'double-farmsteads'. But there were also variations in the form of settlement, dependent on natural and geographical conditions, and on social and demographic factors. (Sporrong, 1997: 25–43) Examples include the linear villages (*radbyar*), and nucleated villages formed in clusters (*klungbyar*), as well as settlements laid out and created as a result of expanding manors. In many regions in the northern parts of Sweden and Finland the pattern of single farmsteads (*ensamgårdar*) dominated. An example of such a region is also the island Gotland in the Baltic Sea, where the pattern of scattered single farmsteads was dominant.

The actual ownership of farmsteads, whether by the nobility, crown, church or freeholders (peasants), was mixed in the villages. In general freeholders dominated the Swedish-Finnish village. However, in some parts e.g. Savolax in Karelia, a kind of shared ownership of land called *samfälligheter* was frequent in the sixteenth and seventeenth centuries (Jutikkala, 1963: 94–99; Myrdal, 1988). It should also be noted that the socio-economic structure in Scandinavia differed between regions and varied over time. For regions dominated by the nobility the use of common lands, outlands and forest also showed a distinct pattern, and conflicts were particularly interesting. In this case in Denmark it is worth noting that the 'higher trees', the 'fruit-bearing trees', such as oak and beech, belonged to the nobleman. Peasants under the lordship of a manor only had rights to use smaller trees and the woods for activities such as wood cutting. In Sweden, freeholders enjoyed a stronger position but mature timber could be owned by the crown, which had privileges e.g. concerning the use of oak, mainly for the needs of the navy.

In general the proportion of freeholders was bigger in Sweden-Finland than in Denmark. In the beginning of sixteenth century circa 45% of the land was 'owned' by freeholders in Sweden-Finland, 25% was church land, 25% noble land and 5% was crown land. In the eighteenth century the proportions had balanced out at 30% crown land, 30% freehold and 30% noble land (Myrdal, 1988: 282). During the eighteenth century it was usual for peasants to buy up their farmsteads, and thus the proportion of freeholds increased (Kyle, 1987).

In some regions, however, the holdings of the nobility dominated, for example in the region around Lake Mälaren in the provinces of Uppland and Södermanland, and in the provinces of Östergötland and Skåne. In parts of Finland, the southern and western districts, smaller estates were common. During the seventeenth century especially the number of manors increased (Orrman, 1987: 277–298). It should also be observed that

in parts of northern Sweden and Finland there was no noble ownership of land at all. The regional differences in the Nordic countries were substantial.

The socio-economic structure in Denmark was dominated by the nobility to a far greater extent. In 1660 the property structure was 25% crown land, 47% noble land, 17% owned by townsmen, 10% by ecclesiastical institutions, and 2% by freeholders. In Norway the corresponding figures from 1660 were 31% crown land, 8% noble land, 21% held by clerical institutions, and 40% by private landowners. Half of the last category was freehold (Fritzbøger, 1999: 90). It was primarily as a result of land reforms, enclosures and the severance of the bonds between lord and peasant (in Denmark the withdrawal of *stavnsbåndet*), in the period from 1761 to 1788 and beyond, that the socio-economic structure was altered in Denmark. As a consequence of the 'land-reforms' the number of freeholders grew rapidly in the beginning of the nineteenth century. A class of independent farmers was formed. These differing structures of land ownership are an important factor to consider when analysing the contemporary discussion of the 'commons question'. How was the ownership of common lands to be changed? Both before and during the agrarian reforms in the eighteenth and nineteenth centuries this was a vital question for many: for peasants, nobility and the state. What were the legitimate historical traditions they could draw on to justify their different demands for common resources?

III. Ownership and traditions of commons usage – the medieval background

The Swedish medieval provincial laws date from the period 1250–1350, supplemented by the national uniform laws (Magnus Eriksson's National Law and Urban Law 1350, MEL; King Kristoffer's National Law 1442, KrL). From these laws it is obvious that the crown claimed specific rights both to the extensive provincial common lands and to the district commons. The medieval provincial law of Östergötland said that the village had the right to use the provincial commons and district commons. People were permitted to fence off parts of the common to use it as meadow or for clearance of arable land if it was no disadvantage to the village; indeed, peasants were encouraged to engage in these colonizing activities (Östgötalagen: 219). The medieval provincial laws for regions in Denmark, Jylland and Skåne (then belonging to Denmark and until the peace in Roskilde 1658) stated that people living together in villages also could use their common forest, heath-land (moors) or other waste-land for expanding their arable cultivation. Common forests and common waters were also mentioned in the law (Skånelagen: 38, 115–116).

In the Swedish National Law of 1350 (Magnus Erikssons Law, MEL), it was stated that nobody should colonize the district commons without obtaining special permission from the head of the district, and the same was stipulated for the provincial commons. The crown also claimed the right to tax the use of the commons, and to get a third of the income from taxes. The other two thirds were collected by the church and the province (*landskap*). It was also stipulated that nobody should colonize or make clearances on provincial or district commons without permission (MEL: 114, 115). Already in the

Danish Law of Jutland (*Jyske lov),* dating from 1241, the king had claimed 'regale' for forests, fishing waters and strands. The same law stated 'if it is a common, then the crown has the ownership of the arable land, and peasants the ownership of the forest.' This meant in practice that peasants could feed their swine and cut wood, except oak and beech, although they were charged by the crown for the usufructs of, for example, beechmast and oak acorns (*ollongäld*). Those charges were however very limited. If people reclaimed the forest, established settlements and cleared new arable land they became 'crown peasants'. In Denmark and Skåne there were conflicts between different interests from the thirteenth century onwards concerning ownership and usufructs of the commons. The different agents were the crown, the church and monasteries, the nobility and the peasantry (Holm, 1988: 90–109). Mathias Cederholm notes many examples of conflicts in the beginning of the sixteenth century concerning 'common lands', 'common forests', borderlines and use-rights in Skåne between the crown, villages and districts. The arguments expressed by the peasantry concerning their traditional rights and protection are extremely interesting. Peasants could for example claim that as long as 'anyone could remember' and 'anyone could think of', they had the right to use the common forests. However, landlords also argued that they had long since had exclusive rights to use forests for grazing, hunting, and the rights to keep a forest warden, and to wood cutting etc. In one legal process a landlord also claimed that his peasants had long since accepted his use of the forest-resources. 'Long since' or as long as 'anyone could remember' could in practice mean a rather short period of time. Sometimes twenty to thirty years could be the ground for claiming ownership and property rights according to a judicial concept called *hävd* (customary or traditional use rights) (Cederholm, 2001).

III.1. Developments during early-modern times

The problems that arose concerning use-rights to marginal land, forest districts and commons can be followed through an increasingly clear divergence of interests both among the users, and among the 'commoners' and outsiders, which became regulated via increasing numbers of cases in the district courts. One determining factor was the expanding early-modern state. The claims of the Swedish crown became very explicit, especially during the sixteenth century. During the Vasa dynasty (1521–1611) the crown took giant steps forward and claimed 'regale' for all land and water-areas that did not belong to anybody specifically. The rights of 'regale' were a kind of indisputable 'dominium', claiming superior rights over resources. These could be waterways in rivers, forests regions, oak-trees and so on. The principle of 'regale' was clearly and explicitly formulated in the correspondence from the king to the people, and especially well articulated in a letter dated 20 April 1542, from Gustav I (Vasa) to people in northern parts of Sweden. In translation, the formulation ran: 'Land that is not cultivated and colonized by anybody belongs to God, to us and to the crown and to nobody else' (Konung Gustav I's registratur, 1861–1916: vol. 14: 40–41). According to this the crown was seen as a kind of original proprietor of all uncultivated lands. During the seventeenth century, feudal principles of ownership were also stressed and revitalized in the juridical discourse, giving weight to the principle of divided ownership. These feudal principles were to some degree revitalized as a result of the dramatic increase of noble land ownership, which was in turn the consequence of the generous policy of donating land and land-rents from the crown to the nobility during the period that Sweden enjoyed the

status of a great power. This was at its most marked during Axel Oxenstierna's regency and the rule of Queen Christina, from 1632–1654 (Nilsson, 1964). The feudal principle meant that the crown, church and nobility had the supreme ownership of land, the *dominium directum*, and people and peasants had the rights to the usufructs of the land, the *dominium utile* (Holmbäck, 1918: 1–10; Molander, 1984: 220–221).

At this time the general policy of the crown was to stimulate the colonization and the reclaiming of wastelands from the forests and commons. These interests of the crown, focused on increasing the number of farmsteads that could be taxed, sometimes clashed with the old villages' way of using the commons collectively. The freeholders considered control of the local resources more important than new colonization, although the result some years later could mean a higher tax-pressure on their land, a pattern apparent from King Gustav's I's (Vasa) and his son Karl IX's correspondence to peasants and people (*allmoge*) in different parts of the realm between 1530 and 1600. The Vasa kings often complained about the peasants' old tradition of gathering too many people, their fathers and their sons (i.e. extended kin groups), in their villages and neglecting to clear new land and cultivate and colonize in the out-lands and forests. Peasants preferred to use out-lands and forests in a common way, and as a consequence they avoided new fiscal demands from the state (Österberg, 1977: 132–143). The crown on the other hand tried to stimulate the colonizers with tax-free years. The number of tax-free years differed, but it was usual to be offered around five to twelve years (Larsson, 1972).

These developments continued over the next century, notably in the different regulations and laws concerning the forests from 1638, 1647 and 1664 (Boëthius, 1939; Boëthius, 1951). This legislation meant that the first steps were taken to protect the forest resources from over-use and devastation. It was stimulated by the extreme demands on the forests as a source for charcoal in iron-production, which was rapidly expanding at the time. Preservation of the forests in order to secure a supply of charcoal for the mine-districts was one of the most important forces lying behind these regulations. Politically, these forest laws can be seen as a part of the crown's active mercantile economy, as well as in the context of controlling people and trying to guarantee a supply of workforce to the ironworks, the manors and farmsteads. There were not to be any vagabonds and squatters illegally colonizing the forests, thereby avoiding the necessity to work as day-labourers, servants and maids (Boëthius, 1951; Sundberg, 1993: 121–124).

In parliamentary work and in the preparations for the national law of 1734, one very substantial question for the peasant estate was the 'commons question'. The peasants' estate in the parliament discussed their rights to continue with swidden agriculture, and issues concerning privatization and partition of the commons were high on the agenda, especially regarding the district commons (*häradsallmänningarna*). Would the conditions of the forests be improved if the commons were privatized? Was the use of the common disastrous? At the same time the crown claimed its legal interests and rights to the ownership of the district commons. It became very explicit with the re-naming of several district commons, henceforth to be called 'crown commons'. These discussions in the parliamentary estates and in the preparations for the new revised national law (1734) reflected problems and different interests within local societies, between groups of peasants, the nobility and the state (Bäck, 1984).

III.2. The use of commons

From the perspective of peasants, living in small hamlets and villages, use of the commons could mean access to a variety of resources. Commons could be colonised and the acreage of arable land expanded by swidden agriculture. Other uses were the production of hay, leaves for fodder, fuel, building-materials, timber, material for tools, berry-picking, honey, hunting (only small animals, not moose and roe-deer) and fishing in forest-lakes etc. But it should be noted that it was in many ways a very restricted access to resources, especially when we consider the larger district and provincial commons. People in the hamlets, for example, were only permitted to obtain firewood from the district or provincial common if they didn't have any wood for fuel at their cottages or farmsteads. These regulations were contained in the national law of 1734 in chapter XVI concerning 'building' (*Byggingabalken)*, under the subtitle *How commons shall be used*, where it explicitly stated:

Provincial commons can be used by the people who live within the province, and district commons and parish commons can be used by people living in the district (*härad*) or parish. They can be allowed to use resources such as grazing, timber, fuel, material for fences, leaves, birch-bark, bark, turf, bast and other things for their own subsistence needs, [nödtorft] (the same as *Nahrung* or *Notdurft*), but not for the use of others or for selling. If you want to cut timber, fuel, fences or sticks (hurdle-stakes), then you must first announce it at the District Thing (court), and the court will assess your needs, then permission from the Crown shall be asked for. If anyone uses the common in another way, then there will be fines.

If you don't live in the province, district or parish you cannot use anything from the commons. If you do, you will be fined for illegal use.

If any part of the common is under protection, for the cultivation of forest-plants or for other reasons, and you cut anything you will be fined, the same as for illegal use or damaging the forest, and you will repair the damage.

It is not permitted to enclose any part of the common. If anyone does, this enclosure shall immediately be torn down, and the person shall be fined. (Sveriges Rikes Lag gillad och antagen på Riksdagen åhr, 1734: 80.)

The new national law of 1734 was also combined with detailed bureaucratic instructions for how assessments of local needs should be made by crown administrators together with peasants from the district court. It was the district court that had the right to interpret the laws and regulations if there were conflicts about the use of the commons, and subsequently these conflicts were brought to court. On a lower level and in daily practice it was the state administration concerning forests, the organization called *jägeristaten*, with the regional forest-sheriff, that handled questions about getting permission to use, for example, resources from the district common. Researchers have interpreted all these bureaucratic procedures as real and effective restrictions (Ihrfors, 1916: 269; Sundin, 1992: 373).

III.3. The byelaws

Many local villages also had byelaws. These should be seen as a local arrangement, and as a means for practical co-operation, with roots reaching back to earlier processes of co-operation in hamlets and villages. They were not a legal institution although the old provincial law used village organization as a starting point in many of its paragraphs. The state stimulated the shaping of written byelaws, especially during the first half of the eighteenth century. At the time a general model for byelaws was created by the state-authorities (Isaksson, 1967: 3–12; Ehn, 1982: 3–18). This initiative from the state can be interpreted as an effort to improve agriculture within the given structures. The initiative to create a prototype of byelaws was made before the enclosure reforms, which started at the end of the century and led to many of the old hamlets and villages being dissolved and disappearing. The byelaws were obviously not then required any longer!

The different byelaws (*byordning*) contained rules that allow a glimpse of the practices among the village inhabitants concerning their use of the village commons. There were very precise regulations about how many pigs the farmsteads could feed in the forest, the right to collect nuts, berries, and birch-bark, etc. Often fines for illegal use or over-exploitation of the resources were stipulated. The fine could be the duty to deliver 'a barrel of beer to the village', or the 'obligation to plant new trees and protect them from the livestock' (Holje byarkiv, Landsarkivet i Lund). In the byelaw of Tyresta hamlet it was explicitly forbidden to enclose any part of the common forest even at the end of the nineteenth century. (Erixon, 1941; 1978) These examples of rules in different village- and hamlet regulations can be multiplied. During the eighteenth century special unifying byelaws, the so-called *mönsterbyordning*, were also produced as a result of the state interest in developing agriculture (Ehn, 1982: 3–18). This prototype, which stimulated further regulations and new byelaws, was aimed at making the life in the hamlets and villages better organized and more strictly regulated. Generally the new byelaws following the *mönsterbyordning* consisted of around 40 paragraphs. In particular, the rules for using the common meadows and pastures were specified in many paragraphs. The byelaws stipulated for instance that nobody should begin to harvest the meadows before it was agreed upon by all of the villagers. The same rule held for the beginning of common grazing after the hay-harvest. There were of course also rules for how many livestock different farmsteads had the right to graze on the common meadows and pastures. The number was dependent on the size of the farmstead. The byelaw also stressed the importance of delaying the date when livestock could be let out for grazing in the meadows and pastures until the earth was fully thawed and dried out in spring-time. In special paragraphs the use of common forests and out-lands was described and regulated. These stipulated how many trees and bushes could be cut, and how many new saplings should be planted. If the forest was good enough, swidden agriculture could be practised. In the byelaws different fines were mentioned for anyone who violated the rules (Ehn, 1982: 20–25).

In districts dominated by estates, such as parts of Skåne, the byelaws were often created on the initiative of the landlord and the parish priest (Persson, 1997: 51–68). It should also be noted in comparison with east-Elbian Europe, Denmark and England, that there were no manorial courts in Sweden, Finland and Norway. From studies of the

manor Trolle-Ljungby in Skåne in southern Sweden, it has been observed that control over forests and 'out-land' developed in the eighteenth century by the means of letting peasants' sons and servants settle in the forest in order to protect the area from 'illegal forest use'. The contract for the new 'forest-wardens' stipulated that the sheriff was responsible for the forest and had to pay the fines himself if he didn't apprehend the forest-thieves (Sundberg, 2001: 269–272). At the manor of Trolleholm, (also situated in Skåne), according to an instruction issued for the development of forest resources, it was recommended that the forest-wardens should live in the forest and be well paid by the manor, and also have a share of the fines from 'illegal forest users'. This was motivated, according to the instruction, by the fact that only under these circumstances could the forest-sheriffs be independent of the ordinary people (living in the countryside), and able to fulfil their controlling obligations. Then they could not, for example, be bribed (Trolleholms godsarkiv, H 2 A 3). In the vicinity of Stockholm it has been observed that the parishes dominated by manors only seldom had byelaws of their own, because the manor controlled their domains (Ehn, 1992: 6). It must be said that these byelaws were enforced at the village level and cases were not in general brought to the district court. Byelaws were a kind of practical organization of labour, and one important person was 'the oldest man in the village' (*byäldste*) who had to gather the men in the village at different times for village meetings. The byelaws had no independent judicial status of their own.

III.4. Some local cases

The most important institutions that regulated the uses and practices were the district courts (*häradsting*). When reading documents from the district courts it is also evident that cases concerning the illegal use of forest resources, both in private and common forests, were very frequently brought to court in the seventeenth and eighteenth centuries (Sundin, 1992; Sundberg, 1993). In his study of court-cases, Jan Sundin has observed that in one of the districts he investigated, Gullbergs härad in Östergötland, there were many cases concerning 'illegal use of the commons'. These were to do with matters such as the collection of wood for fuel and fencing, and it was often cottagers and landless people who were accused of misdemeanours before the court (Sundin, 1992: 379).

Other conflicts concerned the different interests of owners of mines and ironworks and peasants. Molander has analysed a case concerning a parish common in Ölme parish in Värmland in the 1730s. Peasants wanted to restore their common, which had already been divided some twenty years before, while the owners of mines and ironworks still wanted to use the resources for their needs. The farmsteads belonging to the ironworks were in a special position, which in the end meant that there was no united front among peasants against the mine- and ironwork-owners. It was argued by the mine-owners that peasants didn't keep the forest in a good condition when using it as common land. The mine-owners feared devastation of the forest on a large scale, with the resources becoming totally depleted. This is a typical example of 'the end of the forest debate', which was so usual and most explicit during the eighteenth century when the forest question was handled by the estate parliament and subject to different official investigations and analyses. Thorough investigations were made also of the issues relating to this local conflict at the time. The case dragged on for another twenty years and ended with peasants

giving up hope of getting back the forests from the mines as common land. Instead they had to be satisfied with money payments, and a part of the common land that they did retain. This part was later enclosed and partitioned on the explicit request of the peasants. According to Molander's interpretation this was a way for them to strengthen their private ownership of land and forest resources (Molander, 1984: 217–237).

Some further examples come from one district in the vicinity of Stockholm, the district court in Sotholms härad. One case concerns an investigation made in connection with the change in status of a rather large forest called Hanvedens häradsallmänning. It concerned a district common, legally belonging to the people of the district (häradsallmänningen Hanveden), changing status to a crown common, belonging to the state (kronoallmänningen Hanveden). This change, reflecting the initiative and aggrandizing policies of the crown, quickly resulted in the proper documentation of this resource. The first step to take was to establish secure knowledge of the boundaries of the common. From 1717 there is a document consisting of a map and a description made by the land-surveyor Trolling. In the beginning of the description the surveyor complained about rather large problems caused by the ignorance of the inhabitants of local hamlets and villages regarding both the establishment and adjustment of the correct boundaries between the villages' lands and the district common. According to Trolling, the use of the common was very confusing and 'intermixed'. He pointed out that for a long time nobody had made any effort to clarify matters, and he even referred in his report to a document from 1594. However, on starting his investigations and mapping, he soon found that people were actively using the area, and Trolling consulted them about old 'boundary-stones' and other marks. He questioned the landlords and their wardens and peasants, freeholders and leaseholders, who lived in the district. Sometimes it seemed as if rather 'new' boundary-stones had been recently erected. Peasants from the hamlet of Kalfsvik, argued that they had never seen those boundary-markers before and claimed their right to bigger parts of the forest, up to an old bridge, which they had used as a boundary. Old men were asked to testify about these customs. With the new boundary suggested by the land-surveyor, some cottages would obviously in the future belong to the crown and not to the freeholders and leaseholders in the village of Kalfsvik (Lantmäteristyrelsens arkiv, LSA, Österhaninge socken akt nr 1). If that was the case the state would benefit from this boundary, as the new colonizers then would become crown-peasants with no rights of ownership of their own. To define correct boundaries probably also meant that the usage of the common became more strictly controlled by the crown's forest warden and other important state officials such as land surveyors. They were often in contact with local people because of the beginnings of the enclosure movement and the mapping of farmsteads. The role of the land surveyors as mediators solving conflicts in local society and functioning as brokers between the state and the local population has often been discussed by historians and cultural geographers (Sporrong, 1985). Their neutral role can of course be questioned because in the end they represented state authority. One main task for them was to map the arable land and to note the supply of wood and forest for the different farmsteads. From my studies of maps from 1638 it can be observed that only a few farmsteads were noted as lacking access to forest resources. The main problem for the authorities was to get usable resources such as fuel for mines, breweries, housing etc. from the peasantry's assets (Sundberg, 1993: 134–142). This shows that the question of whether forest resources were endangered and might come to an end is a complicated one. Many

voices in the research debate have pointed out that it was the fear of over-exploitation and the disappearance of forests, articulated, for example, in the estate parliament, that was more real than genuine shortages existing in the forests and commons.

Another interesting case brought to the district court concerned illegal forest use on the common forest for the use of both freeholders and leaseholders in the village of Kalfsvik. Some of the peasants in the village lived within the territory that belonged to the landlord of Sandemar manor. It was the landlord's inspector who brought the case to the court. Crofter Per Larsson was accused of the clearance of a rather large area in the forest, and was summoned for 'illegal swidden' and 'illegal cutting of forest'. On behalf of the district court, two peasants, Anders Ersson and Jan Ersson, had to investigate this case. They found that Per Larsson in fact had made rather big clearances, and had even enclosed parts of the common for his livestock. From the court documents one gets the impression of an active colonizing crofter. In the juridical process at the district court the crofter got significant support from a freeholder in the village, who could act independently of the landlord just because he was a freeholder. The other peasants, the leaseholders, could not act separately on an individual basis and could in fact be challenged by the landlord over any permission granted to cotters or outsiders to use the common land. The freeholder testified at the court that he had given Per Larsson permission to enclose some parts of the village common, and he also said he thought that even the landlord's peasants, the leaseholders, had given the crofter their permission. All in all as a result of the process the crofter was sentenced for 'illegal forest use' and 'illegal swidden' and for clearing new land. He had to pay fines but he was not evicted, because of the permission he had obtained from the freeholder, otherwise he probably should have been removed (Sotholms häradsrätt, domböcker 1724–1725).

In other parts of Sweden such as Västerdalarna and Älvdalen in Dalarna other types of changes in the ownership and privatization of the commons and common forests took place. All people in the parishes thought that they owned the forests, independent of whether they were landowners or not. But in these parts of Sweden nearly everyone was a landowner, and the forests resources were large. The common forest, mainly parish-commons in this region, were used by people for grazing the livestock and seasonal settlements (*fäbodar*) for the hay-harvest (*slogar*), for hunting, and for swidden agriculture, harvesting leaves and so forth. When the crown wanted to separate large forests (*rekognitionsskogar*) for the requirements of industrialization, iron-production and sawmills, peasants reacted strongly and in an especially clear and resolute manner in, for example, Västerdalarna. When changes occurred which were for the benefit of the ironworks and for private companies such as loggers, saw- or paper-mills, people protested forcefully. Even when individuals wanted to privatize land, protests were heard. In the discussions concerning boundaries between villages and parishes the arguments over the commons were central. Boundaries were not set until the beginning of and during the nineteenth century, and the forests were usually called 'parish commons', although there was no proof of this juridical legal status. Did they belong to the parish – that is to say to the people – or did they belong to the crown? In Dalarna, in some cases, many people and practically all men went 'armed' out of their houses to protect their commons. In Swedish there is a special expression of this kind of mobilisation of resistance, '*gå man ur hus*' (Holmbäck, 1934: 77–79, 87–91, 92–123, 241–248).

A last remark should also be made on how the questions of ownership and juridical status became very important when the industries based on forest resources were established and developed. Crimes such as 'forest-theft' then increased notably, and what was formerly seen as people's practical use of 'commons' now became forbidden and often called 'illegal forest use' or 'damage of forests'. This was especially evident in Norway and in the northern parts of Sweden and Finland. When peasants were brought to court for 'illegal forest use' and 'forest theft' they argued that they only did what they always been used to doing. (Pajuoja, 1989; Halberg, 2000: 195–225; Ruuttula-Vasari, 2000: 287–304; Sundberg, 1993; Sundberg, 2000: 226–259). In the southern parts of Scandinavia where grain production was more dominant, the process of enclosure and agrarian reforms changed the old villages and their balanced system of using common lands as an integrated part of their economy. The change was not so abrupt and controversial as in the northern regions.

IV. Concluding remarks

To conclude any remarks addressing 'common lands and common rights', especially for Sweden and Finland, one must stress the important role 'common use' played as an integrated part in the old agrarian economic system. In the early modern period, commons integrated into the agricultural life of villages and hamlets, such as 'common meadows', 'common pastures' and 'common village forests', were very important for the peasant population. Different social and economic concerns were reflected in the appropriation of, and access, to these resources. This can even be stated for the use of 'district commons'. The interests of the crown vis-à-vis other groups such as peasants and the nobility ought to be investigated more deeply by developing more research on local sources. The cases presented in this article show that the pattern of conflicts was rather complex. The state did intervene in local societies during the sixteenth and seventeenth centuries. One example of the increasing interests of the state can be observed when district commons were re-named and became crown commons, such as the old district common Hanveden which was renamed and investigated at the beginning of the eighteenth century. New boundaries were then defined by the land surveyor. It was important for the crown to stress that colonizers in the district common forests now belonged to the crown, and that they became crown-cottagers. The special importance of the district commons at the time relates both to the fact that their legal status was not clear but somewhat blurred, and that these geographical areas were rather extensive. Over time forests resources had became more valuable, for peasants, for the state, for industrialists and for the manor-owners.

The expansion of the early modern state into local society was made possible by important institutions such as the district courts, the growing forest administration and land surveyors. It is my belief that these types of conflicts concerning use of commons were frequent and can often be found in the sources before the various enclosure reforms were implemented.

During the process of the enclosure reforms the land surveyor had to solve many different problems. Both the partition and the use of commons were very big and important questions to resolve. The fate of the district commons was a question of special

importance. Ihrfors shows in his study of district commons that frequently 'common-use rights' such as grazing were saved although other forms of appropriation of resources from these commons were altered. During the 1830s many district commons were partitioned and privatized or transformed and became 'parish commons' instead (Ihrfors, 1916: 348–352).

The state interest in ownership and increased control over the large provincial and district commons has as yet not been thoroughly investigated. There are some studies of the commons in a qualified sense, and more often changes in forest resources in general and quantitative aspects have been discussed in Swedish historiography. In that discussion the question of sustainability of forest resources has been a significant issue. The general debate in the estate parliament during seventeenth and eighteenth centuries focused on the question of how to protect, keep and develop the forest resources. Many participants in the debate feared that the forests could be devastated and totally over-used. It was a kind of 'end of the forest debate'. Peasants' habitual uses such as the grazing of live-stock in forests, their swidden culture and their wood-fences were one kind of threat to the resource. Another was the need for fuel, and for charcoal for iron-production in different regions. A third threat was connected with the need for housing. Before the innovation of tiled stoves, heating needs consumed enormous amounts of firewood in the cold Nordic climate, although in a comparative European perspective one must note that the population pressure was not great and the resource availability was rather satisfactory. However, the forest-resources of the district commons obviously became of particular interest in times when the demand for the resource increased. The crown wanted to take over these commons, while some peasants wanted to divide and privatize commons and others wanted to keep them as commons.

Both a broader overview and deeper interpretation of the role of the commons are needed. Approximately how large were the total areas of different types of commons in the Nordic countries? What did commons symbolize for the peasant population in different regions? The transformation of the old village system and the partition of the commons were completed in different ways in the regions during the agrarian revolution and the enclosure reforms. The varying outcomes were dependent both on the social structure and on ecological pre-conditions. Especially in northern regions of the Nordic countries, resources from forests, heaths, moors and mountains were used in a common way even in modern times. Still the idea of access to nature, to our 'common lands' of forests and wilderness is strong and almost seen as a human right in the Nordic countries, although historically, we should remember that there have always been specific regulations on how to use these common rights and common lands.

Bibliography

Manuscript sources

Lantmäteristyrelsens Arkiv, LSA, Stockholms län, *Österhaninge socken akt nr 1*. Karta med beskrivning över kronoallmänningen Hanveden. 1720.

Stockholms stadsarkiv, *Sotholms häradsrätt*, domböcker 1724–1725 A I a 5,

Landsarkivet i Lund, Holje Byarkiv, Trolleholms godsarkiv, H 2 A 3.

Printed and secondary sources

Ågren, M. (1995) 'Att ha brukat sedan forna tider. Argument för rätt till egendom i 1600-talets Sverige', in M. Widgren (ed.), *Äganderätten i lantbrukets historia*, Stockholm, pp. 109–129.

Boëthius, B. (1939) *Skogen och bygden*, Stockholm

Boëthius, B. (1951) *Gruvornas, hyttornas och hamrarnas folk. Bergshanteringens arbetare från medeltiden till gustavianska tiden. Den svenska arbetarklassens historia*, band 11, Stockholm.

Bloch, M. (1965) *Feudal society*, Vol I, London.

Bäck, K. (1984) *Bondeopposition och bondeinflytande under frihetstiden. Centralmakten och östgötaböndernas reaktion i näringspolitiska frågor*, Stockholm.

Bärnhielm, M. (1995) 'Vad lagboken berättar', in M. Widgren (ed.), *Äganderätten i lantbrukets historia*, Stockholm, pp. 17–36.

Cederholm, M. (2001) 'From defence to privileges, 'forsvar' and 'herligheder'. Concept analysis as social history. Denmark–Scania 1500–1650'. Unpublished paper for the symposium 'Modernisation and traditionalism in manorial and local agrarian societies' Lund 16–17 November 2001.

Duby, G. (1981) *Krigare och bönder. Den europeiska ekonomins första uppsving 600–1200*, Stockholm. [orig. 1973]

Ehn, W. (1982) *Byordningar från Mälarlänen. Stockholms, Södermanlands, Uppsala och Västmanlands län*. Samlade och utgivna av Wolter Ehn. Dialekt- och folkminnesarkivet i Uppsala. Serie B:16, Uppsala.

Eliasson, P. (1996) *Den skogbärande utmarken som naturresurs. Ett miljöhistoriskt perspektiv*, Lund. Unpublished paper Department of History, Lund University.

Erixon, S. (1941) *Den äldre folkliga bebyggelsen i Stockholmstrakten. Rådet till skydd för Stockholms skönhet*, Stockholm.

Erixon, S. (1978) *Byalag och byaliv*, Stockholm.

Fritzbøger, B. (1994) *Kulturskoven. Dansk skovbrug fra oldtid til nutid*, Köpenhamn.

Fritzbøger, B. (1999) 'Forest Legislation and Management in Scandinavia, 1660–1850: Natural Resources between Market Economy and Conservation', in E.V. Heyen (ed.), *Nature Use and Nature Conservation in European Legal and Administrative History*, Baden-Baden, pp. 87–109.

Halberg, P.T. (2000) 'Sosial status i bondeskog og bolagsskog', in I. Kaldal (ed.), *Skogsliv. Kulturella processer i nordiska skogsbygder*, Lund, pp. 195–225.

Holm, P. (1988) 'Kampen om det som ingen ejer. Om rettighederne til den øde jord indtil 1241 som baggrund for den tidlige middelalders bondeuro', *Till kamp for friheden*, Århus, pp. 90–109.

Holmbäck, Å. (1918) *Om äganderätten till häradsallmänningar i svensk rättsutveckling*, Stockholm.

Holmbäck, Å. (1930) *Frågan om äganderätten till häradsallmänningarna från 1800-talets början till nutiden*, Stockholm.

Holmbäck, Å. (1934) *Uppkomsten av kronans anspråk på skog inom Älvdalens socken*, Stockholm.

Holmbäck, Å. and Wessén, E. (1979) *Svenska landskaplagar tolkade och förklarade för nutidens svenskar. Fjärde serien*, Uppsala.

Ihrfors, C.G. (1916) *Om häradsallmänningar enligt svensk rättsutveckling. Ett bidrag till den svenska jord- och skogslagstiftningens historia*, Uppsala.

Isaksson, O. (1967) *Bystadga och bystämma. Organizationsformer i övre Norrlands kustbyar*, Umeå.

Jutikkala, E. (1963) *Bonden i Finland genom tiderna*, Stockholm.

Konung Gustaf I:s registratur. Del 1–29 (red.) V Granlund. Stockholm 1861–1916.

Kyle, J. (1987) *Striden om hemmanen. Studier kring 1700-talens skatteköp i västra Sverige*, Göteborg.

Larsson, L.O. (1972) *Kolonisation och befolkningsutveckling i det svenska agrarsamhället 1500–1640*, Lund.

Magnus Erikssons Allmänna Landslag (MEL) (1962), red. by Å. Holmbäck and E. Wessén, Stockholm.

Molander. M. (1984) 'Centralmaktens påbud och lokalsamhällets reaktioner i samband med nyttjandet av en värmländsk allmänning', *Skog och Brännvin ed. Birgitta Ericsson*, Oslo, pp. 217–243.

Myrdal, J. (1988) 'Jordägandet i Sverige från 1500-tal till 1800-tal', *Folkets historia*, 4, pp. 42–52.

Myrdal, J. (1989) 'Jordbruk och jordägande: En aspekt av sambandet mellan agrarteknik och samhällsutveckling', *Medeltidens födelse*, pp. 35–49.

Nilsson, S.A. (1964) *På väg mot reduktionen. Studier i svenskt 1600-tal*, Stockholm.

Orrman, E. (1987) *Säteribildningen i Finland under 1600-talet. Kustbygd och centralmakt 1560-1721*, Helsingfors.

Österberg, E. (1977) *Kolonisation och kriser. Bebyggelse, skattetryck, odling och agrarstruktur i västra Värmland ca 1300–1600*, Lund.

Persson, B. (1997) *Byordningar i Villands. 1773 års byordning från Österlöv. Handlingar angående Villands härad 1997*, Kristianstad.

Ruuttula-Vasari, H. (2000) 'Herrar skall man misstro – framförallt skogsherrar', in I. Kaldal (ed.), *Skogsliv. Kulturella processer i nordiska skogsbygder*, Lund, pp. 287–308.

Sporrong, U. (1985) *Mälarbygd. Agrar bebyggelse och odling ur ett historisk-geografiskt perspektiv*, Stockholm.

Sporrong, U. (1997) 'Odlingslandskapet före 1750', in Larsson, Morell and Myrdal (eds), *Agrarhistoria*, Stockholm, pp. 25–43.

Sundberg, K. (1993) *Resurser och sociala relationer. Studier av ett lokalsamhälle i förändring 1600–1800: Österhaninge och Västerhaninge socknar*, Lund.

Sundberg, K. (2000) 'De hafver denna lilla furuskog så oförsvarligt utöda...' Om nyttjande av skogens resurser i agrarsamhället', in I. Kaldal (ed.), *Skogsliv. Kulturella processer i nordiska skogsbygder*, Lund, pp. 226–259.

Sundberg, K. (2001) *Stat, stormakt och säterier. Agrarekonomisk utveckling och social integration i Östersjöområdet 1500–1800*, Lund.

Sundin, J. (1992) *För Gud, Staten och Folket. Brott och rättsskipning i Sverige 1600–1840*, Lund.

Sveriges Rikes lag gillad och antagen på riksdagen år 1734 (1984), Stockholm. (Rättshistoriskt bibliotek. Band 37).

Widgren, M. (1995) 'Individuellt eller kollektivt ägande i bondesamhällen?', in M. Widgren (ed.), *Äganderätten i lantbrukets historia*, Stockholm, pp. 5–16.

8 Common rights and common lands in south-west Germany, 1500–1800[1]

Paul WARDE, University of Cambridge

I. Introduction

The common lands, and common rights exercised over the property of others, have long been held up as a significant element in the early modern peasant economy. Not only did they provide a selection of resources essential for the maintenance of small-holdings, but also a potential source of discretionary relief for the poor and income for lords and communal institutions. Although people made use of many different common resources from a given area of land, historians have often treated such assets as fixed at best, if not subject to degradation. The lands of village or small urban communities have been viewed as having a set 'carrying capacity', although this must be relativized against the technology and resource demands of the time. Given that resources were both limited and vulnerable to overexploitation, some form of sustainable management was required both of demand for the resource, and to ensure its reproduction.

However, sustainable management of resources in a given area could soon come up against the problems of both rising demand for the resource caused by demographic pressure, and the problem of reconciling competing interests with variant needs. This insight has led in turn to the suggestion that patterns of commons management will emerge predicated upon ecological types. 'Closed' communities limit membership, and often access both to the commons and residency, as a result of having fewer 'common' resources that consequently enjoy a relatively high value to residents. In contrast, 'open' communities can allow a significant amount of in-migration because of the room for expansion awarded by the presence of extensive uncultivated grounds and their products. 'Open' communities might also encourage the establishment of proto-industries or a mixed agrarian economy of smallholders who can scrape out a living from a combination of small-scale farming, petty commodity production or proto-industry, and the fruits of the common lands. More generally, notions of 'over-population' or 'resource scarcity' have been presented as push factors in the history of emigration from south-west Germany, that took on significant dimensions from the 1740s onwards (Hippel, 1977a: 65–66, 71; Grees, 1971: 197; Paas, 1995: 147; Walter, 1990: 8; Viazzo, 1989: 35–36; Hippel, 1984; Boehler, 1983: 28; Fertig, 2000: 291, 315, 358).

[1] I would like to thank Martin Stroh for his assistance in obtaining literature for this paper. Many of the ideas and approaches have benefited, or arisen from, conversations and correspondence with Chris Briggs, Tine De Moor, Leigh Shaw-Taylor, Richard Smith, Petra van Dam and Clemens Zimmermann; I am grateful for their time, thoughts and company. Special thanks to Ann Thompson for her hospitality!

These approaches can swiftly lead to a pleasing model of a customary, environment-sensitive peasant economy, of a people in tune with their natural surroundings. They provide a prediction that we will discover a variation in the management of the commons following ecological variation (accepting that there will always be other intervening variables, such as proximity to market centres), although we might expect 'open' systems to eventually develop into 'closed' ones. It is pleasing precisely because it remains an argument from design. Whether right or wrong, however, it usefully brings our attention to three 'problem' areas, absolutely central to the economic and environmental significance of commoning: the legal basis of the exercise of common rights and the ability to restrict access to such rights (which dovetails with the role of the state and feudal lordship in the peasant economy); who the actual managers and police of the commons were, and to what use their prerogatives were put; and the actual value of the resources to be obtained from the commons to particular users.

These problems will be addressed, though hardly definitively answered here, in the context of south-west Germany; more precisely, those areas which by the first half of the nineteenth century were incorporated into the Kingdom of Württemberg or the Duchy of Baden, stretching from the Upper Rhine and the Alpine foothills of Upper Swabia to the Main, and from the course of the Rhine in the west to the boundary with Bavaria. I will begin by examining the historiography of the commons in this region, the broader aspects of the agrarian economy, and the institutional focus of peasant village life, the 'commune' (*Gemeinde*). Moving on to the legal underpinnings of commoning and the organization of access to, and exploitation of, the rights, one thing at least will be clear: commons change. The values to be derived from and attached to the commons varied just as their users, managers and overlords. They have a history, and cannot be understood simply in terms of the functioning of a 'given' ecosystem. Indeed, whilst they were often governed by customary law, this historical, changeable valuation of the commons bestowed a 'slippery' nature to custom itself and made it a point of contestation among those who had an interest in the common lands.

In turn, this complicates analysis. Giving 'values' to the resources is a task fraught with difficulties, both for communities as a whole, and sub-groups within them. Here only the most significant rights (to fuel and building material, to pasture, and as a space for agricultural expansion) and their relative importance for different social groups are examined. This history of valuation and evaluation must also incorporate the putative 'moral economy' of users and their sense of what constituted a just allocation of resources, as well as the relative success or failure of management of the commons in terms of their environmental condition. Whilst the period covered leads up to the widespread, but by no means universal, privatization and enclosure of the commons from the second half of the eighteenth century on, struggles over resources, exclusions and enclosures were in fact a feature of the entirety of the era. Rather than asking if there was a 'tragedy of the commons', we should be asking more precisely, whose tragedy was the 'tragedy of the commons' and how many acts did this particular drama have?

II. Lordship, topography, and agrarian underpinnings

The historiography of the commons of the south-west is not dissimilar to that of other parts of the German-speaking world. The works of two nineteenth-century jurists – Otto von Gierke and Georg Ludwig von Maurer – stand as seminal tomes (Gierke, 1868; Maurer, 1865). They were not directly concerned with the commons, but rather with a putative tradition of free association, often bound up with common property, stretching back to the age of Tacitus. This tradition, which focuses above all on the *Gemeinde* or commune, is concerned not so much with the management of resources, but a co-operative politico-juridical entity which supposedly provided an institutional opposition to the development of absolutist statehood. This interest has been revived more recently in the labours of Peter Blickle and the thesis of 'communalism', tracing a democratic tradition in German agrarian society rooted in the need for agricultural co-operation, mutual support and religious radicalism, though legally not dissimilar to urban corporations (Blickle, 1991; Blickle, 1997; Head, 1995: 11–24). These oppositions have in turn come under sustained criticism, giving rise to a continuing debate on the internal dynamics of village life, history 'within villages' rather than 'of the village' (Blickle, 1991; Blickle, 1998: 24). What these approaches have in common with studies more rooted in agrarian economic development, and especially on the 'peasant emancipation' (*Bauernbefreiung*) of the nineteenth century, is a tangential interest in common property primarily dictated by its legal and political implications (Bader, 1957: 13; Wehrenberg, 1969), rather than the relative success or failure of systems of common property in their own right. This legalistic approach to agrarian history has tended to view the rural world as ossified and unchanging before a series of top-down reforms initiated by legislation from the eighteenth century onwards (Strobel, 1972: 11–15). Indeed, the commons themselves only enjoyed direct attention from scholars for a rather brief period (Ellering, 1902; Tschuprow, 1902; Hook, 1927; Ulrich, 1935). Common rights have recently moved back onto the historiographical agenda in Germany, reflecting a general turn towards more detailed socio-economic studies of the dynamics of *Ancien Régime* village life. Yet they remain something of a footnote, as a hindrance to agrarian modernization or productive forestry, that act as a locus for conflict from the late eighteenth century onwards (Brakensiek, 1991; Hippel, 1977a; 1997b; Zimmermann, 1983; Zimmermann, 1995; Prass, 1997). Although the study of 'agrarian systems', incorporating a more functionalist approach to the ecology and social development of village communities, has been strongly established for at least two decades among some German-speaking historians, it has yet to be translated into any detailed studies of the German south-west (Netting, 1981; Pfister, 1984; Schnyder-Burghartz, 1992; Viazzo, 1989; Projektgruppe Umweltgeschichte, 2000).

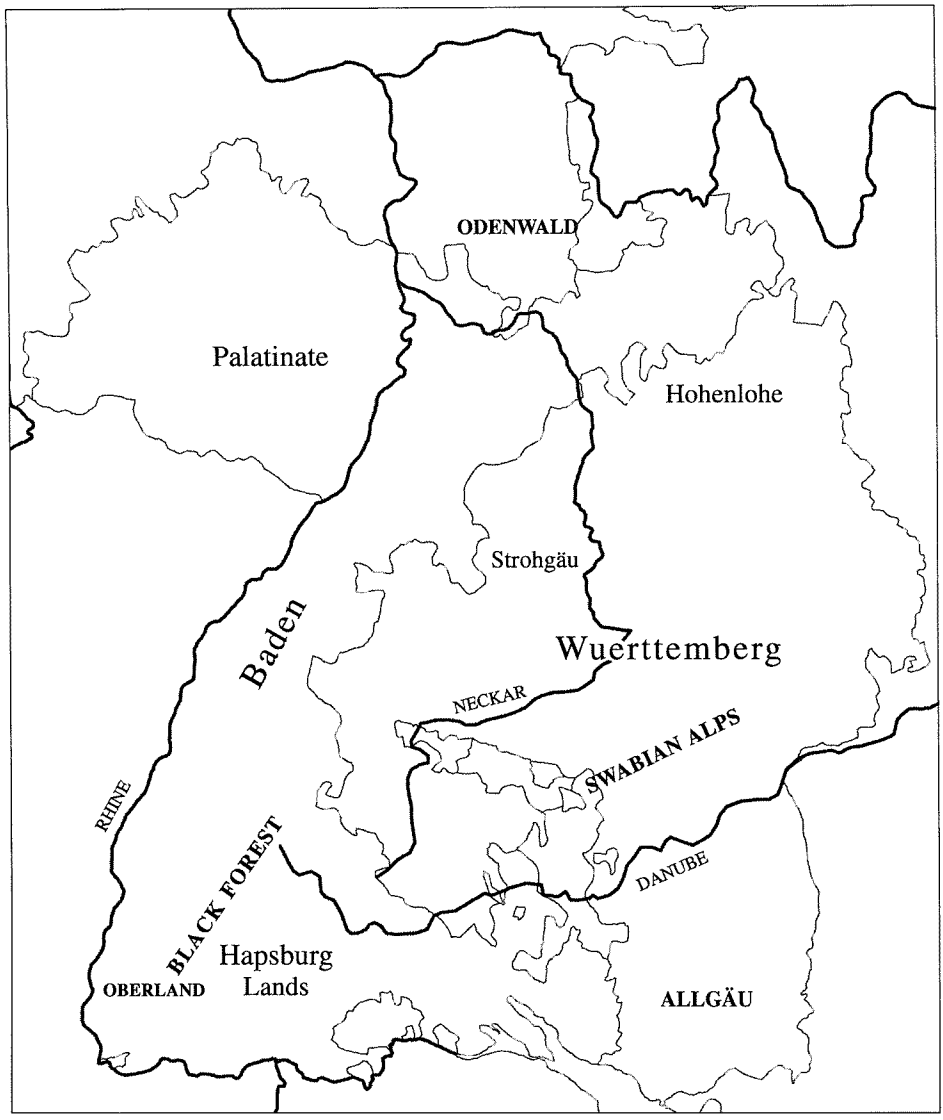
For much of the period after 1500 the German south-west was characterized by highly fragmented lordship, with villages often being subject to several feudal lords enjoying a complex variety of dues and services. Free Imperial cities juridically subject only to the Emperor, powerful monasteries, and secular lordships jostled with the larger territorial powers: The Palatinate, the County of Hohenlohe, the Austrian Habsburg patrimony scattered about the Upper Rhine, the various branches of the House of Baden, and the slowly waxing power of the Dukes – later elevated to Kings – of Württemberg. One should not be fooled by the phrase 'territorial states'. Often these remained a patchwork of overlapping jurisdictions and prerogatives. Certainly the commons of the south-west

were not characterized by any consistent overarching political power. Despite their relative independence, the nobility, however, were rather weak, nowhere a match for territorial princes and largely too independent of each other to form any kind of a collectivity. Equally, the fragmentation of holdings and jurisdictions precluded the kind of coercive economic, political and juridical muscle that the nobility could exercise in other regions of the Empire.

Defined by the valleys of the Rhine to the south and west, and Main in the north, much of the German south-west was upland; the Alpine foothills of the Allgäu, the massif of the Black Forest, the Odenwald in the north, and the Swabian Alp and often wooded uplands to the east of the Neckar valley. These uplands of poorer soils were generally a pre-condition for the more scattered forms of settlement, whether single farms, or irregular scattered villages. Sometimes narrow valleys saw settlement strung out along their floors with the holdings of each household stretched in narrow strips from meadow bottoms up to a parcel of woodland on the ridge. There was, however, no simple ecological translation into settlement type. In fact, by the far the most prevalent form was the three-field system of rotation around a compact nucleated village. Although absent from rough terrain such as the Black Forest and Odenwald, this was virtually the only settlement form in the Swabian Alp as well as the lowlands (Schröder-Schröder, 1970–1992; Grees, 1970–1992; Mayhew, 1973: 26; Hippel, 1997a: 52–53). Inheritance practices showed another, if related pattern. By the seventeenth century holdings were usually impartible in the Black Forest and east and north of the Neckar, though this was enforced to a more or less rigorous degree by local rulers, rather than simply being unalterable custom. Partibility dominated on the Rhine plain and in a broad belt from the Bodensee in the south, up the Neckar valley. As we shall see, this distinction was a significant one for the socio-economic development of the region, though not obviously predicated upon the 'closed' and 'open' community model outlined above (Mayhew, 1973: 133; Medick, 1996: 179, Grees, 1975: 73–74).

The ubiquitous three-field system, subject to tight communal controls and enforced cropping patterns, saw much of the south-west dominated by grain-growing with a strong orientation towards subsistence agriculture and local exchange. However, in some areas this evolved into more complex specializations. After the Thirty Years' War, the cereal-growing heartland of Upper Swabia developed into a breadbasket for proto-industrial areas of neighbouring Switzerland. Viticulture became the major commercial crop of the Neckar valley, reaching a highpoint in the late sixteenth century, after which the terms of trade declined somewhat. The vicinity of large cities such as Augsburg encouraged market gardening, while textile industries put out roots in many districts. Notable among these were the worsted-weaving areas of Württemberg on the eastern fringes of the Black Forest, and the linen industry in south-east Württemberg and around the Danube. Transhumant sheep-herds in the Black Forest or on the Swabian Alp provided the clip for spinners and weavers. Especially in the eighteenth century, areas of more extensive husbandry such as the Hohenlohe plain increasingly made a living from specialized livestock rearing (Göttmann, 1991; Schröder, 1953; Hornberger, 1959; Scott, 1996). This brief survey indicates diversity in the agrarian experience, with increased local specialization by the eighteenth century. Despite the prevalence of subsistence grain-growing, most districts had other forms of income which orientated large numbers of

Figure 8.1 Political boundaries of 1820, south-west Germany



Source: By courtesy of IEG-maps (A. Kunz/J.R. Moeschl)

households to exchange in the public market, and the vagaries of economic fortunes in a world which reached far beyond any supposedly autarkic village community.

III. Access to common rights and their context

To talk about the 'commons' is perhaps to introduce a misnomer into the debate. The commons in the sense of 'common land' was only one form in which 'common' or collectively-exercised rights could exist. Indeed, many common rights were defined according to rights of usage rather than the right to dispose of rigorously delineated spaces. If we refer to the 'commons' of any one place we should at least remember that this denotes a bundle of rights which could vary considerably in substance and value to residents, even when those rights were regulated by the same group or institution. Many disputes focused upon *specific rights* rather than a concept of the 'commons' in general, and hence the struggles around such rights took on different forms, and were framed in different ways over time.

The common lands embraced large areas of pasture and woodland. Some 14% of Württemberg remained common land in 1925 (Ulrich, 1935: 1), an area much smaller than that over which common rights were exercised in previous centuries. In 1863, a full 29% of Württemberg's woodland was owned by communes, and a much higher proportion in densely settled areas (Hippel, 1977a: 562). For most users, the right to grazing and underwood for fuel or fencing was paramount. The lands also provided numerous collectable and often, though not always, unregulated resources, such as broom, furze, turf, berries, fungi, leaves, leaf mould, snails and deadwood, and spaces for woodworking, retting flax and hemp or bleaching. Common rights to all these resources were often exercised over land that was not owned either 'in common' or by a communal institution such as the village commune or municipality, but was for most purposes 'private'. Consequently, notionally private owners of land were limited in the uses to which their land could be put. As well as rights exercised over common waste, pasture or woodland, under the three-field system land was almost universally open to grazing exercised by a communal herd when not sown with a crop, such as in the 'fallow' year or before first ploughings or after the harvest. This is precisely the same as what we have defined as 'common arable' or 'common meadow', although equivalent terms were not in use in south-west Germany, partly because there were very few areas that were not subject to such rights. Potential problems with access over cultivated fields were one of the reasons why the agricultural calendar had to be regulated by village authorities or the lords. Such an arrangement provided a vast labour saving for individual households which did not always need to be overseeing their livestock, but required their uncropped land to be open so that the large herds were able to find sufficient pasture (Viazzo, 1989: 22, 279–280).

In turn, local authorities also leased out common land subject to their control. This was used for gardens or parcels of meadow and arable land by members of the commune. Communes also owned fields worked collectively by corveé labour owed to them, ran communal buildings such as forges and bathhouses, and owned, maintained and charged for the use of village boars or bulls (Bader, 1957: 116). The allotting, leasing or

auctioning for set periods of areas of common lands or indeed rights (such as to pasture sheep) constituted a central part of the history of the commons in the German south-west. We should not simply see the history of the commons as being determined by the activities of the holders of rights, of the 'commoners' as an independent body. Institutional control and the variant priorities of those institutions were critical throughout the period. At the same time, whilst the bundle of common rights potentially embraced a very large part of the agricultural economy, in practice the availability, 'bundling' and value of such rights were very unevenly distributed over an already diversified region.

The collectivities or forms of association which governed the commons fell broadly into two types, the *Genossenschaft* and the *Gemeinde* (commune). Broadly speaking, the *Genossenschaft* was an association vested with rights in material resources such as wood (usually within a limited space), while the *Gemeinde* exercised political rights in a corporate or communal body, which entailed as a corollary the use of common resources within their jurisdiction or areas actually owned by the *Gemeinde* (Bader, 1962: 12, 15, 20; Gierke, 1868: 208, 589–591).[2] The *Genossenschaft* could be an association of individuals, but equally institutions such as monasteries or feudal lords might appear as members – sometimes allowing their subjects to exercise rights – as well as village communes and individual farmers. *Genossenschaften* tended to appear in less intensively-exploited regions, with overlapping jurisdictions, such as the famous Dornstetter *Waldgeding* in the Black Forest, or the *Hardtgemeinschaft* encompassing the 880 hectare *Hardt* woodland on the right bank of the Neckar near Bottwar. Some of these associations developed their own courts, and from the sixteenth century published reasonably detailed ordinances regulating their management, primarily of woodland and wood-pastureland (Blickle, 1986: 175; Gem. Benningen, 1979: 84–85). Others, which simply developed out of overlapping rights of different lordships on a swathe of woodland, such as the *Hagenschieß* to the south-east of Pforzheim on the borders of Baden and Württemberg, failed to develop any strong form of local regulation. Despite the appointment of a forest warden and the implementation of a limited system of fines in the *Hagenschieß* at the beginning of the sixteenth century, the area was partitioned between the users in 1567 with the woodland suffering from overcutting. This appears to have been a clear failure to develop effective forms of monitoring and managing the resource (Warde, 2000: 117–118).

Far more prevalent were those associations which took the form of a *Gemeinde* (commune) or political corporation which managed the common lands and common rights, sometimes exercising those rights over land owned by others within their jurisdictions, but sometimes actually owning the land themselves. These communes, both rural and urban, were the basic building-blocks of political life in the region and usually comprised a single settlement. Membership of the *Gemeinde* entailed becoming a *Bürger,* that is being a male married household head, or at least running an independent economic unit if not in a separate household, and over the age of 25. In the core lands of *Alt-Württemberg* the children of *Bürger* were generally automatically accepted into the *Gemeinde,* a

[2] The *Gemeind* was often used as a synonym for the commons (*Allmende*), based upon the collective right (*Gesamtrecht*) of the commune (*Gemeinde*) as opposed to a use-right based on a particular material.

provision extended to the later incorporated lands of *Neu-Württemberg* (and hence the bulk of the German south-west) early in the nineteenth century. In addition a fee was levied and local authorities could exercise discretion over outsiders whom they admitted, usually based upon incomers' ability to maintain a viable economic unit and not fall upon the charity of their neighbours (Ellering, 1902: 7; Ogilvie, 1997: 49–51). There is some evidence that this could include successfully restricting people's ability to marry. Despite the growth of population over the period, the numbers of those excluded from membership of the *Bürgerschaft* remained remarkably small, especially in regions of partible inheritance. Only a few per cent of the households in most of these areas belonged to the *Beisitzer*, those who did not enjoy citizenship, though with variation (Ogilvie, 1997: 51–54; Sauer, 1982: 145).

In theory, all *Bürger* in Baden and Württemberg could vote on admissions and for village officials. In turn, the commons were regulated by village courts that included regulations on their use in village byelaws, referred to either as ordinances *(Dorfordnungen)* or 'manifests' *(Weistümer)*, and appointed wardens to oversee their resources. Often permission to use the resources rested on the discretion of the village mayor *(Bürgermeister)*, responsible for managerial and fiscal matters, but the actual legal controls were implemented by the village court, a body most frequently consisting of twelve men who co-opted new members, and headed by the *Schultheiß* (bailiff). He was responsible for the local jurisdiction and also, as an agent of the state or lordship, supervised tax collection and the implementation of state ordinances. The jurors of the village court could be elected or co-opted, usually for life, and while the *Schultheiß* increasingly became elected over the period, the lord or state retained the right of confirmation. This constituted, in many places, a broad monitoring system with a fairly high degree of local autonomy as to how it operated (Ludwig, 1896: 10–11).

Membership of the *Gemeinde* and access to common resources did not always go hand in hand, however. Often rights to at least part of the 'bundle' of common resources were maintained by a minority group, who succeeded in establishing a link between the rights and the old medieval farmsteads *(Hofstätten, Huben)*, and restricting the access of those dwelling in more recent foundations.[3] Alternatively, wealthy tenants maintained the integrity of larger holdings and limited the rights of those who owned land outside of these larger farms (Bader, 1973: 33). This was a legacy of late medieval times where across the south-west common rights were granted to households according to their 'needs', and were associated with particular farms. Sometimes the *Gemeinrecht,* used as a synonym for both a 'common right' and membership of the commune, was limited in this manner. The 'political' as well as the 'commoning' community was consequently restricted. Both these phenomena occurred more frequently in the lands outside *Alt-Württemberg* where lords often legislated for impartible inheritance and maintained a tighter grip on large tenant farms as leaseholds, inherited undivided to secure them as taxation, service and surplus-producing units (Robisheaux, 1989: 81; Kollnig, 1985: 137–138). This was

[3] These rights usually pertained to the farmstead, rather than the building itself, though sometimes the expression 'hearth' is used in late medieval documents. It could also be the case that residence on a *Hofstätt* was a requirement for membership of the *Gemeinde.* (Bader, 1957: 54; Hippel, 1977a: 68; Steinle, 1971: 20)

especially important where the rulers received a large share of their income payments in kind, as larger holdings ensured an available surplus to provide this.

In districts of primarily partible inheritance, demographic and economic pressures had generally contributed to the dissolution of such large leaseholds before states were able to move to secure them later in the sixteenth century. While rents in kind might remain important until the nineteenth century, states such as Württemberg found themselves better able to augment their incomes via taxation, and more households were seen as a positive factor providing human capital and cheaper labour (Boelcke, 1970–1992; Hippel, 1977a: 123; Knapp, 1902: 432; Hess, 1968). Two factors took centre-stage in these areas. Firstly, the rigorous maintenance, under the supervision of the *Gemeinde,* of nucleated settlement, which meant that all of the residences in the village fell within one of the old *Hofstätten* (farmsteads) and were consequently permitted rights, even when these farmsteads became partitioned. The second factor was the inheritance practices themselves that partitioned plots and buildings. This limited in the long run the ability of local authorities to keep track of who lived where and determine who might enjoy what rights on the basis of this information. Thus even where rights did in theory derive from the combination of communal membership and residency on a farmstead, the latter lost its significance over time. Equally, the spatial limitation on settlement to the nucleated village prevented squatters from colonizing the 'waste', in marked contrast to some other areas of Europe, although it is not entirely absent from the region, especially at the end of the sixteenth century. In some cases noted by Hermann Grees in the district of Heidenheim some room for agricultural expansion was clearly a factor in new assarts and settlement (Grees, 1971: 197).

Social divisions were also established within the *Gemeinde* on the basis of services and corvée labour owed to both the lord or village commune. In Hohenlohe, for example, it was distinguished between *Vollbauer,* who generally owed four draught animals, *Halbbauer,* liable only for two (where a standard yoke was four animals) and the *Söldner* who owed only the labour of their own hands. Outside of these members of the *Gemeinde* were the wholly landless who usually lived as poor cotters or as inmates in the farms and outhouses of their wealthier neighbours. If inmates enjoyed communal rights at all, it was only as *Schutzgenossen*, having permission to pasture a few animals and having to pay a sum – literally, 'protection money' (*Schutzgeld*) to the Counts of Hohenlohe. This was a case, as Robert von Friedeburg has pointed out, of differentiation *within* households or holdings rather than *between* them. Even if they acquired land, the *Schutzgenossen* could not advance to enjoyment of the commons by right. These distinctions had begun to emerge at least as early as the thirteenth century and characterized much of the north and east of the region, although they could be found along the Rhine valley too. Usually they appeared in combination with an increased tendency towards impartible inheritance and maintenance of holding size (Schremmer, 1963: 11–14; Ellering, 1902: 9; Friedeburg, 1997: 55; Grees, 1975: 2).

As common rights could be awarded along similar principles as the apportioning of corvée by lords, a moot point is whether such rights were seen as deriving from a 'manorial' source, based on a grant from the lordship over land (*Grundherrschaft*), or a juridical one ordered by what became the jurisdictions of public law (such as the jurisdiction of

the *Gemeinde* over its *Markung*). An earlier school of German historiography could confidently assert that is was 'undisputed' that the commons were the 'remnants of a germanic common *Mark*' (Ulrich, 1935: 73; Maurer, 1865: 16). These ideas were disputed by the Austrian 'school' of Anton Dopsch, and were effectively laid to rest by the work of Karl Siegfried Bader (Dopsch, 1933: 43–44; Bader, 1957: 5–6). The answer is probably that the commons, seen as an integral part of a generalized agricultural order, had roots in both manorial and 'communal' arrangements that have their own rich and complex history of struggle and change over much of the medieval period. However, it was Viktor Ernst's insight that whoever exercised the basic right to 'command and forbid' within the local jurisdiction (*Zwing und Bann*) also controlled the commons, and this basically meant the local *Gemeinde,* with a greater or lesser degree of lordly control (Jänichen, 1970: 202–216; Dopsch, 1933: 75).

Two factors, however, can be isolated as significant in the development of this balance and were indeed often connected. In areas of early settlement, management of extensive resources such as grazing and woodland often seems to have become the responsibility of the commune, while in the more recently settled (or, in the case of some districts of Upper Swabia, re-organized) regions lords tended to retain more direct control. Secondly, the intensity of lordly management appears to have been a factor. This was especially the case in determining whether medieval use-rights became consolidated into early modern communal property holding in districts more distant from the centres of lordly power and direct exploitation, as Thomas Simon has charted in the south-western *Markgrafschaft* of Hachberg-Sausenberg (Simon, 1995: 140, 209–210, 218–220). Thus in those villages ruled directly by the Dukes of Württemberg, communes exercised a high degree of autonomy in their management of common lands which was only undermined by the ordinances of the Württemberger *state* rather than the Duke directly exercising power either as landlord or juridical lord. In some districts, though by no means all, the more scattered nature of upland settlement and farming appears to have militated against the formation of strong communes, and in this respect at least, favoured lordly intervention and property-holding. Village ordinances and 'manifests' (*Weistümer*) that regulated the commons do not stem from a consistent source, but might be the result of instructions from state functionaries, agreements between peasants, between lords and peasants, or between various lordships. The last seems more prevalent where peasants with different landlords within one commune came into dispute over their respective rights in the commons.

We must also address the possibility that patterns of access to the commons were determined by the extent of the resources themselves rather than exogenous factors, although these remain extremely hard to disentangle. Investment in small vineyard plots, for example, might be encouraged by the manure and dairy products available as an end product of grazing the commons, and as a consequence providing a boost towards partible inheritance. Equally, the partibility of small high-value plots may in turn increase reliance on commonly-managed resources. Was the generally broader access to commons in areas of partibility a consequence, as described above, of an inability to reserve the rights to particular users such as the holders of long-term leaseholds? Or did a more general access to common rights equally encourage partibility by providing an added incentive to stay, where tiny plots could be supplemented by common resources and the welfare responsibilities of the commune to its members? These welfare obligations might

also entail use of the commons. Certainly, emigrants from 'closed' communities played the land market to retain their rights as *Bürger*, and long-term migrants continued to look to their home *Gemeinde* as a source of security and relief in old age well into the nineteenth century (Kaschuba and Lipp, 1982: 46–49). It may be that such trends accentuated each other, but the rough association of partibility and broad rights in the commons, in a region where virtually all *Gemeinden* were effectively 'closed' in determining membership, alongside the lack of a general correlation between partibility and environment beyond the possibilities of intensive agriculture (viticulture, market-gardening and so on), suggests that if the extent of the commons was a determinant of how rights to it were apportioned, it remained so only as a part of a wider constellation of tenure and income opportunities.

IV. The role of state power and social change

In times of increased population pressure on resources – that is, from the end of the sixteenth century until the Thirty Years' War (1618–1648), and during most of the eighteenth century – the struggles to maintain or transgress these distinctions in access became more intense. Those poor both in terms of wealth and entitlements grew as a proportion of the total population. In western parts of Hohenlohe, where lordly domination was strong, the common lands were simply partitioned as early as the sixteenth century, and from then on became marketable resources traded among the wealthy tenant farmers (Saenger, 1957). In eastern Swabia it was most often the woodland or small plots of garden, both easily delineated and exploited resources, which passed into private ownership (Grees, 1975: 29–31). In parts of Baden the number of lots in certain communal resources was limited, so that whilst each *Bürger* was entitled to their use, he had to wait until a lot was freed up by retirement or death until he could succeed to it; indeed, by the nineteenth century a lot in the commons was nicknamed the 'key to the churchyard' (Ellering, 1902: 7; Schlitte, 1886: 1,246)! In the village of Gersbach in the Badener Oberland, when the eighty rights were all taken, young men simply received no rights, although they were compensated (Straub, 1977: 30).

In other areas limitations took the form of declaring there to be a formal equivalence between services rendered to the lords or commune and the rights those then conferred over communal resources. This did not necessarily mean a formal distinction between service-owing groups as existed in Hohenlohe, but could take the form of an argument based upon the fact that despite nominally equivalent services, the inhabitants of larger holdings undertook higher costs in the performance of those obligations. In a series of disputes between richer and poorer villagers in the Strohgäu region of Württemberg between 1559 and 1620, the notion of an equivalence between obligations and rights was employed alongside other arguments in favour of larger shares for the wealthier. They had bigger households to support, larger farming enterprises, and were thus supposedly of general greater utility to the Dukes of Württemberg as providers of services, taxpayers, and guarantors of good order.[4] The access to a common right *itself* was

[4] These disputes were reproduced in discussions over privatization, and whether enclosure allotments should proceed according to tax assessments, size of landholding, or per head. (Ellering,

not called into question here, but rather the extent of the resources permitted to differing groups, such as stewards of ancient farmsteads and cotters, or 'farmers' as opposed to 'vinedressers' or 'day-labourers', and who could determine what the divisions should be. These were usually the wealthier inhabitants in their guise as village jurors and mayors. While these disputes cluster in a period of relatively high population pressure (though there are earlier examples), it is by no means clear that they were directly connected to 'resource scarcity', even though the court disputations often anticipated such problems in the future. It seems more satisfactory to attribute them to increasing residential segregation between cotters and farmers, or those who owned or rented a tenement, and those who owned a whole house. This polarization of social groups undermined earlier traditions of allowing equal lots to all, whether formally or on an informal basis. The nineteenth-century jurist-historians Gierke and von Maurer saw in such arguments the kernel of a generalized equivalence posited between obligations and taxes due, and rights enjoyed. However, it appears that such aspects of communal membership were not necessarily linked, and this was one argument among many as to how resources should be distributed. It should be noted, however, that although communes had the power to limit in-migration they did not state that they acted to do so because they feared over-burdening the commons (Wehrenberg, 1969: 128).

Where such disputes rumbled on between villagers or between villagers and lords and were not resolved by a local ordinance, the recourse of groups feeling wronged was increasingly to go to higher bodies of state for arbitration and judgement. Strictly speaking these disputes only belonged to the sphere of state intervention because of a general concern for the common weal rather than the personal rights of rulers, but the result was that local rules increasingly became articulated and arbitrated on the basis of higher branches of government. This process anchored communal management more firmly in the context of the centralized state. Such disputes could rest finally on the very nature of the commune, and whether the power to alter or maintain local practice was vested in the *Gemeinde* as a whole, as poorer plaintiffs tended to claim, or in those institutions such as the village court, long-established to govern the *Gemeinde,* and usually dominated by the wealthier farmers. The state's response to such disputes was by no means consistent over time. Just as with the arguments brought forward by petitioners, it could vary according to circumstance. Indeed, by the eighteenth century an economic ideology favouring the expansion of population and human capital was tending to prevail in Württemberg over considerations of securing older taxation units, leading governments and lords to encourage full access to communal resources to the poorer and previously excluded inhabitants. A general rule was that disputes from below, and a concern for income and order from above, tended to play into the hands of a dirigiste state that dictated terms to communes as lower organs of government, increasingly in the form of statutes. In many places this policy was successful, particularly in the lands of *Alt-Württemberg*, which led to some confusion among legislators in the nineteenth century when confronted with the limited access to resources and more graded sets of obligations to be found in the kingdom's newly-acquired lands. Settlement was also permitted by Imperial Knights who controlled numerous small fiefdoms in the south-west, exploiting the labour services of settlers, and extending their juridical power, although the territorial

1902: 37; Grees, 1975: 28; Warde, 2000: 287–298).

extent of their properties was small. (Hippel, 1977a: 64, 77, 564–569; Saenger, 1957: 37–39) In contrast, Baden more eagerly pursued the privatization of common lands under the star of physiocracy, although with mixed success (Strobel, 1972: 184).

As an arbitrator, however, the tendency of higher authorities was still to follow custom if it could be determined; indeed, many of the disputes dealt with reached them precisely because there was no local consensus over what custom should be. Certainly the regulation and management of the commons – setting of stints, size of wood allowances and so forth – were usually considered to be matters for the localities to determine. From the latter half of the eighteenth century onwards governments promulgated enabling legislation to encourage the dissolution of common rights over what was deemed 'private property' such as woodland, along with the enclosure and consolidation of parcels in the open fields, and the enclosure and partition of open common lands. However, these measures were very rarely forced through in the face of determined opposition from villagers, or even minority groups of villagers. The criteria for assessing disputes over who had rights, or the size of those rights, and the correct form by which to resolve the dispute, remained consistent throughout the period. This consisted of either written documentation (though that often had to be supported by oral testimony) or firmly established custom, in theory 'from time immemorial', but in practice often of about three decades. The fact that a 'custom' could in fact be relatively novel was recognized as a problem by government officials and commoners alike, both perceiving that custom was established according to the needs of the time and could favour certain groups (Hippel, 1977a: 564–565; Hippel, 1977b: 654). Nevertheless, custom remained a 'good word' (Wrightson, 1996: 22), which was taken to indicate that something 'was not good because it was old, but old because it was good' (Brunner, 1968: 75). The legal position did not change until the new government ordinances on communal management of the nineteenth century, but the increasing density of accumulated written record over the centuries shifted power gradually in favour of the formal and codified procedures of central government.

Parallel to this process ran the introduction of Roman law that allowed the reconceptualization of the collectivity of the commoners and their common rights. Either the latter became *Servituten,* particular rights adhering to a legal individual exercised over other private property which could be abolished if compensated, or the associations which constituted the commoners were reconfigured as private corporations (Gierke, 1868: 663–664). This allowed a *Gemeinde* to sue at law as a legal personage, a *universitas,* but it equally condemned such activity to the realm of private law and removed in the final instance its autonomy. What might have been seen as a complex overlap of public jurisdictions became subject to the overview of the state (Bader, 1962: 388; Gierke, 1868: 645; Maurer, 1865: 84). Thus while commoners or communes could act in law over particular proprietary rights, they could not dispute, even if they had so desired, the legal authority of the state to make and amend public law. Such a process was already ongoing during the sixteenth century with the establishment of a forest administration and detailed forest ordinances, legally based upon the hunting rights pertaining to lordship, but expanded to a purview over all matters of woodmanship, including woodlands owned and managed by village communes which made up a significant proportion of woodland cover in much of Württemberg. The accumulation of disputes also led in some

circumstances to the promulgation of general ordinances, seeing the communes as the lowest organs of the state administration and accordingly restricting the manner in which they could use the resources that they owned. Commons could not be alienated by communes without permission, and as early as 1552 the government of Württemberg ordered communes to set limits on the numbers of animals that citizens could graze *gratis*. Other ordinances such as that of Baden in 1791, which established that *Bürger* living elsewhere but still performing communal obligations could retain their rights, responded directly to disputes among the commoners themselves (Ellering, 1902: 12; Ulrich, 1935: 34, 54).

Whilst in other areas of Germany this paved the way to a relatively rapid privatization of the commons, the strength and broad base of the political commune in the south-west, and its importance as the local manifestation of the state, tended to militate against such a result. In particular, the commune remained both the provider of poor relief and the basic taxation unit that bore the arrears of the community. The income from the commons was seen as the primary means of alleviating both these burdens, and made the government determined to enforce effective management. The effect of these efforts remains a matter for debate. An older historiographical tradition has seen the increasing state regulation of Württemberger communes as destroying the corporate spirit of these bodies, turning them into rather corrupt and often ineffective enforcers of bureaucratic decrees. From the 1740s, a return of greater autonomy made for much more rigorous policing of communal resources married to tight alliances of family-groups which dominated local office-holding (Ulrich, 1935: 48; Sabean, 1992; Sabean, 1998). David Sabean has associated these changes with the advent of capitalism and the encouragement of intensified agriculture, while Sheilagh Ogilvie and Georg Fertig have emphasised the more enduring exclusionary collusion between local and central powerholders, a process Ogilvie calls 'state corporatism' (Ogilvie, 1997: 66–72, 84; Fertig, 2000: 357–358). Ulinka Rublack has, in contrast, laid stress on the inability of district administrators to effectively enforce decrees (Rublack, 1997). It is likely that the experience was rather variable depending on the resource involved and the level of regular state scrutiny, as was the case with the enforcement of the forest ordinances (Warde, 2000).

As the eighteenth century drew on, however, the discrepancy between the political commune and those entitled to use communal resources became increasingly clear. This was highlighted by the increasing administrative burdens placed upon the *Gemeinde* as a unit of governance, and the continuing success in what would become *Neu-Württemberg* of certain groups in restricting access to the commons. Given the increasing taste of the authorities in both Baden and Württemberg for formal equality of rights for all *Bürger*, a solution was sought either in equal rights for all within the commune, as already existed in many areas, or alternatively a proper separation of the political commune and the bearers of common rights as a private corporation, who then took on the appearance of a *Genossenschaft*. This process emerged occasionally in previous centuries, but only came generally to fruition during the nineteenth century. Governments usually found it cheapest and simplest to confirm those currently in possession of rights as the corporate group, particularly after the collapse in agricultural prices after the Napoleonic wars lessened the demands for enclosure and privatization. Such privatizations were only carried out on local initiative, and *Servituten* allowing common pasture rights on private property were not abolished in Württemberg until 1873 (Schlitte, 1886: 1,190).

The discrimination in the apportioning of common rights, especially where they became based on particular properties or were even tradable (sometimes called *Realgemeinde*), also tended to focus the long-standing question of what actually justified the existence of rights and to what precisely they pertained. Throughout the period a central strand of economic thinking throughout the populace was the right to *Nahrung* or *Notdurft*. This meant the basic subsistence of the household, and at least theoretically many common resources were allotted with the idea that they provided a use-value which secured the subsistence and ability to reproduce of both the household and the communal association of households that comprised the village. Thus many rights stipulated a level of supply commensurate with the self-supply of the household, such as a lot of wood covering the needs of the hearth. Whilst such a standard had its uses as a measure of the sustainability of the household, it could equally enter into the conflict over what a fair lot might be, with the poor arguing that the rich should not enjoy larger shares by dint of their larger households and expenses, but that these households could better afford to buy in such resources and were not reliant on them for their *Nahrung* in the same manner as the poor.

In areas of broad access to common resources, lords, village and town authorities were often strict in regulating the final destination of goods such as straw or wood allotted by the commune. They often banned any sales or even transfers of resources outside of the local village jurisdiction (*Markung*) from which they came (Ernst, 1930: 286–287; Trugenberger, 1991: 140; Warde, 2000: 109; Straub, 1977: 119). This has been viewed as an 'ecological' policy designed to maintain the productivity of village lands by avoiding the alienation of precious biomass elsewhere. However, it is clear that such measures were sometimes enacted by lords as a means of preventing peasant involvement in the market, and met with resistance. It is likely that two interests dovetailed here. One was the 'ecological' concern to enforce sustainability. The other was a more general interest in maintaining *income*, whether through yields, feudal dues or rents. This took the view that transfers out of the local 'agrarian system' would lead to more rapid and possibly irreversible depreciation of assets without the benefits flowing to the owners of capital or land. This could also apply to creditors who wished to see the value of the land conveyed to them as a security for a loan maintained (Ineichen, 1996: 120). Even though there appears to have been a market for such resources within communes (selling 'as expensive as one can', as the ordinances of Gebersheim in Württemberg expressed it in 1594), sales were often limited to that which was not needed for household consumption, to ensure that the resources were put to their intended use (Warde, 2000: 109). There was, however, an incentive for those holding rights to sell their freely-obtained goods on to those areas where they were scarcer and more expensive, and buying in cheap for household consumption. Despite prohibition this appears to have been a regular enough occurrence.

As in some places rights became detached from simple 'citizenship' or membership of the commune, it became an issue, particularly in the *Realgemeinden,* whether rights pertained to particular plots, buildings, or were tradable as a privately-owned commodity. In the district of Kupferzell on the Hohenlohe plain such a market in 'rights' pure and simple already existed from at least the late seventeenth century (Steinle, 1971: 22). Even in villages in the heart of *Alt-Württemberg*, inheritance of properties, or multiple

households living in a single building, gave rise to disputes over the number of lots particular buildings or farmsteads could receive. Some families appear, via inheritance, to have accumulated several 'rights' and rented out buildings at a higher rate because of the right that would be enjoyed by the tenant, even though the lessors could not use it themselves.

V. Common resources and their value

Where access to the 'commons' existed, it entailed very different sets of resources for different communities and groups within those communities, with a corresponding variation in both 'exchange-values' (so much as they can be deciphered from prices) and their ability to supply the immediate needs of the household. Common lands varied greatly in size according to local ecology and the agrarian regime. In some areas the common waste tended to cluster around the borders of the *Markung* at some distance from settlement, while in others they comprised a solid block of land (*Wasen*). Such distributions could become significant if, for example, the common pasture was too distant from the residence to make the practice of regular milking worthwhile.

One illustration of local variation is the snail farms of a handful of villages in the Württemberger *Amt* Münsingen lying on the southern flanks of the Swabian Alp, exporting down the Danube to Ulm, Munich and Vienna. The half a million snails exported by Anhausen and Indelhausen around 1825 could have provided some 333fl. a year alone to the children of villagers who gathered snails from the woodland to be 'fattened' on lettuce in the snail farms, equal to the mean net income of 55.4 ha of local arable (Königl.-Statistisch-Topographischen Bureau, 1825: 69, 83)! (Assuming zero costs for the children's labour and that capital inputs were negligible.) Snails were everywhere, of course, but rarely put to such use. The woodland was equally indispensable to the numerous smallholder producers of honey, though a value as such cannot be put on the provision of nectar. The use of the humus to fertilize vineyards, and the space as bleaching-ground or for the retting of hemp and flax, or washing of animals and laundrying around water-courses should not be forgotten (Hippel, 1977b: 667–668).

Far more widespread was the provision of wood. A central plank of the provision of common resources for subsistence was the supply of firewood and fencing. This did not take the form of free wood-cutting, but rather an annual lot granted in communally-managed woodlands, most likely run on a coppicing system where the woodland was divided into 'coupes' or 'compartments' cut on a cycle equal in years to the number of coupes, to ensure the availability of an adequate supply each year. Such systems, however, faced a rising population, and unless the number of lots was restricted, the extent of each lot and probably the yield from it would decline over time. Whether such a lot could in fact cover the annual firewood needs of a household depended on the extent of, and demands upon, the woodland, and by no means all settlements enjoyed access to such a resource. In the *Forstamt* Leonberg to the north-west of Stuttgart, only about 60% of its seventy settlements had a communally-managed woodland (not always in the actual *Markung*) and some of these were very small in extent (Warde, 2000: 98). More heavily wooded areas tended to be at higher elevations and figure at the poorer

end of tax registers primarily based around immovable property and land-values. Nevertheless, a labourer here with access to free firewood was considerably advantaged against his peers in areas without communal woodland. In the late-sixteenth century, for example, a labourer in Renningen near Stuttgart could obtain the household fuel supplies from perhaps a couple of weeks' woodcutting in the local forest, whilst an equivalent in the open grain-growing country to the north-east might have to spend 3–4 weeks of his high summer wages to heat his house and cook food – though the choice may have been made to suffer in the cold (Warde, 2000: 227). This effect would become more significant over time as wood prices rose faster than those for agricultural products during the eighteenth century, even though most wood yields were probably not nearly so good as Renningen's. As late as 1873, nearly ninety thousand inhabitants of Baden received no less than an average of $3.9m^3$ firewood, not counting faggots and kindling, per household (Ellering, 1902: 72; Troeltsch, 1897: 240)! Not enough to last the year, perhaps, but a considerable boon nevertheless. This very significant variation, however, tended to be governed by geographic circumstances. There is no evidence from the *Forstamt* Leonberg that, in the period before the Thirty Years' War, villages managed their woodlands differently from other types of landowner or expanded them in response to local scarcities. Management patterns seem to follow regional characteristics determined by the environment, rigour of the forestry administration and transportation costs, rather than being determined by ownership (Warde, 2000).

Communes also supplied building wood, though not indiscriminately. Usually village officials and a carpenter were called upon to assess need, and by the latter part of the sixteenth century there are examples of limitations being imposed. A set number of trunks or tree-stumps were allotted, sometimes simply the foundation blocks of a new barn or farmhouse, that still, of course, represented a considerable saving for the recipient – assuming there was a communally-owned wood from which to obtain the material. Sometimes permission to settle in a community was granted only on the condition that the newcomer did not enjoy rights over increasingly scarce local timber. Building seems to have logged out stands of mature trees from some areas by the sixteenth century. A positive policy of encouraging renewal on the part of communes did not take hold until after the Thirty Years' War, when the *Bürger* were often required to annually plant two to three saplings (usually oaks) and protect them from grazing animals. Wood might also be granted out, again often on the discretion of local officials, for repairs or agricultural equipment, although the latter does not seem to have promoted a more widespread ownership of ploughs, carts or harrows.

Woodland was not simply a space dedicated to producing woody material, but was equally a vital source of pasture, as well as the more open common lands. Before the introduction of year-round stall-feeding, the grazing of the commons could be essential for maintaining the local stocks of animals, usually driven out collectively under the supervision of herdsmen employed by the *Gemeinde*, preferably in the afternoon to exploit the shade (Flad, 1987: 80). The manure from these animals, also grazed on the fallow field and on balks and headlands between cultivated strips, provided a central element of the 'recycling technology' of the three-field system aimed at maintaining soil fertility. The very method of extensive grazing meant however that much of the precious excrement was lost, scattered by the grazing beasts. In turn, the pressures of

grazing meant that much woodland space was not managed as closely-stocked coppices or stands of timber, but had to be left open for grazing – indeed, there was a trade-off. The more scattered the trees, the better the grazing. Thus in many environments the felling of canopy trees should not be taken as an index of 'degradation', although this might expose other growth to late frosts. The humus and leaf-fall on the forest floor could also provide an important source of soil fertilizer or bedding for stall-fed animals, providing a binding agent for the manure. Collection of this resource increasingly became a source of dispute between forestry officials and the peasantry as stall-feeding became more widespread (Abel, 1967: 166–167; Schenk, 1996: 164).

The importance of pasture again varied very widely according to the size of the common land and its quality. Much common land was only really suitable for sheep, and by the eighteenth century many *Gemeinden* leased out specific parcels of the commons, or at least the right to graze sheep, to wealthy farmers. Sometimes meadows were set aside for horses and oxen, especially at night when most of the manure was dispensed. Such rights were often limited to those farmers who could afford to yoke their livestock to a plough, a distinct minority in many areas (Flad, 1987: 80). Numbers of livestock permitted onto the commons were often limited by communes, which adjusted the numbers over time. These by and large reflected the size of the commoners' agricultural endeavours. Sometimes they granted rights for specific numbers of animals based upon one's status (determined by the number of animals owed for corvée duties, for example), although it seems that often this established the number that could be pastured *gratis* and one could pay to graze more (Grees, 1975: 37). Another way was to rule that one could graze only so many animals as could be overwintered on their own holdings. This undoubtedly favoured larger holdings and their ability to grow or buy in winter fodder. It presumably restricted the use of the commons for market-orientated fattening of livestock, but equally for draught animals or cows rented over the summer by smallholders. In parts of early seventeenth century Württemberg, only around 60% of households held a cow and only a few communities allowed a substitute goat, the most damaging of all grazers, where a cow could not be afforded (Grees, 1975: 37).[5] Although cow ownership seems to have increased during the eighteenth century, this may have kept pace with agricultural change that raised the amount of fodder available, rather than being a product of increased stocking of the commons. The latter, however, could be a by-product due to the 'overwintering' rules (Maisch, 1992: 106–108; Strobel, 1972: 147; Ineichen, 1996: 120; Troßbach, 1998: 130). Indeed, it was the increase in fodder prices as much as the gradual removal of grazing rights, according to Alfred Straub, that made the post-1770s period particularly hard for the smallholders in the Badener Oberland (Straub, 1977: 173). By the late-sixteenth century hardly any of the poorest 60% of households in the Langenburg district of Hohenlohe owned cows, but might have just one goat or sheep (Robisheaux, 1989: 90; Steinle, 1971: Tables 20–21). Livestock holding was a little more extensive than landholding, but did not extend far down into the ranks of those who had no arable land or meadow. Certainly a right to pasture livestock on the commons was often simply not taken up because the household could not keep the animal through the winter (Suter, 1998: 84). Where the arable fields took up a relatively small area of the local *Markung,*

[5] Sometimes, however, the wealthy were explicitly barred from holding goats if they held cows. The figures come from an as yet unpublished study of livestock holding in Württemberg.

then the economy was proportionately more orientated towards the fruits of the commons. In areas with large open-fields, grazing was predominantly supplied by the fallow (common arable), though the common waste could be an important reserve when the fallow was waterlogged or baked dry and grazing animals might damage the soil later used for tillage.

Whilst the local significance of the commons might vary, there is no doubt that in an aggregate sense the common land, and especially the woodland either owned by associations of commoners, or over which use-rights could be enjoyed, could be a vital source of fodder. It was the 'oat-chest' for the horses of Bietigheim, as one writer put it (Stadtarchiv Bietigheim-Bissingen, B543, Bd. 1). Woodland covered about a third of the region, so the right of access thereto to some degree speaks for itself. In the early seventeenth century, before widespread sowing of fodder crops in the fallow, barely any of the Strohgäu communities came anywhere near the ratio of hay-producing meadow land to arable land recommended by later agronomists such as Engel and von Thünen for the three-field system. This serves to underline the relative paucity of dry fodder and the importance of common grazing at this time. Indeed, farmers were as much dependent upon straw rather than more nutritious hay for overwintering (Warde, 2000: 44–45; Saalfeld, 1967: 148; Othenin-Girard, 1994: 265, 364). Many wealthier farmers found the common grazing rights a useful supplement, and it was by no means unusual for them to resist privatization of the commons and the changes to the local economy entailed. This was especially true in areas of partible inheritance where rights were guaranteed to their children, while partition might leave them with only a meagre parcel of possibly low-value land. In contrast, the landless or land-poor who might hold no animals at all often saw, by the late-eighteenth century, the enclosure and partition of the common lands as a way to get a much-prized foothold as a landholder if these parcels ever came on the market. This was, of course, especially the case if they were in any case excluded from rights (Strobel, 1972: 89; Zimmermann, 1984: 240–241; Krings, 1976: 42). If that land could be made sufficiently fertile to sow clover or fodder crops, the yield could be very considerably higher than leaving it as open pasture.[6]

If the utility and value of common pasture depended upon how it, in combination with other resources available, determined the extent of livestock holding for different groups and households, it is by no means clear what the returns from livestock holding meant to those particular households. Central to this question in much historiographical debate have been the landless or land-poor and their ability to maintain a degree of independence from wage labour by using dairy products at home or as saleable commodities. Certainly a wide base of landownership in regions characterized primarily by partible inheritance facilitated ownership or renting of milch-cows. These might be especially important for smallholders who did not have property in all three fields and thus could not sow a crop in every year of the rotation. Increasingly they sought to sow fodder crops in the fallow, although this reduced grazing. The proportion of the fallow

[6] Although the 25 times higher productivity of clover over pasture suggested by the Hohenlohe pastor Johann Friedrich Mayer would be difficult to sustain, particularly on poorer land. Schlitte's work on the consolidation of holdings suggested that privatization and enclosure often accelerated the process of fragmentation in the south-west. (Saenger, 1957: 94; Schlitte, 1886: 6, 50).

sown was regarded as an index of the fragmentation of holdings by von Varnbühler (Bader, 1973: 97; Schnyder-Burghartz, 1992: 65; Varbühler, 1812: 189.) The part played by the commons in this – although seen as central by some historians – is harder to determine, not least because numbers of stock are not adequate guides by the end of the period to their annual yield (Strobel, 1972: 95, 187). By 1800 larger farmers had already shifted to holding relatively fewer beasts of much improved breeds, while the rather low-yielding creatures of the poor provided significantly less income or sustenance. Nevertheless, the reports of Schlosser in Baden in the 1770s suggested that the poor held very many (too many according to officials) animals for their dairy products. The quality of the fodder – itself related to climatic variation – could also induce a significant difference in the nutritional content of yields (Zimmermann, 1983: 146, 153–154; Pfister, 1984: 90–91).

Furthermore, the value of such livestock holdings would have varied according to family size and life-cycle and whether the products were destined for the hearth or for sale. It requires testing in a range of communities to establish their local relative importance for households. Very roughly speaking, a hectare of unshaded pasture could provide enough fodder for a cow for a year, although this was primarily available in the summer months and owners would have to find a source of dry fodder for the 140–150-day long winter season. This might require another hectare of decent meadowland, less if straw was available from arable cropping. Certainly if such fodder was obtainable, the investment in a cow was worthwhile for the return of dairy products. Given the constraints of the arable-poor's diets, and a much higher calorific return per money spent on cereal crops than dairy products, there was probably a strong incentive to sell dairy products, if possible, rather than retain them for one's own subsistence. This is despite the fact that their value dropped with conversion into durable consumer products such as schmalz or cheese. Notionally, the dairy products of one cow could fetch the equivalent of 7–10 weeks' wages in grain for a smallholder in 1720s Württemberg – perhaps enough to feed two adults for a year (although the grain, in turn, entailed processing costs before consumption), a considerable resource. Hence the availability of common pasture was important for those who had made the leap into landholding, or had another employment by which they could obtain the means to buy fodder, but had no value as a 'right' for those who fell below these thresholds.[7]

Pig ownership, making use of the occasional pannage of acorns or beechmast, appears to have declined throughout the period. The pannage, which could only be used to fatten the pigs and improve the quality of the meat, was not the kind of resource that provided a regular and reliable return. Indeed, a report from Hessen in 1787 noted that even when present, some ten acres of well-set oaks were required to fatten a single pig (Abel, 1967: 233; Schenk, 1994). Where permitted, the gathering of beechmast for oil could be very

[7] These 'ballpark' figures are based around a series of production figures and prices from the 1720s to be found in secondary sources. The range of prices and wages would in fact vary over the year; calculations fall within a continuum from 625 l of fresh milk being sold to the more likely sale of the equivalent amount of milk as Schmalz and curds at the lower end of the range. (Beck, 1993: 172–173, 520, 532, 628; Maisch, 1992: 40, 42, 46–49; Selter, 1995: 183; Pfister, 1984: 89–95).

valuable to the poor by the early-nineteenth century, as much as 70 or 80fl. a year near Reutlingen according to Memminger (Köngl.-Statistisch-topographischen Bureau, 1824: 61). Goats, the cows of the poor, were often considered an important resource, but their indiscriminate grazing brought severe restrictions, often including a complete ban from woodland.

Rising population naturally increased the demand for land and the clearing of arable plots and the establishment of meadows increasingly ate into common lands over the period. This enclosing movement, however, did not always entail privatization. Often it was taken in hand by the *Gemeinden* themselves, who rented out the plots, though still allotting them to those with common rights according to the local customary distinctions, sometimes for terms of up to ten years or in Hohenlohe even for life. As with the allotting of wood, senior communal officials often enjoyed first choice of lot in this process, in a situation where the quality of the land could be extremely variable. This provided a significant source of income for the commune, as well as the opportunity for smallholders to extend their agricultural enterprises. It not least entailed low rents, and sometimes lower taxes, though the short leases may have discouraged improvement (Ellering, 1902: 4–5, 41–44; Schremmer, 1963: 106; Hippel, 1977a: 562–563; Hippel, 1977b: 664–665). While *Gemeinden* throughout the period provided lots in communal gardens, and owned fields which might be leased or tilled by corvée and waged labour (a way to keep the underemployed poor occupied), by the later-eighteenth century such communally-owned and let fields in many areas took up a significant proportion of the open common land, especially where stall-feeding had been introduced. Thus while they continued to be *owned* as commons these parcels of land had ceased to be collectively managed, becoming a peculiar form of leaseholding regulated by the village authorities where the citizens enjoyed set rights to the leases.

VI. Assessing the management of common lands over the long term

The institution of the *Gemeinde* was far more significant as a manager of common lands than the associative *Genossenschaften*. As a consequence, the exercise of common rights was entwined with the management of the commune as a whole, increasingly as the lowest administrative unit of the state, rather than simply ensuring the continuing supply of common resources according to the interests of users. It was perhaps this above all that ensured their survival into the nineteenth century and beyond. With a vast increase in taxation over the period, accelerating especially in the late-sixteenth century, during the Thirty Years' War and Wars of Louis XIV, and reform in the eighteenth century, local authorities became increasingly indebted either as taxpaying units or through supporting their citizenry in times of hardship. With revenues unable to keep up with the demands upon them, it became increasingly attractive to communal authorities to exploit the value of their common resources rather than levying further local taxation (Boelcke, 1964; Ellering, 1902: 6; Wunder, 1986: 49; Carlebach, 1909: 140; Warde, 2000: 110; Trugenberger, 1991: 124; Krings, 1976: 34–35; Ulrich, 1935: 21, 23, 51; Straub, 1977: 56). In 1564 and 1621 the Württemberger government tried to limit revenue-raising solely for the purpose of providing food rather than the repayment of debt, but this was a rather unrealistic prospect (Reyscher, 1830: 164). Either the commons

themselves, but more often the revenues brought in by leasing sheep grazing and parcels of common land, became ways of increasing revenue and securing loans. By relying on the *revenues* from the communal holdings rather than the holdings themselves as security, however, the southern German *Gemeinden* were by and large not vulnerable to defaulting and losing their common land. Indeed, communes in Baden resisted pressures from the Austrian government to privatize their commons because they saw that the poorer households would inevitably lose their allotted plots to creditors, and at the same time the commune would lose a source of income by which the poor could be supported (Ellering, 1902: 34). Some Swabian Alp communities could earn 1,000–1,500 fl. by giving out three-year leases of their pastures to commercial sheep farmers by the late eighteenth century. This was the equivalent of perhaps up to 50,000 litres of unthreshed spelt in the 1790s, more in the previous decade of lower prices (Walter, 1990).

The commons were not only manipulated for financial reasons, but independently of rights, could also be used as a means of alleviating poverty in times of stress. This could be done either by, as above, securing money via the revenues of common land to distribute to the poor, or actually allotting small parcels of the common land itself to provide a partial means of subsistence to the indigent as small cultivators. This does not seem, however, to have extended to the provision of grazing rights (although the *Schutzgenossen* or *Beisitzer* were sometimes allowed such privileges), even if the poorest could have afforded the purchase or rent of a beast. More generally, collection of deadwood or leaves was permitted. This was not a right appurtenant to being a *Bürger*, (although in the forest ordinance of Baden of 1614, it was linked to services rendered to the rulers) but a use-right over property justified by the obligation of rulers to alleviate poverty (Wehrenberg, 1969: 175). Local authorities could exercise discretionary power in the distribution of either resources or parcels for the building of cottages or cultivation. Indeed, Württemberger government ministers *expected* communes to provide heating for the very poorest in the late-eighteenth century (Ellering, 1902: 21; Friedeburg, 1997: 97; Hippel, 1977b: 655, 664; Hauser, 1994: 342; Kaschuba and Lipp, 1982: 6; Grees, 1971: 197).

Thus the attachment of common rights to a theoretically participatory body such as the *Gemeinde* was intimately associated with local politics. There was an expectation on the part of many communal members that the *Gemeinde* would utilize the resources at their disposal for the common weal (*gemein nutz)* and that membership enmeshed one in a web of interrelated – though by no means simply equivalent – rights and obligations. As a right to subsistence (*Nahrung*) was generally recognized, and the immediate institutional expression for many was the *Gemeinde* itself, the commons managed by that authority took on the added 'value' of being representative of the self-supporting local community. If it was felt that the community did not adequately fulfill its moral obligations, the result could be symbolic attacks on the substance of the commune's management of the commons. In Kiebingen this took the form of felling of two trees (equivalent to the two planted each year by each *Bürger*) in night raids by disgruntled poor in the mid-nineteenth century (Knapp, 1902: 40–41; Kaschuba, 1991; Saenger, 1957: 102; Kascuba–Lipp, 1982: 82). In turn, disputes about the organization of the commune could easily be articulated as disputes over the access to and allotment of common rights, and the size of lots, a theme that recurs throughout the period.

These themes of economic justice, equality and reciprocity, have been stressed by followers of the 'communalism' thesis advanced most prominently by Peter Blickle, not as issues so much *within* the commune as *between* village authorities and feudal lords (Blickle, 1997). Certainly disputes over common lands, and use-rights, were prominent in peasant unrest around the end of the fifteenth century and the period up to and including the great Peasants' War of 1524–1525. Lords viewed charges on commonly-managed resources, often exploited on their own property, as a swift route to increasing revenues in a period of agricultural expansion, arousing bitter resistance from the peasants. New demands for documentation to prove rights also allowed territorial lords to assert property rights over land customarily used by lesser lords and communes alike (Simon, 1995: 204–210; Strobel, 1972: 177–178). David Sabean has also argued that the war was fought by some wealthier peasants as a means to exclude the growing numbers of land-poor from grazing and wood-cutting rights. Although the arbitrary action of lords in settling poor on local commons probably increased their ire, there is less evidence that this was really a spark for armed conflict. Such disputes were frequent in the sixteenth century and were usually resolved, as we have seen, by judicial means both before and after the war (Sabean, 1969: 6, 64–65, 76, 160, 188).

With the growth of territorially-based taxation, however, the attitude of both lords and states tended to veer, especially after the Thirty Years' War, to maintaining or expanding tax revenues, promoting population growth, or, under the influence of eighteenth-century reformers and the Physiocrats, to increasing agricultural productivity. This led to both chronologically and geographically variant policies that pitted the state against the interests of different groups of commoners at different periods. It might see either large variations in the alliances formed, or interest groups changing their interests over time in response to the pressure on resources and the economic opportunities available. Certainly, the link of common rights to relatively strong political institutions in the form of the *Gemeinde* made the south-west of Germany a region famously resistant to the top-down introduction of innovations, such as the rationalization of plots and pathways in the open fields, dissolution of use-rights, enclosure and privatization. This did not preclude, however, the widespread, if relatively late, introduction of many of these measures, especially in hand with local shifts towards stall-feeding, but rarely was any one interest group within the commune sufficiently strong to alter the agrarian system entirely to its own benefit. At the same time, the interest of the state in ensuring adequate revenues for the political commune and the effective provision of poor relief could prevent wealthier tenant farmers from aggrandizing the common rights entirely to themselves, or, indeed, privatizing them. Wholesale privatization of rights was rare outside of areas dominated by large impartible tenant farms and lords dependent on dues and services from these holdings.

Despite population growth there was, however, little sure evidence of a 'tragedy of the commons', although there are anecdotal reports and some quantitative evidence throughout the period of yield decline and overgrazing (Flad, 1987: 54; Pfister, 1984: 86). We must be careful in putting this apparent success down to effective management practices, however, as the evidence of a sample of successful and rigorous village ordinances is to some degree self-selecting, and the lack of commons elsewhere could equally be taken as the lack or failure of such ordinances. Indeed, many rules seem to have been

introduced as a direct response to local shortages (of building timber, for example, or the need for new stints), some of which emerge as early as the beginning of the sixteenth century. Fortunately for the region, many soils were not vulnerable to the kind of degradation into heathland and sand-drift that afflicted much of the North European Plain. The rather haphazard nature of regulation in some ordinances suggests that they were promulgated as a response to immediate distributive difficulties rather than laid down as programs for sustainable management. But much more systematic investigation is required before we can establish a weighting that might be given to the relative significance of environmental problems, demographic expansion and socio-economic conflict in generating these documents. In this, the commons of the German south-west await their historian. Equally, this lack prevents us from assessing the real success of monitoring and the long-term course of antagonisms between different social groups. It is only a preliminary conclusion that the alliance of state interests and communal oligarchies, for all its ups and downs, maintained the commons in a largely workable and still valuable state up until the present day. Arguments towards the end of the period about changing the use of the commons appear to have been based largely upon enhancing productivity, obtaining more land or more effectively using communal resources, rather than combating degradation, although one would presume that a side-effect of degradation would be lower productivity.

Whilst the evidence of degradation is not clear, it is likely that *per capita* yields in the harvest of the commons and 'wastes' were declining for most of the period, although not necessarily in market value. Indeed, the 'productivity' of the commons depended upon the bundle of resources which different groups sought to obtain from them, itself determined both by political struggles and the changing opportunity costs of particular activities for different households and groups. Inheritance and settlement practices clearly played a role here in determining fortunes. Changing stints were undoubtedly part of a reaction to this (although it is difficult to tell if these changes came in anticipation of, rather than as a reaction to, degradation). We can also be sure that the *per capita* size of the *Holzgaab*, the annual wood allowance allotted by communes to their members, declined over time. Equally, institutional management of the commons was by no means static. The groups entitled to access altered, in some cases narrowing, in others broadening, whilst in a few regions the common right itself even became a tradable commodity. Communes and commoners did not cling blindly to ancient usages, even where legal entitlements rested primarily upon custom, but innovated in the use and management of their resources, as well as being subject to state and lordly intervention.

Whether 'top-down' approaches failed where they were not inclusive of the commoners (who should not be confused with the general populace), as some theorists would have us expect, remains to be determined. It does seem to be the case that without motivated and effective systems of monitoring by the authorities, well-intentioned ordinances were quietly ignored or forgotten. Certainly there are cases of commons with a weak central authority and enforcement agencies being dissolved early after degradation, such as the *Hagenschieß* near Pforzheim. We can safely say, however, that very few if any commons were completely unregulated, their boundaries were increasingly rigorously defined, and the institutional potential was present for regulation *if* the local authorities saw it as being in their interests. However, the struggles between differing interests set

commoners against each other, as well as a dividing line being drawn between those with and without rights. It was through these clefts, as well as from impositions and legal changes from on high, that the state was able to increasingly intervene, and be invited into, the restructuring and ordering of village life.[8]

Although the structure of communities in the south-west was largely what anthropologists have described as 'closed', their discretion over membership gave them the opportunity to operate in an 'open' or 'closed' fashion according to the resources at hand. Whilst common resources appear not to have provided any obvious basis in themselves for how 'communities', rather than interest groups within them, approached granting access to such resources and the demography of their settlements, they remained part of the income possibilities of those groups. Indeed, it is not obvious why common lands should be managed in a sustainable manner when they were in fact part of a wider 'ecosystem' where the maintenance of a reasonable *per capita* income, irrespective of source, was perhaps more important. Malthus's analysis of a population behaving in relation to its resources relative to both the supply-side opportunities offered by the environment, and the demand for labour from that population, rather than the constraints of an 'immediate' and fixed environment, seems to be the correct context in which analysis should proceed (Viazzo, 1989: 43–46). This could allow for fairly rapid fluctuations in commons management given changes in social structure and income sources, marked in many places by a shift from directly exploiting the common lands collectively to leasing out parcels to citizens, for example. Such an approach should not invalidate the 'carrying capacity' argument, because it remains an important element determining, for example, the degree of orientation to outside markets. But it is clearly insufficient to explain the more precise course of social struggles, the axes around which they operate, and the uses to which common land might be put. One might also expect common lands of the *Genossenschaft* type, vested in material usages, and those based on a broader *Gemeinde*, to be managed in a rather different way, allowing for variations in the local economies. Only systematic and comparative studies in the context of these problems will provide us with answers.

[8] Taking a step further than Ostrom, Agarwal and Narain have argued that distributional equity is essential for the maintenance of common-pool resources. This may bring an insight to the manner in which commons came to be valued and in some instances privatized – if, for example, there was a measure of value that was sufficiently 'common' to the community of users (Prakash, 1997).

Bibliography

Manuscript sources

Stadtarchiv Bietigheim-Bissingen, B543, Bd. 1.

Printed and secondary sources

Abel, W. (1967) *Geschichte der deutschen Landwirtschaft*, Stuttgart.

Bader, K.S. (1957) *Das mittelalterliche Dorf als Friedens- und Rechtsbereich*, Weimar.

Bader, K.S. (1962) *Dorfgenossenschaft und Dorfgemeinde*, Köln.

Bader, K.S. (1973) *Rechtsformen und Schichten der Liegenschaftsnutzung im mittelalterlichen Dorf*, Wien.

Beck, R. (1993) *Unterfinning. Ländliche Welt vor Anbruch der Moderne*, München.

Blickle, P. (1986) 'Wem gehörte der Wald? Konflikte zwischen Bauern und Obrigkeiten um Nutzungs- und Eigentumsansprüche', *Zeitschrift für württembergische Landesgeschichte*, 45, pp. 167–178.

Blickle, P. (ed.) (1991) *Landgemeinde und Stadtgemeinde in Mitteleuropa. Ein struktureller Vergleich*, München.

Blickle, P. (1997) *Obedient Germans? A rebuttal. A New View of German History*, University of Virginia.

Blickle, P. (1998) 'Deutsche Agrargeschichte in der zweiten Hälfte des 20. Jahrhunderts', in W. Troßbach and C. Zimmermann (eds), *Agrargeschichte. Positionen und Perspektiven*, Stuttgart, pp. 7–32.

Boehler, J.-M. (1983) 'Die "Revolution agricole" im Elsaß im Laufe des 18. Jahrhunderts. Fabel oder Tatsache?', *Zeitschrift für Agrargeschichte und Agrarsoziologie*, 31, pp. 27–40.

Boelcke, W.A. (1964) 'Zur Entwicklung des bäuerlichen Kreditwesens in Württemberg vom späten Mittelalter bis Anfang des 17. Jahrhunderts', *Jahrbücher für Nationalökonomie und Statistik*, 176, pp. 319–358.

Boelcke, W.A. (1970–1992) 'Die Grundbesitzverhältnisse auf der Gemarkung Kornwestheim um 1365', in *Historischer Atlas von Baden-Württemberg*, Stuttgart.

Brakensiek, S. (1991) *Agrarreform und Ländliche Gesellschaft. Die Privatisierung der Marken in Nordwestdeutschland 1750–1850*, Paderborn.

Brunner, O. (1968) *Neue Wege der Verfassungs- und Sozialgeschichte*, Göttingen.

Carlebach, R. (1909) *Badische Rechtsgeschichte II. Das Zeitalter des dreißigjährigen Kriegs unter Mitteilung einiger bisher ungedruckter Aktenstücke*, Heidelberg.

Dopsch, A. (1933) *Die Freien Marken in Deutschland. Ein Beitrag zur Agrar- und Sozialgeschichte des Mittelalters*, Baden.

Ellering, B. (1902) *Die Allmenden im Grossherzogtum Baden. Eine historische, statistische und wirtschaftliche Studie*, Tübingen.

Ernst, V. (1930) 'Geschichte', in *Oberamtbeschreibung Leonbergs*, Stuttgart, pp. 252–434.

Fertig, G. (2000) *Lokales Leben, atlantische Welt. Die Entscheidung zur Auswanderung vom Rhein nach Nordamerika im 18. Jahrhundert*, Osnabrück.

Flad, M. (1987) *Hirten und Herden. Ein Beitrag zur Geschichte der Tierhaltung in Oberschwaben*, Bad Buchau.

Friedeburg, R. von (1997) *Ländliche Gesellschaft und Obrigkeit*, Göttingen.

Gemeindeverwaltung Benningen am Neckar (ed.) (1979) *Benningen am Neckar 779–1979. Geschichte der Gemeinde*, Esslingen.

Gierke, O. von (1868) *Rechtsgeschichte der deutschen Genossenschaft*, Berlin.

Göttmann, F. (1991) *Getreidemarkt am Bodensee. Raum – Wirtschaft – Politik – Gesellschaft (1650–1810)*, St Katharinen.

Grees, H. (1970–1992) 'Geologische Grundlagen der Kulturlandschaft', in *Historischer Atlas von Baden-Württemberg*, II.3., Stuttgart.

Grees, H. (1971) 'Das Kleinbauertum in Ostschwaben und sein Einfluß auf die Entwicklung von Siedlung und Wirtschaft', in F. Dussart (ed.), *L'Habitat et les Paysages Ruraux d'Europe. Les Congrès et Colloques de l'Université de Liège*, Vol. 58, Université de Liège, pp. 179–203.

Grees, H. (1975) *Ländliche Unterschichten und ländliche Siedlung in Ostschwaben*, Tübingen.

Hauser, A. (1994) *Dinge des Alltags. Studien zur historischen Sachkultur eines schwäbischen Dorfes*, Tübingen.

Head, R.C. (1995) *Early Modern Democracy in the Grisons. Social Order and Political Language in a Swiss Mountain Canton, 1470–1620*, Cambridge.

Hess, R.-D. (1968) *Familien- und Erbrecht im württembergischen Landrecht von 1555 unter besonderer Berücksichtigung des älteren württembergischen Rechts*, Stuttgart.

Hippel, W. von (1977a) *Die Bauernbefreiung im Königreich Württemberg*, Bd.I., Boppard am Rhein.

Hippel, W. von (1977b) *Die Bauernbefreiung im Königreich Württemberg*, Bd. II., Boppard am Rhein.

Hippel, W. von (1984) *Auswanderung aus Sudwestdeutschland: Studien zur wurttembergischen Auswanderung und Auswanderungspolitik im 18. und 19. Jahrhundert*, Stuttgart.

Hook, K. (1927) *Die Allmenden (Ortsbürgernutzungen) in Hessen*, Heppenheim a.d.B.

Ineichen, A. (1996) *Innovative Bauern. Einhegungen, Bewässerung und Waldteilungen im Kanton Luzern im 16. und 17. Jahrhundert*, Stuttgart.

Jänichen, H. (1970) *Beiträge zur Wirtschaftsgeschichte des schwäbischen Dorfes*, Stuttgart.

Kaschuba, W. and Lipp, C. (1982), *Dörfliches Überleben. Zur Geschichte materieller und sozialer Reproduktion ländlicher Gesellschaft im 19. und 20. Jahrhundert*, Tübingen.

Kaschuba, W. (1991) 'Kommunalismus als sozialer "Common Sense". Zur Konzeption von Lebenswelt und Alltagskultur im neuzeitlichen Gemeindgedanken' in P. Blickle (ed.), *Landgemeinde und Stadtgemeinde in Mitteleuropa. Ein struktureller Vergleich*, München, pp. 65–91.

Knapp, T. (1902) *Gesammelte Beiträge zur Rechts- und Wirtschaftsgeschichte vornehmlich des deutschen Bauernstandes*, Tübingen.

Kollnig, K. (ed.) (1985) *Die Weistümer der Zenten Eberbach und Mosbach. Badische Weistümer und Dorfordnungen, Bd.4.*, Stuttgart.

Königl.-Statistisch-topographischen Bureau (1824) *Beschreibung des Oberamts Reutlingen*, Stuttgart.

Königl.-Statistisch-Topographischen Bureau (1825) *Beschreibung des Oberamts Münsingen*, Stuttgart.

Krings, W. (1976) *Wertung und Umwertung von Allmenden im Rhein-Maas-Gebiet vom Spätmittelalter bis zur Mitte des 19. Jahrhunderts: eine historisch-sozialgeographische Studie*, Assen.

Ludwig, T. (1896) *Der Badische Bauer im Achtzehnten Jahrhundert*, Strassburg.

Maisch, A. (1992) *Notdürftiger Unterhalt und gehörige Schranken. Lebensbedingungen und Lebenstile in württembergischen Dörfern der frühen Neuzeit*, Stuttgart.

Maurer, G.L. von (1865) *Geschichte der Dorfverfassung in Deutschland*, Erlangen.

Medick, H. (1996) *Weben und Überleben in Laichingen 1650–1900. Lokalgeschichte als Allgemeine Geschichte*, Göttingen.

Netting, R. (1981) *Balancing on an Alp. Ecological Change and Continuity in a Swiss Mountain Community*, Cambridge.

Ogilvie, S. (1997) *State Corporatism and Proto-Industry. The Württemberg Black Forest 1580–1797*, Cambridge.

Othenin-Girard, M. (1994) *Ländliche Lebensweise und Lebensformen im Spätmittelalter. Eine wirtschafts- und sozialgeschichtliche Untersuchung der nordwestschweizerischen Herrschaft Farnsburg*, Liestal.

Paas, M.W. (1995) 'Family Labour Strategies in Early Modern Swabia', in R.L. Rudolph (ed.), *The European Peasant Family and Society*, Liverpool, pp. 146–153.

Pfister, C. (1984) *Bevölkerung, Klima und Agrarmodernisierung 1525–1860. Das Klima der Schweiz von 1525–1860 und seine Bedeutung in der Geschichte von Bevölkerung und Landwirtschaft*, Bd. II., Stuttgart.

Prakash, S. (1997) 'Poverty and Environment Linkages in Mountains and Uplands: Reflections on the 'Poverty Trap' Thesis', London. (CREED Working paper; 12).

Prass, R. (1997) *Reformprogramm und bäuerliche Interessen. Die Auflösung der traditionellen Gemeindeökonomie im südlichen Niedersachsen, 1750–1883*, Göttingen.

Projektgruppe Umweltsgeschichte (Ecker, K.; Grünweis, F. M.; Müllner, A.; Sonnlechner, C.; Wilfing, H.; Winiwarter, V.; Wrbka-Fuchsig, I.; Wrbka, T.) (2000) *Historische Entwicklung von Wechselwirkungen zwischen Gesellschaft und Natur*, Wien.

Reyscher, A.L. (1830) *Vollständige, historisch und kritisch bearbeite Sammlung der württembergsichen Gesetze*, Bd. III, Tübingen.

Robisheaux, T. (1989) *Rural Society and the Search for Order*, Cambridge.

Rublack, U. (1997) 'Frühneuzeitliche Staatlichkeit und lokale Herrschaftspraxis in Württemberg', *Zeitschrift für historische Forschung*, 24, pp. 347–376.

Saalfeld, D. (1967) 'Die Produktion und Intensität der Landwirtschaft in Deutschland und angrenzenden Gebieten um 1800', *Zeitschrift für Agrargeschichte und Agrarsoziologie*, 15, pp. 137–158.

Sabean, D.W. (1969) 'The Social Background to the Peasants' War of 1525 in southern Upper Swabia', Winsconsin. Unpublished Ph.D. Dissertation, University of Winsconsin.

Sabean, D.W. (1992) *Property, Production, and Family in Neckarhausen, 1700–1870*, Cambridge.

Sabean, D.W. (1998) *Kinship in Neckarhausen, 1700–1870*, Cambridge.

Saenger, W. (1957) *Die bäuerliche Kulturlandschaft der Hohenlohe Ebene und ihre Entwicklung seit dem 16. Jahrhundert*, Remagen.

Sauer, P. (1982) 'Not und Armut in den Dörfern des Mittleren Neckarraums in vorindustrieller Zeit', *Zeitschrift für Württembergische Landesgeschichte*, 41, pp. 131–149.

Schenk, W. (1994) 'Eichelmastdaten aus 350 Jahren für Mainfranken – Probleme der Erfassung und Ansätze für umweltgeschichtliche Interpretation', *Allgemeine Forst- und Jagdzeitung*, 165, pp. 122–131.

Schenk, W. (1996) *Waldnutzung, Waldzustand und regionale Entwicklung in vorindustrieller Zeit im mittleren Deutschland*, Stuttgart.

Schlitte, B. (1886) *Die Zusammenlegung der Grundstücke in ihrer volkswirtschaftlichen Bedeutung und Durchführung*, Bd. III., Leipzig.

Schnyder-Burghartz, A. (1992) *Alltag und Lebensformen auf der Basler Landschaft um 1700*, Basel.

Schremmer, E. (1963) *Die Bauernbefreiung in Hohenlohe*, Stuttgart.

Schröder, K.-H. and Schröder, P. (1970–1992) 'Ländliche Siedlungsformen um 1850', in *Historischer Atlas von Baden-Württemberg*, IV.16., Stuttgart.

Selter, B. (1995) *Waldnutzung und ländliche Gesellschaft. Landwirtschaftlicher 'Nährwald' und neue Holzökonomie im Sauerland des 18. und 19. Jahrhunderts*, Paderborn.

Simon, T. (1995) *Grundherrschaft und Vogtei. Eine Strukturanalyse spätmittelalterlicher und frühneuzeitlicher Herrschaftsbildung*, Frankfurt am Main.

Steinle, P. (1971) *Die Vermögensverhältnisse der Landbevölkerung in Hohenlohe im 17. und 18. Jahrhundert*, Schwäbisch Hall.

Straub, A. (1977) *Das badische Oberland im 18. Jahrhundert. Die Transformation einer bäuerlichen Gesellschaft vor der Industrialisierung*, Husum.

Strobel, A. (1972) *Agrarverfassung im Übergang. Studien zur Agrargeschichte des badischen Breisgaus vom Beginn des 16. bis zum Ausgang des 18. Jahrhunderts*, München.

Suter, A. (1998) 'Neue Forschungen und Perspektiven zur Geschichte der ländlichen Gesellschaft in der Schweiz (1500–1800)', in W. Trossbach and C. Zimmermann (eds), *Agrargeschichte. Positionen und Perspektiven*, Stuttgart, pp. 73–91.

Tschuprow, A. (1902) *Die Feldgemeinschaft*, Straßburg.

Troeltsch, W. (1897) *Die Calwer Zeughandlungskompagnie und ihre Arbeiter*, Jena.

Trossbach, W. (1998) 'Beharrung und Wandel "als Argument". Bauern in der Agrargesellschaft des 18. Jahrhundert', in W. Trossbach and C. Zimmermann (eds), *Agrargeschichte. Positionen und Perspektiven*, Stuttgart, pp. 107–136.

Trugenberger, V. (1991) 'Malmsheim und Renningen im Zeitalter der Glaubensspaltung', in *Renningen und Malmsheim. Eine Stadt und ihre Geschichte*, Stuttgart, pp. 115–152.

Ulrich, F. (1935) 'Die Allmenden in Württemberg', Jurist. Dissertation, Tübingen.

Varnbühler, K. von (1812) *Beitrag zur Kenntniß der neuen Grundsätze der Landwirtschaft*, Stuttgart.

Viazzo, P.P. (1989) *Upland Communities: environment, population and social structure in the Alps since the sixteenth century*, Cambridge.

Walter, R. (1990) *Die Kommerzialisierung von Landwirtschaft und Gewerbe in Württemberg (1750–1850)*, St.Katharinen.

Warde, P. (2000) 'The ecology of wood use in early modern Württemberg, ca. 1450–1650', Cambridge. Unpublished Ph.D. Dissertation, University of Cambridge.

Wehrenberg, D. (1969) *Die wechselseitigen Beziehungen zwischen Allmendrechten und Gemeinfronverpflichtungen vornehmlich in Oberdeutschland*, Stuttgart.

Wrightson, K. (1996) 'The Politics of the Parish in Early Modern England', in P. Griffiths, A. Fox and S. Hindle (eds), *The Experience of Authority in Early Modern England*, London, pp. 10–46.

Wunder, H. (1986) *Die Bäuerliche Gemeinde in Deutschland*, Göttingen.

Zimmermann, C. (1983) *Reformen in der bäuerlichen Gesellschaft. Studien zum aufgeklärten Absolutismus in der Markgrafschaft Baden 1750–1790*, Ostfildern.

Zimmermann, C. (1984) '"Deren Richten und Trachten nur dahin geht, den Mittelmann in die Classe der Armen zu versetzen..." Probleme des Wandels der Subsistenzwirtschaft in Baden und der Pfalz im ausgehenden 18. Jahrhundert', in Institut für Landeskunde der Universität Mannheim (ed.), *Rhein-Neckar-Raum an der Schwelle des Industrie-Zeitalters*, Mannheim, pp. 237–253.

Zimmermann, C. (1995) 'Bäuerlicher Traditionalismus und agrarischer Fortschritt in der frühen Neuzeit', in J. Peters (ed.), *Gutherrschaft als soziales Modell. Vergleichende Betrachtungen zur Funktionsweise frühneuzeitlicher Agrargesellschaften*, München, pp. 219–238.

9 The management of common land in north-western Germany

Stefan BRAKENSIEK, University of Bielefeld

I. Introduction

The task of providing a broad overview of the management of common lands in the north-west of Germany is beset with considerable difficulties. A fascination with tracing the origins of historical phenomena to which scholars of the nineteenth and early twentieth centuries succumbed, can account for numerous impressive studies on the emergence and the constitution of the commons (*Markenverfassung*) in Germany as a whole (Grimm, 1840–1878; Maurer, 1856; Gierke, 1868) and in Westphalia and Lower Saxony in particular (Freudenstein, 1879; Philippi, 1907; Schotte, 1908; Lappe, 1912; Floer, 1914). Beginning with Jacob Grimm, August von Haxthausen, Friedrich Carl von Savigny and Paul Wigand, romantic erudition was eager to collect juridical antiquities (*Rechtsaltertümer*), which were said to reflect the 'popular spirit' (*Volksgeist*) in the German and even the Germanic past. Jacob Grimm himself launched a major investigation of the so-called *Weistümer*, the product of which is an edition of sources, indispensable till the present to understanding the relationship between lords and peasants in the Late Middle Ages and in the early modern period. Most subsequent research is based upon this edition.

Even if we do no longer share this essentialist perspective which dominated historical research on this subject until 1945, we depend on these early works. Current editions of source material and analytical studies are confined to the south and west of Germany (Kollnig, 1968, 1979, 1985; Schumm and Schumm, 1985; Krämer and Spiess, 1986; Schmitt 1992; 1996; Hartinger, 1998), Thuringia in central Germany (Schildt, 1996) and Schleswig on the Danish border (Rheinheimer, 1999). For north-west Germany we have to rely on an edition of Frisian sources (Ebel, 1964) and a brief study of the *Oldenburger Bauernbriefe* (Seeber, 1975), both of which are devoted to an investigation of very particularly structured sub-regions. Strangely enough, most of the in-depth information about the management of the commons in Westphalia and Lower Saxony dates from the late eighteenth and early nineteenth centuries, when jurists and bureaucrats who dealt with actual problems arising from the privatization of the remaining commons, wrote about this subject (Piper, 1763; Möser, 1768; Lodtmann, 1770; Klöntrup and Schledehaus, 1782; Klöntrup, 1783; Klöntrup, 1798–1800; Löw, 1829; Behnes, 1830; Stüve, 1872). The dissolution of the commons themselves has been a subject of recent historiography (Brakensiek, 1991; Prass, 1997; Gudermann, 2000a). These reasons explain the paucity of studies providing more than a simple description of the institutional framework of the commons. Above all, we have no actual research that takes into acount the dynamics of change in the use and organisation of collective resources. Bearing this in mind, the present article can only give some impressions.

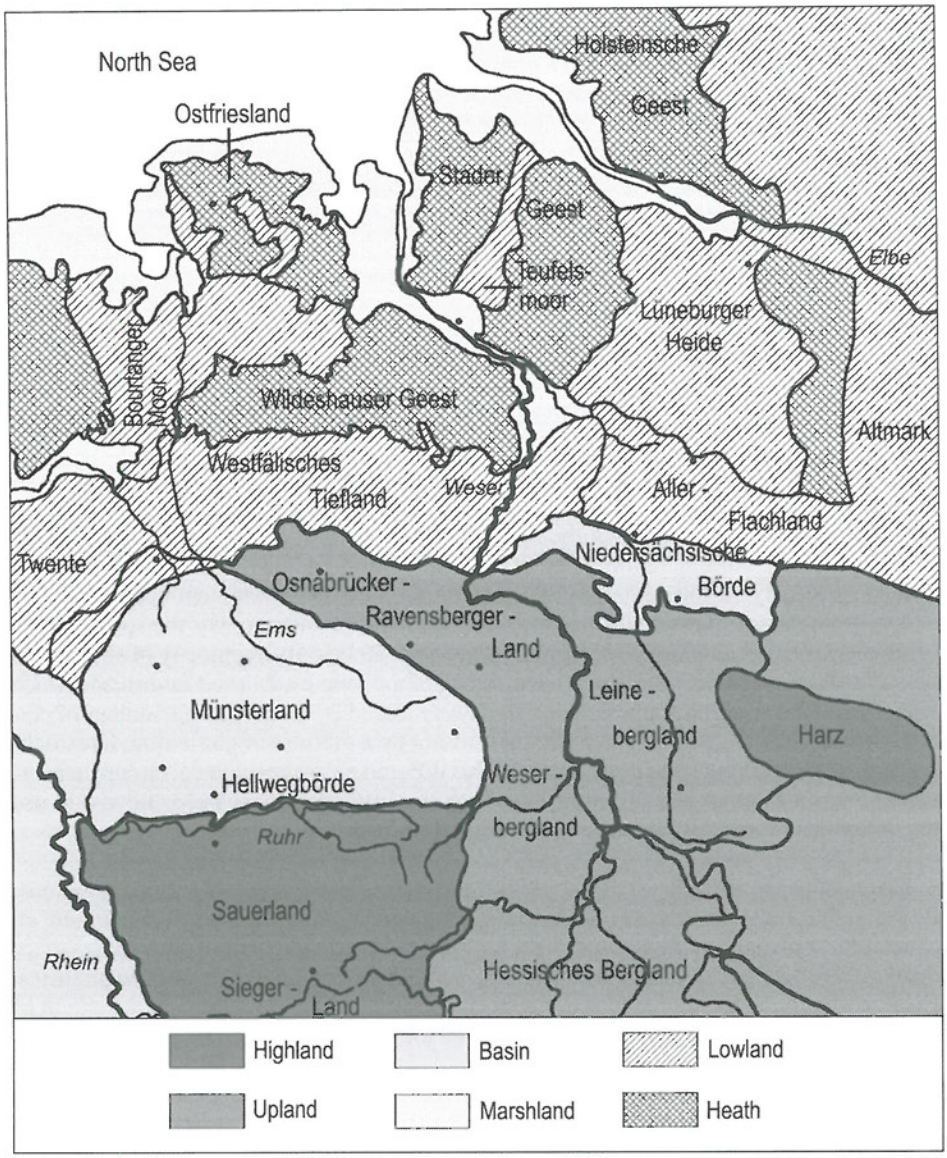
Why do we require two articles on the German commons, one on the south and another presenting findings about the north-west? Apart from the usual variations occurring from place to place, social and agrarian structures differed fundamentally in these two regions. While the practice of equal inheritance was more prevalent in south-western and central Germany, the north was characterized by indivisible inheritance. Most southern peasants were obliged to pay tithes and rents to lords or princes without being subject to personal subordination. Feudal bondage was more deep-rooted in the north-west. Though peasants here also achieved, in the early modern period, hereditary ownership of their farms, with corvée playing a relatively minor role, they were not only obliged to pay rents and to deliver grain or livestock in kind, but were bound to their lords for permission to marry, to sell parts of their farm or to obtain a loan. The relationship between lords and peasants in the Hanoverian territories was governed by the so-called *Meierrecht* which left peasants personally free (Wittich, 1896; Achilles, 1998; Saalfeld, 1998). In Westphalia most peasants were subject to even stricter feudal bondage (*Eigenbehörigkeit*), which meant more intense control and higher obligatory payments upon marriage and inheritance (Schotte, 1912; Hanschmidt, 1983; Mooser, 1984).

While nucleated villages prevailed in southern and central Germany, the northern lowlands were characterized by scattered settlement. This coincided with a completely different form of agriculture. As with other European countries, regions with nucleated villages were characterised by varieties of open field systems with common arable, while in the north-western plains, the peasants, living on isolated farms, in hamlets or comparatively small villages (*Drubbel*), tilled the soil individually. Many variations of these general patterns can be detected and geographers have investigated them in detail (Hömberg, 1938; Herzog, 1938; Riepenhausen, 1938/1986; Müller-Wille, 1938; Hücker, 1939; Garben, 1951; Schwalb, 1953; Pohlendt, 1954; Linden, 1958; Knoke, 1968; Marten, 1969; Fliedner, 1970; Born, 1974; Balzer, 1983).

Taking natural conditions, settlement structures, the organization and the utilization of land into consideration, north-western Germany can be divided into seven major regions: the Frisian lowlands (*Marschen*), the areas of scattered settlement in the lowlands of Lower Saxony (*Niedersächsische Geest*), the Münster Basin (*Münsterland*), the uplands of the *Weserbergland*, the village settlement areas in the south-eastern uplands of Lower Saxony, several small black-earth regions (*Börden*), and the southern highlands (*Sauerland*) (Hambloch, 1981; Müller-Wille, 1955, 1966, 1940/1983).

Beginning at the coast of the North Sea and following the rivers upstream, there is a strip of marshland (*Marschen*) where soils are very fertile if provided with effective drainage. These densely populated regions had been fully cultivated since the Middle Ages, so that common waste could rarely be found. On the heavy soil individualized production of grain, vegetable oils and dairy-products for the market prevailed. The farmers, mainly Frisian, had never experienced feudal bondage, and instead a class-society developed early. Prior to 1800 the main obligations of the rural population were the building and maintenance of dikes, organized through parish-wide *Deichbauverbände*. Lords and princes had introduced similar conditions to small inland regions through the recruitment of Frisian settlers for the cultivation of the *Flußmarschen* next to the rivers Elbe, Weser and Ems since the eleventh century (Nitz, 1984; Wunder, 1986: 35–37).

Figure 9.1 Landscapes of north-western Germany



Conditions in the neighbouring regions of the *Geest* differed sharply. In the north-western plains of Lower Saxony an alternating pattern of huge moors and sandy soiled districts existed. The dryer areas are thought to have originally been wooded, but were degraded to heath in the course of human settlement. Enormous efforts were necessary in order to obtain yields from the predominantly poor soils, and even then the output

fluctuated from year to year. The arable was confined to relatively small fields called *Esch*, cultivated without rotation. The continuous cultivation of rye depended on the exploitation of the surrounding wastelands; this was carried out by cutting the upper-most humus layer of the heath (*Plaggen*), composting it together with manure and bringing this mixture out onto the tillage. Crop production of the *Plaggen-Esch* type presupposes a ratio of about one to ten between cultivated land and waste (Thöle 1987). Accordingly, wastelands stretched over between 60 and 90% of the surface area of the *Geest*. Fens and heaths were collectively used and these commons persisted in the main until the late-eighteenth century. It is not surprising that the region was relatively sparsely populated; only those areas where the proximity to the Netherlands offered the possibility of seasonal work registered a rapid growth of the rural proletariat.

Only in the most remote regions with barren grounds did agriculture remain archaic and social structures stable. Wherever cultivable soils could be found, as in wider parts of Lower Saxony, the Münster Basin (*Münsterland*) and the Westphalian *Weserbergland*, common land was transferred to private hands as a result of the so-called *Zuschlagsausweisungen*, a piecemeal enclosure that continued throughout the Late Middle Ages and the early modern period. Such allotments were made to long-established peasants as well as to settlers and they resulted in an extension of the arable and a partial dissolution of the commons in wider parts of the north-west. These newly cultivated plots of arable (*Kamp*), scattered like an archipelago in a sea of common woods, heaths and fens, were used individually. In the course of the early modern period, settlement became denser and in some regions isolated farms grew into hamlets. Simultaneously, the stratification of rural society became more sharply differentiated, since only a minority of substantial peasants (*Erben, Hufner, Vollbauern*) owned one of the long-established farmsteads which was sufficient in itself to support them. They were joined by an increasing number of cottage-owners (*Kötter*) who had to make their living by a mixture of gardening, livestock-rearing, linen-weaving and day-labouring. This differed according to local circumstances, depending on whether and the extent to which the cottage-owners were allowed to use the commons. These differences will be dealt with later.

The area of the nucleated village settlements stands out as being of particular interest. It covers the south-eastern part of Lower Saxony and Westphalia. This area is in fact an extension of the large village settlement areas of southern and central Germany, where open field farming was usual with rotations, subjecting agriculture to strict regulations. Even within the areas of village settlement there were further gradations in the extent of co-operative ties: cultivation was less regulated the further north and west one travelled. In the south-eastern uplands of Westphalia and Lower Saxony, the old established order of open fields continued until the nineteenth century, while in some black-earth regions like the *Hellwegbörde* and the *Hildesheimer Börde* near Brunswick, ample possibilities of access existed for the proprietors of singular strips inside the fields, or else such pathways were created in the course of the ordnance surveys carried out in the eighteenth century (Pohlendt, 1954; Linden, 1958). In all the village areas the common pastures, meadows and wastes accounted for not more than 20% of the land belonging to the village. The woodlands must be examined separately. These were not to be found at all in the open black-earth regions. On the other hand, in the upland and highland parts of north-western Germany, woodlands were the most important area used in common.

Figure 9.2 Territories of north-western Germany

II. Types of common land in north-western Germany

Common arable fields could be found in north-western Germany in three different forms: as open fields (*Zelgen, Felder*) in combination with nucleated village settlements in the south-eastern uplands, as so-called *Vöhden* in the Münster-Basin, and as fields of the *Esch* type. Leaving aside the open field system, which was customary in wider parts of Europe and is well known to agrarian historians, *Vöhden* were fairly specific to those parts of central Westphalia where humid clay soils, which naturally tended to get covered with grass, prevailed. In this region the arable was divided up into parcels called *Kamp*, enclosed by hedges and tilled individually. But some of the larger plots were used by communities of farms and estates, which lay scattered in the flat landscape. Such a *Vöhde* came under the plough for four or six years, and was then used as common pasture for another four- or six-year period. Tillage was done individually, with every owner knowing the whereabouts of his strips precisely. Following the last harvest, the field lay open to common pasture without being cared for. Normally the proprietors of a *Vöhde* had privileged rights of grazing, but other inhabitants of the community (*Bauerschaft*) or the parish (*Kirchspiel*) were also allowed to put out some cattle, sheep or geese to pasture. Agrarian experts of the late-eighteenth century passionately criticised this economy since the owners tended only to fertilize their strips at the beginning of the period of individual tillage, neglecting them during the rest of the time (Schwerz, 1836: 22–26, 249–251; Kraft, 1941: 55, 61–62; Lülff, 1956: 55–56), the Vöhden only being used as grazing for geese because of their poor quality.

In contrast to *Vöhden,* which were confined to a narrow area, fields of the *Esch* type existed across wide parts of Lower Saxony and Westphalia, in the sandy *Geest* regions as well as in other areas with more fertile soils. Such fields represented that part of the arable which had been cultivated very early. Correspondingly, strips inside of the *Esch* belonged only to those farmsteads which had been founded in the Middle Ages and cottagers normally did not share any part of these fields. Again, tillage was done individually here and common use was restricted to short periods of pasture; what is more, it was confined to the owners of a strip inside of the *Esch* fields. All the others had to content themselves with wastes and woodlands where a majority of the rural households exercised common-use rights. What was true of the arable could also be said about the meadows: common use was not the norm. If it occurred, it was limited to a number of entitled households for short seasonal periods. Contemporary observers have frequently stated that the rural population of Westphalia and Lower Saxony was inclined to a restrained individualism. Climate, scattered settlements, a secluded way of life, the limited scope of local politics and the small scale of the common economy are held to have been responsible for this mentality. Certain circumstances, however, are not consistent with this judgement: the common use of pastures and woods, above all, was predicated upon close co-operation (Bölsker-Schlicht, 1994: 10–22).

By far the most extensive category of common land in the north-western lowlands was the waste (*Gemeinheit, Ödland*), be it fen (*Moor*) or heath (*Heide*). Before human settlement the landscape had been covered by sparse deciduous woodlands, but since the Middle Ages it had been downgraded to heath by pasture and deforestation. The extent of wasteland depended on the nature of the soil and the ground-water level. In

most parts of the lowlands wastes covered about 40–60% of the surface area in the late eighteenth century, reaching peak-values of 90% in regions like the *Bourtanger Moor,* bordering the Netherlands, and in central parts of the *Lüneburger Heide*. In their driest parts, fens were used as pastures; in areas bordering cultivated land, people exercised the common right of turbary to win peat for fuel and turf as straw-material, though the centres of the fens remained untouched (Schwalb, 1953). The heaths were of greater value for the residential population: Here people grazed their cattle and sheep, gathered some firewood from isolated shrubs, picked berries and mushrooms, dug sods (*Heideplaggen*) to store straw-material and kept beehives (Cordes, 1981). Geographers have described a specific peasant economy as one which depended on these huge stretches of common heaths, condemned to vanish in the late eighteenth and early nineteenth century when population grew and enclosure abolished common-use rights. Today most of the former heath has been converted to arable, meadow and pasture, while its most infertile parts are forested with coniferous trees.

Common pasture was extremely valuable in the Münster Basin and in the hilly uplands of the German north-west, even if it was of a more moderate size there. Originally wooded with oak, beech, horn-beam and other deciduous trees, the common wastes suffered deforestation during the Late Middle Ages and especially the early modern period. In the late eighteenth century the hilly grounds and the most damp areas were covered only with grass or isolated trees, bushes and heather. Often, grazing-ground and bush-land were also called *Heide,* or in their damper parts *Bruch*. Their size differed from place to place, so that the average extent can hardly be given. In the *Osnabrücker Land,* a part of the north-western uplands, approximately one half of the country was open to common pasture of different kinds at the close of the early modern period (Herzog, 1938), while in the neighbouring *Ravensberger Land* a ratio of 40–50% has been calculated (Riepenhausen, 1938). In the district of Lüdinghausen, which belongs to the loamy part of the Münster Basin, the commons covered only a quarter of the surface area, with grazing, heath and woodlands being their most important components (Kraft, 1941: 33, 55). In the district of Steinfurt, situated in the western part of the Münster Basin, 60% of the dry and sandy areas were covered by commons, while values reached only 30% in the communities on loamy and more fertile soils (Lülff, 1956: 226).

During the early Middle Ages large areas of north-western Germany had been wooded. Since then, until 1800, nearly complete deforestation overtook the lowlands, while in the uplands tiny woods and even some forests still remained. Only some remote parts of the southern highlands (*Hochsauerland*) remained covered with woodlands, unless neighbouring industries or avaricious princes had devastated them. Here, medieval institutions survived, regulating the use of the commons which remained common woodlands. Extensive forests belonging to a large number of lords and peasant communities provided opportunities for lumbering, gathering fire-wood, producing charcoal, grazing cattle and fattening swine. Again, we can recognize a special economy adapted to ecological conditions, in which the cultivation of grain was of minor significance whereas pastoral agriculture and industry complemented each other (Bernhardt, 1872/1966; Liedhegener, 1933; Müller-Wille, 1980; Selter, 1995).

III. The legal basis of common right

A central concern of German historiography during the nineteenth century was to ascertain who the 'original proprietors' of the commons had been. While constructing a past characterised by 'Germanic freedom', most historians maintained that during the 'dark centuries', in the absence of written records, all land was held in common by free men. The settlers of the fifth century who were said to have been the ancestors of the German people as a whole, allegedly owned the *Marken* communally and made decisions in a basically democratic way. According to this view, the subsequent right of lords and peasants to use the commons as joint property, during later centuries, was a lingering trace of that archaic equality and freedom (Möser, 1768: 63–66; Grimm, 1840; Thudichum, 1860: ix; Gierke, 1868). This opinion had been challenged by an opposing interpretation: only members of the nobility, descended from those freemen of the past, owned the land (Piper, 1763; Maurer, 1856: 63–70; Dopsch, 1933: 9, 37).

Either way, the concept of a single and absolute property right is inadequate to explain the complex ownership and use of common land in Germany in the Middle Ages. The manorial system (*Grundherrschaft*), followed by a network of rural communes (*Gemeinde, Bauerschaft*) and finally princely dominions (*Landesherrschaft*), developed and came to be engaged in a struggle for local power. Who would prevail over the others and what kinds of arrangements were arrived at, depended on how strong these institutions were in crucial situations. As long as grazing and wood were in abundant supply there was no need for property rights at all. Each person took what they wanted. It was only during the High Middle Ages – owing to population pressure – that resources grew increasingly scarce in north-western Germany, so that institutional regulation became inevitable. The creation of so-called *Markgenossenschaften* was the usual solution (Schotte, 1908). The earliest indication of this can be found in traditions dating from the twelfth century, though it is only from the fourteenth century that information becomes more detailed. Most source material, whether normative regulations (*Weistümer*, *Bauerbriefe*, *Beliebungen*), court-records (*Markenregister, Höltingsprotokolle*) or registers of fines (*Brüchtenregister*), dates from the sixteenth century onwards, a period when the co-operatives were weakened and had begun to disappear.

In late-medieval sources the problem of property was of no real significance: all regulations revolve around questions of what area the commons embraced, who was allowed to use the resources, how far individual use-rights reached, the organisation of jurisdiction and the sanctioning of deviant practices, and who was entitled to change the rules. Within the framework of *Markgenossenschaften* lords and peasants co-operated, owning the commons in a way that jurists later tried to grasp in terms of Roman law as *universitas*. Areas governed by these communities were not necessarily congruent with political units. Their boundaries were at times defined by the area of a parish or a manorial court, though more often they were in accordance with the landscape and agricultural conditions. Originally *Marken* were thought to be woodland, so that the rules of the *Markgenossenschaften* above all concerned clearances, lumbering and mast. When the huge forests disappeared the sub-division of the *Marken* began, leaving manageable commons to village communities or other neighbourhoods. This process started in the Middle Ages and continued during the early modern period.

It seems as if the *Markgenossenschaften,* together with similar self-governing institutions, owned the commons through wide parts of Westphalia and Lower Saxony in the Middle Ages. In the late-eighteenth century, however, it was only in the bishoprics that a greater number of *Marken* had survived, while in the lay principalities most of them had vanished. They had been replaced here by village-communities, state-ownership or private property (Hauptmeyer, 1988). Beginning in the sixteenth century, the princes tried to gain property rights over wastes and forests. They staked their claims to a general over-lordship (*Oberholzgrafschaft*), appointed supervisory authorities (*Forstbehörden, Ämter*), enacted general regulations (*Forstordnungen, Dorfordnungen*) and downgraded the entitlement of commoners to mere rights of usufruct. In general, princely efforts concentrated on the most valuable forests and the huge fen-districts. They were less successful in case of pasture or common wastelands, and left common arable aside (Piper, 1763; Maurer, 1856: 63–70; Bernhard, 1872: 88–96, 162–169, 208–214; Stüve, 1872: 628–649, 781–829; Freudenstein, 1879; Schotte, 1908: 1–15; Rihn, 1920; Lülff, 1956: 35–42; Timm, 1960: 7–38; Knoke, 1968: 38–90; Wobst, 1971: 17–38; Hasel, 1974; Mooser, 1979; Hasel, 1985: 89–97; Günther, 1994; Selter, 1995: 82–105; Below, 1998).

IV. Institutions: *Markgenossenschaften* and *Gemeinheiten*

Common wastelands, pastures and woodlands owned by a co-operative were known as *Marken.* The *Markgenossenschaften* were complex, self-governing organizations which prevailed in wide parts of north-western Germany in the Late Middle Ages and were particularly common in the ecclesiastical principalities during the seventeenth and eighteenth centuries. How the institutions of the *Marken* were shaped depended on local customs which varied from one place to another even within a small radius. Consequently the following passages can only give an impression of some major regulations. Owners of farmsteads with full rights of usufruct were known as *Erben* (literally 'inheritors'). A full use-right was called *Echtwort* or *Ware* and its holders were entitled to receive building timber in case of need, to collect fire wood for their households, to graze a certain number of cattle and sheep on the wastes and to fatten pigs in the woodlands, depending on the yield of acorns and beechnuts. These rights pertained to a farmstead, not to an individual. Therefore, common-use rights could only be inherited as an integral part of a farmstead, and they could not be sold or sub-divided. The use-rights conformed to the needs of local households, to the exclusion of the market economy. Originally, in most *Marken* it was forbidden to sell wood to non-commoners, and to graze cattle and sheep or fatten pigs which belonged to strangers. But with the rise of a market economy since the Late Middle Ages influential members of the co-operatives and powerful outsiders were tempted to circumvent these bans (Timm, 1960).

Local courts (*Höltinge* or *Markengerichte*) were held regularly and attended by lords and peasants. Lay judges (*Markenrichter* or *Holzgrafen*) and persons entitled to use the commons in a privileged manner (*Erbexen*) normally came from the nobility, but in some co-operatives even a wealthy peasant (*Schulze*) could be the judge. In most regions this office was hereditary, but in some *Marken* the lay judge was elected by all commoners. The assembly of the *Erbexen* and *Erben* made decisions of general importance

which were binding on nobles and peasants entitled to use the commons and on all others entering the common ground. The *Markengerichte* examined infringements of regulations of the co-operative and controlled the usufruct which was carefully graduated. In some *Marken* the jury was comprised of all fully entitled commoners. This body arrived at a verdict, while the judge merely had to pronounce it. In other *Marken* membership of the jury was confined to the *Erbexen*, who stemmed from the nobility or the privileged group of the *Schulzen*.

The *Markengerichte* or *Höltinge* normally met once or twice a year to reiterate the old order by restating and acknowledging its rules, and to punish offences by imposing fines. These were levied in the form of either money or natural produce. In most cases the judge received a third of the fines (*tertia marcalis*), while the rest of the money was used to improve the commons or was shared out among the members of the co-operative after the lower officials were paid. Food and beer were consumed by all commoners at the end of the session to demonstrate that unanimity and peace had been reinstated. The co-operatives maintained a number of lower officials, i.e. shepherds and herdsmen for cattle or swine. Supervisors (*Schüttleute, Malleute*) appointed annually from the ranks of ordinary commoners, were charged with reporting those who sought to alter the shape of the commons or use them without permission, and were obliged to confiscate livestock found grazing at prohibited places or in forbidden periods of the year. Most of the time they were rewarded for their efforts through the grant of exclusive use-rights, i.e. fattening of additional swine or collecting of fallen branches (*Windbruch*) (cf. Mager-Möller, 1997: 130. The 'constitution' of different *Marken* is well documented in Lodtmann, 1770; Klöntrup, 1782, 1783; Löw, 1829: 70–143, 191–276; Behnes, 1830: 90–117; Grimm, 1842: Vol. 3: 1–321; Grimm, 1863, Vol. 4: 648–737; Stüve, 1872, Vol. 2: 628–649, 781–829; Freudenstein, 1879: 42–77; Schotte, 1908: 32–145; Flocr, 1914; Middendorff, 1927:12–28; Liedhegener, 1933: 77–110; Lülff, 1956: 42–52; Kölling, 1962; Knoke, 1968: 38–90; Hasel, 1985: 89–97; Saalfeld, 1998: 664–670; Lachenicht, s.d.: 24–68).

It seems as if co-operatives of the *Marken* type never covered all of north-western Germany, not even during the peak period of the spread of this institution during the Late Middle Ages. They dominated wide parts of Westphalia and the south of Lower Saxony, and were quite frequently found in all wooded areas. On the one hand, less complex managerial forms together with ownership of the princes prevailed from the beginning in the northern plains, that is in the extensive fens and the immense heaths. In the southern uplands, on the other hand, especially the highlands, forests were owned by lords or princes (*Sundern, Bannforsten*) interspersed with the huge *Marken* districts from the Middle Ages onwards (Timm, 1960: 27–38, 134; Hesmer-Schroeder, 1963: 114–118; Günther, 1994).

During the sixteenth century centrally controlled bureaucracies came into being in most lay principalities and successfully did away with the medieval co-operatives, replacing them with ordinary commons (*Gemeinheiten*). Such a development can be observed in the territories of Hanover, Brunswick, Oldenburg or the lay principalities of Westphalia, and it was pushed to the extremes in case of the small counties of Lippe and Schaumburg-Lippe, where the ruling prince was also the largest seigneur (Freudenstein, 1879). It has been argued that counts and dukes specifically acquired the *Holzgrafschaft*

to exercise a right of ownership over the *Marken* as a measure to establish and to safeguard their territorial sovereignty (*Landeshoheit)* (Timm, 1960: 27–38; Knoke, 1968: 53–56, for regional detail on how local administration was penetrated by princely rule cf. Herberhold, 1960; Burghardt, 1995; Mager-Möller, 1997). In some regions the noble *Erbexen* and the peasants withstood this strategy, but in most regions they were not strong enough and resistance was tamed by a mixture of military threat and promise that the former members of co-operatives would be further granted rights of use over most of the common land.

Therefore, after the early seventeenth century most commons in the lay principalities of Lower Saxony were owned by territorial princes. Full use of the commons was open to members of the rural communes, which consisted of hereditary tenants (*Meier*) with substantial farms and a number of privileged cottage-owners (*Kötter*). These members of the commune were called *Reiheleute* (literally: 'people forming a row'), because they held communal offices in succession and were obliged to regularly perform duties, such as transporting official letters, clearing ditches, maintaining paths and roads etc. The daily management of the common wastes lay in the hands of the municipal assemblies, while offences against rules and regulations, designated as being part of 'good policing' (*gute Policey*), were punished by the local official of the territorial state. Thus ordinary sessions of the state authorities replaced the ancient *Markengerichte* (Achilles, 1998: 667–670). We do not know very much about the daily management of common pasture and common arable, but it seems as if this was practised by the peasantry quite autonomously. Yet the scope for political action available to rural communes in Lower Saxony was not comparable with that which was usual in Württemberg (Wittich, 1896: 117–146; Hauptmeyer, 1988: 224–235; Warde in this volume). Only the larger woodlands were put under direct governmental control. Unlike the less productive moors and heaths of the plains, the forests in the uplands yielded considerable profits. So it is not surprising to observe that the forest authorities were particularly tenacious adversaries of peasant use-rights.

In contrast to Lower Saxony, the use of the ordinary commons (*Gemeinheiten*) in the lay-principalities of Westphalia was not connected to membership of the commune. Instead, rights of usufruct were attached to long-established farmsteads in a hamlet, village or parish (Löw, 1829: 83–116). The owner of a 'younger' dwelling had to be content with minor entitlements or was excluded completely. But after some decades, when the peasant-community had accepted the settler as a member, he was permitted to graze a cow, to gather some wood and to cut the sods he needed against payment of a reasonable yearly sum (Löw, 1829: 116–123). In the towns the right to graze cattle and collect firewood was normally confined to full members of the borough (*Stadtbürger*) (Haff, 1910; Lappe, 1912).

If the sub-division of self-governing co-operatives and their downgrading to ordinary commons (*Gemeinheiten*) was the 'normal' development in the course of the early modern period, how can the survival of a number of ancient *Markgenossenschaften* in the ecclesiastical principalities be explained? These were to be found mainly in Westphalia, namely the bishoprics of Münster, Paderborn and Osnabrück, the princely abbey of Corvey, the Vest Recklinghausen and the Duchy of Westphalia, both belonging

to the archbishop of Cologne. In these territories the estates held strong political positions and were able to prevent the elected princes from abolishing their prerogatives. Therefore noble *Holzrichter* and *Erbexen* succeeded in preserving the *Marken* as strongholds of their privileges (Hesmer-Schroeder, 1963: 115: map of the Marken in the Münster Basin). The question arises whether the fully-fledged *Markgenossenschaft* found in the ecclesiastical principalities during the eighteenth century was not in fact an integral part of the prevailing rent system which guaranteed regular payments in money or produce flowing from the peasantry to the nobility. The main benefits of the co-operative also accrued to the corporate aristocracy: prestige, sovereign authority and revenue.

But even there societal dynamics required, for some, a change in the management of the commons. With an increase in the number of users since about 1450, all unlimited use-rights ceased and were replaced by neatly defined rights of usufruct. These limitations called for scrutiny so that nearly everywhere the mechanisms of monitoring the common land came to be refined: the duties and obligations of the members of the co-operatives were multiplied, and sanctions intensified. For example, in the so-called *Letter Mark*, one of those extensive and solidly based co-operatives of the *Münster Basin*, the unlimited lumbering of some privileged users was restricted in 1505, and in 1609 all use-rights were 'rectified' by introducing stints. In this way the pasture of cattle and sheep dramatically diminished. Furthermore, in 1688 felling firewood was confined to certain areas which had been designated by officials (*Malleute*), and in 1723 lumbering was completely forbidden until enough trees had grown to a sufficient height (Schotte, 1908: 89–116; Lachenicht, s.d.: 56–64). Cattle, sheep and pigs were branded to discriminate those entitled from the livestock of those who only claimed use (Lülff, 1956: 56–58).

It seems that these local findings were typical for the developement of the commons' management in the north-west as a whole. From the late-fifteenth century a trend can be observed towards smaller spatial units, which could be controlled in a stricter manner by institutions newly installed in a process characterized by conflicts between commoners and authorities. During this process the number of persons concerned with the management of the commons, the control of use-rights and the punishment of infringements against good order grew. From the sixteenth century in some *Marken*, regularly paid *Unterholzrichter* or *Holzförster* can be found as agents of their noble masters or princes and had to fulfill the same duties as their traditional counterparts, the *Scharleute* or *Malleute*. Since the former were appointed by the lord, and the latter elected by the assembly of commoners, their loyalty differed and conflicts necessarily arose. Sometimes these conflicts were 'productive' in that they sharpened the consciousness of all participants about the limitations of common goods, leading to carefully obeyed regulations. But often enough these conflicts resulted in a competition for the exploitation of the remaining resources. Unfortunately there is not enough empirical work done to decide what factors were responsible for the preservation or the destruction of a common (Maurer, 1856: 255–269; Seidensticker, 1896, vol. 1: 65–66; Stüve, 1872: 623, 644, 758–776; Schotte, 1908: 106–109; Timm, 1960: 36–37; Günther, 1994: 58–59: note 117, wording of the oath of a '*Selhauer*')

V. Resources and access to the common land

Common resources were of essential importance for the entire rural population of north-west Germany. To be without access to the commons meant having to pay heavily for some indispensable needs. Above all fuel, grazing and fertilizer could only be gained on common ground. On the other hand, common arable did not play a decisive role in this region.

Access to common resources depended on membership of a co-operative or on the ownership of a farmstead (*Stätte*). Nowhere was residence alone sufficient. Instead, common-use rights were imagined as being an integral part of a certain farmstead or a noble estate which could not be acquired separately. One could gain use-rights in different ways, normally by undivided inheritance of an entitled farmstead, in some cases by purchase of such a *Stätte*, or by the clearing and founding of a new farm somewhere on common ground, which could only succeed if the proprietors and/or all users agreed. At first sight property rights and the constitution of the commons would appear to have favoured economic and social stability. But an entitled user could let a small tenant have a part of his use-rights. This form of leasehold came to be of increasing importance for the labouring poor (*Heuerlinge*) in the seventeenth and eighteenth centuries.

In principle access to common resources was unequal. As a rule, the older a farmstead, the larger its cultivated area and the more substantial its common-use rights appeared. Whether under the aegis of the territorial authority or of a *Markengericht* appointed by the feudal lord, or even within the scope of self-government, it was the substantial peasants (*Vollbauern, Erben*) who owned the most firmly entrenched use-rights. It appears that the common woodlands were exploited more by the seigneurs while the common pastures were often used only by the estates and demesnes to graze flocks of sheep. The peasants largely retained the right to use cattle pasture, to cut sods and turf, to gather leaves and to collect firewood.

When the rural population grew, as was the case before the Black Death in the Middle Ages, or in the late-fifteenth and the sixteenth centuries, and again following recovery from the Thirty Years' War in the eighteenth century, a growing section of the people made their living without having a fully established farmstead, and consequently it was difficult for them to gain access to the commons. But although use of common pastures and woodlands had never been a legal right, it was ultimately impossible to exclude the small man from this privilege. Where strong collective traditions prevailed, as, for example, in the *Markgenossenschaften* of the Münster Basin, the owners of long-established farmsteads could perhaps foil new settlement, so that population growth came to a standstill locally. But the territorial princes were inclined to permit new settlements on common ground, as that would increase their rents and taxes.

If the territorial princes were also *Markenherrn*, as was the case in large parts of north-western Germany, the peasants had to acknowledge the fact that their commons had to serve the political interests of the sovereign. The commons which belonged to the ruling prince were not only jeopardized by the daily exploitation carried out by many *Markenrichtern* and *Erbexen*, but could also be disposed of at an early stage: in

many cases the princes settled the future of large tracts of commons in a decidedly high-handed manner by starting new settlements or entire villages there, or by planting coniferous trees, thus rendering them useless from any other point of view (Cordes, 1981: 58–73; Hesmer-Schroeder, 1963; Knoke, 1968; Mantel, 1990: 65–79, 164–181, 202–204, 232–238, 323–376; Seidensticker, 1896).

Thus in most regions more and more cottages came into being and from the sixteenth century onwards their owners were in the majority. Cottage-owners (*Kötter*) took the old-established farmsteads (*Erben*) as a model for their agricultural practices: many of them tried to achieve the status of a *Bauer* by breeding more cattle and gradually enlarging their farms. In fact their holdings proliferated until the middle of the eighteenth century. Yet land for settlement was limited, so that the foundation of new cottages could not expand further, even if population growth continued. During the early modern period, above all since the end of the seventeenth century, rural industries opened up new economic opportunities for the laboring poor. Young couples could marry and make their living without having inherited a farmstead, relying instead just on spinning and weaving. State-authorities compelled the municipalities to accept these newly founded households because they looked upon them as potential tax-payers and the home of future soldiers. But most owners of a farmstead also willingly leased dwellings and garden-plots to these so-called *Heuerlinge*, because the small tenants were obliged to do seasonal work at reduced wages and because they brought in cash. They had to pay for nearly everything they needed: living space, plots of land, tillage, fodder-crops, grain, fire-wood and common pasture. Most of them owned a cow, so commons supplied an important contribution to the subsistence of poor households. Therefore, the impoverished rural proletariat were the most steadfast advocates of the commons. In their eyes the use of the *Marken* and *Gemeinheiten* was indispensable and they feared for their survival should they be abolished. Nevertheless in the period between 1770 and 1850 enclosure forced the *Heuerlinge* to do away with their cattle.

VI. Sustainability

The answer to the question as to whether sustainability was guaranteed by co-operatives and other institutions managing the commons in the Middle Ages and the early modern period comes from two different perspectives. According to one view, there are good reasons to speak of a 'tragedy of the commons' in north-western Germany. At the end of the eighteenth century contemporaries lamented that common woodlands were being widely devastated, that the heaths were expanding and that some commons were losing their vegetation completely because of over-exploitation. On the other hand, closer examination raises doubts whether these complaints were justified and whether common use was responsible for the evils attributed to it. It could moreover be argued that an ecological and economic system which had survived for nearly one thousand years should not thoughtlessly be condemned for an alleged lack of sustainability (Radkau, 1983; Mantel, 1990: 89–111; Radkau, 2000: 90–98). What is more, in the late eighteenth and early nineteenth centuries, widespread aversion among the rural population to the dissolution of the *Marken* and *Gemeinheiten* demonstrates that the commons in north-western Germany could not have lost their value completely (Prass, 1997).

In the case of the woodlands, all depended on the question of what a forest should look like. If the object was to obtain building timber, the focus of German forestry since the late eighteenth-century, and for which mature coniferous trees were preferable, then common woodlands, which normally were used for diverse purposes, could be designated as 'devastated' (Selter, 1995: 118–200). But common use by the rural population was not normally responsible for the real devastation of woodlands and forests in north-western Germany. Instead, it was certain industries that exercised destructive power. It is well known that as early as the Middle Ages, the salt-works of Lüneburg were responsible for the disappearance of all woodlands in the surrounding areas (Timm, 1960: 43–44). And in some parts of the southern highlands, such as the *Harz*-mountains, princely silver-mining demanded such huge amounts of charcoal and wood to maintain the tunnels, that in the fifteenth and sixteenth centuries the forests completely vanished and had to be restocked under the surveillance of territorial forest authorities (Steinsiek, 1999).

The famous example of the *Hauberge* in the southern Westphalian highlands demonstrates that common use could even guarantee a sustainable form of economy, which harmonized the needs of industry and agriculture. In this particular region dominated by the iron industry, the mountainous ground was parceled out in 16, 18 or 20 'fields' which were used in a long term rotation. Commoners planted oaks and after about fifteen years felled them in order to produce bark for tanning and charcoal. The next summer they burned branches and the remaining vegetation to fertilize the poor soil, and sowed rye in autumn. After the harvest the remaining rootstocks started to bud, so that a period of grazing could soon follow: pigs were put out to pasture in the second year, which was said to clear the ground, sheep-grazing started after four years and cattle was put out to grass after five years. This economy came into being in the Late Middle Ages and did not perish before the late nineteenth century when economic conditions rapidly changed. *Hauberge* originally were confined to a narrow area near the city of Siegen, spreading to neighbouring regions during the seventeenth, eighteenth and even nineteenth centuries; but although viewed favourably by the enlightened public, they were never adopted in other parts of Germany (Radkau-Schäfer, 1987: 107–110; Selter, 1995: 93–94).

If it was not the communal use of resources proper that caused the ecological decline of the *Marken* and *Gemeinheiten* in the early modern period, what factors were responsible for the obvious symptoms of crisis? Contemporaries agreed that war had a devastating effect on the woodlands: armies ruthlessly felled wood, so that especially during the Thirty Years´ and the Seven Years´ Wars private forests and common woodlands suffered severely. But these uncontrolled actions of bands by soldiers were accompanied by a systematic selling of wood by the commoners themselves, who were forced to do so in order to raise the enormous compulsory levies (Stüve, 1872: 628; Hesmer-Schroeder, 1963: 133–139; Lachenicht, n.d.: 64, 75). In times of peace communal regulations provided that a felled tree was replaced by several seedlings (*Telgen, Potten, Heister*) protected by fences or walls against grazing animals. In the face of huge plundered areas these traditional measures of re-forestation failed in wartime and the continuing pasture of sheep and cattle ensured that woodland was changed into mere heath permanently (Stüve, 1872: 646; Freudenstein, 1879: 29; Floer, 1914: 102–103; Kraft, 1941: 58; Timm, 1960: 70–71, Hesmer-Schroeder, 1963: 157–160, 274).

Population growth was the other factor which in the long run was responsible for an over-exploitation of common pasture and the environmental downgrading of the common grounds as a whole (Radkau, 2000). Evidence for this opinion can be found by comparing regions characterized by a rapidly growing population which coincided with an emerging rural industry to other areas more stable in population where agriculture remained the leading economic sector. It is clear that from the sixteenth century onwards, the most alarming information came from those regions where an expanding textile industry created the preconditions for a rapid growth of the labouring poor, i.e. in the uplands of Lower Saxony, in the counties of *Ravensberg* and *Lippe*, in the *Osnabrücker Land*, and in western Westphalia at the border with the Netherlands. Here the management of common lands more and more failed, because the number of users exceeded all economic and ecological limitations (Middendorff, 1927: 35–84; Brakensiek, 1994).

Several reasons for this development could be mentioned without any certainty about their specific significance. It seems as if it was all too tempting for most territorial princes, for the nobility and even for the old-established *Vollbauern* (substantial farmers) to allow new settlements. Princes gained new tax-payers, landlords made a profit by selling allotments from the commons, and the owners of a farmstead won cheap farm-hands as well as leaseholders who had to pay rents regularly. Therefore, for all decisive actors actual profits seemed to outweigh long-term disadvantages. But the great difference between regions where a large-scale dissolution of the commons occurred in the early modern period and other neighbouring areas where the process was much slower or did not even happen reminds us of the need for caution. Only close analysis of by-laws and court-rolls could give us a clear picture of decision-making on a local or a regional scale. Comparative case studies of that kind are urgently required.

Bibliography

Achilles, W. (1998) 'Ländliche Wirtschafts- und Sozialgeschichte von der Mitte des 17. bis zum Beginn des 19. Jahrhunderts', in C. van den Heuvel and M. von Boetticher (eds), *Geschichte Niedersachsens*, Vol. 3/1: *Politik, Wirtschaft und Gesellschaft von der Reformation bis zum Beginn des 19. Jahrhunderts*, Hannover, pp. 691–727.

Balzer, M. (1983) 'Grundzüge der Siedlungsgeschichte (800–1800)', in W. Kohl (ed.), *Westfälische Geschichte*, Vol. 1: *Von den Anfängen bis zum Ende des Alten Reiches*, Düsseldorf, pp. 231–273.

Behnes, C.A. (1830) *Beiträge zur Geschichte und Verfassung des ehemaligen Niederstifts Münster*, Emden.

Bei der Wieden, B. and Borgemeister, B. (1993) *Niedersächisches Waldwörterbuch. Eine Sammlung von Quellenbegriffen des 11. bis 19. Jahrhunderts*, Melle.

Below, S. von (1998) 'Das Eigentum am Wald. Ein Forschungsüberblick', in S. von Below and S. Breit, *Wald. Von der Gottesgabe zum Privateigentum. Gerichtliche Konflikte zwischen Landesherren und Untertanen um den Wald in der frühen Neuzeit*, Stuttgart, pp. 1–55.

Bernhardt, A. (1872–1875) *Geschichte des Waldeigentums, der Waldwirtschaft und Forstwirtschaft in Deutschland*, 3 vols, Berlin. (New print: Aalen, 1966).

Bölsker-Schlicht, F. (1994) *Bevölkerung und soziale Schichtung im nördlichen Emsland vom 17. bis zum 19. Jahrhundert. Versuch einer Quantifizierung im Vergleich dreier Jahrhunderte*, Sögel.

Born, M. (1974) *Die Entwicklung der deutschen Agrarlandschaft*, Darmstadt.

Brakensiek, S. (1991) *Agrarreform und ländliche Gesellschaft. Die Privatisierung der Marken in Nordwestdeutschland 1750–1850*, Paderborn.

Brakensiek, S. (1994) 'Agrarian Individualism in North-Western Germany, 1770–1870', *German History*, 12/2, pp. 137–179.

Burghardt, W. (ed.) (1995) *Das Vestische Lagerbuch von 1660*, Münster.

Cordes, R. (1981) *Die Binnenkolonisation auf den Heidegemeinheiten zwischen Hunte und Mittelweser (Grafschaften Hoya und Diepholz) im 18. und frühen 19. Jahrhundert*, Hildesheim.

Dopsch, A. (1933/1968) *Die freien Marken in Deutschland. Ein Beitrag zur Agrar- und Sozialgeschichte des Mittelalters*, Baden/Aalen.

Ebel, W. (ed.) (1964) *Ostfriesische Bauerrechte*, Aurich.

Fliedner, D. (1970) *Die Kulturlandschaft der Hamme-Wümme-Niederung. Gestalt und Entwicklung des Siedlungsraumes nördlich von Bremen*, Göttingen.

Floer, F. (1914) *Das Stift Borghorst und die Ostendorfer Mark. Grundherrschaft und Markgenossenschaft im Münsterland*, Berlin.

Freudenstein, O. (1879) *Geschichte des Waldeigenthums in der Grafschaft Schaumburg. Ein Beitrag zur Lehre von den Markgenossenschaften*, Hannover.

Garben, I. (1951) *Die landwirtschaftlichen Faktoren in der Entwicklung der Schaumburg-Lippischen Kulturlandschaft*, Hannover.

Gebauer, J.H. (1944) 'Der Hildesheimer Wald. Geschichte einer niedersächsischen Waldmark', *Archiv für Landes- und Volkskunde von Niedersachsen*, 21, pp. 161–219.

Gierke, O. von (1868/1964) *Das deutsche Genossenschaftsrecht*, Vol. 1: *Rechtsgeschichte der deutschen Genossenschaft*, Darmstadt.

Grimm, J. (1840–1878) *Weisthümer*, 7 vols, Göttingen, esp. vol. 3, pp. 1–217 (Westphalia) and pp. 218–321 (Lower Saxony), vol. 4, pp. 648–708 (Lower Saxony), vol. 6, pp. 715–734 (Westphalia) and pp. 734–737 (Lower Saxony).

Gudermann, R. (2000a) *Morastwelt und Paradies. Ökonomie und Ökologie in der Landwirtschaft am Beispiel der Meliorationen in Westfalen und Brandenburg (1830–1880)*, Paderborn.

Gudermann, R. (2000b) 'Mitbesitz an Gottes Erde. Die ökologischen Folgen der Gemeinheitsteilungen', in S. Brakensiek (ed.), *Gemeinheitsteilungen in Europa. Die Privatisierung der kollektiven Nutzung des Bodens im 18. und 19. Jahrhundert*, Berlin, pp. 85–110. (Jahrbuch für Wirtschaftsgeschichte; 2).

Günther, R. (1994) *Der Arnsberger Wald im Mittelalter. Forstgeschichte als Verfassungsgeschichte*, Münster.

Haff, K. (1910) 'Markgenossenschaft und Stadtgemeinde in Westfalen', *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte*, 8, pp. 17–55.

Hambloch, H. (1981) 'Naturräumliche Gliederung im nordwestlichen Mitteleuropa. Anmerkungen zu einer Karte', in *Westfalen – Nordwestdeutschland – Nordseesektor. Wilhelm Müller-Wille zum 75. Geburtstag von seinen Schülern*, Münster, pp. 69–78.

Hanschmidt, A. (1983) 'Das 18. Jahrhundert', in W. Kohl (ed.), *Westfälische Geschichte*, Vol. 1: *Von den Anfängen bis zum Ende des Alten Reiches*, Düsseldorf, pp. 605–685.

Hartinger, W. (1998) *"...wie von alters herkommen...". Dorf-, Hofmarks-, Ehehaft- und andere Ordnungen in Ostbayern*, 2 vols, Passau. (Passauer Studien zur Volkskunde; 14/15).

Hasel, K. (1974) 'Zur Geschichte des Waldbesitzes in Deutschland', in I. Bog (ed.), *Wirtschaftliche und soziale Strukturen im säkularen Wandel. Eine Festschrift für Wilhelm Abel zum 70. Geburtstag*, Vol.1, Hanover, pp. 77–95.

Hasel, K. (1985) *Forstgeschichte. Ein Grundriß für Studium und Praxis*, Hamburg.

Hauptmeyer, C.-H. (1988) 'Dorf und Territorialstaat im zentralen Niedersachsen', in U. Lange (ed.), *Landgemeinde und frühmoderner Staat. Beiträge zum Problem der gemeindlichen Selbstverwaltung in Dänemark, Schleswig-Holstein und Niedersachsen in der frühen Neuzeit*, Sigmaringen, pp. 217–235.

Hempel, L. (1976) 'Flurzerstörungen durch Bodenerosion in früheren Jahrhunderten', in G. Richter (ed.), *Bodenerosion in Mitteleuropa*, Darmstadt, pp. 181–194.

Herberhold, F. (1960) *Das Urbar der Grafschaft Ravensberg von 1556*, Münster.

Herzog, F. (1938) *Das Osnabrücker Land im 18. und 19. Jahrhundert. Eine kulturgeographische Untersuchung*, Oldenburg.

Hesmer, H. and Schroeder, F.-G. (1963) *Waldzusammensetzung und Waldbehandlung im niedersächsischen Tiefland westlich der Weser und in der Münsterschen Bucht bis zum Ende des 18. Jahrhunderts*, Bonn.

Hömberg, A. (1938) *Siedlungsgeschichte des oberen Sauerlandes*, Münster.

Hücker, W. (1939) *Die Entwicklung der ländlichen Siedlung zwischen Hellweg und Ardey (Oberamt Hörde)*, Münster.

Klöntrup, J.A. and Schledehaus, J.F.A. (1782) *Das Osnabrückische gemeine Marken-Recht*, Hannover/Osnabrück.

Klöntrup, J.A. (1783) *Von den Erbexen und Gutsherrn in Rücksicht auf das Markenrecht*, Osnabrück.

Klöntrup, J.A. (1798–1800) *Alphabetisches Handbuch der besonderen Rechte und Gewohnheiten des Hochstiftes Osnabrück mit Rücksicht auf die benachbarten westfälischen Provinzen*, 3 vols, Osnabrück.

Knoke, H. (1968) *Wald und Siedlung im Süntel. Eine siedlungsgeschichtliche Untersuchung*, Rinteln.

Kölling, F. (1962) *Die Süntelwaldgenossenschaft. Ein Beitrag zur Rechts- und Wirtschaftsgeschichte einer Schaumburger Markgenossenschaft*, Rinteln.

Kollnig, K. (1968) *Die Weistümer der Zent Schriesheim*, Stuttgart.

Kollnig, K. (1979) *Die Weistümer der Zent Kirchheim*, Stuttgart.

Kollnig, K. (1985) *Die Weistümer der Zenten Eberbach und Mosbach*, Stuttgart.

Krämer, C. and Spiess, K.-H. (1986) *Ländliche Rechtsquellen aus dem kurtrierischen Amt Cochem*, Stuttgart.

Kraft, H. (1941) 'Die bäuerlichen Gemeinheitsflächen im Kreise Lüdinghausen um 1800', *Westfälische Forschungen*, 4, pp. 27–68.

Kremser, W. (1990) *Niedersächsische Forstgeschichte. Eine integrierte Kulturgeschichte des nordwestdeutschen Forstwesens*, Rotenburg/Wümme.

Lachenicht, G. (s.d.) *Die 'Gemeine Mark' und ihre Teilung in Lette bei Coesfeld. Ein Beitrag zur sozialen Problematik der Markgenossenschaft und Markenteilung im Münsterland*, Coesfeld.

Lappe, J. (1912) *Die Bauerschaften und Huden der Stadt Salzkotten*, Heidelberg.

Liedhegener, C. (1933) *Das Kirchspiel Hellefeld. Ein Beitrag zur Kenntnis der historischen, wirtschaftlichen und sozialen Verhältnisse des sauerländischen Bauernstandes*, Münster.

Linden, H. (1958) *Die naturlandschaftliche Kleingliederung und Agrarstruktur an der Grenze des westfälischen Hellwegs gegen das Sandmünsterland*, Bonn-Bad Godesberg.

Lodtmann, J.F.A. (1770) *De jure holzgraviali, praesertim in episcopatu Osnabrugensi libellus*, Lemgo.

Löw, K.F.L. Freiherr von (1829) *Ueber die Markgenossenschaften*, Heidelberg.

Lülff, E. (1956) *Die Marken als Gemeinschaftsbesitz im Kreise Steinfurt zur Zeit der Markenteilung. Ein Beitrag zur westfälischen Wirtschaftsgeschichte*, Münster.

Mager, W. and Möller, P. (eds) (1997) *Das Urbar der Grafschaft Ravensberg von 1556.* Teil 3: *Ergänzende Quellen zur Landes- und Grundherrschaft in Ravensberg (1535–1559)*, Münster.

Mantel, K. (1990) *Wald und Forst in der Geschichte. Ein Lehr- und Handbuch*, Alfeld/Hanover.

Marten, H.-R. (1969) *Die Entwicklung der Kulturlandschaft im alten Amt Aerzen des Landkreises Hameln-Pyrmont*, 2 vols, Göttingen.

Maurer, G.L. von (1856) *Geschichte der Markenverfassung in Deutschland*, Erlangen.

Middendorff, R. (1927) 'Der Verfall und die Aufteilung der gemeinen Marken im Fürstentum Osnabrück bis zur napoleonischen Zeit', *Mitteilungen des Vereins für Geschichte und Landeskunde von Osnabrück*, 49, pp. 1–157.

Möser, J. (1768) *Osnabrückische Geschichte. Allgemeine Einleitung*, Osnabrück. (New print: *Sämtliche Werke. Historisch-kritische Ausgabe*, 12/1, Oldenburg/Hamburg, 1964, pp. 63–69).

Mooser, J. (1979) 'Gleichheit und Ungleichheit in der ländlichen Gemeinde. Sozialstruktur und Kommunalverfassung im östlichen Westfalen vom späten 18. bis in die Mitte des 19. Jahrhunderts', *Archiv für Sozialgeschichte*, 19, pp. 231–262.

Mooser, J. (1984) *Ländliche Klassengesellschaft 1770–1848. Bauern und Unterschichten, Landwirtschaft und Gewerbe im östlichen Westfalen*, Göttingen.

Müller-Wille, W. (1938) 'Der Feldbau in Westfalen im 19. Jahrhundert', *Westfälische Forschungen*, 1, pp. 302–325.

Müller-Wille, W. (1955) 'Agrarbäuerliche Landschaftstypen in Nordwestdeutschland', *Tagungsbericht und wissenschaftliche Abhandlungen des Deutschen Geographentags vom 25.–30. Mai 1953 in Essen*, Wiesbaden, pp. 179–186.

Müller-Wille, W. (1966) *Bodenplastik und Naturräume Westfalens*, 2 vols, Münster.

Müller-Wille, W. (1980) 'Waldnutzung, Besiedlung und Industrialisierung des Sauerlandes', in W. Müller-Wille (ed.), *Beiträge zur Forstgeographie in Westfalen*, Münster, pp. 39–60.

Müller-Wille, W. (1940/1983) 'Der Landbau im altniederdeutschen Tiefland', in W. Müller-Wille (ed.), *Probleme und Ergebnisse geographischer Landesforschung und Länderkunde. Gesammelte Beiträge 1936–79*, Vol.1, Münster, pp. 92–139.

Nitz, H.-J. (1976) 'Moorkolonien. Zum Landesausbau im 18./19. Jahrhundert westlich der Weser', *Mensch und Erde – Festschrift für Wilhelm Müller-Wille*, Münster, pp. 159–180.

Nitz, H.-J. (1984) 'Die mittelalterliche und frühneuzeitliche Besiedlung von Marsch und Moor zwischen Weser und Ems', *Siedlungsforschung*, 2, pp. 43–76.

Philippi, F. (ed.) (1907) *Landrechte des Münsterlandes*, Münster.

Piper, F.G. (1763) *Historisch-juridische Beschreibung des Marken-Rechtes in Westfalen*, Halle.

Pohlendt, H. (1954) 'Die Feldsysteme des Herzogtums Braunschweig im 18. Jahrhundert', *Ergebnisse und Probleme moderner geographischer Forschung – Hans Mortensen zu seinem 60. Geburtstag*, pp. 179–195.

Prass, R. (1997) *Reformprogramm und bäuerliche Interessen. Die Auflösung der traditionellen Gemeindeökonomie im südlichen Niedersachsen, 1750–1883*, Göttingen.

Radkau, J. (1983) 'Holzverknappung und Krisenbewußsein im 18. Jahrhundert', *Geschichte und Gesellschaft*, 9, 4, pp. 513–543.

Radkau, J. and Schäfer, I. (1987) *Holz. Ein Naturstoff in der Technikgeschichte*, Reinbek bei Hamburg.

Radkau, J. (2000) *Natur und Macht. Eine Weltgeschichte der Umwelt*, München.

Rheinheimer, M. (1999) *Die Dorfordnungen im Herzogtum Schleswig. Dorf und Obrigkeit in der Frühen Neuzeit*, 2 vols, Stuttgart.

Riepenhausen, H. (1938/1986) *Die bäuerliche Siedlung des Ravensberger Landes bis 1770*, Münster.

Rihn, H. (1920) *Die Besitzverhältnisse an den Mooren der Grafschaft Hoya mit besonderer Berücksichtigung des vormaligen Amtes Diepenau und Uchte*, Münster.

Saalfeld, D. (1998) 'Ländliche Wirtschafts- und Sozialgeschichte vom Beginn des 16. bis zur Mitte des 17. Jahrhunderts', in C. van den Heuvel and M. von Boetticher (eds), *Geschichte Niedersachsens*, Vol. 3/1: *Politik, Wirtschaft und Gesellschaft von der Reformation bis zum Beginn des 19. Jahrhunderts*, Hannover, pp. 637–688.

Schildt, B. (1996) *Bauer – Gemeinde – Nachbarschaft. Verfassung und Recht der Landgemeinde Thüringens in der frühen Neuzeit*, Weimar.

Schmitt, S. (1992) *Territorialstaat und Gemeinde im kurpfälzischen Oberamt Alzey vom 14. bis zum Anfang des 17. Jahrhunderts*, Stuttgart.

Schmitt, S. (1996) *Ländliche Rechtsquellen aus den kurmainzischen Ämtern Olm und Algesheim*, Stuttgart.

Schneider, K.H. and Seedorf, H.H. (1989) *Bauernbefreiung und Agrarreformen in Niedersachsen*, Hannover.

Schotte, H. (1908) *Studien zur Geschichte der westfälischen Mark und Markgenossenschaft mit besonderer Berücksichtigung des Münsterlandes*, Münster.

Schotte, H. (1912) 'Die rechtliche und wirtschaftliche Entwicklung des westfälischen Bauernstandes bis zum Jahre 1815', in E. Freiherr von Kerckerinck zur Borg (ed.), *Beiträge zur Geschichte des westfälischen Bauernstandes*, Berlin, pp. 5–106.

Schumm, K. and Schumm, M. (1985) *Hohenlohische Dorfordnungen*, Stuttgart.

Schwalb, M. (1953) *Die Entwicklung der bäuerlichen Kulturlandschaft in Ostfriesland und Westoldenburg*, Bonn.

Schwerz, J.N. von (1836) *Beschreibung der Landwirthschaft in Westfalen und Rheinpreussen*, Stuttgart.

Seeber, E. (1975) *Die Oldenburger Bauerbriefe. Untersuchungen zur bäuerlichen Selbstverwaltung in der Grafschaft Oldenburg von 1580 bis 1810*, Oldenburg.

Seidensticker, A. (1896) *Rechts- und Wirtschaftsgeschichte norddeutscher Forsten, besonders im Land Hannover*, 2 vols, Göttingen.

Selter, B. (1995) *Waldnutzung und ländliche Gesellschaft. Landwirtschaftlicher „Nährwald" und neue Holzökonomie im Sauerland des 18. und 19. Jahrhundert*, Paderborn.

Steinsiek, P.-M. (1999) *Nachhaltigkeit auf Zeit. Waldschutz im Westharz vor 1800*, Münster.

Stüve, J.C.B. (1872) *Geschichte des Hochstifts Osnabrück von 1508 bis 1623*, Vol. 2, Osnabrück. (New print: Osnabrück, 1970).

Thöle, R. (1987) 'Die Verbreitung und Technik der Plaggendüngung und -wirtschaft im Sandmünsterland', in E. Köhler and N. Wein (eds), *Natur- und Kulturräume*, Paderborn, pp. 335–339.

Thudichum, F. von (1860) *Die Gau- und Markverfassung in Deutschland*, Giessen.

Timm, A. (1960) *Die Waldnutzung in Nordwestdeutschland im Spiegel der Weistümer. Einleitende Untersuchungen über die Umgestaltung des Stadt–Land–Verhältnisses im Spätmittelalter*, Köln.

Verhey, H. (1935) *Waldmark und Holtingsleute in Niedersachsen im Lichte der Volkskunde*, Würzburg.

Wittich, W. (1896) *Die Grundherrschaft in Nordwestdeutschland*, Leipzig.

Wobst, A. (1971) *Der Markwald. Geschichte, Rechtsverhältnisse, wirtschaftliche und soziale Bedeutung der deutschrechtlichen Gemeinschaftswaldungen in der Bundesrepublik Deutschland*, Stuttgart.

Wunder, H. (1986) *Die bäuerliche Gemeinde in Deutschland*, Göttingen.

Wunder, H. (1987) 'Peasant communities in medieval and early modern Germany', *Les communautés rurales – Rural communities*, Vol. 5, Paris, pp. 9–52.

10 Preliminary conclusions. The commons of north west Europe

Martina De Moor, Ghent University
Leigh Shaw-Taylor, University of Cambridge
Paul Warde, University of Cambridge

In the forgoing chapters the eight contributors have provided broad overviews of the current state of knowledge on the post-medieval commons of north west Europe. Consequently we now have a provisional sketch of the extent, nature and management of common lands, as well as the national, or in some cases regional, historiographies within which they have been studied. There remain many gaps in our knowledge, with some regions much more richly served than others by detailed studies that address the issues of interest here. Nevertheless there is much to be learned by peering over the boundaries set by our diverse political histories, languages, and historical debates. Hopefully, national and regional historiographies can now begin to exercise a stronger influence upon each other.

The picture that has emerged in the preceding chapters is inevitably complex. Whilst acknowledging that complexity, we now turn to the task of drawing out some general conclusions. National politics played an important determining role but there can be no question of 'national' models. All of the contributors have found much that is familiar from their own areas in the descriptions of other regions. However, each of the regions considered here has its own peculiarities. And within regions there were often significant differences from one common to the next. However, it is our task as the writers of the conclusion to this book to draw out more general observations that go beyond the mere identification of differences, on whatever scale. It is our good fortune to be able to highlight the aspects of these studies of common lands that seem most striking to us, and in doing so, set out some possible avenues for future research. Inevitably, these must take the form of somewhat tentatively formulated hypotheses. If they do not stand the test of time, then we hope that their undoing will provide further insights into the management of this form of property, which remained so central to European agrarian life for so many centuries.

We begin by examining the very general characteristics of common lands – where it was, and what sort of resources could be won from it. Secondly, we reconsider, in some detail, the criteria for the successful long-term management of 'Common Pool Resources' (CPR) laid out by Elinor Ostrom. Ostrom herself laid great stress on the importance of empirical research in her critique of the untested assumptions underlying the theories and models of other approaches. Her own study was an analysis of case studies conducted by other scholars, but only two of these case studies pertained to common lands whilst the rest were studies of fisheries, irrigation systems and water basins. Unfortunately, both of the common land studies were of commons which by definition were 'successful' since they have survived down to the present day. This 'pick and mix' approach has bedeviled much historical scholarship on the commons. Clearly much can be learned

from studying commons that have survived, but at the same time we need to be very wary of generalizing from such evidence about the nature of the much larger number of commons that have disappeared. Furthermore, due to the continued production and preservation of documents associated with long-enduring, and hence 'successful' commons, these are much easier to identify and study than those which did not survive.

It is rare that arguments concerning the management of the commons have been subject to more systematic scrutiny on the basis of entire regions. Of course, the chapters in this volume remain, to a large extent, syntheses of local historiographies with many gaps. We can, however, take the first steps towards identifying areas of relative success and failure (measured by endurance) across a broad swathe of north west Europe, and assessing the utility of Ostrom's criteria for providing explanations for these outcomes.

Thirdly, we map out the broad outlines of forms of access to common resources. As should by now have become clear, these were not static. Commons changed, and so did the groups of users and managers. Amongst the processes of change, perhaps the most important was the 'ring-fencing' of resources. Yet this is one of the least developed themes in the historiography of the commons and goes to the heart of the kind of reciprocities and legitimations that supposedly underpinned the very existence of this type of property regime, and deserves careful consideration. Such changes cannot be fully understood without an adequate consideration of the role of lordship and the state in both determining who the entitled beneficiaries were to be and in regulating their rights. While the 'top-down' enforcement of privatization and enclosure has been a familiar theme in agrarian history, less attention has been given to the importance of these 'higher' institutions in earlier forms of management.

In the final section, we return to the issue of 'sustainability', and the existence or non-existence of 'tragedy'. By the end of the book we hope readers will agree that we have reached the stage both in the development of theory, and in our own comparative work, where as Ostrom writes 'the sweeping conclusions of the first variants ... have given way to a more qualified body of knowledge, involving many more variables and explicit base conditions' (Ostrom, 1990: 7). Long-enduring systems can both be identified, and the relative merits of 'ecological', 'economic', 'institutional', and 'political' explanations for their longevity may be posited, insofar as these can be distinguished. We hope that these suggestions, in turn, will provide a fresh impetus towards a further round of research.

I. The nature of common land

Except in regions entirely devoid of common land, common waste was virtually ubiquitous, whereas common arable and common meadow were widespread in some regions but almost unknown in others. What follows on the nature of common land is concerned primarily with common waste.

It is clear that common waste and pasture, that land generally referred to by the shorthand of 'the commons' tended, to be land that was characterized either by relatively

infertile soils in comparison with other pieces of land in the locality, or by the need for a high level of investment (such as drainage) to make it suitable for arable cultivation. There were, of course, exceptions, such as collectively-managed but physically enclosed pastures along riverbanks or upland edges. Indeed, as these were very well-demarcated and comparatively small in size, they barely match the criteria of CPRs at all, as the costs of limiting access were very small and the 'free-rider' problem that so preoccupies some theorists can have been of only minimal importance. They were, however, undoubtedly considered as a variant of common by their users. But more generally speaking it was land unsuitable for arable cultivation or hay production that was managed as permanent or semi-permanent 'common waste' or common pasture. This might take the form of the sandy heathlands of the Campine region of Flanders and the *Geest* region of northern Germany, or upland and fenland areas of Britain, or the extensive forest landscapes of Scandinavia. Very often this tallied well with settlement geography, with common lands sited in the 'outer ring' of least rentable land as in Von Thünen's famous model (Hall, 1966). However, topography rather than a simple model of settlement density appears to have been more important on the macro-scale. Within densely populated regions such as Flanders and the Netherlands there were very extensive areas of commons, for instance in the sandy-soiled districts of the Campine region or Drenthe.

The longevity of this pattern of 'low productivity' land-use (though we must stress that the agro-system could not have survived without it) suggests that it has generally been correct to consider the property regime as a response to the high costs of cultivation, rather than its 'low productivity' being caused by the property regime. Indeed, as Stefan Brakensiek and Peter Hoppenbrouwers clearly demonstrate, very extensive commons were required in sandy-soiled districts with 'infield-outfield' systems to provide the sods and binding agents for dung with which to sustain arable agriculture. The 'enclosure' or 'improvement' of these areas often entailed substantial investment, and alterations to the local agricultural systems, in the seventeenth and eighteenth centuries. Indeed, in some regions, notably in the northern European heathlands, land use change took the form of afforestation with conifer monocultures during the nineteenth century. The relatively low rental values of these lands did not necessarily attract an influx of migrants encouraged by the low cost of access to resources, however. The areas highlighted here in the east of the Netherlands and in north-west Germany were subject to the 'pull' factors of the Dutch cities and more often display out-migration than in-migration. Equally, the ability of local communities of users either in their capacity as commoners or in other institutional forms, such as the English parish, to regulate movement and settlement, was an additional significant factor that cannot be reduced to the local state of the common resource.

II. The management of common land

Nearly everywhere we look, we find reasonably sophisticated institutions set up to manage commons, that for the most part involved users as jurors in village or manorial courts, and locally-employed monitors. In many cases these institutions also enjoyed the power to alter the rules. Those areas that did not have any kind of effective institutional framework stand out as exceptions. This does not mean, of course, that *every* area of

common land in a given region was subject to regulation by the users in an enduring, institutionalized framework. In most places we simply do not know if this was the case or not. It is important to note, however, that such tools were available. Any lack of regulatory efficacy cannot be seen as an *information* problem. Users were aware that there were ways and means of trying to deal with such problems. At this stage in the research, it seems that some kind of a court staffed primarily by locals, whether under the auspices of lords, communes, municipalities or the community of commoners, was the norm, northern Sweden apart. However the ubiquity of these institutions elsewhere is not beyond question since this presumption rests largely upon the surviving records of such institutions. Where such records cannot be found in the archives this could indeed be due to the failure of the documents to survive but could equally well result from the historical absence of such institutions. Low population densities and state usurpation explain the case of northern Sweden.

The 'tools of the trade' employed to manage common resources also appear to have been rather similar across north western Europe. These included, in many cases, though by no means all, the limiting of commercial activity with resources obtained from the commons, various kinds of limits on the amount of each resource that users could take (Ostrom refers to these as 'appropriation' issues), the provision of monitors and systems of sanctions for malefactors, restrictions on the timing of access to resources, and the enforcement of collective exploitation (such as communal village herds). The actual application of such measures could vary considerably from place to place. Nor is it always clear what the underlying rationality behind such approaches might have been. They could be read as 'ecological' measures, attempting to ensure the sustainability of the resource. Certainly users were aware of the importance of this problem and often referred to the needs of their descendants in disputes. However, one could also posit 'efficiency' reasons, such as the need to minimize labour costs by collective supervision (such as in a communal herd) or the minimizing of costs generated by boundary setting (fencing, for example) when the rental value of the soil was relatively low in the first place. Finally, one could read these measures as enforced 'risk-sharing' that ensured that users shared the costs of capital depreciation in a manner that was at least roughly proportional to their enjoyment of the resource, the classic 'problem' of managing a public good. Such an imperative did not have to come from the community of users, but might well have been enforced by local lords who saw the removal of biomass such as wood or livestock from the local agro-system as an unrewarded depreciation of their assets. Possibly it is unreasonable to expect to be able to distinguish such neat categories of causation.

Such difficulties do not remove the need to explain disparities in the application of particular tools, however. One example is the distinction between limiting grazing numbers by means of a set numerical 'stint' of livestock per household or user, the less specific rule of 'levancy and couchancy' or overwintering that limited grazing rights to those animals that could be kept over the winter by the resources of each user's own farm, and 'agistment' that simply required a payment per grazing beast. Angus Winchester provides an attractive explanation of the geographical variation of these rules in northern England based on changing pastoral economies in the late medieval period. It seems likely that in many areas of northern Europe, where common rights were exercised by tenant farms or particular landholdings, an earlier rule of overwintering came to be

substituted by numerical limits, sometimes supplemented by agistment. This could be explained by the increasing untenability of earlier arrangements as holdings fragmented, but also altered cost structures. It is likely that numerical limits were somewhat easier to supervise than the rule of levancy and couchancy, especially in areas of large or scattered population. Both systems, however, required adequate institutional arrangements to set grazing levels, monitor use and collect payments or fines. As these costs might vary considerably from place to place on a fairly small scale, it is unsurprising that the variation in the application of particular operational rules appears to have been so great, even within regions. In addition it is possible that in commercializing economies characterized by any kind of cattle trade stinting would have been the more convenient form.

Many of these local courts seem to have employed monitors and had a system of graduated (though not always) fines for punishing wrongdoers. Rules were drawn up in byelaws that were approved and amended by the courts or assemblies of users. Courts themselves might consist of elected or co-opted jurors, which gave scope for the creation of governing oligarchies. However, most records of regulations and byelaws that have come down to us are clearly incomplete in that they do not provide a set of rules sufficient to cover all of the management parameters for a system of common rights. Some things – such as access times – were often weather-dependent and at the discretion of officials. Others were simply regulated by custom, although in the very long term the survival of customs often depended on the judgements handed down in public courts. There was no alternative world of custom outside of legal institutions. Many of the documents that have come down to us are clearly the result of disputes, although it is often not clear if the rules recorded for the first time were reaffirmations of well-established practice, or innovations to deal with new problems.

It is difficult, in fact, for those places for which we have records, to find many regions in Europe that did not fulfill most of the criteria laid down by Ostrom for long-enduring, self-managed commons. Exceptions appear most notably in France, where by the eighteenth century, enduring commons in Brittany, Burgundy, Bresse and the Auvergne seem, at least according to agronomist observers, to have been suffering from severe degradation. This had not led, however, as in the Île-de-France, to their early usurpation, partition and privatization. Indeed, these regions of relative 'failure' do not seem to have been characterized, in the main, by institutional structures radically different from those where common resources were maintained in a good condition. It seems more to be the case that they did not function so effectively. This brings us to the difficulties of applying Ostrom's criteria in practice. The criteria are necessarily abstract so that they can be broadly applicable. In consequence it is not always straightforward to assess, in particular cases, whether the individual criteria were satisfied.

Important criteria such as 'low-cost', 'participation', 'accountability', and 'congruence', are useful starting points in identifying problems. But whether or not these criteria were met depended to some extent upon the assessments of the users themselves who by no means always had commonly-shared evaluations of what these concepts might entail. In short, they are satisfying explanations of why common property regimes worked, but only take us so far when any convincing reasons for their breakdown

or non-appearance in similar institutional circumstances are required. This is particularly apparent when we are dealing with highly-differentiated communities of users and byelaws or customs of fairly limited scope. Ostrom's work has primarily been dedicated towards rehabilitating common property in the social sciences. It is perhaps not surprising that it therefore provides a more complete understanding of how common land was managed successfully for so long than it does of exactly how and why such systems collapsed when they did or why they were replaced.

We must conclude, then, that while a 'new institutionalist' approach is central to any analysis of how property regimes function, and has vitally focused attention on the widespread presence of local regulatory institutions, in these northern European cases we must go further in examining the broader institutional and economic contexts of the commons in order to effectively explain their management, or less ambitiously, to focus on the sets of problems about which we are insufficiently informed.

III. Access to common lands

Simplifying greatly, we can identify four main ways by which people came to enjoy rights to commonly-managed resources.

1. Tenancy or ownership of a particular building, farmstead or landholding. Sometimes, as in England, this depended on being a tenant or sub-tenant of a manor or lord. In other areas, however, such as the Auvergne or Provence, such property was allodial. In cases where the manor actually owned the commons, disputes were resolved in the manorial (lord's) court, a form of private court not abolished in England until the 1920s. In Normandy a very similar system prevailed.

2. Membership of a commune or municipality. Common rights were owned by the collectivity of 'citizens' or members of the commune, who exercised these rights as a group rather than as an association of individuals. They had rights to common resources within the jurisdictional area of the commune. The land over which rights were exercised was often actually owned by the institution of the commune itself. The commune was nearly always subject juridically to lordship, and later, the state. The village court made byelaws and often acted as the lowest rung of the public court system. This was frequently found in some form in southern Germany, parts of the Netherlands, Alsace and Béarn in France, and Värmland, Dalarna, Småland, and Skåne in Sweden.

3. Through being part of a co-operative or an association of members with rights to a material resource. In German these were termed *Genossenschaft,* in the Netherlands *markgenootschappen* and in Flanders they went by a variety of purely local names. Members could be anything from a peasant farmer to a member of the nobility, a village commune, a corporation or monastery. Membership rights sometimes inhered in persons and were frequently heritable. But in other examples membership rights were attached to particular buildings or landholdings, as in case one above. These co-operative institutions enjoyed material rights over a set area of land and usually had their own regulatory institutions. They were often associated with large wooded areas, and evidence from

both northern and southern Germany, and western Flanders, suggests that such institutions were most widespread in late medieval times.

4. When all residents in an area, or in fact any subjects of the local ruler, had rights. This was only usual where there were very large and virtually inexhaustible commons, such as in northern Sweden. It was occasionally found around large commons in Flanders where everyone who lived within a certain distance from the common had rights. In some ways these examples conform more to 'open access' resources rather than 'commons' as they are now understood in the contemporary social science literature. They either had their own local institutions to manage them, or were effectively unmanaged. Sweden seems an unusual example where all subjects had rights, but with the size of allowances varying according to the size of their agricultural enterprise. The numbers of users was theoretically unlimited, in practice this was far from being the case.

However, these forms could alter over time in any one locality. Having introduced this typology, we must examine change, both in the exogenous factors to which commons were subject, and within the institutions themselves.

IV. The exclusion process

The distinctions apparent within the peasantry in the High Middle Ages increased over the early modern period. Some of these pertained to the common rights they were allowed. Often they were calculated in a reciprocal relationship to the feudal services or dues owed to lords and communal authorities, or relative to the size of tenancies – a relation between needs and rights that would break down, but remain a matter for dispute, over the period. Such distinctions were especially easy to make where there was a manorial basis to the system and rights were simply linked to tenancies within that manor. On top of this came the effects of two great waves of population growth in north-west Europe, from the late fifteenth century to around 1580–1640, and during the eighteenth century. Especially during the first of these, users responded by ring-fencing resources and limiting rights.

Ring-fencing could take two forms. One was the limiting of rights to particular households, farms, farmsteads or even buildings without land. In England the unambiguous distinction between dwellings with and dwellings without common rights first appears widely in the documents in the sixteenth century. Whether this was effected by way of a distinction between established residents and incomers at a particular moment in time remains a moot point. This also occurred elsewhere, especially where larger tenancies were impartible, as in some regions of south-west Germany, making it easy to keep track of those who enjoyed rights. Buildings erected subsequent to set dates, or outside of particular sites such as notionally 'ancient' farmsteads, were no longer accorded rights. An attachment to particular holdings was also a characteristic of the co-operative style *Genossenschaften* in northern Germany. Limits were set to the amount of resources that could be taken, and distinctions were made between villagers as to who did and did not have rights, creating a distinct community of commoners. These commoners were often but not always the wealthier farmers and peasants. The

losers were the land-poor and landless who had no rights, and if they enjoyed the use of common resources, did so only on sufferance. Indeed, it may have been increased residential differentiation, created either by partitioning of old buildings and farmsteads or the growth in number of cottages, that created perceptible social differentiation and confusion over whether rights pertained to people or landholdings. This led in turn to disputes, and the distinctions being recorded.

The second form of exclusion took place within communes or municipalities. Here authorities could govern in-migration by setting barriers to entry such as property requirements and payments, or even on the basis of reputation. They could limit marriage opportunities by either requiring people to guarantee that they would not be dependent on poor relief in the future, or obliging them to request permission to marry, say, if under the age of twenty-five. Again, the conditions under which these rules were set were not necessarily linked directly to the commons, but more a generalized fear about income, indigence and possible future dependence on transfer-payments from others. This pattern of behaviour was common in many German communes. In districts of scattered settlement and areas of impartible inheritance, the membership of communes could easily be limited to fairly substantial landholders. However, in areas of partible inheritance with nucleated settlements such as in the German south-west, this proved impossible and the numbers of residents actually excluded from communal membership remained very small. Here, instead, people tended to have graded rights that depended on the size of their holding, services owed, or if, for example, they lived in a partitioned house or owned an entire farmstead. This pattern was also replicated in some districts of the Netherlands such as Drenthe or the Meinweg woodlands of Limburg (where rights varied according to the ownership of wagons and horses), whether the community of users embraced a majority or minority of the local population. In Sweden rights were restricted to landowners or tenants, and regulated in a hierarchy of commons governed by the village court, district courts and provincial royal officials. It was perhaps the low settlement density and very extensive resources that had allowed the crown here to claim jurisdiction over and regulate users of nearly all common land.

Hence while the degree varied, the experience of exclusion was almost universal and a primary mechanism in managing the commons. This is entirely in line with the argument of Ostrom that 'appropriators [users] must be able to exclude others from access and appropriation rights,' to create an incentive for effective management (Ostrom, 1990: 91). In some places the poor did not live on separate plots at all, but in the houses of the wealthy or in cottages on their farmsteads. Here we might say there was differentiation within rather than between enterprises and households. However, this hardly ever took place with solely the commons in mind. At stake was the economic situation, fears of the poor, fears of overexploitation, and political concerns. However, it had the effect of reducing the consumption of commonly-managed resources, and generating a community of users who identified with an interest in maintaining and managing the common property regime. That it might be connected with a wider set of issues than the income generated by the common itself, goes some way towards explaining the phenomenon noted by Martina de Moor in Flanders, whereby many of those with common rights did not actually exercise them but nevertheless supported the preservation of the commons.

V. The state and the commons

None of the institutions that managed commons existed in a vacuum. However, there were significant variations in their relations with higher authorities across Europe. In England, for example, the manorial basis of commoning was relatively independent of the public legal system. In many of the German states, the communes that regulated the commons were subject to the territorial prince whose power developed into the modern state in a process of increased central regulation and fiscal demands driven by bureaucratic development and military competition. Indeed, the communes were not only the lowest rung of the legal and administrative system, but the fiscal units responsible for the collection of taxation. By the second half of the seventeenth century, this was true over much of France, too. In contrast, all uncultivated land was claimed by the Swedish monarchs with increasing force from the fourteenth century onwards. The royal declaration of 1542, the forest regulations of 1647 and 1664 and the national law of 1734 each increased the power of the monarchy to regulate many aspects of the commons from the centre, even though most everyday management decisions were left to local officials.

Thus while in all places the users had a significant say, and direct role in their management, they stood in very different relations to the governing power. In England the civil parish was responsible for poor relief whilst regulation of the common was a manorial affair (though see Birtles 1999 for a somewhat different view). In contrast, communes over much of continental Europe had a direct responsibility for poor relief and tax-payment. As the level of taxation rose massively during the early modern period, especially during the Thirty Years' War from 1618–1648, communes found themselves trapped between bearing the arrears of their members or supporting them in their penury. Municipalities used the commons to meet debts in four ways leading to a variety of possible outcomes. The most drastic option was the outright sale of the common. A second option was to try and pay off the debts incurred by securing further loans using common lands as security. This too could lead to the disappearance of the common if the municipality defaulted on the loan. Another possibility was leasing the common and using the rents to repay debts, which led to the temporary loss of the common. Finally the resources (especially timber) could be stripped and sold. In south-west Germany and eastern France, in the long-term the revenues from leasing and sales seem to have provided a strong incentive for the land to remain in communal hands.

Thus, while the tools of commons management and the involvement of users in that management appear to have been relatively consistent across the north-west of the continent, in some areas the commons were being managed with solely the economic interests of the users in mind, whilst in others they became an institutionalized adjunct to local government that could not be alienated without the permission of the state. At the same time they were an important instrument at the village level for juggling the fiscal demands of expanding government.

The state could also influence access to rights. The *Genossenschaft* or co-operative form of an independent association with rights vested in a material resource rarely survived in areas of intensified state control, and they became absorbed into the governmental system as appurtenances of the communes. In contrast, in the small

ecclesiastical regimes of Germany that did not attempt to compete with more expansive neighbours, they were able to survive down to the nineteenth century. Similarly, in England, where the state had little or no bearing on the development of commons management, users could exercise fairly autonomous control. In France, where commons had often been alienated to creditors in the seventeenth century as a consequence of municipalities defaulting on debt, the state stepped in to prevent this process and protect what they recognized as important sources of revenue for their taxpayers. Thus 'politics' was a vital element in determining how the commons were managed, as well as governmental action often providing one of the main impetuses behind the dissolution of such systems (Brakensiek, 2000). However, governments rarely intervened in the operational practice of commons management.

VI. The state of the commons

The need to disaggregate common resources, and the varying outcomes that different resources such as timber, grazing, and peat might be subject to, was highlighted in the introduction to this volume, and received further emphasis in the contributions of Leigh Shaw-Taylor and Paul Warde. Stressing this point allows something of a re-evaluation of the previous literature on commons. Wood stands out as being the resource most prone to degradation and we will therefore look at this in a little more detail.

Jan Luiten van Zanden has argued that in the *marken* of the eastern Netherlands, soil degradation and overcutting of wood was a common problem during the late sixteenth and seventeenth centuries. This was only remedied around 1700 with the introduction of a well-monitored system of differential fines for transgressions. This, a successful adaptation of communal institutions to earlier problems, itself came under pressure when agrarian change, after 1800, reduced the importance of communal grazing and left commons exposed to the demands of those users who wanted to invest in privatized land for arable cultivation (Van Zanden, 1999). A number of points are raised by Van Zanden's work. One of the main indices of degradation he uses is the disappearance of standing timber, combined with grazing which prevented the regeneration of woodland, and the degeneration of much common land into heath. This is a very common experience from the medieval period onwards on sandy-soiled districts of northern Europe, to the extent that sand drift over cultivated land had become a very significant problem in the Netherlands, Denmark, southern Sweden, the East Anglian Breckland in England and parts of northern Germany by the eighteenth century (Kjaergaard, 1994: 18–40; Bailey, 1989: 26–27). Part of this was undoubtedly caused by the loss of the topsoil following deforestation, partly for timber for building and fencing, but also where there existed a very considerable demand for fuel for industrial production. Lüneberg heath is undoubtedly the most famous of these relatively recent man-made heathlands. However, the removal of mature trees was a common problem all over Europe and in some regions had become severe by the early sixteenth century. The unsustainable removal of mature, large timber trees which could be used for shipbuilding or large-scale construction should not be confused with sustainable management practices such as coppicing or the periodic cutting of scrubland.

We can posit three reasons for timber clearance. Firstly, few seem to have operated with the kind of investment time-horizons necessary to preserve a large stock of mature timber, even if they conscientiously managed younger stocks for use as fuel. This was true of all owners of woodland, not just that owned in common. However, the removal of mature stands from common lands appears to have been sufficiently slow that users rarely engaged in deliberate strategies to encourage regeneration. Secondly, wood was an asset easily made liquid, especially timber. It was relatively easy to transport where there was access to waterways, and nearly always in demand. Thus both individuals and communes often responded to fiscal pressures or debt by selling off wood or woodland. Thirdly, many users did not actually control the timber assets on their commons. It seems to have been a derivation of hunting law that allowed princes and rulers to claim control over what were called 'bearing' or 'fruitful trees', those that provided fodder for game in the form of acorns or beechmast. This right had solidified into a general claim to manage the forests in most areas of Europe by the end of the sixteenth century, and in some places long before. Thus in theory the commoners either had no claim to such trees, or were restricted in their use. In these circumstances there was little incentive to ensure their sustainable management, especially where they overshadowed pasture. Woodland often proved rather difficult to police, and in some regions this led to early examples of the phenomenon whereby 'nationalization created *open-access resources* where limited-access *common-property resources* had previously existed' (Ostrom, 1990: 23). That said, it should be noted that nineteenth-century France provides a counter-example, since Vivier argues that nationalization led to a much tighter regulation of the forests and to considerable regeneration.

However, when we turn to consider non-wood resources, more general indices of degradation are difficult to devise because of both variation in resources desired, and the variation in the robustness of the ecosystems exposed to exploitation. Sandy-soils, for example, were much more vulnerable to erosion and sand drift once vegetation cover had been reduced than were heavier soils. The long-term management of thin soils with ineffective drainage, particularly where there was deforestation, had also frequently raised the water table and brought about widespread waterlogging (Kjaergaard, 1994: 21, 27, 40–49). This in turn put more pressure on the commons via grazing or the removal of the topsoil to maintain the fertility of the cultivated fields. However, these environmental problems by no means only appeared in commonly-managed property. The destruction of thin soils was speeded up by agricultural intensification and the widespread introduction of permanent stall-feeding for livestock, often permitted by the spread of fodder crops, in the second half of the eighteenth century. To make this system effective, large amounts of topsoil was required to act as the binding agent for manure in the stalls, that could then be spread upon the fields. Thus the crisis of many areas of thinly-soiled commons around 1800 was more to do with the pressures of an agricultural system undergoing transformation, than a failure of the old agrarian system.

Some examples of environmental degradation clearly relate to common lands where regulation had never been present or had broken down. However, whilst we can point to definite examples of environmental degradation occurring under regimes of common property management, it is rather unclear whether these were the result of the property regime, or the broader agrarian system. After all, we can point to equivalent examples

of degradation on private property at the same time. It certainly was not the case that common property regimes were doomed to an early demise, nor that they were the cause of low productivity rather than an adjunct of a regime that for a long time was incapable of the kind of investment required to generally raise productivity. This is not to say that on occasions this could not be the case. Communal regulation could certainly act as a brake on innovation. But there does not seem a general model that we can apply to all instances, and the 'Tragedy'-model in north-west Europe would appear, in the sense of a general unsustainability of commons *per se*, to be comparatively rare. A variable raised by Stefan Brakensiek in northern Germany probably had some importance. If users generally dwelt at some distance from a common, then it was often over-exploited. This is probably a simple case of the cost of monitoring, and indeed exploitation, being relatively high, lessening the incentives for sustainable management.

It may seem contradictory to talk about 'commons' which were clearly managed by a single regulatory institution, and then plead for the importance of disaggregating into the different resources a particular area of common land offered. However, even within one regulatory system, it is clear that resources could suffer variable fates dependent on both their opportunity cost to users, ecological vulnerability, and the costs of monitoring. It is here that the 'equity' question must be considered.

The enduring examples of common property regimes examined in detail by Ostrom, mostly irrigation systems, show a reasonably high degree of equity among users. Although landholdings (or livestock holdings) varied, users were involved in similar farming systems and required similar, if not identical, resources (such as water). It might be argued that a reasonably homogeneous economic background to the users is a prerequisite to effective sustenance of the commons, permitting a 'contingent' strategy. This is where users will follow a strategy so long as they are reasonably convinced that other users will honour their commitments to use the resource in the same fashion. Does this process require the group of users to have similar interests from the outset?

It could be argued that the means of achieving institutional efficacy and a degree of equity among users, was not to modify the internal rules governing that community, but rather to make it exclusive. In many areas of Europe, including England, the eastern Netherlands, and areas of Germany dominated by impartible inheritance, commoners were often a minority of the local population. In those places where the group of commoners extended to the membership of the political commune or municipality, there was both a hierarchy within that group, and a means of exclusion by erecting barriers to in-migration. Indeed, Nadine Vivier has argued that a failure to exclude was one of the causes of environmental degradation in Burgundy. Those who fell outside the group of commoners could look upon common property regimes as a system just like private property – an insidious form of rent-taking enjoyed by those born early enough or rich enough to obtain it. From this viewpoint, the history of the commons, the process of privatization and the pauperization of some, could simply be seen as one part of a 'tragedy of exclusion'. This seems to be a very promising avenue for future research. Yet at the same time, there were clearly many commons where the users were a highly differentiated group, embracing both large farmers and landless labourers.

It may be that until the pushes for agricultural 'modernization' in the late-eighteenth and early-nineteenth centuries, users recognized that they were part of a broader 'agro-system' that required co-operative maintenance, even if the opportunity costs of particular strategies were widely variant among the users. This could produce a broadly-based compliance with regulations, and ensure that attempts to alter the system proceeded through legal channels, often calling higher echelons of government into play. At the same time, this may have generated a degree of tolerance for certain groups of malefactors who took resources (such as brushwood) which were of relatively low value to other groups of users (such as large-scale graziers). The costs of attempting to reconfigure the system in the interests of any sub-group could well have been prohibitively high.

The institutionalist approach of Ostrom has certainly borne fruit and drawn our attention to previously little considered aspects of the agrarian world, in this case of north-west Europe. It is time to put the provocative abstract model of the 'Tragedy of the commons' to rest as a model of 'the commons', though it should be retained as a useful conceptual shorthand for what can occur in the absence of effective management. What is needed now are more nuanced empirical and comparative studies. The material amassed here, for all the limitations of our knowledge, demonstrates clearly the inadequacy of explanations for the management of the commons, its adaptations and continuities, in terms of any single over-riding factor. It underlines the pressing need to incorporate our understanding of these property regimes into the broader context of local agrarian societies, especially where the dissolution of the commons is considered to be a major element in 'modernization.' At the very least, a sketch map of commons management in north west Europe has emerged, from which we can proceed to fill in detail, if necessary modify our approaches, and engage in comparative work with other regions of Europe and the wider world.

Bibliography

Bailey, M. (1989) *A Marginal Economy? The East Anglian Breckland in the later middle ages,* Cambridge.

Birtles, S. (1999) 'Common land, poor relief and enclosure: the use of manorial resources in fulfilling parish obligations, 1601–1834', *Past and Present*, 165, pp. 74–106.

Brakensiek, S. (ed.) (2000) *Jahrbuch für Wirtschaftsgeschichte. Gemeinheitsteilungen in Europa. Die Privatisierung der kollektiven Nutzung des Bodens im 18. und 19. Jahrhundert*, 2, Berlin.

Hall, P. (1966) *Von Thünen's Isolated State. An English edition of Der Isolierte Staat by Johann Heinrich von Thünen,* London.

Kjaergaard, T. (1994) *The Danish Revolution, 1500–1800. An ecohistorical interpretation*, Cambridge.

Zanden, J.L. van (1999) 'The paradox of the marks: the exploitation of commons in the eastern Netherlands 1250–1850', *Agricultural History Review*, 47, pp. 125–144.

Glossary

Agro-system: the combination of technical, physical and social aspects of the agricultural production process, within a well-defined area.

Common arable and common field: refer to land primarily used as arable in individual/ private ownership. After the harvest and in years when the land was not being cropped, the land was subject to common rights. Common field is often referred to as open field, referring to its physical openness.

Common land: land used, managed or both by several individuals or groups.

Common meadow: refers to land primarily used for hay production and subject to individual (private) ownership. After the hay harvest the meadow was open for common grazing.

Common pasture: refers to grass land used for common grazing.

Common waste: refers to common land used neither for the cultivation of crops nor for the production of hay but principally for the grazing of animals or the gathering of fuel and sometimes other materials.

Common woodland: refers to permanent woodland used for gathering wood and derived products.

Communal field: refers to fields owned and farmed (as arable) collectively.

Common Pool Resource (CPR): refers to a natural or man-made resource system that is sufficiently large to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use (Ostrom, 1990: 30).

Dominium utile: a right to use the resources within a particular area.

Dominium directum: a right to the soil of a specified area.

Enclosure: the process of ending the exercise of common use-rights over land, usually accompanied by the construction of a physical barrier around the land, or barriers becoming a permanent feature in landscapes that previously had been open for common usage during some part of the year.

Institutions: refers to the nexus formed by formalised organisations such as seignorial or village courts, assemblies or committees, the procedures they established and the officials they appointed.

Opportunity costs: the cost of a particular choice measured as the cost of the next best alternative.

Overwintering ('levancy and couchancy' in English law): this provided that commoners could graze as many beasts as they were able to sustain off their own resources over the winter, when grass-growth was too meagre for common grazing.

Privatisation: refers to the transfer to individual ownership of previously collectively or communally owned land.

Stinting: the setting of a maximum number of beasts that could be grazed.