Land and Law: Reciprocal Rights and Duties in Private Property

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Abstract

The paper aims to explore the property right concept as one which includes the definition of rights and duties. In my opinion it is important to discuss this concept in an attempt to improve the present discussion about the appropriation and exploitation of natural resources such as land in general and farm land in particular. The responsibility associated with rights and, thus, its conception in reciprocal terms, is present in some of the main works of economic thought. In developed societies legal rules play an important role in the definition of rights and reciprocal duties. This importance justifies the contact with and the analysis of the legal rules that define the property right in a specific case – that of Portugal. The previous considerations reveal our approach options in the property right study and can be summed up in three words: memory, plurality and (legal) reality. These (heterodox) options offer an essay for the analysis of rights in its human dimension. And, in human terms, it is also possible to include ethical considerations that involve the relation of man to nature (land).

1. *Introducing the Heterodox Study of Property – Memory, Plurality and (Legal) Reality*

The paper aims to present some conclusions of research on the property right in agricultural land. Today, we are presented with an opportunity and, in my opinion, an urgency to reflect on property, the institution that provides control over natural resources such as land, justified in part by the demand for the sustainability and multifunctionality of agricultural production. In the Portuguese case, as in other developed countries, problems of desertification and the frequency and dimension of forestry fires in recent years are additional factors.

In this reflection I give emphasis to memory. In addition to memory I consider plurality and reality.

Memory led to the contribution of some great economists who wrote about land, property, and, in some cases, land property, in terms of its instrumental value (material

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progress) but also in terms of its meaning. In the case of land property, this should inspire the power associated with the control of something that is, as some of them proposed, an inheritance of humanity. Memory led me to plurality.

The importance of formal rules in the case of property (the property right) introduced me to law. In fact, it is in law that it is possible to find a definition and a characterization of this institution.

Finally, reality is a result of pluralism because this research considers the norms that form the property right in some components of the Portuguese legal system.

These themes - memory, plurality and reality – organize the presentation which wants to open the notion of property in contrast to the neoclassical view that assumed it without discussion. As we will see, memory, plurality and reality reveal the responsible and reciprocal nature of the property institution.

2. *Memory: Responsibility and Reciprocity in Private Property*

Memory should not be used as an erudite exercise. My visit to economic thought serve a wider purpose that seeks the institution of property and updates it in the light of some of the problems faced by our societies, namely those related with the exploitation of natural resources such as land.

The vision of the liberal classics that presents the institution of property as a responsible and worthy one is fundamental because it stresses precisely the relative nature of the property right. The changes related with the definition of the public interest explain the evolution of the limits of that right. Its power changes but it is always a relative power. The responsible nature of property is something independent of the view about the origins of property (natural right *vs.* acquired right). This responsible notion can remit to different purposes – economic progress, protection of environmental values, social justice and ethics – and presents specificities when we talk about land resources.

In Locke, the defense of natural property right is associated with labor[3] and found natural and moral limits.

[3] "Whatsoever then, he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes his Property. It being by him removed from the common state nature placed it in, hath by this labour something annexed to it, that excludes the common rights of other men. For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others" (John Locke, *Two Treatises of Government* [1823], http://cepa.newschool.edu.het: 116).

The former are imposed by nature and are, at a first moment, defined in a situation characterized by abundance:

> "Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for other because of his enclosure for himself"[4].

The latter, the moral limits, derive from the capacity that every man has to care about what belongs to him:

> "God has given us all things richly. […]. But how far has He given it us 'to enjoy'? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more that this share, and belongs to others. Nothing was made by God for man to spoil or to destroy"[5].

In Locke's view, the introduction of money, social conventions and government, and the substitution of the state of plenty by one of scarcity, changes the natural limits but not the moral ones. These are presented in the capacity of care, the abstention of prejudicial actions and should continue to inspire the social conventions that regulate property.

If labor explains the formation of the property right "at the beginning", the conventions permit its regulation in the next phases of historic evolution. However, the principles that inspire it maintain[6]. The moral legitimacy present in the Locke theory of the "First Occupancy" explains most of the interest that is devoted to it[7] and is founded in utilitarian terms.

The same can be said about the physiocrat perspective which defends private property and the necessity to protect it in the name of "social order"[8].

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[4] *Id*.: 118.
[5] *Id.*:117.
[6] "[…] I think, it is very easy to conceive, without any difficulty, how labour could at first begin a title of property in the common things of Nature, and how the spending it upon our uses bounded it; so that there could then be no reason of quarreling about title, or any doubt about the largeness of possession it gave, right and conveniency went together. For as a man had a right to all he could employ his labor upon, so he had no temptation to labour for more than he could make use of. This left no room for controversy about the title, nor for encroachment on the right of others. What portion a man carved to himself was easily seen; and it was useless, as well as dishonest, to carve himself, or take more than he needed" (*Id*: 126).
[7] Jeremy Waldron, "Property", *in Stanford Encyclopedia of Philosophy*, http://standford.edu/entries/property (21-04-2006): 5.
[8] François Quesnay, *O Quadro Económico,* Lisboa, Fundação Calouste Gulbenkian, 1966 [1763]: 142-143.

Smith's economic considerations about property involve a criticism about some of the norms that dominated it during his time, namely inheritance norms that complicate the development of small property and land market.

The criticism of inheritance norms is common to Say, Malthus and Mill and sustains a proposal that aims to improve the performance of the institution of property in terms of economic progress but also in terms of social justice[9].

In this classical works, it is possible to find a specific approach to land which has consequences in terms of its appropriation. In Says view, for instance, land provides a productive service – "le service productive de la terre"[10] – that gives utility to a set of natural materials. The possibility of appropriation of natural elements does not mean, however, an absolute right because, and in Say's words:

> "It is not the landowner that permits the nation to live, to walk and to breathe in his lands : it is the nation that permits the landowner to cultivate the soil, which she recognises as its owner, and does not concede to anyone in an exclusive way the enjoyment of public places, big roads, lakes and rivers"[11].

In Malthus work, it is also possible to find this land notion as something different from the other productive resources. In the definition of land, he uses expressions like "God' gift" or "nature gift". Its power to produce a surplus is explained in "that quality of earth" which is not present in other productive resources.

This special power of land is not accepted by Ricardo. For him the surplus, the rent, is due to the scarcity and not to the mysterious forces of nature. Land is a resource like any other in Ricardo's approach[12].

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[9] This concern with social justice is present in Mill's view.

[10] "La terre a la faculté de transformer et de rendre propres à notre usage une foule de matières qui nous seraient inutiles sans elle ; par une action que l'art n'a pu imiter, elle extrait, combine les sucs nourriciers dont se composent les grains, les fruits, les légumes qui nous alimentent, les bois de construction ou de chauffage, etc. " (Jean-Baptiste Say, *Cours Complet d'Économie Politique*, Paris, Otto Zeller-Osnabruck, 1972 [1803]: 410).

[11] In French : "Ce n'est pas le propriétaire qui permet à la nation de vivre, de marcher et de respirer sur ses terres : c'est la nation qui permet au propriétaire de cultiver les parties du sol dont elle le reconnaît possesseur, et qui d'ailleurs se réserve et ne concède à personne exclusivement la jouissance des lieux publics, des grandes routes, des lacs et de rivières", *in id*.: 532.

[12] "Será que a natureza não colabora com o homem na indústria? A força do vento e da água que move as máquinas e ajuda a navegação não conta para nada? A pressão atmosférica e a força do vapor que nos permitem fazer funcionar as máquinas mais maravilhosas não são dons da natureza? Isto para não falar dos efeitos do calor no abrandamento e fundição dos metais nem da decomposição do ar nos processos de tinturaria e fermentação. Não é possível criar um processo de fabricação em que a natureza não colabore com o homem e não o faça, também,

This is not the view of Stuart Mill whose criticisms of property norms, especially those of inheritance, are very vigorous. It is the difference in land resources that justifies some of Mill's criticism about this institution. Responsibility and merit are the values that should inspire property which, for him, corresponds to "the primary and fundamental institution" and is analysed in his theory of wealth distribution. Thus, the Mill approach goes beyond mere efficiency and includes a dimension of ethics and social justice. The following comments illustrate this aspect of Mill's thought on this subject:

> "Even in the case of cultivated land, a man whom, though only one among millions, the law permits to hold thousands of acres as his single share, is not entitled to think that all this is given to him to use and abuse, and deal with as if it concerned nobody but himself. The rents or profits which he can obtain from it are at his sole disposal; but with regard to the land, in everything which does with it, and in everything which he abstains from doing, he is morally bound, and should whenever the case admits be legally compelled, to make his interest and pleasure consistent with the public good. The species at large still retains, of its original claim to the soil of the planet which it inhabits, as much as is compatible with the purposes for which it has parted with the remainder"[13].

Moral references about property are present in classic but also in their critics and heirs.

Among the former, I should mention Marx whose criticisms of private property in the case of land reveal a similar view to that of "intergenerational solidarity" and "sustainable development". In Marx words:

> "In terms of a superior economic form of society, private property of land to the benefit of one individual should be as absurd as the property of human beings by other human beings. Even the entire society, the whole nation or, more, all societies that exist at the same time and taken together, are not the owners of land. They have the possession, the use and are charged with administration like a good father and leave it to future generations in improved form"[14].

Among the latter, I believe it is important to mention Marshall and Walras.

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generosa e gratuitamente" (David Ricardo, *Princípios de Economia Política e de Tributação*, Lisboa, Fundação Calouste Gulbenkian, 1989 [1817]: 83).

[13] John Stuart Mill, *Principles of Political Economy*, London, Augustus M. Kelley Publishers, 1848 [1987]: 235.

[14] In Portuguese:"Do ponto de vista duma forma económica superior da sociedade, a propriedade privada da terra em proveito de um indivíduo parecerá tão absurda como a propriedade dum ser humano em proveito de outro ser humano. Mesmo uma sociedade completa, toda uma nação, ou, mais, todas as sociedades que existem simultaneamente tomadas em conjunto, não são proprietárias da terra. Elas só têm posse, o usufruto, e são encarregadas de a administrar como um bom pai de família, para a legarem, melhorada às gerações vindouras", *in* Karl Marx, *O Capital*, Lisboa, Edições 70, 1867 [1975].

In his references about property of land[15], Marshall adopts a poetic style and stresses the moral and aesthetic qualities that are present in the work of land.

To Walras, the appropriation of scarce things is something that should be considered in the context of social economics which is the domain of the interindividual relations and is distinct from the domain that analyses the relation between man and materials – the economics domain in marginalist's view. In the case of land property, the purposes of social justice justify the nationalization of land. In his own words:

> "The fact that the earth is a thing and property of human beings is something that we can understand. But why not to everyone, to all men in a collective manner? Why only to some people, to some men in an individualistic way? Why to John more than to Paul? Why to you more than to us? This is something that is for us completely impossible to understand"[16].

> "Lands do not belong to all men of one generation; they belong to humanity, that is, to all of human generations […]. In legal terms, the humanity is the owner and the present generation makes use of lands"[17].

Like Marx, Walras conceived land as humanity's inheritance and, as a consequence, its property should respect the interests of future generations.

In spite of these social and moral considerations, the purposes of objectivity and science oriented economics in another direction. As far as property and property of land is concerned, things are presented in completely different terms. In the context of orthodox agricultural economics, for instance, land is conceived as a homogeneous resource and property, namely the different forms of property, is presented in consequence and utilitarian terms. From the neoclassical view, maximizing calculus is the only criteria that define the limits of individual decisions concerning the use of

[15] To Marshall, the property of land "constitutes "[…] the remote cause of the distinction that all economists are obliged to make between land and the other things. It is the basis of the more interesting and more difficult of economic science" (Alfred Marshall, *Princípios de Economia*, Madrid, Aguilar S. A. Ediciones, 1948 [1890]: 124-125.

[16] In French version: "Que la terre soit une chose, et qu'à ce titre elle appartienne aux personnes, c'est-à-dire aux hommes, c'est encore entendu. Mais pourquoi pas à toutes les personnes, à tous les hommes collectivement ? Pourquoi à quelques personnes, à quelques hommes individuellement ? Pourquoi à Jean plutôt qu'à Paul ? Pourquoi à vous plutôt qu'à nous ? Voilà ce qu'il nous est absolument impossible de comprendre", *in* Léon Walras, *Études d'Économie Sociale, théorie de la répartition de la richesse sociale*, Paris, Paris, Libraires-Éditeurs, Lausanne, Librairie de l'Université1936 [1896]: 33-34.

[17] In French: "Les terres n'appartiennent pas à tous les hommes d'une génération ; elles appartiennent à l'humanité, c'est-à-dire à toutes les générations d'hommes […]. En termes juridiques, l'humanité est propriétaire, et la génération présente est usufruitière des terres", *in id*.: 219.

resources which suggests an absolute notion about rights involved in productive process.

We have to look elsewhere to find economic reflections about property in its human dimension. It is among institutionalists that the curiosity and need to explain institutions is found, as suggested by the name of this approach. The study of norms and conventions that influence the control of resources needed for human subsistence is central in the Works of Veblen and Commons. For Veblen, economics is defined by the study of human behavior in its relation with material means and should explain the habits and the social norms, their origin, their nature, their institutionalization and evolution. Among them, there is property which is the "primary institution" according to Veblen's view.

In this search, and in the case of property reflections, some institutionalist views give a central place to formal norms, namely the legal ones. This is the case of Commons, to whom:

> "The changes in the meaning of the economic equivalent of property as assets and liabilities have made necessary a deeper analysis of the meaning of the term rights as used in jurisprudence"[18].

In his efforts to clarify the concept of *rights*, Commons refers Hohfeld[19] work about "jural relations". Hohfeld denounced the imprecise way economists use that concept. A right always presupposes a correlative duty; it is legally protected and should not be confused with privileges, uses, etc. [20]. This is the correct way to use the concept, one that reveals its interdependent nature.

Commons add the notion of reciprocity to correlativity which constitutes a fundamental element in the definition of rights. According to Commons, correlativity and reciprocity represents different things in that definition:

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[18] J. R. Commons, *Institutional Economics, its place in political economy*, New Brunswick and London, Transaction Publishers, 2003 [1934]: 77.

[19] I should stress the fact that Commons mentioned this Hohfeld proposal in the context of his analysis of *transactions* which constitutes the basic unit of the institutionalist economics approach. Transactions are defined by Commons in the follow terms: "Transactions are the means, under operation of law and custom, of acquiring and alienating legal control of commodities, or legal control of the labor and management that will produce and deliver or exchange the commodities and services, forward to the ultimate consumers" (J. R. Commons, "Institutional Economics", in *American Economic Review*, vol. 21, 1931: 1-2).

[20] "(T)he term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense" (Hohfeld *apud.* Cole and Grossman, "The meaning of property rights: law versus economics?", *in Land Economics*, nº 78 (3), 2002: 318).

> "An authorized right cannot be defined without going in the circle of defining its correlative (corresponding) and exactly equivalent duty of others. One is the 'I' side, the other is the 'you' side, one the beneficial, the other the burdensome side of the identical transactions. […]. […] there is an equality, that is, correspondence, of one's rights and other's duties. But at the same time, a right cannot exist without some deduction, however great or small, by virtue of a reciprocal duty clinging to it and diminishing its possible benefits"[21].

Like correlativity, reciprocity gives a dynamic view of the right involved in property institution because:

i) It introduces the idea of *limit* that is present in rights, stressing their relative nature - there are no absolute rights;

ii) Relativity defines the space of individual decision which is influenced by the collective action present in norms, namely legal norms;

iii) The space of individual decision is also composed by *duties*[22].

The idea of responsibility associated with the appropriation and exploitation of resources in classic and marginalist thought is analogous to that of reciprocity in Commons work. In my opinion both notions – responsibility and reciprocity - reveal the relativity of rights, the existence of duties that individuals must and should observe regarding things they possess and exploit, and introduce a moral dimension in the economic approach.

Contrary to marginalists and neoclassics, Commons sees no problem in this moral dimension. For him, this is one of the fundamental dimensions of the analysis of transactions in its institutionalist economics. He adds economic and legal to the moral dimensions.

In a research about the property right, Commons proposal concerning on the method economics should adopt looks interesting because in our societies the property right is essentially the legal right. I accepted this advice to try and find out what the law says about the property right with regard agricultural land.

[21] J. R. Commons, *op. cit*. [1934]: 131.

[22] It is important to stress that this reciprocal duties have an evolutional nature: "The valuation of interests consists in weighing their relative importance. It is a matter of relative human values within a community of interests where the burdens and benefits of limits of limited resources must be shared, and these cannot be shared by rules of logic; they are shared according to feelings of value, that is, of relative importance of reciprocity" (*Id.*: 133).

3. *Plurality: the Legal Dimension of Economic Decisions*

The economic meaning of the definition of rights and the central role that formal rules play in it has been stressed by numerous economists. This is the case of Commons, as we have seen, but also Coase[23] and some of the proposals of his legacy, namely the School of Property Rights[24].

What Barzel, for instance, presents as "economic property" ("the ability to enjoy a piece of property") is the result of a state recognition[25], the "legal property", of what the individuals can do with things.

Despite the formal rules limitations ("legal rules are always incomplete"[26]), they play a central role in the definition of rights. In Hodgson's words:

> "Individual property is not mere possession; it involves socially acknowledged and enforced rights. Individual property, therefore, is not a purely individual matter. It is not simply a relation between an individual and an object. It requires a powerful, customary and legal apparatus of recognition, adjudication and enforcement. Such legal systems make their first substantial appearance within the state apparatuses of ancient civilization. […]. Since that time, states have played a major role in the establishment, enforcement and adjudication of property rights"[27].

[23] In "The problem of social cost", Coase refers that the factors of production should be conceived like sets of rights ("bundle of rights") to do certain actions: "We may speak of a person owning land and using it as a factor of production but what the landowner in fact possesses is the right to carry out a circumscribed list of actions. The rights of a land-owner are nor unlimited. […]. The cost of exercising a right (or using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right […]" (Coase [1960], "The problem of social cost", *in* Steven G. Medema (ed.) *The Legacy of Ronald Coase in Economic Analysis*, Edward Elgar, 1995: 44).

[24] To Demsetz "property rights are an instrument of society and derive their significance from the fact that they help a man from those expectations which can reasonably hold in his dealings with others. These expectations find expression in the *laws* (my emphasis), customs, and mores of a society" (Demsetz, "Towards a theory of property rights" [1967], in Steven G. Medema (ed.) *The Legacy of Ronald Coase in Economic Analysis*, Edward Elgar, 1995: 207). To Furubotn and Pejovich "[…] a theory of property rights cannot be truly complete without a theory of the state" (Furubotn e Pejovich *apud* Erik G. Furubotn and Rudolf Richter, *Institutions and Economic Theory*: *the contribution of the new institutional economics*, The University of Michigan Press, 2001: 118).

[25] "Economics are the end (that is, what people ultimately seek), whereas legal rights are the means to achieve the end" (Yoram Barzel, *Economic Analysis of Property Rights*, Cambridge, Cambridge University Press, 1997: 3).

[26] *Id.*: 120.

[27] Geoffrey Hodgson, "The evolution of institutions: an agenda for future theoretical research", in *Constitutional Political Economy*, nº 13, 2002: 122.

The knowledge of this kind of rules provides an understanding of the limits that individuals face in their decisions that involve resource allocation. The importance of law in the study of property rights introduces plurality in the research.

The exercise of plurality is always an exercise of curiosity and patience. It is interesting to see the differences of language and approach to human reality adopted by different sciences. And precisely one of my first impressions as a result of contact with the world of legal norms was the evidence that rights are always relative and, in this sense, it was interesting to put into practice the idea of correlativity and reciprocity as proposed by Commons.

Despite this analytical tool, my contact with law was not orientated by any rigid principles. I tried to respect the context and to understand the logic that is behind legal norms. This does not mean, however, that I abstained from a critical perspective. It means that I adopted an attitude that did not force the norms to tell me things that they do not want to say. In this option I did not want to evaluate the norms in terms of their efficiency[28]. My aim was to know the norms and identify the values and the tendencies that characterize them, particularly those that influence the property of agricultural land. This identification work is based on some convictions:

- "Property matters"; property is a central institution in economic life and should be explained;
- Property is fundamentally the property right, the set of norms, namely the legal norms that regulate the allocation of resources in a logic of correlativity (interindividual) and reciprocity (intraindividual);
- The legal norms that define the rights and duties related with resources are not unchangeable; their permeability to external changes should, however, consider the specificity of the legal system as well as the capacity to transform social values into protected rights.

I believe that plurality is almost a natural option in research on property. It is not possible to understand the decisions related with land if we do not know what the property right

[28] The search of efficiency of legal norms is present in Posner *Economic analysis of law* (1ª edition in 1973). In the 1992 edition, Common Law is presented like a system of rules that should "promote the adoption of efficient behavior from individuals, not only in explicit markets but in all forms of social interaction" (Posner *apud* Ejan Mackaay, "History of law and economics", in *Encyclopedia of Law and Economic Contents*, http://allserv.rug.ac.be: 77).

is. To know that we must get out and try to build a relation with the human science that centers on the study of this subject - law.

4. *Reality: Reciprocal Rights and Duties in Land Law – the Portuguese Case*

My exercise of plurality included the analytical reading of three components of the Portuguese legal system (legal reality):

- The Constitution[29];
- The Civil Code;
- Separate legislation in specific areas, namely those referred in this paper: i) environment, territory and ecology; ii) Common Agricultural Policy (CAP).

I applied the concept of reciprocity to these normative sources by identifying norms that define the property right, in particular, and as far as possible, related to land and agricultural land.

With regard to the Constitution, the idea of reciprocity of rights is found in the possibility of introducing restrictions on "fundamental rights"[30]. This is a consequence of the adequacy of rights with the economic, social and political aspects of the Constitutional project. According to an expert opinion:

> "[That] implies a narrowing of the powers scope traditionally associated to private property and an acceptance of restrictions (to the benefit of state, collectivity and other individuals) of the liberties of use, fruition and disposition"[31].

In fact, it is possible to identify some explicit and implicit constitutional restrictions to the property right that involve land. In explicit terms, these restrictions are fundamentally related with the possibility of expropriation in the following situations: excessive area of land and abandonment. In implicit terms, it is important to mention the restrictions that

[29] Portuguese Constitutions dates from 1976 with revisions in 1982, 1989 and 1997.
[30] In Portuguese law, the property right corresponds to a fundamental right of similar nature.
[31] In Portuguese: "[Este projecto] implica um estreitamento do âmbito dos poderes tradicionalmente associados à propriedade privada e a admissão de restrições (quer a favor do Estado e da colectividade, quer a favor de terceiros) das liberdades de uso, fruição e disposição", *in* J. Gomes Canotilho e Vital Moreira, *Constituição da República Portuguesa Anotada*, Coimbra, Coimbra Editora, 1993: 333.

can be introduced where the property right clash with the right to "environment and quality of life"[32]. The same experts said that:

> "The environmental protection can justify restrictions to other constitutionally protected rights. Thus, for instance, the freedom to build that is commonly considered inherent to the property right, is nowadays conceived as a 'potential freedom to build', because it can only develop in the context of legal norms which include those of environmental protection"[33].

On the other hand, the Civil Code reveals the content of the property right – use, usufruct and disposition - as well as other fundamental norms that contribute to the definition of that right in terms of estate access, neighbourhood relations, abandonment situations and agrarian regulation.

One of the discussions of the doctrine of Portuguese civil law respects the "social function" of property which in the Portuguese case is not explicit. The possibility to derive this function from the article 334º ("abuses of right") is not consensual. According to that article: "The exercise of a right is illegitimate when it manifestly exceeds the limits defined by good faith, good customs or by its social or economic end".

This article focuses the question of the limit of rights; however, it is in a negative way and allows no room for positive duties or the "stimulating solicitations" that characterize the social function[34]. In Portugal it seems that the absence of an explicit reference to the social function of property makes it difficult to resolve the conflict around land uses. There is considerable evidence of this in cases related with the right to build on land that is part of the National Agricultural Reserve.

As a subjective right and regulated by the same constitutional rules of fundamental rights, the property right is given special treatment that is present in the respect of its

[32] "Contrary to other legal-constitutional systems, namely some European, e.g. Italian, German and the Spanish, the Portuguese Constitution unequivocally integrated the environmental values through the consideration of the "right of environment" in its article 66º" (Maria Elizabeth Moreira Fernandez, *Direito ao Ambiente e Propriedade Privada [aproximação ao estudo da estrutura e das consequências das "leis-reserva" portadoras de vínculos ambientais]*, Coimbra, Coimbra Editora, 2001: 19-20).

[33] In Portuguese: "A defesa do ambiente pode justificar restrições a outros direitos constitucionalmente protegidos. Assim, por exemplo, a liberdade de construção, que muitas vezes se considera inerente ao direito de propriedade, é hoje configurada como 'liberdade de construção potencial', porque ela apenas se pode desenvolver no âmbito ou no quadro de normas jurídicas, nas quais se incluem as normas de protecção do ambiente", *in* J. Gomes Canotilho e Vital Moreira, *op. cit*.: 348.

[34] The social function of property is explicit in Italian legal-constitutional system ("private property has a social function"), Spanish ("the legislator legislates about the right of private property according to its social function") and German ("property obliges. Its use should serve the common good at the same time"), *in* Moreira Fernandez, *op. cit*.: 204.

"fundamental core". At his point it is important to say that the property right is defined in a negative manner – we can identify what owners cannot do, but it is more difficult to identify the full scope of their legal possibilities.

The clash between the property right and the right to environment plays a central place in literature on Portuguese law. In a discussion around the possible conception of the latter as a subjective right (like that of property), one of the experts quoted above refers the transformation of the rights subject which is no longer the person or group of persons but also the "generation subject". Besides, and following the same author, nowadays we see what he calls the "transfer of the problem from the rights arena to one of fundamental duties". In his own words:

> "We want to stress the need to overcome the euphoria of the individualism of fundamental rights and the implementation of a community of responsibility, of citizens and public entities regarding the ecological and environmental problems"[35].

Extending the environmentally responsible subjects and the generation notion reminds us of the conception of land as humanity's inheritance as presented by some of the economists cited above and corresponds to the spirit of the sustainable development concept.

These are values that are also present in separate legislation. In fact, it is there that the references to sustainability and multifunctionality of land are more frequent and where the reciprocal duties of property are more explicit.

Among the thematic groups that organize legislation, I want to emphasise: "environment, territory and ecology" and "CAP".

The former constitutes a paradigmatic set of legal diplomas in terms of the idea of reciprocity of rights. In fact, the constitutional possibility that allows restrictions to be introduced on the property right when there are another rights to protect is always visible in this theme and translates into restrictions on private property of land.

[35] In Portuguese: "Pretende-se sublinhar a necessidade de se ultrapassar a euforia do individualismo dos direitos fundamentais e de se radicar uma comunidade de responsabilidade de cidadãos e entes públicos perante os problemas ecológicos e ambientais" (J. Gomes Canotilho (2005), "O direito ao ambiente como direito subjectivo", *in Stvdia Ivridica*, nº 81: 48).

In this context, there is a clear tendency to protect environmental, ecological and patrimony values through the constitution of territorial reserves[36]. Thus, and in this case, the reciprocal logic has a territorial nature and presents problems related with the coexistence of rights and interests that are associated with the multiple functions of the territory and is far from peaceful.

The latter corresponds to some structural legal diplomas of the CAP and allows trends in policies to be identified, namely those that are related with the use of land. One of the main aspects of this policy evolution concerns precisely important changes in the regulation of these uses. Productive performance reached by the countries which first formed the Community justified the implementation of measures limiting production (e. g. set-aside and quotas). At the same time, the affirmation of environmental and food security was made slowly but irreversible.

In the context of CAP, the discussion about the property right, namely its reciprocal nature, has specific outlines related with the contractual nature of restricting some rights as well as with their monetary compensations. This triggers criticism of the legitimacy of some CAP measures in terms of their genuine attempt to deal with environmental concerns and constitutes a peculiar type of reciprocity in the rights exercise because they exteriorize liabilities that should be internal to farmers' decisions.

In my opinion, monetary compensations present in some CAP measures, on one hand, and the constitution of territorial reserves which are visible in the other group of legal diplomas, on the other, correspond to the main instruments in the Portuguese legal system related with land private property, namely farm land, in what concerns the implementation of environmental and ecological values. These instruments shape the property right reciprocity because they involve the definition of duties that farm land owners should observe and excludes, *de jure*, a conception of that right in absolute terms.

One should not conclude however that, *de jure*, there are no problems since there are normative weaknesses and inconsistencies that complicate the responsibility purpose with regard private property. This is the case of some CAP measures but also of the abandonment theme because they do not have a coherent legal approach given the urgency of these situations reality. It is also interesting to observe that the absence

[36] These are the cases of National Agricultural Reserve, National Ecological Reserve, Nature Network, as well as the National Network of Protected Areas which occupy a great part of the Portuguese continental territory.

of an explicit reference to property's social function in the Portuguese legal system provides the opportunity for various interpretations of what seems to constitute a sacred core of private property.

5. *Concluding Remarks: the Ways of Doing Right(s)*

My heterodox reflection about the property subject focused memory, plurality and legal reality.

Memory led to plurality and thereafter to reality. Nowadays, the memory of what some economists have said about the nature of property – that it involves responsibility and reciprocity – seems fundamental and creates the need for a precise understanding of what the property right is. This need justifies an articulation between economics and law through an exercise of plurality. The articulation with law called my attention to the legal norms that define the legal reality (*de jure*) of the property right.

It is important to stress that neither the economic works I considered here nor the legal norms present an absolute notion of property. On the contrary, memory and plurality showed that we are faced with an institution that gives control over things and power of exclusion but in a regulated and interdependent way considering the rights and interests of others in dynamics that are diverse in temporal and spatial terms.

What seems to be evident, in fact, it is not or not always. In certain contexts the property issue is still a taboo and it is not easy to interfere in owners rights. Farmers provide a good illustration of this.

In one of their papers, Bromely and Hodge refer that in a context where the concerns about agricultural production involved production increase, private property of land corresponds to "a fundament of democracy and individual freedom". However, these traditional rights still maintain in a completely different situation regarding the economic conditions and relative scarcity[37]. The conflicts of interests around land use calls for a redefinition of land resources and stress the difficulties regarding changes in the *status quo:*

> "When the agricultural sector […] resists efforts to alter the prevailing property rights position then a struggle occurs between the presumed 'right' of a landowner to do as

[37] Daniel Bromley and Ian Hodge (1990), "Private property rights and presumptive policy entitlements: reconsidering the premises of rural policy", in European Review of Agricultural Economics, nº 17: 198.

> he/she wishes, and the 'right' of the members of society to be free from the unwanted effects of agricultural land use. The state will be under pressure to reflect the interests of those adversely affected by the externalities. But, given the apparent sanctity of property rights in land, any negotiations with the agricultural sector will start from a position of political weakness"[38].

The coexistence of the property right and other rights that derive from the affirmation of social values related, namely, with environment and ecology, is a difficult exercise. Thus there are no easy answers to the following questions:

- What are the limits of private property restrictions in the name of public or other private rights and interests?
- Which restrictions should be compensated?

In my opinion this type of questions justifies the need for an ethical approach to private property related with land. Considering this issue, legal norms express a specific pattern of interdependent human relations with regard to the natural environment. But this is not a fixed pattern and is susceptible of reflection in an effort that tries to determine how we arrange or should arrange our lives in relation to natural environment.

The ethical dimension corresponds precisely to one of the dimensions that Commons identifies in his analytical approach to transactions. His analysis explores other authors' contributions[39] and presents some concepts like "liberty" and "no right" that are involved in the basic unity of economic analyses (transactions). It is interesting to notice that he presents the relation of man to nature as an example of the latter and which is characterized by an absence of ethical dimensions.

However, it is also important to notice the fact that man's relation to nature can be thought of in ethical terms, contrary to Commons view. Thus, my final comments adopts Commons proposal because I want to stress the importance of introducing the moral dimension into the economic approach but in a different way. This difference is related with my last findings on this matter that involves land property and the relation of man to nature.

[38] *Id*.: 199.
[39] In particular, Hohfeld and his leading critic – Kocoureks (Commons, *op cit*. [1924]).

I was very pleased when I recently read some contributions within the branch of environmental philosophy entitled "Land Ethics" written by Aldo Leopold[40], professor in Wisconsin University, during the last years of his life (1933 -1948).

For Leopold all ethics are based on simple premises: "individuals belong to a community of interdependent parts" and "land ethics amplifies the community boundaries with the purpose to include soils, water, plants and animals"[41].

The enlargement of community justifies the need to redefine the notion of responsibility related with land property. Thus, responsibility is associated not only with the fact that land is humanity's inheritance as some economists defend but, also with the fact that land has its own existence not (or not only) as a means (in an anthropocentric view) but as an end.

This involves a redefinition of the universes of human action that have a moral sense and supposes a broad conception of rights and duties[42]. The following comments of Leopold make it clear that this is a revolutionary proposal[43]:

> "We abuse from land because we see it as a resource that belongs to us. When we see it as a community where we belong, maybe we can use it with love and respect […] land ethics change *Homo Sapiens* from conqueror of the community-earth to its entire member and citizen. This implies the respect for its fellow-members and also the respect for the community as a whole[44].

This revolutionary vision instigates my curiosity and I finish as I began – with memory. The memory of land ethics and Leopold's thought could bring economics to land and to community (*oikos*). That is something to discover.

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[40] The origin of Land Ethics is the III part of Leopold work *Sand County Almanac* (1948).
[41] Maria José Varandas, "Fundamentos da Ética da Terra", *in* Cristina Beckert e Maria José Varandas, *Éticas e Políticas Ambientais,* Lisboa, Centro de Filosofia da Universidade de Lisboa, 2004: 154.
[42] Maria José Varandas, *op cit.*: 157.
[43] I reproduce the opinion of Maria José Varandas, *op cit*.: 155.
[44] In Portuguese: "Abusamos da terra porque a encaramos como um recurso que nos pertence. Quando a encararmos como uma comunidade à qual pertencemos, talvez a possamos usar com amor e respeito […] a ética da terra muda o papel do *Homo sapiens* de conquistador da comunidade-terra a seu membro e cidadão por inteiro. Tal implica o respeito pelos seus membros companheiros (fellow-members) e também o respeito pela comunidade como um todo" (*apud* Cristina Beckert e Maria José Varandas, *op cit*.: 155).

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