Land and Law: Reciprocal Rights and Duties in Private Property

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Abstract

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Abstract

The paper aims to explore the property concept as one which includes the definition of rights and duties. 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 property rights in a specific case – that of Portugal. The previous considerations reveal the approach adopted in property rights study and can be summed up in three words: memory, plurality and (legal) reality. These options offer an essay for the analysis of rights in its human dimension, including, as a final note, some ethical considerations that involve man-nature relations.

1. INTRODUCING THE STUDY OF PROPERTY – MEMORY, PLURALITY AND (LEGAL) REALITY

Today we are confronted with an opportunity and an urgency to reflect on property, the institution that provides control over natural resources such as land which in part derives from the demand for 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.

This reflection on landed property evoked memory, plurality and reality.

Memory involved the contribution of economists of all times who wrote about land, property, and, in some cases, landed property, in terms of its instrumental value (material progress) but also in terms of its broad meaning, including the power associated with the control of something that is, as some of them proposed, an inheritance of humanity. Memory led to plurality.

The importance of formal rules in the case of property introduced law in this approach. In fact, in law we find a characterization of this institution.

Finally, reality. The research considers the norms that contribute to property rights delimitation in some components of the Portuguese legal system.

These keywords - memory, plurality and reality – organize the paper. Its intention is 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

The vision of the liberal thought which presents the institution of property as a responsible and worthy one stresses the relative nature of property rights.

In Locke, for instance, the defense of natural property rights is associated with labor[2] and founded on “natural” and “moral” limits.

The former are imposed by nature and are, at the outset, defined in a context of abundance:

[2] “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).

> "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"[3].

The latter, the "moral" limits, derive from the charge that every man should have regarding its possessions:

> "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"[4].

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 expressed in concern of interest, 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 allow its regulation in the next phases of historic evolution. However, the principles that inspire it steel remain[5].

Smith's economic considerations about property involve a criticism of some of the norms that defined it, namely inheritance law, which made difficult the development of small property and land market.

The criticism of inheritance legal norms is also present in Say, Malthus and Mill's works, all of them supporting measures aimed at improving the performance of the property institution in terms of economic progress but also in terms of social justice[6].

The specificity of land advocated in these classical works justified some of the conclusions regarding its appropriation. In Says view, for instance, land provides a productive service – "le

[3] *Id.*: 118.
[4] *Id.*:117.
[5] "[…] 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).
[6] This concern with social justice is present in Mill's view.

service productive de la terre"[7] – that gives utility to a set of natural materials. Being possible, the appropriation of natural elements does not involve, however, absolute rights because:

> "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"[8].

The view of Iand as something different from other productive resources is also present in Malthus when he uses expressions like "God's gift" or "nature's gift" and the thesis that its surplus is explained by "that quality of earth".

This special power of land is not accepted by Ricardo. For him the surplus, the rent, is due to scarcity and not to mysterious forces of nature. Land is a resource like any other in Ricardo's approach[9].

This is not the view of Stuart Mill whose criticisms of property law, especially inheritance, are very vigorous. The specificity of land resources justifies the author's criticism concerning this institution. Responsibility and merit are the values that should inspire property, which, for Mill, corresponds to "the primary and fundamental institution". Thus, Mill's approach goes beyond mere efficiency and includes a dimension of ethics and social justice. The following comments illustrate well this aspect of Mill's thought:

> "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.

[7] "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).

[8] 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.

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

> 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"[10].

Moral references about property are present also in the critics of classical liberalism and its heirs.

Among the former, one should mention Marx's view one private appropriation of land:

> "From the point of view of a higher economic form of society, the private ownership of the globe on the part of some individuals will appear as absurd as the private ownership of one man by another. Even a whole society, a nation, or even all societies together, are not the owners of the globe. They are only its 'possessors', its users, and they have to hand it down to the coming generations in an improved condition, like good fathers of families"[11].

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

In his references about landed property[12], Marshall adopts a poetic style and stresses the moral and aesthetic qualities involved in agriculture.

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 – Pure Economics. In the case of landed property, social justice concerns would justify the nationalization of land. In his own words:

> "The fact that land is a thing and that, to this extent, it may belong to people, that is 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 individually? Why to John more than to Paul? Why to you rather than to us? This is something that is for us completely impossible to understand"[13].

[10] John Stuart Mill, *Principles of Political Economy*, London, Augustus M. Kelley Publishers, 1848 [1987]: 235.
[11] Karl Marx, *Capital*, Frederick Engels (ed.), Vol. III, cap. 7, [traduzido da primeira edição em alemão por Ernest Untermann], Chicago, Charles H. Kerr and Company, 1909, p.902, *in* http://www.dominiopublico.gov.br (30 Março 2007).
[12] 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.
[13] 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.

> "Land does not belong to all men of one generation; it belongs to humanity, that is, to all of human generations […]. In legal terms, the humanity is the owner and the present generation it usufructuary"[14].

In spite of these social and moral considerations, the purposes of objectivity and scientificity oriented Economics in another direction. In the neoclassical view, the maximization calculus is the only criteria for decisions concerning the use of resources, something that suggests an absolute notion of rights involved in the productive process.

We have to look elsewhere to find economic reflections about property. The study of norms and conventions that influence the control of resources needed for human livelihood is central in the works of American institutionalists, namely Veblen (1857-1929) and Commons (1862-1945).

In his reflections about property, Commons emphasizes formal norms, namely legal ones. According to him:

> "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"[15].

In his efforts to clarify the concept of *rights*, Commons refers to Hohfeld's[16] 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. [17]. This is the correct way to use the concept, one that reveals its interdependent (correlative) nature. To *correlativity* Commons adds the notion of *reciprocity* in rights definition, two terms that correspond to different aspects of rights:

> "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

[14] 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.

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

[16] 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).

[17] "(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).

> 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"[18].

Like correlativity, reciprocity gives a dynamic conception of rights involved in the 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) It defines the space of individual decision as one which is influenced by collective action presented in norms, namely legal norms;

iii) It allows the view of individual decision as encompassing (also) *duties*[19].

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. 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 Economic action.

It is important to mention that economic, legal and moral concerns compose the trilogy of Commons approach to *transactions*, the analytical basic unit of his Institucionalist Economics.

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

[19] 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 central role that formal rules play in it has been stressed by some economists. This is the case of Commons, as we have seen, but also Coase[20] and his heirs in the Property Rights School[21].

What Barzel, for instance, presents as "economic property" ("the ability to enjoy a piece of property") is the result of a state recognition[22], the "legal property".

Despite their limitations ("legal rules are always incomplete"[23]), formal rules 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"[24].

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

Despite the analytical tool present in the concept of *reciprocity*, the contact with law was not orientated by any rigid principles[25]. The aim was to know the norms and identify the values and

[20] 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).

[21] 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).

[22] "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).

[23] *Id.*: 120.

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

[25] This does not mean, however, an abstention of a critical perspective. It means that an attitude was adopted that did not force the norms to tell things related, for instance with their efficiency. The search for efficiency on legal norms is

the trends that characterize them, particularly those that influence the property of agricultural land. This aim presupposes the following ideas:

- "Property matters"; property is a central institution in economic life and should be explained;
- Property is fundamentally the property rights, the set of norms, namely the legal ones, that regulate the allocation of resources in a logic of correlativity and reciprocity;
- 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.

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).

4. REALITY: RECIPROCAL RIGHTS AND DUTIES IN LAND LAW – THE PORTUGUESE CASE

The exercise of plurality present in the knowledge of legal norms included the analysis of three components of the Portuguese legal system (legal reality):

- The Constitution[26];
- The Civil Code;
- Separate legislation in specific areas, namely those referred in this paper:
  i) Environment, Territory and Ecology; ii) Common Agricultural Policy (CAP).

Regarding the Constitution, the idea of *reciprocity* is found in the possibility of introducing restrictions on "fundamental rights"[27]. This aspect can be seen as a consequence of the adequacy of rights with the economic, social and political aspects of the Constitutional project:

> "[That] implies a narrowing of the scope of powers traditionally linked 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"[28].

In fact, it is possible to identify some explicit and implicit constitutional restrictions to property rights involving land. In explicit terms, these restrictions are fundamentally related with the possibility of expropriation in the following situations: excessive area of land and its abandonment. In implicit terms, it is important to mention the restrictions introduced when property rights clash with the right to "environment and quality of life"[29]. The experts quoted above said that:

> "The protection of the environment may justify restrictions to other constitutionally protected rights. Thus, for instance, the freedom to build that is

[26] Portuguese Constitutions dates from 1976 with revisions in 1982, 1989 and 1997.
[27] In Portuguese law, the property right corresponds to a fundamental right of similar nature.
[28] 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.
[29] "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).

> 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"[30].

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

In Portugal it seems that the absence of an explicit reference to the "social function" of property constitutes a problem in the resolution of conflicts around land uses. There is considerable evidence of this in cases related with the "right to build" on land that is integrated in the National Agricultural Reserve[31]. In this context, the discussion around the potential clash between property rights and the "right to environment" has been presented in a way that considers the "rights subject". According to one of those authors, that "subject" is no longer the "person" or "group of persons" but also the "future generations". Besides, and following the same author, we nowadays witness 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"[32].

Extending the environmentally *responsible subjects* and the *future generations* idea reminds the conception of land as humanity's inheritance as presented by some of the economists considered in this paper and expresses the spirit of *sustainable development.*

[30] 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.

[31] 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). In fact, one of the main discussions 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".

[32] 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).

These are values also considered 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.

The thematic legislation group "Environment, Territory and Ecology" constitutes a paradigmatic set of legal diplomas in terms of rights *reciprocity*. In fact, the constitutional possibility that allows restrictions to be introduced on property rights when there are other rights to be protected is always visible and translates into restrictions on landed private property. In this context, there is a clear tendency to protect environmental, ecological and patrimonial values through the constitution of territorial reserves[33].

As far as the CAP legal diplomas are concerned, the discussion around the reciprocal nature of rights has specific outlines related to the contractual nature of some restrictions as well as with monetary compensations. This triggers criticism on 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 exercise of rights because they exteriorize liabilities that should be internal to farmers' decisions.

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 landed private property, namely farm land, in what concerns the implementation of environmental and ecological values. These instruments shape the reciprocal elements in property rights because they involve the definition of duties that landowners should observe and excludes, *de jure*, a conception of rights in absolute terms.

One should not conclude however that, *de jure*, there are no problems since there are normative weaknesses and inconsistencies which undermine responsibility in respect to property. This is the case of some CAP measures and some others related with land abandonment. It is also interesting to observe that the absence 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)

The previous reflection on property rights evoked memory, plurality and legal reality.

[33] 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.

Memory led to plurality and thereafter to reality. Nowadays, the memory of what economists in the past have said about the nature of property – that it involves responsibility and reciprocity – is wonder recall since it is illustrative in connection to a better understanding of property rights. Such an understanding calls for an articulation for Economics and Law through an exercise of plurality. The articulation with Law involved the study of legal norms that define the legal reality (*de jure*) of property rights.

It is important to stress that neither the economic works considered, 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 certain contexts, however, the property issue is still a taboo and it is not easy to interfere with owners rights. Farmers attitudes provide a good illustration of this. Bromely and Hodge refer that when the concerns about agricultural production involved production increase, private property of land corresponds to "a fundament of democracy and individual freedom". These attitudes tend to remain in a completely different situation regarding the economic conditions and relative scarcity[34]. 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 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"[35].

The coexistence of property rights with other rights that derive from other 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?

[34] 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.
[35] *Id.*: 199.

This type of questions demands an ethical approach to landed property. Considering this issue, legal norms express a specific pattern of human-nature relations which is not fixed and, thus, 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 final comments of this paper are dedicated to Ethics through the words of Aldo Leopold (1933-1948), the founder of *Land Ethics*.

For Leopold all ethics are based on simple premises: "individuals belong to a community of interdependent parts" and "land ethic enlarges amplifies the boundaries of the community to include soils, water, plants and animals, or collectively: the land"[36].

The enlargement of community calls for a redefinition of responsibility notion related with landed property. Thus, responsibility is associated not only with the fact that land is humanity's inheritance, as some economists uphold, 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[37]. The following comment of Leopold expresses this "revolutionary proposal"[38]:

> "We abuse land because we regard it as a commodity belonging to us. When we see land as a community which we belong, we may begin to use it with love and respect"[39].
>
> "[…] a land ethic changes the role of *Homo Sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also the respect for the community as such"[40].

By recalling *Land Ethic* and Leopold's words we hope to bring Economics to Land and to community-earth, a "new" and redefined *oikos*.

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[39] Aldo Leopold, *op cit*.: viii.
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