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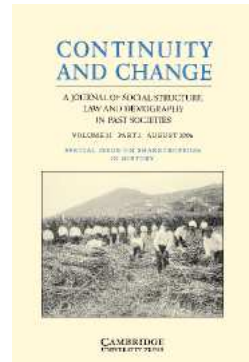
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The Portuguese Civil Code and the *colonia* tenancy contract in Madeira (1867–1967)

BENEDITA CÂMARA*

ABSTRACT. In this article the author examines a form of agricultural contract known as the *colonia* contract, which was widespread throughout the island of Madeira from 1750 and which was abolished in 1967. She argues that the publication of the liberal Civil Code of 1867 changed the rules concerning the operation of this contract. The landlord lost control of his economic property rights over the land. The change in the rules governing this type of contract partially explains the reduction in its use but the impact of the change is attributed to inefficiencies that already existed in the contract.

INTRODUCTION

A long tradition among economists, dating back to the eighteenth century, argued that sharecropping was both inefficient and irrational.¹ However, in 1969 Steven N. S. Cheung challenged this view. The new institutional economics literature reviewed the premises of neoclassical thought – perfect rationality and the perfectly competitive market.² Empirical work inspired by the economics of development and by economic history paid attention to the imperfections in the market and argued for an optimistic view with regard to sharecropping contracts, based on the argument that these contracts reduced both parties' transaction costs. A more moderate form of this view was put forward by some authors. It was considered to be valid for traditional agriculture, but was questioned in cases where the contracts did not adapt to economic development due, for instance, to increases in capital inputs and the growing opportunity

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costs of agricultural labour.³ In general terms, empirical studies have shown that it is difficult to define and fix a general structure for contracts since this structure was diverse and changeable, the most promising variables explaining the recorded changes in the contractual mix over time and space having been shown to be ‘proxies representing the cost of contracting’.⁴

From a different standpoint, analysis of economic property rights – as opposed to legal property rights – is based on the study of contracts because they reallocate rights among contracting parties. Economic property rights, since they were considered neither absolute nor constant, were completely related to transaction costs. Transaction costs are to be understood as the costs of transfer, capture and protection of rights while this concept, within the theory of contracts, includes those costs which are wholly borne by the owner of the land, such as costs of supervision and costs of contract enforcement, as well as the negotiation costs borne by both parties. The economics of institutions defines economic property rights as the rights of an actor to use valuable assets. For Tháinn Eggertsson the property rights of an actor are embodied both in formal rules and in social norms and customs. This means that their economic relevance depends on how they are recognized and enforced by other members of society. The power of an actor to use valuable resources derives from both external and internal control. The structure of contracts, in turn, also reflects the institutional environment and the internal rules of contracts.⁵

The aim of this article is to demonstrate that the Portuguese Civil Code of 1867, based on liberal thinking, changed the rules governing the operation of an agricultural contract that was made between two private bodies and was known as the *colonia* contract. This contract was in widespread use on the island of Madeira. The rules in question were important in the structure of the contract since their purpose was to reduce transaction costs. As a result of the change, the mechanisms of internal control over the land which were afforded to the landlord were altered. In order to explain the problem I shall give a brief description of this type of contract, the *colonia*, as well as identifying the main environmental characteristics of the island and major directions in the development of its agriculture and the contractual mix between 1750 and 1967 (Part I). In Part II, I discuss the operation of the *colonia* between 1750 and 1867, examining the ownership of improvements invested in the land, namely the crop plants and buildings, their valuation and the investment of crops, as sales, debts and mortgages. In Part III, I demonstrate how the Code changed the way the contract operated, comparing the results of this change with the previous method of operation, noting

that the impact of these changes was due to the uncertainties the contract already contained. I conclude that the new institutional environment made it more difficult for a landlord to protect the value of his land and to take possession of it for the purposes of exchange. Indeed, I shall argue that the change, since it produced an *increase* in transaction costs which it had been the purpose of the rules to minimize, led (although not singlehandedly) to the decline of the *colonia* contract after 1867.

I. THE *COLONIA* CONTRACT

(a) *The terms of the contract*

The *colonia* contract was an agricultural contract involving the sharing of the products of the land between the *colono* (the tenant) and the landlord. A particular feature of the *colonia* contract was the fact that the *colono* took ownership of improvements to the farm – this involved investment in fixed assets other than land, such as perennial plants or buildings (supporting walls for terraces; houses; barns; presses). The *colono* could acquire ownership of improvements by reason of having made, bought or inherited them. As a general rule, the landlord did not own the improvements but if he did and wished to have a piece of land cultivated, he would sell some or all of the improvements to the *colono*. The *colono* could also acquire improvements from another *colono* provided that the landlord agreed.

The *colonia* contract had no fixed term, because *colonos* and landlords committed themselves and their heirs to complying with the conditions of the contract while it should last. In that sense it was a long-term contract. Improvements could be handed down by way of inheritance because the contract did not expire upon the death of the *colono* or of the landlord. The *colono* could terminate the contract by selling the improvements to the landlord or to a third party. In that case, the landlord would exercise his right of first refusal to purchase the improvements. Another condition stipulated in the contract was that the *colono* was required to accept that the owner of the land had the right to terminate the contract at any time, provided that he paid compensation to the *colono* for the improvements the latter had made (in other words, eviction). A court decision recorded in 1859 used these customs of the *colonia* contract as grounds to state that if there was produce still to be harvested this would receive a price as a product in relation to the contract and then would be added to the valuation of the other fixed-capital investments (walls, houses, barns: called *benfeitorias*), other than land, to be paid for by the landlord prior to eviction.⁶ This right of the landlord to have

the *colono's* investments revert to him was a potestative right – a right of redemption – by means of which title to the soil and surface of the land was consolidated.⁷ This reverting of the investments to the landlord could be carried out by mutual agreement or through litigation. The landlord might take this step in order to punish a *colono* for negligence or lack of success, but it might simply be the case that he wished to use the land for an alternative purpose.

(b) *The environment, the evolution of agricultural crops
and the contractual mix*

One feature which characterizes the island of Madeira is that a large part of its agricultural land is on very steep slopes. The agricultural area makes up 27 per cent of the total (20,000 out of 73,700 hectares). As a result of their geographical location and climate, the lower areas on the south coast offer conditions for the highly fruitful cultivation of tropical crops.

Between 1750 and 1820, the cultivation of vines expanded and these occupied an undefined but large part of the agricultural area (varying in the different parts of the island). The high prices that wine fetched throughout the second half of the eighteenth century and at the beginning of the nineteenth accounted for the speed of this expansion. At the beginning of this period farming, as a source of income, took place through a variety of contracts, and a significant proportion of the land was inalienable.⁸ There is nothing to suggest that fixed-rent tenancy was common in Madeira at that time, as it was not in the mid-twentieth century. Emphyteusis and a particular sharecropping contract (the *contrato de meias*) which contained some elements of emphyteusis (*laudemium* – a proportion of the sale of any improvements and a fine for alienation) were common. Emphyteusis is a perpetual right in a piece of land that is the property of another. The right is founded on a contract between the owner (the *dominus emphyteuseos*) and the lessee (the *emphyteuta*), and the land is called *ager vectigalis* or *emphyteuticarius*. The right consists in the legal power of the lessee to cultivate the land and to treat it as his own, on condition that he cultivate it properly and pay to the owner (the *dominus*) a fixed sum (*canon, pensio* or *reditus*). This payment had a more or less symbolic character and was to be paid at fixed times. Normally the right had originally been sold by the owner to the lessee when the land could not be sold freely due to entailment. It is particularly important to distinguish emphyteusis from the *colonia* contract because this payment never occurred when improvements (*benfeitorias*: the plants, walls, houses, barns) owned by the *colono* were sold by him to another *colono*.

TABLE 1
Main crops grown in Madeira, 1865–1958 (approx. nos. of hectares)

<i>Year</i>	<i>Vines</i>	<i>Sugar cane</i>	<i>Bananas</i>	<i>Total</i>
1865	2,500	357	—	2,857
1908	1,850	1,500	—	3,350
1948	1,800	1,200	400	3,400
1958	1,800	1,300	1,000	4,100

Sources: Benedita Câmara, *A economia da Madeira* (Lisbon, 2002); Estatísticas Agrícolas, séries retrospectivas (Lisbon, 1971); João Inácio da Costa e Sousa, 'Estúdio comparativo da economia da produção de banana e cana sacarina', unpublished thesis, Instituto Superior de Agronomia (Lisbon, 1950), 54, 17; *Relatório apresentado pela Comissão para o Estudo da Produção e Comércio da Banana na Ilha da Madeira* (Funchal, 1959), 1.

Colonia contracts and sharecropping were different from emphyteusis because in them the usufruct or *dominium civile* related to the right to use and cultivate the land had never been sold by the owner. Under *colonia* the owner only allowed improvements to his land (proximate dominion or *dominium directum*) that were owned by the *colono*. Under sharecropping any improvements are owned by the property-owner. This is why under *colonia* the owner does not receive any *laudemium* (proportion of the sale of the improvements); he simply has to agree as to the identity of the new *colono*. (See also endnote 30, below.) The name and form of the *colonia* contract presupposes that such elements were not part of that contract.

Between 1865 and 1958 the area occupied by the main crops (vines, sugar cane and bananas) changed from 14 to 20 per cent of the total agricultural area (see Table 1). A number of changes occurred in the agriculture of Madeira from the second half of the nineteenth century. Owing to diseases and pests (particularly a blight caused by a fungus called oidium and phylloxera) vine cultivation began to produce other demands and cultivation costs leading, particularly, to the planting of American vines and the use of pesticides and fertilizers. Parallel to this, from the 1870s onwards, the trend towards a reduction in wine prices led farmers to turn to other options. Vine cultivation was reserved for the higher areas of agricultural land and two tropical crops – sugar cane and banana plants (after 1930) – were in competition for the lower land (less than 350 metres high) in the south of the island. Simultaneously, the level of agriculture intensified due to a large increase in population at a time when both possibilities for increasing the amount of land

available and for alternative occupational activities outside of agriculture were non-existent. Root vegetables like potatoes or sweet potatoes tended to replace already scarce cereal crops and the rearing of animals in stalls also increased. The greatest change took the form of the use of fertilizers. From what is known about the use of chemical fertilisers in Madeira, it can be seen that this began to increase from the end of the nineteenth century but that a really significant increase only took place from 1930 onwards, which coincides with the expansion of banana-plant cultivation. Labour-saving technology was not in use. Madeira thus witnessed an economic growth typical of a traditional economy.⁹

From 1867 on there was a change in Madeira's contractual mix. Of particular note in this change are the sharp increase in small family farms; the continuing decline of emphyteusis; some growth in wage labour from the 1930s on, parallel to the expansion of banana-plant cultivation; and, above all, a shift between the two common standard contracts – a feature of both of these being that remuneration was dependent on yield. *Colonia* contracts declined and sharecropping expanded. As sharecropping contracts involved greater supervision costs than *colonia* contracts it is important to discuss here the relationship between the shift in the contractual mix of Madeira and the introduction of new crops. Lee Alston has argued that scientific progress, by stabilizing harvests, made the 'farm-specific knowledge of tenants less valuable'.¹⁰ If we accept that in Madeira the use of fertilizers stabilized harvests in the case of sugar cane and even more so in the case of the banana crop – which required intensive use of chemical fertilizer – it may be that increases in capital inputs through the use of fertilizers played a role in the decline of the *colonia* contract. This tends to suggest that, very possibly, when fertilizers were used the landlord preferred the skills of a salaried worker who would follow his orders to the reputation of a less-skilled *colono*. The increase in investment by the landlord – in chemical fertilizers – led to the need for a greater degree of supervision by the landlord.¹¹ Since the more valuable land (suitable for crops such as sugar cane and bananas) was that which, in fact, incurred these additional costs of supervising labour, we have a reason why the change in contract choices by landlords took place specifically in relation to this land. In another article I will try to assess how much the decline of the *colonia* contract was due to the increased need for supervision over growing the new crops and how much this decline was due to the Civil Code. The focus of this article, however, is on assessing how far the institutional framework, by means of the Civil Code, changed landlords' internal control over the contract.

II. OPERATION OF THE *COLONIA* CONTRACT, 1750–1867*(a) The ownership of investments: crop plants and buildings*

Use of the *colonia* contract began to expand after 1750 in line with the expansion of vine-cultivation. The spread of the *colonia* contract was associated with the move to the higher ground for vine-growing, which made building terrace walls necessary.¹² The fact that landlords opted for long-term contracts acted as an incentive for *colonos* to invest in crop plants and in buildings.

Vines require a long period of time before they begin to bear fruit. With regard to vine cultivation, the formula of the *colonia* contract was similar to Sicily's *contrati di miglioria*.¹³ The tenant had to prepare the soil and plant the vines. No rent was due until the plants had begun to bear fruit, after which time the entire harvest went to the farmer for at least the first three years. In Madeira when vines were first planted it was common practice in the *colonia* contract for the landlord to waive the *colono*'s payment of the *demídea* (half-share). From the fourth year onwards the *colono* paid one-third and after six years half of the profits. The costs of planting were generally borne by the *colono*. The nature of the *colonia* contract made it logical for the *colono* to become the owner of the plants. Title of ownership to crop perennial plants was settled in different ways in different contracts and places. For example, in sharecropping contracts in Sicily, when the contract came to an end – contracts were normally made for a period of eighteen years – the vines reverted to the landlord. In Catalonia, the *rabassa morta* contract extended for as long as the grapevines continued to be productive.¹⁴ In *colonia* contracts the vines belonged to the *colono* without restriction and, in the event of eviction, they were to be valued and the landlord was obliged to pay the *colono* for them.

With regard to buildings, it was common practice for the landlord to authorize their construction. The early *colonia* contracts already placed restrictions on building. In 1756, landlords stipulated that the *colonos* 'should work very hard to produce lower-cost investments (buildings) which could be totally useful'.¹⁵ This meant that right from the start the idea of useful investments was an important criterion for landlords when authorizing these buildings. They sought to ensure that the investment would serve the financial and economic purposes of the farm. Many buildings were authorized by landlords with the objective of reducing transport costs. Others were authorized on the basis that they were justified in terms of their business purpose for the farm. Those which were aimed only at serving the well-being of the *colono* were often rejected. Landlords were therefore concerned with details such as the location of

buildings, the size and type of roof of houses and the height of the supporting walls of terraces. When probate inventories of the property of *colonos* are studied, the value of walls can be seen to be particularly prominent. These walls were of different types. Terrace-supporting walls were the most onerous. The criterion for valuation was by cubic area. Where the walls were built using stone from the land, these were not included in the valuation.

The literature on agricultural contracts defines a particular type of contract which the landlord has the right to terminate as an ‘eviction contract’, and discusses how this right functions in the operation of the contract. Oriana Bandiera discusses the function of eviction in long-term contracts in terms of the incentives the contract produces and the costs which arise when those incentives cease to operate.¹⁶ In this sense, the control exercised by landlords in relation to improvements (in particular buildings) such as occurred with *colonia* contracts was rooted in the fact that the threat of eviction acted as an incentive to the *colono* to increase his productivity. If the landlord allowed the value of improvements, particularly buildings, to increase, he would be less able to evict. However, this can be seen from another perspective. As economic property rights are related to what Barzel calls ‘residual claimancy’ – in the case of exchange the landlord is able to gain from the increase in value of the land, or vice versa – it may be concluded that while the rules regarding exchange of the land which the Civil Code later changed remained in force, the landlord, being the residual claimant of the land, was not penalized.¹⁷

(b) *Valuation of crop plants*

Landlords usually opted for long-term contracts when the crops were perennials like vines. As has already been mentioned, in Madeira the *colono* was the owner of the plants. In Catalonia the *rabassa morta* contract established a structural link between the life of the plants and the life of the contract. This aspect was not explicitly provided for in the *colonia* contract. We have already seen that incentives to plant were related to the fact that rent was not charged until the plant entered the productive phase. In addition to this it is important to discuss whether there were incentives to maintaining the longevity of perennial plants (the vines) and, if so, how these worked.

In 1759, at a time when the price of wine was rising, attempts were made to promote the planting of vines. There was noticeable concern that the valuation of vine plants would have to be revised. This may well have been due to the fact that, between 1692 and 1759, the nominal price of

a thousand vine shoots (*bacelos*) had fallen between 31 and 42 per cent.¹⁸ This decrease in nominal prices may explain why it is believed that an increase in the estimated value of the vines would encourage the *colono* 'to plant many more, look after them with greater care so that they do not die, instil in him the principle of not losing that which he had bought and increasing his capital with such an improvement'.¹⁹ Whilst the logic of the contract suggests that since the *colono* owned the plants he would naturally have an interest in increasing his capital, it can also be concluded that at that time their longevity was of concern to both landlords and public authorities.

Valuations of improvements carried out by *colonos* centred on perennial plants, particularly vines. These plants were valued on the basis of the number of their stems. Key criteria for valuation were the quality and age of the plants and the quality of the husbandry. For the *colono* the investments were work stock. The longevity of the perennial plants could not be guaranteed if the *colono* had a reason to increase the current income of his assets at the expense of the longer term. The landlord was interested in both the productivity and the longevity of the plants. The frequent references to valuation indicate how essential this was to the proper working of the *colonia* contract.²⁰

(c) *Investments and harvested crops: sales, debts and mortgages*

Colonos sold their improvements (*benfeitorias*) to each other from the outset, but the need to obtain the landlord's consent was also a feature from the time of the first contracts. This was because the landlord had the right of first refusal. Several deeds of sales of investments exist from 1803. These had been annulled because the landlord had objected to a third party buying the *colono*'s position by way of a sale of the improvements.²¹ Parallel to this, in sales of investments between *colonos* where the contractual provision governing the landlord's right of first refusal was breached, the seller undertook to absolve 'the purchaser of any doubt or uncertainty which might arise in the future', namely if an appeal was brought to court, and as a result the purchaser had to promise to accept the court's verdict.²² This meant that sales were often negotiated with the seller-*colono* taking on the risks, since the deeds of sale or mortgage of improvements contained clauses in which the seller took responsibility for any lawsuit brought by the landlord against the purchaser. The *colono* undertook to indemnify the purchaser in the event that the transaction was annulled. As security for this eventuality he might even mortgage his own assets.²³

A different situation arose with regard to harvested crops. In fact, the *colono* might mortgage his annual harvest in order to pay off his debts. The creditor might be the landlord but was more usually another party. The *colono* would hand over his produce (his part of the harvest after dividing it with the landlord – the *demídea*) to pay debts. Often a debt to one landlord would be paid using wine harvested from the land of another.²⁴ This meant that the *colono* considered himself to possess, and was regarded as possessing, what Lee Alston terms ‘a direct claim to the crop’. According to Alston, this is what marks the legal distinction between a share tenant and a wage worker or a sharecropper since the latter two were only owed ‘a wage (per day, month or year) or a share of the output as compensation for their labour’.²⁵ According to this classification, the *colonia* contract was a share tenancy and, in that sense, was similar to the *rabassa morta* contract of Catalonia and the share-tenancy contracts of the southern USA.

As was mentioned with regard to investments (crop plants and buildings), landlords always sought to intervene in the transfer of investments between *colonos*. In some instances the landlord made his permission conditional on certain requirements being fulfilled by the new *colono* such as ‘availability, industry and loyalty which render him able to continue the said contract’ or ‘if he be a good farmer, loyal and of good behaviour’, with these requirements being considered ‘as necessary for growing the crops as being a *bonus pater familias*’.²⁶

III. EFFECTS OF CHANGES TO THE PORTUGUESE CIVIL CODE

(a) *The Civil Code and the rules of the contract*

Portuguese liberalism was heavily inspired by the work of the classical economists. The liberal theorists believed that the institutions they sought to abolish were the cause of the underdevelopment in agriculture. Throughout the nineteenth century, law, on the one hand, played a central role in the economic establishment of liberalism, with the legal codes giving perfect expression to this tradition. Furthermore, the origins of many legal maxims were rooted in economic science. Liberal civil society was identified with the market.²⁷

The Civil Code affected two of the rules of the *colonia* contract. The first of these was concerned with checking the reputation of the new *colono* when there was a transfer of investments between *colonos*, and the second was related to the landlord not giving his consent to a transaction between *colonos*. Both of these were mechanisms of internal control that were necessary for the landlord to obtain and maintain his economic property

rights over the land. Where these rules were not practised the probability of conflict increased and the only remedy left to the landlord was to evict the *colono* through the courts, thus making it more expensive for him to recover his property rights over the land.

The way in which the Code produced these changes was via implications resulting from the classification of the *colonia* contract and a change in the concept of 'eviction'. In the first case the *colonia* contract was acknowledged as a property regime which had emerged by way of custom, and was classified as a form of sharecropping contract (*parceria*). It was subject in many ways to the same set of rules, based on the argument that in both types of contract land was handed over against a share of its fruits, payable annually. In terms of legal property rights, this definition posed the problem of how to classify investment in improvements.

In the legal and political debate surrounding the classification of investments in the Civil Code, opinions were divided between those who equated the *colonia* contract with emphyteusis and those who associated it with sharecropping. Sharecropping contracts (*parceria*) and *colonia* contracts were different from emphyteusis because they did not involve the sale of useful ownership from the owner to the lessee. In sharecropping contracts improvements provided by the partner usually belonged to the landlord and remained his property. In the case of emphyteusis the property-owner reserved for himself the right to direct ownership through election (right of preference), the ground rent, the *laudemium* (or fine for alienation) and forfeiture rights (fines paid by the owner to the emphyteuta if the contract was broken). This contract preserved two separate but unequal real rights of ownership, the emphyteuta's share being larger than the landlord's.²⁸ Emphyteusis in fact represented a disguised sale of inalienable land. The great difference between emphyteusis and *colonia* contracts is that in the latter the use of the property could revert to the landlord at any time so long as the landlord paid the *colono* for the investments that he owned (crop plants and buildings). The explanation for this lies in the fact that the landlord had never sold or transferred the useful ownership to the *colono*. Emphyteusis expanded in mainland Portugal from the seventeenth century onwards, and Madeira witnessed the spread of *colonia* contracts from the middle of the eighteenth century. The result is that in Madeira landlords, instead of losing absolute ownership as they did on the Portuguese mainland, were able to recover the land by virtue of the mechanism of eviction.²⁹

In legal terms, classifying the investments (crop plants and buildings) as a right *in rem* (that is, a right of ownership) meant accepting that

the *colono* was the owner of improvements. The problem lay in determining how this form of ownership could be reconciled with ownership of the land. What was at issue was, firstly, to establish whether or not the improvements remained independent of the landholding and, secondly, to determine the relative degree of importance of each of these rights. The *colono*'s property rights in relation to improvements were interpreted as 'weaker' and 'not firm' rights based on the landlord's power to have the *colono*'s rights in the property revert to him at any time.³⁰ Classification of *colonia* contracts in the Civil Code as sharecropping was encouraged by the landlords. This was managed by not listing *colonia* contracts amongst the forms of imperfect property, as happened with emphyteusis. This was important since it guaranteed that the *colono*'s property rights in relation to improvements would be interpreted as 'not firm'.

By introducing the notions of the free market and free competition, the Code presupposed the abolition of a number of restrictions to free trade and the removal of all clauses which limited the expectations created in the parties or which subjected them to delays and thus increased the risks related to transactions.³¹ The way in which the Code changed the rules regarding the transfer of investments between *colonos* – which presupposed that the landlord's consent was a requirement in order for the transaction to take place – is bound up with a revision of the interpretation of *evicção*. *Evicção* according to Portuguese law consisted of the seller's obligation to pay the equivalent of the purchase price by way of indemnity to a third party who made a claim and demonstrated that he was the owner of the asset which was sold. The Civil Code of 1867 stated that 'when the purchaser, by express agreement, has exempted the seller of responsibility for *evicção* or, having been advised of the risk, has taken it upon himself' the transaction could proceed.³² This legislative change enshrined free-market principles. It proscribed articles in notarial deeds the effect of which would have been to frustrate the expectations of the contracting parties or to subject them to a period of uncertainty as to the outcome of a particular transaction. Hence, this enabled the risk factor previously ascribed to the seller-*colono* to be passed on to the purchaser.

The purpose of the rule that the landlord's consent was necessary for the transfer of investments between *colonos* was to show that the economic property rights that a *colono* had over his investments were subject to restrictions in the case of exchange. In fact, these restrictions made the economic property rights of the *colono* weaker than those of the landlord. In other words, in the original contract this rule was used by the landlord to reduce the transaction costs of the contract. As we shall

see, the removal of this clause had repercussions concerning the manner in which mortgages worked.

(b) *The new rules and a comparison of the results: inefficiencies within the contract*

The new interpretation given to *evicção* in the Portuguese Civil Code gave the *colono* an opportunity to use his improvements as effective security for mortgages or to sell them to third parties without first having to consult the landlord, contrary to that which had previously been the case, as we have seen. It also became possible and common practice for *colonos* to enter into direct contracts with individual farmers in which the product of the land was shared, also without the need for the landlord's consent. Some of these contracts between *colonos* and individual farmers were linked to the long-term sale of improvements on the investments by means of a mortgage. The change in the rules introduced by the Civil Code allowed for highly complex subletting arrangements since the original *colono* was now able to sublet his contract and act as a landlord who received rent from another farmer.

The landlords reacted to these new practices of the *colonos*. They became much more careful about granting permission to build – requests were approved on a case-by-case basis – and they were more vigilant in order to ensure that no unauthorized buildings were erected. Any building work carried out by a *colono* without written permission from the landlord was cause for eviction enforced by the courts. Even more significantly, though, in cases where permission for building was granted by the landlord, from the end of the nineteenth century it became common for the landlord only to grant permission if the *colono* agreed to receive compensation at a previously agreed price.³³ These attitudes led to an increase in conflicts but landlords managed to control building by the *colonos*. In 1916, in an attempt to contradict this trend, a bill was presented to Parliament that would allow a *colono* to build without his landlord's permission. Landlords and some politicians campaigned against this bill and prevented its approval. Had such a law been passed, the land would have been worth less to the landlord for the purposes of sale and, in particular, for mortgaging. The landlords were well aware of this consequence.³⁴

In the 1860s, immediately after publication of the Civil Code, notarial deeds treated *colonia* contracts as a synonym for sharecropping. Shortly afterwards, standard sharecropping contracts began to arise which were of limited duration, which stipulated the landlord's participation in the inputs of production and which demonstrated the landlord's concern

to ensure that he remained the owner of any investments (crop plants and buildings). There are references in the 1880s to evictions and reprisals by landlords towards *colonos*. My research shows a wave of mainly amicable but also court-enforced evictions recorded from the end of the 1860s onwards. After the end of the nineteenth century, in the southwest part of the island, mortgages, sales of investments and contracts involving *colonos* became more and more rare.³⁵ Specific references to the decline of the contract begin to appear from 1916, it being noted that there were parishes without landlords because ‘over time, the *colonos* had bought the lands where they owned improvements’.³⁶ In 1929, the decline of the once almost universal *colonia* contract to a much reduced system was once again noted. In 1965, an agricultural survey confirmed that the occurrence of the contract was found more on the southern side of the island than on the northern side, and prevailed on both sides in the central and eastern zones.³⁷

As we have already pointed out, the *colonia* contract involved a set of rules that allowed internal control by the landlord over his land. The new interpretation given to *evicção* in the Portuguese Civil Code led to the undermining of the whole set of custom-based rules which had enabled the landlord to enforce the contract by means of sanctions. By enshrining free-market principles and eliminating those clauses (conditions) which generated uncertainty as to the outcome of transactions, the Civil Code of 1867 made it possible for one *colono* to sell his improvements to another without this being subject to the landlord’s approval. This change removed the barriers to the sale of investments by one *colono* to another, and landlords ceased to recruit *colonos* according to their reputation. The landlord was no longer protected by a contractual provision. Since transactions between *colonos* without the landlord’s intervention were made easier, conflicts increased and, as a consequence, landlords’ costs for reclaiming their economic property rights over their land also increased. It became more difficult for a landlord to protect the value of his land and to gain possession of the land for the purposes of exchange. The landlord, as the residual claimant, began to lose out.³⁸

The impact of these changes cannot be appreciated unless it is also understood that the contract itself already contained uncertainties which the new legal system exacerbated. As was mentioned with regard to the distinctions (both *de iure* and *de facto*) established by Lee Alston between sharecroppers and share tenants, in compensation for supplying part of the capital in the form of work stock or other assets the share tenant receives a greater share than a sharecropper, increasing his incentive to work. Share tenants in the southern USA and *rabasseros* (in Catalonia)

were similar in that the former received two-thirds or three-quarters of the output, while the latter received two-thirds. The difference was greater for the share-tenant *colono* who only received half of the output, which may explain why incentives to work were lower than in the former cases. In the sharing of the output of harvests the share tenant of the *colonia* contract was entitled to half whilst the share tenant of the *rabassa morta* received two-thirds.³⁹ However, there were many similarities between the *colonia* contract and the *rabassa morta* since in both cases the share tenants owned the vines. As has already been mentioned, another aspect of the uncertainties lay in the fact that the *colono* could claim the harvests and mortgage them without restrictions. On the other hand, there were restrictions to mortgaging improvements. A transfer of improvements between *colonos* required consent from the landlord. However, in practice these rules were broken. *Colonos* effected these transactions by assuming responsibility on behalf of the purchaser should the landlord not agree to the sale. Lastly, it was common practice for *colonos* to use their investments as a deposit or as a guarantee to the Treasury.⁴⁰

Initially the *colonia* contract provided an incentive for land use since it was used in such a way as to allocate property rights among the contracting parties. The structure of the contract led to investment by the *colono*, namely in the construction of terraces and in the planting of perennials such as vines. The take-up by *colonos* shows that they profited from these investments. The way in which the market for the mortgaging of *colonos*' investments operated in the *colonia* contract provided a solution which allowed the landlord to guarantee the capital in the form of work, stock or other assets, which he needed to farm his land without losing control over the ownership of that land.⁴¹

In overall terms landlords were never the sole suppliers of long-term credit to their *colonos* and they figured even less in short-term loans (see Table 2). From the second half of the nineteenth century, landlords began to move away from long-term, mortgage-backed sales of improvements to *colonos*. After the changes introduced by the Civil Code the use by *colonos* of informal systems of credit gained pace. This meant that the *colonos* resorted to costly options.⁴²

From the landlord's point of view, the changes introduced by the Civil Code presented him with difficulties in protecting the value of his land and in gaining possession of it for the purposes of exchange. These changes coincided with changes in agricultural production costs. Notwithstanding the fact that the incentives for the *colono* to work were relatively low in comparison with similar contracts, once the costs of production inputs began to rise maintaining the value of the land made it necessary to

TABLE 2
*Landlords as creditors: debts secured by mortgages over improvements
 in two districts of Madeira, 1803–1932*

<i>Years</i>	<i>Total number of cases</i>	<i>Creditor landlord (number of cases)</i>	<i>Creditor landlord (% of cases)</i>
District of Câmara de Lobos			
1803	24	2	8
1827–1828	29	13	45
1834–1837	26	14	54
1867	1	0	0
1872–1874	43	6	14
1888–1890	47	5	11
1908–1910	21	3	14
1917–1919	44	1	2
District of Ponta do Sol			
1861–1862	9	0	0
1867–1868	8	0	0
1870–1871	9	1	11
1874–1877	19	0	0
1884	8	0	0
1886–1887	10	0	0
1889–1890	5	1	20
1909–1910	8	0	0
1931–1932	1	0	0

Sources: Arquivo Regional da Madeira, Notary's notebook of deeds, Câmara de Lobos, nos. 1520, 1649, 1516–17, 1526, 1531–4, 1669, 1870, 1670, 1671–2, 1717–21, 1747–9, 1751, 1753, 1757, 5752–8, 5817; of Ponta do Sol, nos. 490, 481–2, 486, 479, 476, 370, 469, 376, 377, 432–3, 446, 5364.

increase those incentives or risk the allocation of property rights within the contract being called into question. However, the changes introduced by the Civil Code did not guarantee the modification of the system of incentives and did not also assure the adaptation of the *colonia* contract to that system of incentives.

CONCLUSION

Almost at the same time as the Civil Code was implemented, a series of economic conditions changed the methods of agricultural cultivation, with a tendency to a move away from traditional models. Vine-cultivation became more expensive as a result of the diseases and pests which plagued it after 1851 and in the 1870s and, following on from this,

there was the progressive use of fertilizers for sugar-cane and banana-plant crops. Between 1867 (the publication of the Civil Code) and 1967, with the new Civil Code, containing the prohibition of the signing of *colonia* contracts in the future) a change in the contractual mix in Madeira took place. Not only was the decline of the *colonia* contract one element in a broader change in the contractual mix but it also coincided with the progressive use of fertilizers for sugar-cane and banana crops. The traditional models of agricultural cultivation, however, seemed to fit with the advantages of the *colonia* contract. What is most efficient depends upon circumstances. After 1869, the *colonia* contract, being treated as a sharecropping contract, did not cope with an increased need for both investment and supervision by landlords, particularly in the more valuable lands used for the new crops. At the very moment when an increase of supervision by landlords was needed they simultaneously faced the loss of their internal control of the contract. To assess how much the decline of the *colonia* contract was due to the increased need for supervision necessary to grow the new crops and how much this decline was due to the Civil Code requires future research.

In this article I have outlined what seems to me to be the share of responsibility that the action of the Civil Code played in the decline of the *colonia* contract. By giving a new meaning to the term *evicção*, the Civil Code changed the landlord's internal rules of control over his economic property rights. The impact of the Code can be understood in the light of the uncertainties that characterized the contract. Once the clauses of the contract which were intended to reduce the transaction costs ceased to produce their effects, landlords began to experience additional difficulties in maintaining the value of the land for the purposes of transfer. All this suggests that the more the transaction costs rose, the more landlords tended to adopt other contractual choices.

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ENDNOTES

- 1 A. Smith, *A riqueza das nações* (Lisbon [1776], 1981–1983); A. Marshall, *Principles of economics*, 8th edn (London [1890]), 1956. For a summary see K. Otsuka, H. Chuma and Y. Hayami, ‘Land and labor contracts in agrarian economies: theories and facts’, *Journal of Economic Literature* **30** (December 1992), 1965–2018.
- 2 S. N. S. Cheung’s zero transaction costs model suggests that the various types of contract can produce similar outcomes, which raises difficulties as to the choice of one type of contract over another (‘Transaction costs, risk aversion, and the choice of contractual arrangements’, *Journal of Law and Economics* **12** (1) (1969), 23–42). See also Y. Barzel, *Economic analysis of property rights*, 2nd edn (Cambridge, 2003), 33–7.
- 3 See Juan Carmona and James Simpson, ‘The “rabassa morta” in Catalan viticulture: the rise and decline of a long-term sharecropping contract, 1670s–1920s’, *Journal of Economic History* **59** (1999), 291. For a perspective of the adaptive role played by sharecropping in Catalan agriculture until the middle of twentieth century see also Ramon Garrabou, Jordi Planas and Enric Sagner, ‘Sharecropping and management of large rural estates in Catalonia, 1850–1950’, *Journal of Peasant Studies* **28** (3) (2001), 89–90, 105. The development literature is summarized in N. Singh, ‘Theories of sharecropping’, in P. Bardham ed., *The economic theory of agrarian institutions* (New York, 1989); H. P. Binswanger and M. R. Rosenzweig, *Contractual arrangements, employment, and wages in rural labor markets in Asia* (New Haven, 1984); D. G. M. Newbery and J. E. Stiglitz, ‘Sharecropping, risk-sharing, and the importance of imperfect information’, in J. A. Romasset, J. M. Boussard and I. Singh eds., *Risk, uncertainty, and agricultural development* (New York, 1979); K. Otsuka, H. Chuma and Y. Hayami, ‘Land and labor’. The economic history literature is summarized in L. Alston, ‘Tenure choice in southern agriculture, 1930–1960’, *Exploration in Economic History* **18** (1981), 211–31; L. Alston and K. D. Kauffman, ‘Up, down, and off the agricultural ladder: new evidence and implications of agricultural mobility for blacks in the Postbellum South’, *Agricultural History* **72** (1998), 263–79; J. S. Cohen and F. L. Galassi, ‘Sharecropping and productivity: feudal residues in Italian agriculture, 1911’, *Economic History Review* **43** (1990), 646–56, and P. T. Hoffman, ‘The economic theory of sharecropping in early modern France’, *Journal of Economic History* **42** (1) (1984), 155–62.
- 4 T. Eggertsson, *Economic behaviour and institutions* (Cambridge, 1990), 228–9, and T. Eggertsson, ‘A note on the economic of institutions’, in Lee Alston, T. Eggertsson and D. C. North eds., *Empirical studies in institutional change* (Cambridge, 1998), 17–20.
- 5 Eggertsson, ‘A note’, 7–9. The concept of property rights follows the thinking of Alchian and Cheung, amongst others; see Barzel, *Economic analysis*, 33 and 3–4. For transaction costs in the theory of contracts see Alston, ‘Tenure choice in Southern agriculture’, 213 and 218.
- 6 J. P. Sanches de Castro, *Sentenças d’um Juiz de Direito* (Lisbon, 1860), 170.
- 7 J. de O. Ascensão, *Direitos reais* (Lisbon, 1971), 513.
- 8 In 1750 *domínio utile* ownership of land (land not farmed under contract but directly) was concentrated among fewer families than came to be the case from the 1880s on (*Recenseamento das explorações agrícolas das ilhas adjacentes* (Lisbon, 1965), 7; *A vida econômica da Madeira. A imprensa. Os três projectos* (Funchal, 1916), 20; *Inquérito sobre a situação econômica da Ilha da Madeira e medidas convenientes para a melhorar ordenado por decreto de 31 de Dezembro de 1887* (Lisbon, 1888), 92.

- 9 In 1864 the population of the island of Madeira was 110,105 and in 1960 it was 265,332 (*Censos da população*, details of resident population). See also P. T. Hoffman, *Growth in a traditional society: the French countryside, 1450–1815* (Princeton, 1996), and for Portugal after 1930 see Pedro Lains, ‘New wine in old bottles: output and productivity trends in Portuguese agriculture, 1850–1950’, *European Review of Economic History* 7 (1) (2003), 43–72.
- 10 L. Alston and J. P. Ferrie, ‘Paternalism in agricultural labor contracts in the U.S. South: implications for the growth of the Welfare State’, in Alston, Eggertsson and North eds., *Empirical studies in institutional change*, 319.
- 11 Lee J. Alston, ‘Cost of contracting and the decline of tenancy in the South, 1930–1960’, *Journal of Economic History* 39 (1979), 324–6; L. Alston and R. Higgs, ‘Contractual mix in Southern agriculture since the Civil War: facts, hypotheses, and tests’, *Journal of Economic History* 42 (1982), 327–54.
- 12 Arquivo Histórico Ultramarino, Lisbon (hereafter AHU), Madeira Collection, Governor’s despatch of 7 July 1759, Box no. 1, MS 174.
- 13 Oriana Bandiera, ‘On the structure of tenancy contracts: theory and evidence from 19th century rural Sicily’, London School of Economics, Development Economics Discussion Paper, no. 19, STICERD (October 1999), 5.
- 14 J. J. de Sousa, *História rural da Madeira: a colônia* (Funchal, 1994), 262, 265, 267, 295. For Sicily see Bandiera, ‘On the structure of tenancy contracts’, 5, and for Catalonia see Carmona and Simpson, ‘The “rabassa morta”’.
- 15 De Sousa, *História rural*, 347 (author’s translation).
- 16 Oriana Bandiera, ‘Contract duration and investment incentives: evidence from land tenancy agreements’, London School of Economics, Department of Economics Paper, July 2003, 6 and 10; Bhaskar Dutta, Debraj Ray and Kunal Sengupta, ‘Contracts with eviction: repeated principal–agent relationships’, in P. Bardham, *The economic theory of agrarian institutions* (Oxford, 1989), 94. The word *expulsão* (eviction) was used in a draft law on the *colônia* drawn up in 1867 which argued that no *colono* could ‘limit the right of the landlord to evict him’ because anyone who had possession of something on a temporary basis did not acquire any title to it and was always required to give it back because there was no transfer of direct ownership to the *colono*; see J. R. Trindade de Vasconcelos and J. A. de Almada, *Projecto de lei regulamentar do contrato de colônia ou parceria agrícola na Ilha da Madeira* (Funchal, 1867), 9 and 25–6.
- 17 Barzel, *Economic analysis*, 3. In this sense ‘economic property rights’ means the right an individual has over an asset (land) to consume it through exchange.
- 18 A. Vieira, *A vinha e o vinho na história da Madeira, séculos XV–XX* (Funchal, 2003), 92.
- 19 AHU, Madeira Collection, Governor’s despatch of 7 July 1759, Box no. 1, MS 174 (translation by the author).
- 20 Shortly before the Civil Code was approved, the vines had been devastated by pests and replanting was necessary; judges, notaries and politicians blamed the way official valuers were appointed for not ensuring impartiality in valuations, as far as the landlord was concerned (Sanches de Castro, *Sentenças d’um juiz*, 192; *Diário da Câmara dos Senhores Deputados*, Session 17, 25 February 1855, 184–5).
- 21 Arquivo Regional da Madeira (hereafter ARM), Notary’s notebook of deeds of Câmara de Lobos no. 129, fos. 60–60v. and 68v.
- 22 ARM, Notary notebook of deeds of Câmara de Lobos, no. 1649, fos. 82 and 79.
- 23 ARM, Notary notebook of deeds of Câmara de Lobos, no. 1516, fos. 21v and 22, dated 1856; Notary notebook of deeds of Funchal, no. 892, fo. 2, dated 1852, and fos. 84–5,

- dated 1853; no. 903, fos. 31–2; fos. 37–8; fos. 46–7; fos. 63v–64; fos. 66, 67 and 101, dated 1853–1854; no. 3304, fo. 41–3, 50–1, 58–9, dated 1855. It still appears very sporadically in 1868 (Funchal, no. 902, fo. 3).
- 24 ARM, Family Torre Bela (hereafter FTB), Box no. 21–3.
- 25 Lee J. Alston, ‘Tenant farming’, in Joel Mokyr ed., *The Oxford encyclopedia of economic history* (Oxford, 2003), vol. 5, 97–8.
- 26 ARM, FTB, Box no. 21–3.
- 27 A. M. Hespanha, ‘Instituições e quadro legal’, in Pedro Lains and Álvaro F. da Silva eds., *História de Portugal, o século XIX* (Lisbon, 2005), 421–46.
- 28 Luís da Cunha Gonçalves, *Tratado de direito civil* (Coimbra, 1934), vol. IX, 216 and 218.
- 29 For mainland Portugal see Nuno Monteiro, *O crepúsculo dos grandes (1750–1832)* (Lisbon, 1998).
- 30 It was for this reason that the *colônia* contract was regarded as the most complex piece of real law in Portuguese jurisprudence (see Ascensão, *Direitos reais*, 513). There were two opposing schools of law in the classification of improvements, one presented by J. D. Ferreira, *Código Civil anotado* (Lisbon, 1895), vol. II, 516 (see Ascensão, *Direitos reais*) and seconded by J. R. T. de Vasconcelos and J. A. de Almada (*Projecto de lei regulamentar*), and the other put forward by L. da C. Gonçalves, *Tratado de direito*, vol. VII, 370, and vol. IX, 55, and Pedro Pitta, *O contrato de “colônia” na Madeira* (Lisbon, 1929).
- 31 Hespanha, ‘Instituições’, 421–5.
- 32 Article 1051, paragraphs 1 and 4 of the Civil Code of 1867 (see Gonçalves, *Tratado de direito*, vol. VI, 9–12 and 16).
- 33 ADF, FOV, Box no. 13, Mss. 61–3, 45–7, 50, 52, 54, 57–9, dating from the period 1880 to 1900. The *colono* to whom permission was granted was often obliged to pay an annual sum for use of the ground on which his house was built (a ground rent). Sometimes he would mortgage his assets to the landlord to guarantee the payment of the ground rent. In particular, he would undertake not to mortgage the house against debts and not to sell it without the landlord’s permission or even undertook to sell it for a fixed amount.
- 34 *Diário da Câmara dos Deputados*, Articles 3 to 7 of the *Projecto de lei* (bill), Session 11, February 1916, 7–8, and *A imprensa*, 6, 21 and 148–50.
- 35 For example in a sample of Ponta do Sol there were 19 amicable evictions and 6 by order of a court between 1866 and 1876 (see Notary notebook no. 358, 481, 486, 359–60, 476 and 479).
- 36 *A vida económica da Madeira*, 20–1.
- 37 Pitta, *O contrato de ‘colônia’*, 13 and 70; *Recenseamento*, 3–5 and X.
- 38 Landlords tried both before and after the Civil Code, without success, to maintain preference rights in transactions about investments (*Diário da Câmara dos Senhores Deputados*, no. 17, 25 February 1855, 184–5, bill presented by J. S. Ribeiro, and 17 March 1854, 325–6; ARM, *Governo Civil*, Book 362, fo. 187). For an analysis of the impact of the legal constraints (rent control) see S. N. S. Cheung, ‘Price controls, property rights, and institutional change: roofs or stars: the stated intents and actual effects of rents ordinance’, in Altston, Eggertsson and North eds., *Empirical studies in institutional change*, 224–43.
- 39 Alston, ‘Tenant farming’, 97–8; Lee Alston and Kyle Kauffman, ‘Competition and the compensation of sharecroppers by race: a view from plantations in early twentieth century’, *Explorations in Economic History* 38 (2001), 181–94, 184; Alston, ‘Agricultural chutes and ladders: new estimates of sharecroppers and “true tenants”

- in the South, 1900–1920’, *Journal of Economic History* **57** (2) (1997), 466; and Carmona and Simpson, ‘The “rabassa morta”’, 293.
- 40 In 1822 the state stated that it was unable to claim certain payments since these had been secured by overvalued investments (AHU, Madeira Collection, Representation by the Junta da Fazenda Nacional da Madeira to the Congress, 30 May 1822, Box XIX, Ms. 6476).
- 41 On the importance of the mortgage market for economic growth, see Winifred B. Rothenberg, ‘Mortgage credit: a proto-capital market in early stages of economic development: Massachusetts, 1642–1770’, *Proceedings of the Twelfth International Economic History Congress* (Madrid, 1998), 46; Angela Redish, ‘The mortgage market in Upper Canada: window on a pioneer economy’, in S. Engerman et al., *Finance, intermediaries and economic development* (Cambridge, 2003), 111–12. See also Gilles Postel-Vinay, *La Terre et l’Argent: l’agriculture et le crédit en France du XVIIIe siècle* (Paris, 1998); P. T. Hoffman, G. Postel-Vinay and J.-L. Rosenthal, *Priceless markets: the political economy of credit in Paris* (Chicago and London, 2000).
- 42 On the economic consequences of the lack of mutual credit societies and savings banks in Portugal, see the paper by Jaime Reis, ‘Os bancos Portugeses 1850–1913’, given at the *Conferência Internacional de História das Empresas*, Rio de Janeiro, 1991, 62. From the 1930s on the creation of cooperatives and state intervention in agriculture contributed to change this situation. As a result the conditions of agricultural production of small-scale farms improved.