

# An Application of the Anti-Commons Theory to an Elderly Nursing Home Project in Portugal

José Lamelas<sup>#</sup>, José António Filipe<sup>\*</sup>

<sup>#</sup>*Universidade Lusófona de Humanidades e Tecnologias (ULHT-CPES), Lisboa, Portugal*

pereiramelas@gmail.com

<sup>\*</sup>*Instituto Universitário de Lisboa, ISCTE-IUL, BRU-UNIDE, Lisboa, Portugal*

jose.filipe@iscte.pt

**Abstract** - The present study evaluates the consequential economic and ethical problems which occur when bureaucracy is present in companies' projects evaluation by governmental agencies. The delay of projects approval generates loss of value once projects may not be implemented or are implemented after the suitable time. Theory of anti-commons is presented in the contextualization of the problem. As seen in this study, when an "anti-commons" emerges, resources may be prone to under-use. In an anti-commons situation there are too many entities deciding what may lead to the under-use of the resources. In Portugal, bureaucracy in projects approval contributes to such a situation of anti-commons. The present study analyses a project for the construction of an elderly nursing home, for which is necessary a permit to be obtained from the Portuguese government. This study is made according to the framework of the anti-commons theory.

**Keywords** - Bureaucracy, Anti-commons, Elderly Nursing Home, Portugal.

## 1. Introduction

The discussion on property rights is classical and in the last decades the discussion has been enlarged to consider new frameworks. An approach has been presented on some issues generated by the excessive fragmentation of property rights: the anti-commons theory. Michelman (1982) has exposed the anti-commons as "a type of property in which everyone always has rights respecting the objects in the regime, and no one is ever privileged to use any of them except as particularly authorized by others". Later, Heller (1998) stated that in an anti-commons problem there is a property regime in which numerous owners hold effective exclusion rights over a scarce resource. Therefore, the co-existence of multiple exclusion rights creates conditions for the suboptimal use of a resource. In the "tragedy of the anti-commons", resources may stay idle even in the economic region of positive marginal productivity.

A project in the construction sector (of an elderly nursing home) in Portugal is studied and allows to evaluate the possibility of using the hypothesis suggested by Buchanan & Yoon (2000) that bureaucracy can be studied with the help of the anti-commons conceptualization.

In this context, some questions are posed about the time that a project needs to be approved by official entities and about the necessary administrative procedures in order to take the project approved. The bureaucratic procedures show the incapacity of administrative official structures to allow that economic system operate efficiently. Processes depend on too much legislation and on the will of a set of bureaucrats that often "want to show that they control the system".

Particularly in this case, it can be seen a significant delay in the project's approval, what makes the project to get unviable because too much time has gone.

An economic analysis allows to show how a problem of anti-commons can originate an important loss of value. It is seen how anti-commons tragedies appear in such situations as the ones that are shown in the present study's problem.

## 2. Anti-Commons and Bureaucracy

After the introduction of the concept of anti-commons by Michelman, the tragedy of the anti-commons was formulated by Michael Heller to describe a coordination breakdown where the existence of numerous rights holders frustrates achieving a socially desirable outcome.

Considering the anti-commons theory, generically, it can be said that when several rights holders have, each one, the right to exclude others

from using a scarce resource, this resource may have a limited and unsatisfactory use. This problem of the “tragedy of the anti-commons” reflects that the resource is prone to be under-used.

After the emergence of an “anti-commons”, its particular passage to an efficient process may be long and extremely slow, due to the properties inherent to “anti-commons” and to the difficulties existing for overcoming the “tragedy of the anti-commons”.

As a consequence of all this, it is necessary to make an important reflection about the definition of property rights to overcome several important aspects for resources exploitation. When there are too many property rights and too many rights of exclusion, tragedy may be seen as the probable last result. In thesis, too many decision makers have the right to exclude others but, in fact, no agent has the privilege to use the resource suitably. An insufficient use is the corollary for this situation.

Bureaucracy is also often seen as a possible object of application of anti-commons framework. The suggestion of Buchanan and Yoon (2000) that the anti-commons construction offers an analytical means of isolating a central feature of “sometimes disparate institutional structures” shows, in fact, the problems arisen from bureaucracy in this context.

Buchanan and Yoon (2000) presented a case on which bureaucracy is evident on diminishing the potential of a project. On a Buchanan’s visit to Sardinia, Italy, in early 1999, he was informed that a potential entrepreneur was seeking to invest in a combined seaside/hunting-preserve resort. Action was inhibited by the necessity of getting permits from several regional agencies (for example, the tourist board, a hotel-restaurant agency, and the wildlife protection agency), each one of which hold effective exclusion rights to the project that would, if implemented, be productive of value. Another example stated by the authors involving the bureaucratic barriers was the residential construction. Housing permits were showed to require the approval of several separate overlapping agencies, each of which could prevent construction.

The persistence of bureaucratic circuits of approval and implementation of projects can difficult the entrepreneurship activities diminishing the potential for regional and local development. The present study analyses a problem in which a project is proposed to Portuguese authorities to be approved according the existing legislation and the rules

needed for this kind of projects. The delayed project’s approval made the project to become unviable.

### 3. The Problem

The object of the present study is supported on the way how a construction permit in Portugal is got for building an elderly nursing home located in a land outside the urban area, in a district capital in the countryside.

In recent years, some legislation has been published in order to try to facilitate licensing procedures. However, these measures just simplified the current licensing, i.e. when there is an estate plan that provides all the criteria for the construction and the permit may not be different from what was previously established.

In case something in the permit application is different from the current process, this soon becomes more complex and time consuming.

The process set out herein relates a situation of a permit application for an elderly nursing home, which became an unusual project, because its respective type of use and location were too specific.

In late September 2008 the first formal meeting with the designer was held. Then the aims of the project were approached, namely the building capacity for a total of 120 users, but at the start of its operation it should be able to receive 80 users. In this meeting other issues were also approached, such as the respective instructions and information provided by Social Security for this kind of construction.

On 18th November 2008 the preliminary study of the project was delivered at the Town Hall, so that it could give instructions about its feasibility, namely on how to license; to the particular location it would be necessary to draw up a detailed plan. One month after the delivery of this study, the Town Hall informed that it was approved and consequently the preparation of the Detailed Plan, required for the subsequent building permit.

After this approval, on 8th January 2009, the Regional Journal (*Reconquista*) and on 10th January 2009, the National Journal (*Sol*) published Notice No. 217/2008 about the request for the implementation of the referred Detailed Plan. In March 2009 the collaboration agreement for the implementation of the Detailed Plan was signed between the constructor and the Town Hall. However, this agreement and the

identification of the Detailed Plan were published in the Official Gazette only on 9th June 2009.

Meanwhile the Town Hall established a period of 15 days, ending on 2nd July 2009, for the submission of the Detailed Plan Project, which was delivered within the requested term. On 29th September 2009 the Town Hall sent the first letter regarding the project and informing the opinions of some consultees, namely the company EDP - Electricity of Portugal<sup>1</sup> and the public agencies ANACOM - National Communications Authority<sup>2</sup> and ARS - Regional Health Authority<sup>3</sup> and the Social Security. On 9th November 2009 the Town Hall sent another letter informing the CCDRC - Committee for Coordination and Regional Development Center<sup>4</sup> opinion and asking for the delivery of several elements, including the certified maps of the Detailed Plan location.

On 18th December the elements for the cartography certification were delivered to the Portuguese Geographic Institute<sup>5</sup>. On 21st April, four months after documentation delivery, IGP informed that it was necessary to pay 530 € (five hundred and thirty euros) in order to get the respective cartography certification. Furthermore, they informed that the process would be completed only four months after payment. The account was settled within eight days. On 23rd August IGP sent finally a letter approving the cartography, which was immediately forwarded to the architect. This one delivered it to the Town Hall, as well as the information requested on 9th November 2009.

On 25th November 2010 the Town Hall sent a letter enclosing the CCDRC minutes dated 17th November 2010 and asking for a few more elements, besides the modification of some ones already delivered. In January 2011 the new elements were delivered to the Town Hall.

Finally on 23rd March 2011 the Official Gazette published that the Detailed Plan was in a public discussion phase.

On 30th June 2011 the Detailed Plan was approved in the Municipal Assembly and published in the Regional Journal (*Reconquista*) on 11th August

2011. No complaints were made during the public discussion phase. Finally the Official Gazette published the Detailed Plan on 28th November 2011.

However, after all this long period, i.e. the conclusion of this process – a nursing home for the elderly - the respective licensing for the project was put aside, because three years later the economic situation had changed a lot and so the project was not feasible anymore.

The situation described above shows that the existing plans for the spatial planning and subsequent licensing are too strict and it is impossible to adapt them in a very short term to the changes occurring constantly in the economy.

In summary, the steps were as follows:

---

<sup>1</sup> EDP - *Eletricidade de Portugal*.

<sup>2</sup> ANACOM - *Autoridade Nacional de Comunicações*.

<sup>3</sup> ARS - *Administração Regional de Saúde*.

<sup>4</sup> CCDRC - *Comissão de Coordenação e Desenvolvimento Regional do Centro*.

<sup>5</sup> IGP - *Instituto Geográfico Português*.

Date	Description	Legislation in force to date of the project
Sept. 2008	First meeting with the designers team to draft an elderly nursing home	<ul style="list-style-type: none"> <li>• Normative Despatch 96/89, 25/October;</li> <li>• Normative Despatch 99/89, 27/October;</li> <li>• Law Decree<sup>6</sup> 133-A/97 of 30/May</li> <li>• Normative Despatch 12/98, 25/February;</li> <li>• Decree 364/98, of 26/June</li> <li>• Law Decree 268/99, 15/July;</li> <li>• Normative Despatch 62/99, 12/November;</li> <li>• Normative Despatch 30/2006, 8/May;</li> <li>• (Decree at present 67/2012, 21/March)</li> </ul>
18 Nov. 2008	Delivery of the previous project study at the Town Hall and application feasibility of licensing at the indicated location	PDM- Hall Master Plan <sup>7</sup> in force
19 Dec. 2008	The matter was discussed at the Town Hall Board meeting and approved its implementation	
8 Jan. 2009	The notification was published in the <i>Reconquista</i> Journal on 8 Jan. 2009 allowing the execution of the Detailed Plan	Municipal notification 217/2008
10 Jan. 2009	<i>Sol</i> Journal published the notification authorizing the execution of the Detailed Plan	
3 March 2009	Signing the cooperation agreement for the implementation of the detailed plan, between the contractor and the Town Hall	
9 June 2009	Publication of the collaboration agreement for the development of the	Town Hall Notification 10726

---

<sup>6</sup> DL - *Decreto Lei*.

<sup>7</sup> PDM - *Plano Diretor Municipal*.

	Detailed Plan in the Official Gazette	
2 July 2009	Deadline for the delivery of the detailed plan project by the contractor	<ul style="list-style-type: none"> <li>• Law Decree 380/99, 22/September;</li> <li>• Law Decree 46/2009, 20/February</li> </ul>
29 Sept. 2009	Town Hall informed the opinions of some consultees: EDP, ANACOM, ARS and Social Security	
9 Nov. 2009	Town Hall informed CCRDC position in relation to the Detail plan and requested delivery of various elements to join the process, the certified cartography among others	Law Decree 202/2007, 25 May
18 Dec. 2009	The necessary elements to carry out cartography certification were delivered to IGP	
21 April 2010	The IGP sent bill of 530€ for payment. Only after its settlement, cartographic certification would be considered and this would take four months after payment	
29 April 2010	The account was settled with the IGP	
23 August 2010	IGP letter informing the cartographic approval	
25 August 2010	Delivery of cartography approval at the Town Hall, as well as other elements required on 9 Nov.	
25 Nov. 2010	Town Hall gave notice of the latest CCDRC positions CCDRC, enclosing a minutes dated 17 Nov. 2010 and requesting the delivery of more elements and correction of others already delivered	
Jan. 2011	Delivery of all the requested elements to Town Hall	

23 March 2011	Start of public discussion of the Detail Plan. No claims were submitted	Notification 7341/2011
30 June 2011	The Detail Plan was approved at Town Hall Meeting	
11 August 2011	<i>Reconquista</i> Journal published approval of the Detailed Plan	
28 Nov. 2011	Official Gazette published approval of the Detailed Plan	Notification 23713/2011

#### 4. Discussion and Results

In the present case, a project submitted for approval was delayed for so long that when entrepreneurs got the permit to exploit the project, the suitable time for its economic exploitation was gone. This project, which was presented to the Portuguese authorities as a profitable business, could be implemented as a viable project. However, too many departments and entities were asked to decide and pronounce about the project. In consequence, considering that, and also all the procedures demanded for the project approval, the project got unviable. This project was not implemented even if it could yield net social benefits.

The existence of numerous rights holders who prevented other agents from using a resource (from building an elderly nursing home and exploring it economically), frustrated what would be a socially desirable outcome, considering all the agents involved in the project, since the entrepreneurs until the beneficiaries of the service.

#### 5. Concluding Remarks

In Portugal, it is usual that often situations emerge in which it is possible to apply the framework of anti-commons. Related to bureaucracy, several papers have shown this possibility (see for example, Filipe *et al*, 2011a,b).

This paper shows how several departments of local government and other governmental and non governmental agencies make a project unviable. All of them have to decide about the project. The timings to decide are too lengthy and the administrative circuits too long and complex. The long process of approval has made that the project got unviable and consequently it was not implemented. In the “tragedy

of the anti-commons”, resources often are not exploited or, being exploited, too much financial resources are spent and, as the suitable time for launching the project is gone, the exploitation conditions for the project got worse. In these scenarios the logical corollary is a loss of value. The evidence is that the resources were under-used with the obvious consequences of loss of welfare and economic value; an important service for the community was not offered although the evident existence of economic and social interest for all the involved agents, entrepreneurs, community, fiscal authorities, Town Hall, ...

#### Acknowledgments

The authors would like to thank the company Martins & Irmão, Lda and their partners, Mr. Adriano Martins and Dr<sup>a</sup> Sónia Martins, the information provided and their financial support to this work.

#### References

- [1] Buchanan, J. M. and Yoon, Y. J. (2000). Symmetric tragedies; commons and anticommons. *Journal of Law and Economics* 43.
- [2] Eisenberg, R. (1989). Patents and the progress of science: exclusive rights and experimental use. *University of Chicago Law Review* 56.
- [3] Eisenberg, R. (2001). Bargaining over the transfer of proprietary research tools: is this market failing or emerging?. In R. D. et al (Eds), *Expanding the bounds of intellectual property: innovation policy for the knowledge society*. New York: Oxford University Press.
- [4] Filipe, J. A., Ferreira, M. A. M. and Coelho, M. (2011a), Utilization of Resources: An ethical

- issue. The anti-commons and the aquaculture case in Costa, G. J. M. (Ed.), *Ethical Issues and Social Dilemmas in Knowledge Management: Organizational Innovation*, Hershey, USA: IGI Global.
- [5] Filipe, J. A., Ferreira, M. A. M., Coelho, M. and Yordanova, D. (2011b) Aquaculture Procedures in Portugal and Bulgaria. Anti-commons and Bureaucracy. *International Journal of Academic Research*, 3
- [6] Gordon, H. S. (1954). The economic theory of a common property resource: the fishery. *Journal of Political Economy* 62.
- [7] Greer, L. A. and Bjornstad, D. J. (2004). *Licensing complementary patents, the anticommons and public policy*. Technical report. Joint Institute for Energy and Environment.
- [8] Hardin, G. (1968). The tragedy of the commons. *Science* 162.
- [9] Heller, M. A. (1998). The tragedy of the anticommons: property in the transition from Marx to markets. *Harvard Law Review* 111.
- [10] Heller, M. A. (1999). The boundaries of private property, *Yale Law Review* 108.
- [11] Heller, M. and Eisenberg, R. (1998). Can patents deter innovation? The anticommons in biomedical research. *Science* 280.
- [12] Leal, D. R. (2002b). A new fishing tragedy? The “anticommons” leads to underuse. PERC REPORTS in <http://www.perc.org/publications/percreports/sept2004/fishing.php>.
- [13] Michelman, F. I. (1982). Ethics, economics and the law of property. In J. R. Pennock & J. W. Chapman (Eds), *Nomos XXIV: Ethics, Economics and the Law*. New York: New York University Press.
- [14] Parisi, F., Schulz, N. and Depoorter, B. (2003). *Simultaneous and Sequential Anticommons*. George Mason University of Virginia, School of Law. Law and Economics Working Paper Series 03-11
- [15] Parisi, F., Schulz, N. & Depoorter, B. (2005). Duality in Property: Commons and Anticommons. *International Review of Law and Economics*, 25, 578-591
- [16] Schulz, N. (2000). Thoughts on the Nature of Vetoes When Bargaining on Public Projects, *Wurzburg Economic Papers*, 00-17.
- [17] Schulz, N., Parisi, F. and Depoorter, B. (2002). Fragmentation in Property: Towards a General Model. *Journal of Institutional and Theoretical Economics* 158.
- [18] Stewart, S. and Bjornstad, D. J. (2002). *An experimental investigation of predictions and symmetries in the tragedies of the commons and anticommons*. Technical report. Joint Institute for Energy and Environment.

### Legislation

- [19] Normative Despatch 96/89, 25/October; (*Despacho Normativo 96/89, 25/Outubro*)
- [20] Normative Despatch 99/89, 27/October (*Despacho Normativo 99/89, 27/Outubro*)
- [21] Law Decree 133-A/97 of 30/May (*DL 133-A/97 de 30/Maio*)
- [22] Normative Despatch 12/98, 25/February; (*Despacho Normativo 12/98, 25/Fevereiro*)
- [23] Law Decree 364/98, of 26/June (*Portaria 364/98, de 26/Junho*)
- [24] Law Decree 268/99, 15/July (*DL 268/99, 15/Julho*)
- [25] Normative Despatch 62/99, 12/November (*Despacho Normativo 62/99, 12/Novembro*)
- [26] Normative Despatch 30/2006, 8/May (*Despacho Normativo 30/2006, 8/Maio*)
- [27] Administrative Rule 67/2012, 21/March (*Portaria 67/2012, 21/Março*)
- [28] Law Decree 380/99, 22/September (*DL 380/99, 22/Setembro*)
- [29] Law Decree 46/2009, 20/February (*DL 46/2009, 20/Fevereiro*)
- [30] Law Decree 202/2007, 25 May (*DL 202/2007, 25/Maio*)
- [31] PDM of Castelo Branco Town Hall (*PDM de Castelo Branco*)