Sustainable Development and Institutions: the case of property rights

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Abstract

Property rights correspond to one of the central institutions in the debate on sustainability. Nowadays, and in the case of landed property rights, this importance has been worldwide increased by the concerns on food security and climate change. In fact, the control and use of important natural resources allowed by the institution of property are crucial to food production and the mitigation of climatic changes. The paper presents the institution of property rights considering the contribution of economic theory, namely Classical Political Economists and Institutionalism perspective. The revision of literature and conceptual approach on property rights is followed by the analysis of crucial norms regarding the definition of landed property rights in the Portuguese case, providing the base to critically address this institution within the debate on sustainability.

Keywords: Sustainability, Institutions, Land, Property Rights, Law and Economics

1. Introduction

According to Hodgson, "Property is a crucial economic institution" (Hodgson, 2016: 684). The current reflection on landed property is stressed by the risks and problems faced by our societies such as food security and climatic changes. In the Portuguese case, as in other developed countries, problems of desertification and the frequency and dimension of forestry fires in recent years (including protected areas) are additional factors of risk and, thus, of increasing attention to land control and management. Therefore, the search for sustainability should include the consideration and critical approach to the institution of property, that is, the rules that shape the control of natural resources such as land. Vandana Shiva refers that "Land is inelastic. Fertile land is a very precious and very scarce resource. It needs to be protected and conserved as an asset of the farmers and as a national heritage to be passed on to future generations. [...]. Climate change and peak oil should wake us up to the consequences of destroying our local food economies. (Shiva, 2008: 39). In fact, the control and use of important natural resources allowed by the institution of property are crucial to food production and the mitigation of climatic changes. The paper presents the institution of property rights considering the contribution of economic theory, namely Classical Political Economists like Jean- Baptiste Say (1803), Thomas R. Malthus (1820), and John Stuart Mill (1848), which present land as a common heritage, and Institutionalist perspective, namely T. R. Ely (1924) and John R. Commons (1934).

2. Methods

The discussion of the main findings and results related with landed property rights is found in theoretical and secondary sources and considers a case study- the Portuguese case. In fact, and besides the revision of literature on property rights based on the history of economic thought, the paper integrates legal and juridical information (e.g., jurisprudence), which provides important elements regarding the discussion of landed property rights in Portugal. The presentation of the Portuguese case illustrates central aspects and approaches related with the institution of property such as its relative and reciprocal nature raising the possibility and importance of property rights restriction envisaging sustainability purposes.

3. Results and Discussion

3.1 Property Rights and Sustainability in Economic Thought

Classical Political Economy and previous liberal authors present the institution of property as a responsible and worthy one stressing its relative nature. The changes related with the definition of the "public interest" contribute to explain the evolution of rights limits. Responsibility can remit to different purposes – economic progress, protection of environmental values, social justice and ethics – and presents specificities in landed property.

According to Locke (1681) property rights should be founded on labor and have "natural" and "moral" limits. The former ones 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" (Locke, 1823 [1681]: 118).

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 that this share, and belongs to others. Nothing was made by God for man to spoil or to destroy" (Idem: 117).

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 correspond to care, the abstention of prejudicial actions and should continue to inspire the social conventions that regulate property.

If labor explains the formation of the property right "at the beginning", the conventions permit its regulation in the next phases of historic evolution. However, the principles that inspire it maintain. The moral legitimacy present in Locke's theory of the "First Occupancy" explains most of the interest that is devoted to it (Waldron, 2006: 5).

Adam Smith's reflection on property involves a critical approach related, namely, with inheritance laws, which according to him constitute an obstacle to the development of small property and land market. The criticism of inheritance norms is also present in the Political Economy of Say (1803), Malthus (1820) and Mill (1848) and remits to a proposal that aims to improve the institution of property in terms of economic progress, social justice and ethics.

The critical approach to the institution of property within Classical Political Economy involves a specific conception of land. In Says view, for instance, land provides a productive service – "le service productive de la terre" (Say, 1803: 410) – that gives utility to a set of natural materials. The possibility of appropriation of natural elements does not mean, however, absolute rights because, and in Say's words:

> "It is not the landowner that permits the nation to live, to walk and to breathe in his lands : it is the nation that permits the landowner to cultivate the soil, which she

> recognises as its owner, and does not concede to anyone in an exclusive way the enjoyment of public places, big roads, lakes and rivers“ (Say, 1813: 410).

In Malthus view, land is different from the other productive resources, a “God' gift” or “nature gift” whose surplus is explained by “that quality of earth” (Malthus, 1820).

According to Ricardo land is a resource like any other. For him the surplus, the rent, is due to the scarcity of fertile land and not to mysterious forces of nature (Ricardo, 1817).

Diversely, Mill's criticisms of property norms, especially those of inheritance, are very strong and justified by land specificity. Responsibility and merit are the values that should inspire property, which, corresponds to “the primary and fundamental institution” and is analysed in his theory of wealth distribution. Thus, Mill's approach goes beyond mere efficiency and includes a dimension of social justice and ethics. The following quotations illustrate this vision:

> “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” (Mill, 1848: 235).

Moral references on property are present in Classical Political Economy but also in its critics and heirs. To Walras (1896), one of the Marginalists, for instance, landed property is considered in the context of Social Economics, that is, within the domain of interdependence relations, and should be founded in the persecution of social justice:

> “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” (Walras, 1986 : 33-34).

> “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“ (Idem : 219).

Walras conceived land as humanity's inheritance and, therefore, the norms of its appropriation (property rights) should respect the interests of future generations, a central dimension of the current concept of sustainability.

The reflection on property within a framework of interdependence and institutional relations is the theoretical ground of Institutionalism. Old Institutionalists consider norms and conventions that

mediate human interactions, that is, institutions, with influence on the control of resources needed for human subsistence. According to Veblen (1898-9), 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 Veblen's view corresponds to the "primary institution" (Veblen, 1898-9).

In Old Institutionalism the reference to formal norms, namely law, corresponds to an important dimension in the research on land use and property. In fact, the presentation of property as an institution, that is, as a set of norms involving rights and duties remit to its social, ethical and political dimension and, thus, to the acknowledgement of its design and evolution in particular contexts, reflecting also prevailing cultural and civilizational values. In *Land Economics* Ely (1924) identifies the following analytical domains in an institutionalist approach of land: "Legal characteristics of Land" and "The Social Characteristics of Land", which should concur to one common end: the improvement of the social conditions of living:

> "Men's relations to each other with respect to land are as fundamental as any other economic relations. In view of the importance of land in relations among men, policies and plans of land utilization should, if they do not already, converge toward one common end. That end is the improvement of the social conditions of living. It is a test or standard by which all principles and policies of land utilization should be measured" (Ely, 1924: 9-10).

> "The whole movement for the conservation of natural resources expresses an extension of social control of land. In our great cities, where land has its most intensive use, social control through building codes, planning and zoning laws, sanitary regulations, is growing. This tendency finds expression in what may be called the principle of social control: The more intensive the use of land, the more highly developed must be the social control" (Idem: 23).

The central place of the definition of "The scope of Land Economics" is occupied by "The Public Policies" of the following institutions: "Land Classification, Land Settlement, Social Control, Conservation, Land Tenure, Land Credit, land Utilization, Land Transfer, Land Taxation, Land Income, Planning, and Tenancy" (Ely, 1924: xii).

The contribution of Ely may remit to the design of a Political Economy of Land where institutions play a central role and converge to the improvement of living conditions and "the social ends of land utilization".

The 'social purpose' of property is addressed also by Commons (1934), through an approach that considers property in its *correlative* and *reciprocal* nature:

> "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" (Commons, 1034: 131).

The notion of *reciprocity* introduces the notion of rights limits and relativity: property rights are shaped by norms, namely legal ones, which define the scope of individual decision and *duties*.

In this discussion it should also be highlighted the contributions of the School of Property Rights, starting with Coase (1960), which in 1988 mentioned that:

> "When the physical facilities are scattered and owned by a vast number of people with very different interests…the establishment and administration of a private legal system would be very difficult. Those operating in these markets have to depend, therefore, on the legal system of the State" (Coase, 1988: 10, *apud* Hodgson, 2015: 691).

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, customs, and mores of a society"(Demsetz, 1995 [1967]: 207). What Barzel (1997), for instance, presents as "economic property" ("the ability to enjoy a piece of property") is the result of a state recognition, a "legal property" defining what individuals can and cannot do with things under their control.

Whereas Barzel establishes a distinction between legal rights and economic rights ("As I use the concept, property rights consist of legal rights (de jure) and economic rights (de facto" [Barzel, 2015: 719]), Hodgson's considers that "'the ability to enjoy' something" is not a right. Rights, Hodgson argues, "result from institutionalized rules involving assignments of benefits" (Hodgson, 2015: 692), an approach that integrates the contribution of Old Institucionalism:

> "[Property] is a relationship between people involving rights with regard to tangible or intangible assets. The exchange of property involves a minimum of not two parties but three, where the third is the state or a 'superior authority' (Commons, 1924: 87). These social relations involve rights, benefits and duties (Cole and Grossman, 2002; Hallowell, 1943). The basis of a right of ownership of a resource is an acknowledgement of that right by others, through mechanisms of institutional accreditation and legitimation. Property is a 'creature of…the legal system' (Penner, 1997: 3)" (Hodgson, 2015: 688).

This is in accordance with Hodgson previous developments on the subject:

> "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" (Hodgson, 2002: 122).

The theoretical insights introduced by the schools of economic thought allow the acknowledgement of property as a central institution in economic life, corresponding to a set of norms, namely legal ones, which define the scope of action in relation with resources. The presentation of property

rights in the Portuguese case illustrates this acknowledgement by considering the main legal sources that define property and landed property rights, highlighting the relative and reciprocal nature of this institution (Commons, 1934) regarding the integration of values and norms aiming the sustainability of landed property rights. The consideration of law with influence on property rights and the reference to jurisprudence cases illustrates and demonstrates the procedures and complexity involved in the practical implementation of sustainability values on land use and, therefore, on the design of landed property rights.

3.2 Property rights and sustainability: the Portuguese case

The main Portuguese legal sources that contribute to the definition of property and landed property rights are the following:

- The Portuguese Constitution;
- The Civil Code;
- Law in areas such as the environment, ecology, territory, and the Common Agricultural Policy (CAP).

In the Portuguese Constitution, the idea of rights reciprocity is found in the possibility of introducing restrictions on “fundamental rights”, a consequence of the adequacy of rights with the economic, social and political aspects of the Constitutional project. According to Portuguese constitutional law experts:

> “[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” (Canotilho e Moreira, 1933: 33).

In fact, it is possible to identify some explicit and implicit constitutional restrictions to landed property right. In explicit terms, these restrictions are mainly related with the possibility of expropriation in the following situations: excessive area and land abandonment. In implicit terms, it is important to mention the restrictions that may be introduced when property right clashes with, for instance, the right of ‘environment and quality of life’ (article 66º of the Portuguese Constitution). Regarding this aspect, the same authors refer the following:

> “The environmental protection can justify restrictions to other constitutionally protected rights. Thus, for instance, the freedom to build that is commonly considered inherent to the property right, is nowadays conceived as a ‘potential freedom to build’, because it can only develop in the context of legal norms which include those of environmental protection” (Canotilho e Moreira, 1993: 348).

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 and farm regulation.

The potential conflict between property right and the right to environment and quality of life remits to a central debate in Portuguese literature concerning property Law. One of the issues of this debate involves the conception of the right to ‘environment and quality of live’ as a subjective one

(like property) and, therefore, the transformation of the subject of rights no longer as a person or group of persons but as the "generation". This perspective expresses a shift from rights towards duties, that is, the "transfer of the problem from the rights arena to one of fundamental duties" (Canotiho, 2005):

> "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" (Canotilho, 2005: 48).

Some court cases illustrate the tension between rights and reveal the social and legal consolidation of sustainability concerns. This is the case of environmental jurisprudence Quinta do Taipal presented by Canotilho (1995), which involved a conflict between landed property right and the right to 'environment and quality of life'. According to Canotilho, this is a "*leading case* of Portuguese environmental jurisprudence" (Canotilho, 1995, quoted in Ferreiro, 2005: 311). There were four Court Judgments produced during the five years of the case. The process opposes a private landowner and the public prosecution and envisages the defense of the preservation of a water reserve used by a particular bird specie ('garças do Mondego') and the 'rights and freedom' to produce rice in that reserve. The public prosecution and the environmental position prevailed in this case. The Supreme court decision involve aspects which remit to the relative nature of property rights and the need to preserve other important societal values and rights such as the environmental and quality of life, stressing the reciprocal nature of property rights and, therefore, its social function. The judge refers that:

> "The idea of absolute and unlimited property rights, which is the result of liberal politico-economic conceptions, has been eroded by the emphasis in its social function in parallel with the evolution of political and economic systems towards more solidary forms of citizenship and institutional participation"

> "The restrictions (of private and public law) to the plenty and exclusive use of landowners, contained in the article 1305º of the Civil Code, are part of the right itself, with its normal elements. Therefore, they should not be conceived as exceptional attacks to the *dominus* absolute power"

> "Some of these restrictions of private law, as those of the article 1346º of the Civil Code, are already the result of an ecologic concern" (in Canotilho, 1995, quoted in Ferreiro, 2005: 312-313).

This court case illustrates the practical application of property law (Constitution and Civil Code) where environmental values were raised and took the lead. The decision of Quinta do Taipal case mobilized other legal diplomas, namely European Directives (e.g., Habitats and Birds Directives), as well as Portuguese Environment Law.

In fact, the regulation of land use through the law on these areas has impact on the delimitation of property rights. The Framework Environmental Law (Law nº 19/2014, 14 April) constitutes a general normative source on environmental and ecological issues and should be considered in articulation with other legal diplomas more directed to land uses like, for instance, the diploma on territorial reserves such as the National Agricultural Reserve (Decree nº 73/2009, 31 March). According to this diploma, the National Agricultural Reserve corresponds to a "restriction of public

utility of national scope integrated in the tools of territorial management" in alignment with European and national policies and the United Nations. The Decree refers that the "end of the last century added a new dynamic and broader vision to the classical conception of land and soil. This new vision identifies several social and environmental functions of land and soil besides the traditional ones (food, fiber and wood production)" (Regulation of water cycle, Energy production, Reduction of carbon emission, Support to biodiversity, Leisure activities)[1]; the diploma refers also the "increased social concern with environmental values and the multifunctionality of farm and forest land, a precious and indispensable resource in the search for ecosystem sustainability and the preservation of the planet"[2]. The different interpretations of the Decree on National Agricultural Reserve regarding, for instance, allowances in situation of expropriation resulted in jurisprudence that points out in opposite directions. The Judgement of the Supreme Court (nº 6/2011, 17 may), for instance, states that in expropriation situations the property under National Agricultural Reserve should be paid in accordance with the potential of construction of this land independently of different land classifications within other laws and regulations. This Judgement was changed by a more recent one (Judgment 2138/11, 7 May 2013) which states that: "Landed property integrated in National Agricultural or National Ecological Reserve […] cannot be classified as *'land appropriated to construction'* under expropriation processes"; "Even if a land, integrated in the National Agricultural Reserve, does not present agricultural potential, this does not mean that it can be considered appropriated to construction purposes"[3] (idem). These two jurisprudence cases remit to different views of land classified within National Agricultural Reserve (and Ecological National Reserve) as well as of the law that regulates its use and compensatory allowances in expropriation situations. In this realm, and considering these Judgements, we assist to an increase of environmental and ecological values in fundamental law related with landed property rights.

Common Agricultural Policy corresponds to an important institutional framework with significant impacts on land use and the definition of property reciprocal duties. The gradual introduction of environmental values in this policy (e.g., agro-environmental measures, 1992) involve financial transferences to farmers and, therefore, some of the restrictions on property rights present a specific and voluntary nature. The reference to sustainability purposes is central in the European Regulation on Rural Development Policy (European Regulation nº 1305/2013, 17 December). It is possible to find this reference, and among others, under recitals 4, 13, 14, and 22. The recital 22 refer that "The payments under agro-environmental and climatic measures should continue to have a prominent role in the support to sustainable development of rural areas and in response to the increase demand of environmental services" (European Regulation nº 1305/2013, 17 December). The search for sustainability gives place to rules, which envisage the control of effective good practices in land use and management. The European Regulation nº 1306/2013 presents eco-conditionality regarding the financial support under Common Agricultural and Rural Development Policy related with "good farm and environmental conditions of land'. The financial support involved in this policy is managed through specific rules, including the eco-conditionality. The diploma states that conditionality aims a sustainable agriculture through the awareness of farmers, which are obliged to respect basic norms (translated by the Member States) in terms of environment, public health, animal and plant health, and the well being of animals. The same diploma refers that the conditionality implies some "administrative constraints of farmers and national administration considering the need to maintain registration, controls and sanctions, if necessary" (European Regulation nº 1306/2013).

[1] Our translation.

[2] Idem.

[3] Idem.

We are dealing with European Regulation, which define the scope of landed property rights in relation with the purposes of Common Agricultural and Rural Policy. The control of good practices related with land use involved in eco-conditionality principle is related with the decoupling between production and funding introduced by CAP reform of 2003. In fact, the separation between production and the reception of financial support presents several risks, namely farmland abandonment and environmental and ecological threats. In Portugal these rules have been have been criticized by some authors (Baptista, 1993, Cunha, 2004, Rolo e Cordovil, 2014). According to Rolo and Cordovil, for instance, "[T]he application of important CAP financial resources in the form of income support without any connection with agro-forest production and its contribution to territory planning constitutes a symptom of incoherence with the mission and the goals of territorial and social cohesion" (Rolo e Cordovil, 2014: 57).

In recent research (Terres et al, 2015, 'Farmland abandonment in Europe: identification of drivers and indicators, and development of a composite indicator of risk'), Portugal appears as one of the European countries with "higher risk of farmland abandonment" (Terres, 2015: 20), followed by Spain, Italy, Greece, Latvia, Estonia, Finland, Sweden and Ireland (idem, ibidem). The reasons to farmland abandonment are "multidimensional" and include "natural constraints, land degradation, socio-economic factors, demographic structure, and the institutional framework" (Idem: 21).

Farmland abandonment may "[…] threaten farmland biodiversity […] associated with anthropogenic landscape of high nature values. […]. Besides its influence on biodiversity, land abandonment has a range of consequences for ecosystem functions and the provision of ecosystem services. […]. This influence is often context-specific, e.g., wildfire frequency and intensity, nutrient cycling, carbon sequestration, cultural landscape values, and water balance. Moreover, food security being one of the major challenges for the future, the EU has a justified strategic interest in keeping its agricultural production potential, in view of short and long term need such as food, fiber and biomass production"(Terres et al., 2015: 21).

In Portugal, and besides ecological, socio-economic and demographic aspects, there are institutional/legal obstacles involved in land abandonment. In fact, the Constitutional restriction on property related of the 'abandonment of the means of production' is not translated into civil law or other more specific legal diplomas in a clear form, illustrating the difficulties and complexity involved in a concrete threat to sustainability and, therefore, undermining the importance of the institutional framework on property rights.

4. Conclusions

Institutions are fundamental in the debate on sustainability. Among the institutional aspects that should be considered in the search for more sustainable economies are property rights. Property and landed property are considered by different schools of Economic Thought. In fact, we find a reflection on land and its form of appropriation, that is, property, in Classical Political Economy and Institutionalism. The specificities of land, namely its conception as humanity's inheritance, justify the concerns and critical analysis of the institutional dimensions involved in its appropriation, that is, property law. These critics envisage economic and moral concerns and remit to the concept of sustainability. The reference to law is central in the debate envisaging more efficient and ethic property institutions among Classical Political Economists. Old Institutionalism presents important insights in the analysis of property. The proposal of *Land Economics*, for instance, integrates the reference to public policy aims and areas related with land and property - a Political Economy of Land. The notions of correlativity and reciprocity of rights presented by Commons highlights the relative nature and the social function of property. His conception of rights as a set of correlative and reciprocal duties involves the acknowledgement of legal norms in a central way. More

recently, Hodgson develops this perspective by stressing the current importance of property and its legal dimension.

The reference to landed property rights in the Portuguese case considered the main legal sources and raises some of the issues regarding a sustainable land use. The consideration of the Portuguese Constitution, the Civil Code and law on environment, territory and Common and Rural Development Policy allows the illustration of sustainability concerns regarding land use and farm activities, raising, at the same token, the complexity and problems that arrive in cases of rights conflicts (e.g., property rights and environment and quality of life). In fact, jurisprudence cases considered in the paper remit to conflicts involved in land use and the diversity of interpretations of Law related with landed rights and other fundamental rights. Territorial reserves and eco-conditionality under Common and Rural Development Policy correspond to specific situations of property rights restriction related with sustainability goals. According to recent research, Portugal is one of the European countries with more risk of farmland abandonment. Besides some fundamental aspects of CAP, such as the decoupling between financial support and productive counterparts, which may constitute a risk in this realm, the Portuguese law related with land and territory management does not offer easy and clear solutions to the problem. Thus, the institutional dimension involved in the design of property rights is central to address sustainability challenges.

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