

The Normative Dimension of Land Resources: Reciprocity and Community in a Property Rights Approach

Maria de Fátima Ferreiro

ISCTE – Higher Institute of Social Sciences and Business Studies¹

Department of Economics

Dinâmia - Research Center on Socioeconomic Change²

Lisbon, Portugal

I. Introduction: the Research Path

The aim of this paper is to reflect on property rights, i.e., the institution that provides control over natural resources such as land. In this reflection it will be adopted an approach that privileges memory, plurality and reality and stresses the ethical dimension present in resources exploitation. At this point the paper will refer *Land Ethics* as proposed by Aldo Leopold (1887-1948) in his work *A Sand County Almanac* ([1949] 1968) which presents a deep and revolutionary vision on human-nature relations.

Today, we are presented with an opportunity and, in my opinion, an urgency to reflect on property rights. These are in part justified 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 (including in protected areas) are additional factors.

Memory includes economic notes related with the conception of land, property and, in some cases, landed property, in terms of its instrumental value (material progress) but also in terms of its social and moral dimensions including the perception of the consequences associated with the control of something (land). In land property case, that is, as some economists proposed, an inheritance of humanity. Memory led to plurality.

One should mention that in a first stage the purpose of the research was to demonstrate the importance of formal rules, namely legal ones, to understand the structure of property rights. That purpose justified the identification and analysis of legal norms (legal reality) that integrate three components of the Portuguese legal system: the Constitution, the Civil Code and separate legislation organized in the following thematic

¹ Instituto Superior de Ciências do Trabalho e da Empresa.

² Centro de Estudos sobre a Mudança Socioeconómica.

groups: agrarian law; environment, territory and ecology; forestry and game; Common Agricultural Policy (CAP).

Thus, and at this stage, the exercise of plurality was made with Law. This exercise of plurality will be extended to Philosophy, introducing Ethics in the discussion of property and initiating a reflection that stresses, once again, the normative dimension of this institution.

The consideration of a moral dimension involves a critical perspective of economies use (and abuse) of natural resources. This view integrates a notion of *Community* that involves all living species and, as such, is wider than the original *oikos* which is, as we know, the root of the word Economics (*oikonomikos*) as presented in Xenophonte's and Aristotle's economic reflections.

The association between Economics, Law and Ethics is something proposed by Commons in his *Institutional Economics*. In fact, for him, the consideration of *transactions*³ should comprehend that trilogy. The disciplinary boundaries had instigated Leopold as well for whom:

“We classify ourselves into vocations, each of which either wields some particular tool, or sells it, or repairs it, or sharpens it, or dispenses advice on how to do so; by such division of labors we avoid responsibility for the misuse of any tool save our own. But there is one vocation – philosophy – which knows that all men, by what they think about and wish for, in effect wield all tools. It knows that men thus determine, by their manner of thinking and wishing, whether it is worth while to wield any”⁴.

The following notes summarise memory, plurality and reality guidelines and express this research central convictions:

- “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 reciprocal rights and duties;

³ According to Commons, *transactions* constitutes the basic unit of the Institutionalist Economic approach and are defined as such: “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” (in J. R. Commons, “Institutional Economics”, in *American Economic Review*, vol. 21, 1931: 1-2).

⁴ Aldo Leopold, *A Sand County Almanac*, Oxford University Press, [1949] 1968, p.68.

- The legal norms that define the rights and duties related with resources use 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-ethical values into protected rights.

II. Land and Law - the Reciprocal Nature of Property Rights

The vision of the liberal classics that presents the institution of property as a responsible and worthy one is fundamental because it stresses the relative nature of property rights. The changes related with the definition of the “public interest” contribute to explain the evolution of the rights limits. Responsibility can remit to different purposes – economic progress, protection of environmental values, social justice and ethics – and presents specificities in landed property.

In Locke, the defense of natural property right is associated with labor⁵ and found “natural” and “moral” limits. 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”⁶.

The latter, the moral limits, derive from the capacity that every man has to care about things under his control:

“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 than this share, and belongs to others. Nothing was made by God for man to spoil or to destroy”⁷.

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

⁵ “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”, in John Locke, *Two Treatises of Government* [1823], <http://cepa.newschool.edu.hk>: p.116.

⁶ *Id.*, p.118.

⁷ *Id.*, p.117.

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 maintain⁸. The moral legitimacy present in the Locke theory of the “First Occupancy” explains most of the interest that is devoted to it⁹ 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”¹⁰.

Smith’s economic considerations about property involve a criticism about some of the norms that dominated it during his time, namely inheritance ones which complicate the development of small property and the 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 justice¹¹.

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”¹² – 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

⁸ “[...] 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”, *in Id*, p.126.

⁹ Jeremy Waldron, “Property”, *in Stanford Encyclopedia of Philosophy*, <http://standford.edu/entries/property> (21-04-2006): p.5.

¹⁰ François Quesnay, *O Quadro Económico*, Lisboa, Fundação Calouste Gulbenkian, 1966 [1763]: pp.142-143.

¹¹ This concern with social justice is present in Mill’s view.

¹² “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.”, *in Jean-Baptiste Say, Cours Complet d’Économie Politique*, Paris, Otto Zeller-Osnabruck, 1972 [1803], p.410.

she recognises as its owner, and does not concede to anyone in an exclusive way the enjoyment of public places, big roads, lakes and rivers¹³.

In Malthus work, it is also possible to find a land notion as something different from the other productive resources, a “God’ gift” or “nature gift” whose 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 the scarcity of fertile land and not to the mysterious forces of nature. Land is a resource like any other in Ricardo’s approach¹⁴.

This is not the view of Stuart Mill whose criticisms of property norms, especially those of inheritance, are very vigorous and are also justified by land specificity. 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 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”¹⁵.

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

¹³ 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.*, p. 532.

¹⁴ In Portuguese: “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”, *in* David Ricardo, *Princípios de Economia Política e de Tributação*, Lisboa, Fundação Calouste Gulbenkian, 1989 [1817], p.83.

¹⁵ John Stuart Mill, *Principles of Political Economy*, London, Augustus M. Kelley Publishers, [1848]1987, p. 235.

Among the former, I should mention Marx whose critics of landed private property reveal a similar view to that of contemporary “intergenerational solidarity” and “sustainable development”. In Marx words:

“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”¹⁶.

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

In his references about landed property¹⁷, Marshall adopts a poetic style and stresses the moral and aesthetic qualities that are present in land work.

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, the purposes of social justice justify its nationalization. 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”¹⁸.

“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”¹⁹.

¹⁶ Karl Marx, *Capital*, Frederick Engels (ed.), Vol. III, cap. 7, (translation from the first german edition by Ernest Untermann], Chicago, Charles H. Kerr and Company, 1909, p.902, in <http://www.dominiopublico.gov.br> 30 March 2007).

¹⁷ 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”, in Alfred Marshall, *Principios de Economía*, Madrid, Aguilar S. A. Ediciones, [1890] 1948, pp.124-125.

¹⁸ In French: “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’Université, [1896], 1936, pp. 33-34.

¹⁹ 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.*,

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 scientificity oriented economics in another direction. As far as property and property of land is concerned, things are presented in a completely different way. 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 consequential and utilitarian terms. From the neoclassical view, maximizing *calculus* is the only criteria that define the limits of individual 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 in its human and interdependent dimension. As suggested by its name, it is among Institutionalism that we find the study of institutions. The analysis of norms and conventions that influence the control of resources needed for human subsistence is central in the works of Veblen and Commons. According to Veblen, Economics is 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, in his view, corresponds to the "primary institution".

In this search, and in the case of property reflections, some institutionalist approaches 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"²⁰.

p. 219.

²⁰ J. R. Commons, *Institutional Economics, its place in political economy*, New Brunswick and London, Transaction Publishers, [1934] 2003, p. 77.

In his efforts to clarify the concept of *rights*, Commons refers Hohfeld²¹ work about “jural relations”²².

Commons add the notion of *reciprocity* to that of correlativity presented by Hohfeld. According to Commons, correlativity and reciprocity represents different things in that definition:

“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”²³.

The notion of *reciprocity* gives a dynamic view of rights 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) It indicates that the space of individual decision is composed by *duties*²⁴.

²¹ 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”, in J. R. Commons, “Institutional Economics”, in *American Economic Review*, vol. 21, 1931, pp. 1-2.

²² Hohfeld denounced the imprecise way that economists use the “right” concept. For him, a right always presupposes a correlative duty, it is legally protected and should not be confused with privileges, uses, etc. - “(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”, in Cole and Grossman, “The meaning of property rights: law versus economics?”, in *Land Economics*, n° 78 (3), 2002, p. 318.

²³ J. R. Commons, *Institutional Economics, its place in political economy*, New Brunswick and London, Transaction Publishers, [1934] 2003, 131.

²⁴ It is important to stress that this reciprocal duties have an evolutionary 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”, in *Id.*, p.133.

The central role played by formal rules in property rights definition has been stressed by numerous economists. This is the case of Commons, as we have seen, but also Coase²⁵ and some of the proposals of his legacy, namely the School of Property Rights²⁶.

What Barzel, for instance, presents as “economic property” (“the ability to enjoy a piece of property”) is the result of a state recognition²⁷, the “legal property”, of what the individuals can and cannot do with things under their control. According to Hodgson’s:

“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”²⁸.

The analysis of legal norms was orientated by the concept of *reciprocity* and I adopted an attitude that did not force the norms to tell me things that, and apparently, they don’t say like if they are or not efficient²⁹. The purpose was the knowledge of norms including the values and the tendencies that characterize them, particularly those that influence landed property.

²⁵ 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 not 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 [...]”, in Coase [1960], “The problem of social cost”, in Steven G. Medema (ed.) *The Legacy of Ronald Coase in Economic Analysis*, Edward Elgar, 1995, p. 44).

²⁶ 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”, in Demsetz, “Towards a theory of property rights” [1967], in Steven G. Medema (ed.) *The Legacy of Ronald Coase in Economic Analysis*, Edward Elgar, 1995, p. 207). To Furubotn and Pejovich “[...] a theory of property rights cannot be truly complete without a theory of the state”, in Erik G. Furubotn and Rudolf Richter, *Institutions and Economic Theory: the contribution of the new institutional economics*, The University of Michigan Press, 2001, p. 118).

²⁷ “Economics are the end (that is, what people ultimately seek), whereas legal rights are the means to achieve the end”, in Yoram Barzel, *Economic Analysis of Property Rights*, Cambridge, Cambridge University Press, 1997, p.3.

²⁸ Geoffrey Hodgson, “The evolution of institutions: an agenda for future theoretical research”, in *Constitutional Political Economy*, n° 13, 2002, p.122.

²⁹ The search of efficiency of legal norms is present in Posner *Economic analysis of law* (1^a 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”, in Ejan Mackaay, “History of law and economics”, in *Encyclopedia of Law and Economic Contents*, <http://allserv.rug.ac.be>, p. 77.

The exercise of plurality and (legal) reality included the critical reading of three components of the Portuguese legal system:

- The Constitution³⁰;
- The Civil Code;
- Separate legislation in specific areas, namely, “environment, territory and ecology” and “CAP”.

On one hand, and as far as the Constitution concerns, the idea of rights reciprocity is found in the possibility of introducing restrictions on “fundamental rights”³¹. 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”³².

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 can be introduced when the property right clash with the right to “environment and quality of life”³³. The experts quoted above 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

³⁰ Portuguese Constitution dates from 1976 with revisions in 1982, 1989 and 1997.

³¹ In Portuguese Law, property right corresponds to a fundamental right of “similar nature”.

³² 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, p. 333.

³³ “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”, in 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, pp. 19-20.

freedom to build', because it can only develop in the context of legal norms which include those of environmental protection"³⁴.

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.

The clash between the property right and the right to environment is a central issue in Portuguese literature concerning property Law. That is the case of a discussion around the possible conception of the right to “environment and quality of live” as a subjective right (like property rights). In this context, 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 the conception of land as humanity's inheritance as presented by some of the economists considered here and corresponds to the spirit of the sustainable development concept.

Finally, and in what concerns separate legislation, one should mention the importance of land sustainability and multifunctionality concerns and the explicit reference of reciprocal duties concerning property.

On one hand, the “environment, territory and ecology” legislation group constitutes a paradigmatic set of legal diplomas in terms of rights reciprocity. In fact, the constitutional

³⁴ 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.*, p. 348.

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”, in J. Gomes Canotilho, “O direito ao ambiente como direito subjectivo”, in *Stvdia Ivridica*, nº 81, 2005, p. 48.

possibility that allows restrictions to be introduced on property rights in order to protect other rights is always visible in this theme and translates into restrictions on landed private property. In this context, there is a clear tendency to protect environmental, ecological and patrimony values through the constitution of territorial reserves³⁶. 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 multiplicity of territory uses, something that is far from peaceful.

On the other hand, some structural CAP diplomas allow the identification of policy trends, namely those related with land 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 in a slowly but irreversible way. It must be stressed that in the context of CAP, the discussion about the property right, namely its reciprocal nature, has specific outlines regarding their contractual nature and 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, and in some cases, they exteriorize liabilities that should be internal to farmers' decisions. Concerning this issue, it is interesting to quote Aldo Leopold's opinion regarding monetary compensations to private landowners in the United States:

"When the private landowner is asked to perform some unprofitable act for the good of the community, he today assents only with outstretched palm. If the act cost him cash this is fair and proper, but when it costs only forethought, open-mindedness, or time, the issue is at least debatable"³⁷.

Monetary compensations present in some CAP measures and the constitution of territorial reserves correspond to the main instruments in the Portuguese legal system related with property rights on land regarding environmental and ecological values. These instruments shape the property rights reciprocity because they involve the definition of duties that landowners should observe and exclude, *de jure*, a conception of that right in absolute terms³⁸.

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.

³⁷ Aldo Leopold, *op. cit.*, p.213.

³⁸ One should not conclude however that, *de jure*, there are no problems since it is possible to identify normative weaknesses and inconsistencies that complicate the responsibility purpose

As far as the constitution of territorial reserves concerns, they express a model of nature-man relations that involves separation and a *museufication* of natural values. The need to protect nature from human action reveals a tendency to destruction and other beings conception not as something with an intrinsic value but as a resource, i.e., a mean to human ends, namely those related with progress. Some of these museums continue to serve economic progress and are “economic resources”³⁹ through the Recreation Industry. This economic activity is deeply considered in *A Sand County Almanac* in a very adequate and opportune way considering nowadays relation with countryside including the public policies solutions to economic and social depression of rural territory:

“Like ions shot from the sun, the week-enders radiate from every town, generating heat and friction as they go. A tourist industry purveys bed and board to bate more ions, faster, further. Advertisements on rock and rill confide to all and sundry the whereabouts of new retreats, landscapes, hunting-grounds, and fishing-lakes just beyond those recently overrun. Bureaus build roads into new hinterlands, then buy more hinterlands to absorb the exodus accelerated by the roads. A gadget industry pads the bumps against nature-in-the-raw, woodcraft becomes the art of using gadgets. And now, to cap the pyramid of banalities, the trailer. To him who seeks in the woods and mountains only those things obtainable from travel or golf, the present situation is tolerable. But to him who seeks something more, recreation has become a self-destructive process of seeking but never quite finding, a major frustration of mechanized society. [...] [...] wildlife once fed us and shaped our culture. It still yields pleasure for leisure hours, but we try to reap that pleasure by modern machinery and thus destroy part of its value. Reaping it by modern mentality would yield not only pleasure, but wisdom as well”⁴⁰.

Presently, tourism appears as the panacea to rural spaces with desertification problems. In fact, the alternatives to agriculture proposed by the second pillar of CAP (Rural Development) means, in most cases, tourism. This demands new skills but also a redefinition of farmer identity and new conflicts around land uses which involve institutional aspects namely those related with Land Law⁴¹. Regarding the alternatives to traditional land uses, one of the important question is: “Are these uses more sustainable?”. The considerable literature on these

regarding private property (e.g. CAP and abandonment situations).

³⁹ Cf. Aldo Leopold, *op cit.*, pp.165-177.

⁴⁰ *Id.*, p.166; 187.

⁴¹ Regarding these kind of problems, Leopold said that: “The difficulty is that these communities (marshes, bogs, dunes, and ‘deserts’) are usually interspersed with more valuable private lands; the government cannot possibly own or control such scattered parcels. The net effect is that we have relegated some of them to ultimate extinction over large areas. If the private owner were ecologically minded, he would be proud to be the custodian of a reasonable proportion of such areas, which add diversity and beauty to his farm and to his community”, *in* Aldo Leopold, *op cit.*, p.212.

matters suggests that there are no single answers to that question. One can mention the Portuguese “golf paradises” which are very important in economic terms ⁴²but are they so interesting in environmental and ecological ones regarding, namely, the demand and the pollution of water?

The effort to consider environmental issues in economic decisions, and at least in academic discussions, tends to consider an ethical dimension. This constitutes a new challenge in Economics pluralist nature but is not a novelty if we consider some classical works and the heterodoxy literature which seeks the human face of Economics, one that considers and questions our place in the world, a community that integrates all the living creatures and seeks harmony through *reciprocity* and *community* principles.

III. A New Start: Land (and) Ethics of Aldo Leopold or Ways of Doing Right(s)

The coexistence of rights is a difficult exercise. Thus, and regarding the property rights, 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?

We can find some answers to these questions in our legal systems regarding Land Law which express a certain pattern of man-nature relations and can and must be subject of our reflection and critic, including the *right* and *wrong* proposed by Leopold Land Ethic.

The enlargement of the *reciprocity* idea regarding property rights is allowed by the ethical considerations which goes behind human interests and expediency and is expressed in the notion of *community* - “land ethics amplifies the community boundaries with the purpose to include soils, water, plants and animals”⁴³.

⁴² According to the Newspaper *Expresso* (September, 9th, 2006) in Portugal the golf tourism involves 1,8 millions of euros and represents 100,000 jobs.

⁴³ Aldo Leopold, *op cit.*, p.204.

This involves a redefinition of the universes of human action that have a moral sense and supposes a broad conception of rights and duties⁴⁴. The following comments of Leopold illustrate this revolutionary proposal⁴⁵:

“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 whole⁴⁶.”

Thus, *reciprocity* comprehends the respect regarding all living creatures that constitute the community-earth. The *right* and *wrong* of our actions has strong implications in the power and the control of land allowed by property. The following quotations constitute a good illustration of Leopold thoughts concerning this institution:

“When god-like Odysseus returned from the wars in Troy, he hanged all on one rope a dozen slave-girls of his household whom he suspected of misbehavior during his absence. This hanging involved no question of property. The girls were property. The disposal of property was then, as now a matter of expediency, not of right and wrong⁴⁷.”

“When some remote ancestor of ours invented the shovel, he became a giver: he could plant a tree. And when the axe was invented, he became a taker: he could chop it down. Whoever owns land has thus assumed, whether he knows it or not, the divine functions of creating and destroying plants⁴⁸.”

The philosophical critics of Leopold that seek the economic progress and the distant and destructive relations between man and the other “fellow-members” of “community earth” are accompanied by some pragmatic notes regarding political and economic aspects of conservation measures. That is the case of the clarification of the Government role and the necessity to introduce Land Ethics or “some other force which assigns more obligations to the private landowners⁴⁹.”

Land Ethics occupies the third and last part of *A Sand County* where the author presents the main concepts and approaches of this new discipline, namely:

- Its fundamentals and main aspects;

⁴⁴ 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, p.157.

⁴⁵ I reproduce the opinion of Maria José Varandas, *op cit.*, p.155.

⁴⁶ Aldo Leopold, *op cit.*, p.viii; 204.

⁴⁷ *Id.*, p.201.

⁴⁸ *Id.*, p.67.

⁴⁹ *Id.*, p.213.

- The definition of land and the impact of human interference and control in its process of self-renewal;
- The importance of an ecological conscience or the need to develop it.

Defining an ethic as a “differentiation of social from anti-social conduct”⁵⁰, Leopold explains that the “thing” has its origins in the “tendency of interdependent individuals or groups to evolve modes of co-operation. The ecologist calls these symbioses. Politics and economics are advanced symbioses in which the original free-for-all competition has been replaced, in part, by co-operative mechanisms with an ethical content”⁵¹:

“All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in that community, but his ethics prompt him also to co-operate [...]”⁵².

Land Ethics deals with the right and wrong regarding land uses. “A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise”⁵³. The extension of ethics to land is presented like an “evolutionary possibility” and an “ecological necessity” or, as quoted above, “the land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively: the land” because land “is not merely soil, it is a fountain of energy flowing through a circuit of soils, plants and animals”⁵⁴. As a member of the “biotic team”, man should “quit thinking about decent land-use as solely an economic problem” and “examine each question in terms of what is ethically and esthetically right, as well as what is economically expedient. It is important to say that Leopold doesn’t deny the importance of “economic feasibility limits” as a limit of what can or cannot be done with land. What he doesn’t accept is the “fallacy of the economic determinists” which defends that economics determines all land uses. For Leopold “this is simply not true”⁵⁵.

⁵⁰ *Id.*, p.202.

⁵¹ *Id.*, *ibid.*

⁵² *Id.*, pp. 203-204.

⁵³ *Id.*, p. 224.

⁵⁴ *Id.*, p.216; 224. This “interdependence between the complex structure of the land and its smooth functioning as an energy unit” constitutes “one of its basic attributes. [...]. When a change occurs in one part of the circuit, many other parts must adjust themselves to it. [...]. Waters, like soil, are part of the energy circuit. Industry, by polluting waters or obstructing them with dams, may exclude the plants and animals necessary to keep energy in circulation”, *in id.*, p. 216; 217.

⁵⁵ *Id.*, p.225

One of the basic ideas concerning the conception of land as an “energy circuit” is that “man-made changes are off a different order than evolutionary changes, and have effects more comprehensive than is intended or foreseen”⁵⁶. The adjustment of land to the “new order” and the reaction to violence over it are diverse around the world. Leopold presents some cases⁵⁷ to illustrate this diversity and concludes that “the land recovers, but at some reduced level of complexity and with a reduced carrying capacity for people, plants, and animals. Many *biotas* currently regarded as ‘lands of opportunity’ are in fact already subsisting on exploitative agriculture, i.e. they have already exceeded their sustained carrying capacity”⁵⁸. To Leopold “the effort to control the health of land has not been very successful” and “[...] in land, just as in the human body, the symptoms may lie in one organ and the cause in another”⁵⁹. The author stresses the importance of places where “land physiology remains largely normal despite centuries of human occupation” and “wilderness” as two important “norms” to build a “science of land health” considering the need to have healthy lands to compare with the sick ones to know how good a performance to expect⁶⁰.

The development of an ecological conscience mentioned by Leopold is something that should deserve our attention and reflection regarding nowadays practices related with land uses. The comments of the author about this issue stress the importance of education and seek the farmers in a central way. For him, the model of “conservation education” does not fit with his “community-earth” approach because:

“[...] the content is substantially this: obey the law, vote right, join some organizations, and practice what conservation is profitable on your own land; the government will do the rest. Is not this formula too easy to accomplish anything worth-while? It defines no right or wrong, assigns no obligations, call for no sacrifice, implies no change in the current philosophy of values. In respect of land-use, it urges only enlightened self-interest. Just how far will such education take us? [...]”⁶¹.

⁵⁶ *Id.*, p.218.

⁵⁷ That is the case of Western Europe where “[...]. Some large animals are lost; swampy forests have become meadows or plowland; many new plants and animals are introduced, some of which escape as pests; the remaining natives are greatly changed in distribution and abundance. Yet the soil is still there and, with the help of imported nutrients, still fertile; the waters flow normally; the new structure seems function and to persist. There is no visible stoppage or derangement of the circuit”, *in id.*, pp. 218-219.

⁵⁸ *Id.*, p.219.

⁵⁹ *Id.*, p.194-195.

⁶⁰ *Id.*, p.197.

⁶¹ *Id.*, p.208.

The absence of obligations to land “over and above those dictated by self-interest” had provoked a situation where “we have more education but less soil”⁶². Nowadays, some environmental actions, protests and conventions aim the global context. Nevertheless, I find similarities between agricultural policy and farmer’s behavior described by Leopold and the present situation. According to him:

“[...] we asked the farmer to do what he conveniently could to save his soil, and he has done just that, and only that. The farmer who clears the woods off a 75 per cent slope, turns his cows into the clearing, and dumps its rainfall, rocks, and soil into the community creek, is still [...] a respected member of society. If he puts lime on his fields and plants his crops on contour, he is still entitled to all the privileges and emoluments of his Soil Conservation District. [...] we have been too timid, and too anxious for quick success, to tell the farmer the true magnitude of his obligations. Obligations have no meaning without conscience [...]. No important change in ethics was ever accomplished without an internal change in our intellectual emphasis, loyalties, affections, and convictions”⁶³.

Despite the restrictions and limitations of property rights in Land Law, we find that, and in certain contexts, the property issue is still a taboo and it is not easy to interfere in owners rights. 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 scarcity⁶⁴. 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”⁶⁵.

As Leopold said, “No important change in ethics was ever accomplished without an internal change in our intellectual emphasis, loyalties, affections, and convictions”.

⁶² *Id.*, p.209.

⁶³ *Id.*, p.210.

⁶⁴ Daniel Bromley and Ian Hodge, “Private property rights and presumptive policy entitlements: reconsidering the premises of rural policy”, in *European Review of Agricultural Economics*, n° 17, 1990, p.198.

⁶⁵ *Id.*, p.199.

If the conception of land as a humanity inheritance, as presented by some classical and marginalist economists, allows a responsible and reciprocal view of the property institution, the ethical considerations of Leopold, namely his “community-earth” concept, extends the consideration of human actions consequences in a challenging way.

IV. Concluding Remarks: Improving Inconformity and Curiosity in Economic Research and Policy

It is important to stress that neither the economic works I considered nor the legal norms present an absolute notion of property. On the contrary, memory, plurality and (legal reality) present an institution that gives control and power of exclusion over things but in a regulated and interdependent way, considering other’s rights and interests in different temporal and spatial terms.

The introduction of an ethical dimension regarding human decisions complements that reciprocal view through its enlargement to all “members-fellows” of the “community-earth,” as Leopold wrote. This ethical approach improves the pluralistic nature of economics and constitutes a challenge as well, one that improves inconformity and curiosity in economic research. This challenge is essentially expressed in the *community-earth* concept because it allows a new approach regarding land use and its institutional background in some central economic issues and notions, namely:

i) The enlargement of the universe of human action consequences and, thus, the *enlargement of reciprocal relations* regarding human “fellow-members”;

ii) The possibility to *rethink property* in the sense that the power and control allowed by it comprehends an important, unique and multidimensional universe – the “Land Pyramid” or the “biotic team” according to Leopold conceptualization. The coexistence of economic values with cultural and ecological ones demands policy and legal rules that integrate these dimensions in property rules⁶⁶. Thus, “community-earth” demands an enforcement of landowners obligations:

“[...] the existence of obligations over and above self-interest is taken for granted in [...] rural community enterprises as the betterment of roads, schools, churches, and baseball teams. Their existence is not taken for granted, nor as yet seriously discussed, in bettering the behavior of the water that falls on the land, or in the preserving of the beauty or diversity of the farm landscape. Land-

⁶⁶ It is important to stress that some of the legal rules considered in my research, namely international ones, seek values besides human interest and use (e.g., UE Habitats and Birds Directives).

use ethics are still governed wholly by economic self-interest, just as social ethics were a century ago”⁶⁷.

iii) The need to *redefine the concept of value*. Its unidimensional expression in monetary terms does not comprehend the wealth of biotic life - something that does not fit with mathematical *calculus*. The presentation of monetary evaluations as a way to the perception of the value of wildlife⁶⁸, for instance, corresponds to a distant, utilitarian and artificial relation with the community-earth. As Leopold said:

“When we conclude that we must bait the farmer with subsidies to induce him to raise a forest, or with gate receipts to induce him to raise game, we are merely admitting that the pleasures of husbandry-in-the-wild are yet unknown both to the farmer and to ourselves”⁶⁹.

iv) *A new approach to sustainability* instigated by the idea that land has an intrinsic value besides inter-generational solidarity (anthropocentric view) – the “biotic rights” referred by Leopold. The conservation attitude, which Leopold describes as capacity to be humble aware that each stroke is a signature on the face of his land (“written not with a pen, but with an axe”)⁷⁰, should be based on knowledge, love and respect. For him, human “superiority over the beasts” is related with our capacity to “mourn the loss” of species because it expresses the recognition of other life-subjects besides human ones:

“For one species to mourn the death of another is a new thing over the sun. The Cro-Magnon who slew the last mammoth thought only of steaks. The sportsman who shot the last pigeon thought only of his prowess. The sailor who clubbed the last auk thought of nothing at all. But we, who have lost our pigeons, mourn the loss. Had the funeral been ours, the pigeons would hardly have mourned us. In this fact, rather than in Mr. Dupont’s nylons or Mr. Vannevar Bush’s bombs, lies objective evidence of our superiority over the beasts”⁷¹.

The search of harmony and balance between the “fellow-members” of the “community earth” present in Leopold thought instigates the primary and central philosophical question which search the human place in the world.

Aristotle teleological approach identifies *happiness or well-being* as the human end, which implies the improvement of the best of the human qualities (moral virtues and

⁶⁷ Aldo Leopold, *op cit.*, p.209.

⁶⁸ One should mention, e.g., the nature evaluation techniques such as the Hedonic pricing, Travel cost method, Contingent valuation and Willingness to pay.

⁶⁹ Aldo Leopold, *op cit.*, p.175.

⁷⁰ *Id.*, p.68

⁷¹ *Id.*, p.110.

contemplation). Thus, human reason should serve the great purpose of human life. Is this purpose compatible with destruction of our “fellow-members”? Hardly, if we think that *De Anima* is common to all living creatures; all have an end; all, including human being, search perfection, i.e. the accomplishment of life in its great diversity.

The development of an ecological conscience stressed by Leopold implies also an aesthetic, the improvement of the perception potential, the education of sensibility regarding beauty. The poetry of *Sand County* transmits the music of invisible things, those that require education and habituation, like the moral virtues of Aristotle. Regarding birds, the invisible are the precious ones because “there is a peculiar virtue in the music of elusive birds. Songsters that sing from top-most boughs are easily seen and as easily forgotten; they have the mediocrity of the obvious”⁷². Thus, Land Ethics corresponds to a Land Aesthetics⁷³.

That correspondence has always been present in philosophy (e.g. Plato, Aristotle, Kant and Hegel). Regarding natural things, it seems important to remember Kant *sublime* idea. To Kant, the ultimate mission of Philosophy is to establish the relation between man and his destiny and the *sublime* idea allows precisely the articulation between reason and morals. The “spectacle” provided by mountains, storms, volcano, hurricane, the ocean, the water falls of powerful rivers is *sublime* because it improves the soul forces above its limits ⁷⁴ and allows the discovery of resistance as a human faculty. This one encourages the comparison with the “apparent” omnipotence of nature and our physical impotence, something very present in Turner painting. The spiritual faculty of *sublime* is something instigated by natural elements in Kant view.

Reason, happiness and virtue concepts appear together in ethical thoughts and are strongly demanding to Economics in its theoretical and practical consequences but, and as Leopold said in an ironically manner, there is no problem, “this sound simple”, considering that we all love our land:

“[...] do we not already sing our love for and obligation to the land of the free and the home of the brave? Yes, but just what and whom do we love? Certainly not the soil, which we are sending helter-skelter downriver. Certainly not the waters, which we assume have no function except to turn turbines, float barges, and carry off sewage. Certainly not the plants, of which we exterminate whole communities without batting an eye. Certainly not the animals, of which we have already extirpated many of the largest and most beautiful species. A land ethic of course cannot prevent the

⁷² *Id.*, p. 53.

⁷³ Maria José Varandas, *op cit.*, p.166.

⁷⁴ Immanuel Kant, *Crítica da Faculdade do Juízo*, Lisboa, Imprensa Nacional Casa da Moeda, [1790] 1998, p.158.

alteration, management, and use of these 'resources', but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state"⁷⁵.

The marvelous travel through the seasons and counties provided by *A Sand County Almanac* improves inconformity and curiosity and, therefore, can contribute to our reconciliation with the "earth-community", a new and redefined *oikos*.

⁷⁵ Aldo Leopold, *op. cit.*, p.204.

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