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## Ownership claims and property rights

**BENOÎT PIGÉ\***

*We contrast property rights (post social rights) and ownership (pre social rights). We call ownership the relation one has with an asset (the pre-social natural right), and property rights the rights that frame the relations one has with others through the medium of the asset (post-social rights). Property rights are economic arrangements to fulfill individual and collective requirements. By contrast, ownership results from the risk exposure of oneself to the use of some assets' attributes. This distinction allows getting a new theoretical approach on both land property and firm property.*

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*“Theories of property in the Western philosophical tradition divide roughly in two. There is a notion of property as presocial, a natural right expressing the rights of persons which are prior to the state and law, this being the view of Hugo Grotius, Samuel von Pufendorf, John Locke, Immanuel Kant, and Georg W.F. Hegel; and there is a notion of property as social, a positive right created instrumentally by community, state, or law to secure other goals – the theory of Thomas Hobbes, David Hume, Adam Smith, Jeremy Bentham, Emile Durkheim, and Max Weber.” (Getzler 1996: 641).*

Economic studies focus on property rights to establish a framework for corporate governance (Demsetz 1967; Furnbotn & Pejovich 1972) or to understand their economical impact (Anderson & Hill 1975; North & Thomas, 1973). Many discussions on property rights refer to the search of a hierarchy to

establish a priority among conflicting property rights or claims (Becker 1977). Whether one considers property as a natural right or as a positive right, the consequence can be significant on the management of firms or on land settlement. We do not propose to settle the dispute among the various authors but to start with this distinction to assess the difference between *pre-social* rights (or *natural* rights) and *post-social* rights (or *positive* rights).

We contrast property rights (*post social* rights) and ownership (*pre social* rights). We call *ownership* the relation one has with an asset (the *pre-social* natural right), and *property rights* the rights that frame the relations one has with others through the medium of the asset (*post-social* rights). Property rights are institutionally devised (North 1981) to regulate the various uses of an asset's attributes.

The objectives assigned to property rights can be economic efficiency, egalitarian wealth repartition, justice, etc. Law can recognize some property rights, some others can be customary or they can be reminiscent of past institutions. Property rights also result from history and confrontation among various constituents. They are normatively legitimate when they protect and recognize ownership. The legitimacy of property rights is always contingent on other institutions that set the framework for a social life. Therefore, the adequacy between property rights and ownership can only be positively studied at the territorial level (Besley 1995; Torre-Castro & Lindström 2010).

By contrast, our definition of ownership as a *pre-social* natural right implies that ownership can exist even when current and local institutions do not recognize it. Ownership is not instrumental; it is normative, contingent on the relationship between one-self and the asset. Therefore, it is a key concern to define *ownership* for deriving a moral standpoint to assess the normative legitimacy of property rights.

Normative legitimacy is usually a dead-end question as it refers to one's own ideology or preferences. In a market-based approach, normative questions are dismissed as irrelevant. Only instrumental questions seem to matter about the rules governing property rights. Property rights are assumed to be necessary tools which do not encompass ethics but which are relevant to the pursuit of economic efficiency and wealth creation.

We adopt a different approach and consider that normative legitimacy matters (Jones and Wicks 1999), and that normative questions are fundamental for any development of property rights. Moreover, if instrumental approaches lack any normative foundations, they tend to legitimize the right of the powerful (Klein 2007). If one hopes to find any normative foundations for property rights, one has to refer to property rights as conditions for the development of human society, i.e. for preservation of the human condition (Arendt 1958).

## **I. Property rights**

Institutions delineate property by establishing legal, contractual or customary property rights. The normative justification of these property rights is a widely discussed subject among academic fields. However, the nature of the asset that is the object of property is usually neglected.

### *A. The infinite dimensions of asset attributes*

Let us hypothesize that an asset  $X$  is composed of  $n$  dimensions. Each dimension  $X_i$  reports to a specific use or human cognition. Dimensions differ according to time and space, to history and culture, to institutions that govern a

community or a nation (Aoki 2007, 2010). All dimensions are related to human use or cognition<sup>1</sup>:

$$(1) \quad \mathbf{X}: \begin{pmatrix} X_1 \\ X_2 \\ \dots \\ X_n \end{pmatrix}$$

*The infinite character of dimensions.*— At a given time and place, not all dimensions are necessarily known or recognized. We hypothesize that the number of dimensions of an asset is infinite, but that only a small part of them are humanly recognized at any given time and place. The key aspect of any dimension is its human recognition. Only persons confer meanings to the dimensions of an asset. As observed by German philosopher Heidegger (1927), a traditional hammer is no more than a piece of wood and a piece of metal tied together but it possesses some specific dimensions due to the person who uses it. A hammer can be considered as wood for the fire, it can be considered as a useful tool to drive nails, or it can even be considered as a weapon.

Asset attributes relate to one or several dimensions. They are the tangible dimensions of an asset. They are supposed to be unbiased and objective characteristics or aspects of an asset (Barzel 1997: 5). However, asset attributes can also confer meaning to intangible dimensions. For instance, a hammer can have an aesthetic dimension; one could use it to decorate his or her living place.

All kind of assets have several dimensions, which can evolve according to time and places. For instance, a field has several dimensions. For hunters, it is a place to catch animals; for gold prospectors, a place to investigate minerals; for farmers,

<sup>1</sup> An asset's dimension could be recognized without having any use of it.

a place to sow and harvest; for everyone, it is a place to go for a walk and enjoy nature. Some of these dimensions can be contradictory but most of the time they are complementary.

*The object of the property: the asset dimensions and not the asset essence.*— We deem that both ownership and property rights do not rest on the substance of things but only on their appearance, i.e. their dimensions which depend on human perception (Heidegger 1927, 1962). Therefore, we cannot focus on the ownership (or property rights) of an asset's essence<sup>2</sup> but only on the ownership (or property rights) of the asset dimensions.

This diversity of asset dimensions is already well recognized in human affairs<sup>3</sup>. For instance, a sand quarry can be turned into a fishing lake<sup>4</sup>, a hunting area can be cleared and farmed. Some asset dimensions can be affected by external factors. For instance, the pollution generated by a nearby factory, or the noise of a highway, can affect a habitation. Some asset dimensions can also generate side effects on neighboring properties (Coase 1960).

### *B. The nature of property rights*

Property as a bundle of rights is a concept firmly accepted in the property rights' literature. We go one-step further by explicitly considering that the bundle of property rights is related to a plurality of dimensions of the object of ownership<sup>5</sup>.

<sup>2</sup> The essence of things cannot be owned by human beings, but only their use (Thomas Aquinas (1272, II-II Q66).

<sup>3</sup> An asset can even encompass social attributes such as ethnic significance because of the presence of ancestors' graves, or common history if the field was the place of an historic battle or the home of a famous individual.

<sup>4</sup> For instance, in Victoria (Canada), a sand quarry was turned into the magnificent Butchart Garden.

<sup>5</sup> Nahapiet and Goshal (1998: 243) explicitly recognize the plurality of dimensions for social capital.

*Property rights as a bundle of rights.*— “What is owned are rights to use resources, including one’s body and mind, and these rights are always circumscribed, often by the prohibition of certain actions. ... It is not the resource itself which is owned; it is a bundle, or a portion, of rights to use a resource that is owned” (Alchian & Demsetz 1973: 17). Therefore, the same asset can have a plurality of individual or collective proprietors.

“Property rights include any social institutions that define or delimit the range of privileges regarding specific resources granted to individuals” (Asher, Mahoney and Mahoney 2005: 8). Property rights are economic arrangements to fulfill individual and collective requirements. They emerge from lawful recognition, i.e. from institutions; therefore, they are historically and locally determined (Benjaminsen & Sjaastad 2008; Kim and Mahoney 2002). They are part of institutions established to set up limits to assets’ use and to provide a structure to everyday life (North, 1990). They include not only legal or contractual rights but also customary property rights (Rawls, 1971).

Each asset X can be grasped through its property rights  $PRX_j$ , which encompass its diverse dimensions:

$$X_n: \begin{bmatrix} PRX_1 \\ PRX_2 \\ \dots \\ PRX_l \end{bmatrix} \text{ with } PRX_1: \begin{pmatrix} X_1 \\ \dots \\ X_i \end{pmatrix}; PRX_2: \begin{pmatrix} X_{i+1} \\ \dots \\ X_j \end{pmatrix}; PRX_l: \begin{pmatrix} X_k \\ \dots \\ X_m \end{pmatrix}$$

A property right  $PRX_l$  can encompass several dimensions (for instance the  $X_l$  and  $X_2$  dimensions). A single property right could also encompass all known dimensions.

*Property rights delineate the use of assets.*— The main allocative function of property rights is the internalization of beneficial and harmful effects (Demsetz

1967: 350). “*Private ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner’s private rights*” (Demsetz 1967: 354). Property rights are restricted to the specific dimensions involved and are ruled by local, national or international institutions. In some countries, legal property rights include the rights to destroy an asset. In other ones, this right will be strongly regulated, it may be subjected to public authorization or involve the compensation of other property rights’ holders<sup>6</sup>.

“*Property rights convey the right to benefit or harm oneself or others. ... The recognition of this helps to highlight the close relationship between property rights and externalities*” (Demsetz 1967: 347). “*What the landowner in fact possesses is the right to carry out a circumscribed list of actions ... A system in which the rights of individuals were unlimited would be one in which there were no rights to acquire. ... The cost of exercising a right (or using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right*” (Coase 1960: 44).

Property rights’ conflicts can happen on two instances. One when a given property right is collectively held. The other when different property rights (held by different owners) apply to the same asset. Running streams in XIXth century England are good examples of both kinds of conflicts (Getzler 1996). These conflicts are usually resolved through legal settlement or with the application of customary norms (Ellickson 1986, 1991).

*Specific and residual property rights.*— Some authors (Libecap 1989; Schlager & Ostrom 1992) have proposed to synthesize property rights under a few synthetic

<sup>6</sup> In Europe, if one wants to destroy part of his or her home to make some new installations, he or she has to apply for a variance which is granted by county councils. Moreover, if there is a local housing shortage, a habitation that is uninhabited for a long time can be requisitioned by the State to provide a roof for families. Of course, numerous legal conditions are required to implement such a procedure of requisition. In the same way, in local cases of famine, if food is privately available but his or her owner does not agree to dispose of it and prefers to let it rot, many countries allow (and even require) the State to requisition the food.



rights such as access (the right to enter a defined physical property) and withdrawal (the right to obtain the products of a resource) with varying extensions as regard management, exclusion and alienation.

However, due to incomplete contracting, some dimensions of an asset cannot be entirely specified in contracts. Therefore, Grossman and Hart (1986: 692) suggest distinguishing specific and residual rights. Specific rights are contractually well-defined property rights. By contrast, Grossman and Hart (1986) posit that the residual right (that we denote  $\bar{PRX}$ ) allows using the asset for all unspecified uses (that we denote uses  $k$  to  $n$ ). The residual property right includes all unknown or undefined dimensions of an asset:

$$\bar{PRX} : \lim_{n \rightarrow \infty} \begin{pmatrix} X_k \\ \dots \\ X_n \end{pmatrix}.$$

This approach is aimed at maximizing economic efficiency (Hart 1988). The proprietor of residual assets' dimensions will not only have incentive to maximize the use of asset dimensions but also to discover new dimensions and uses.

Specific property rights are considered by the main proprietor as obligations

and restrictions to its capacity to use the asset. For instance,  $PRX_1 : \begin{pmatrix} X_1 \\ \dots \\ X_i \end{pmatrix}$  is a

residual right. It is considered a contract between the proprietor of residual rights and the acquirer of this specific right for using asset's dimensions  $X_1$  to  $X_i$ .

By contrast, Coase (1960) and Alchian and Demsetz (1973) consider that property rights (and therefore residual rights) are always limited. We adopt Coase position and depart from Grossman and Hart (1986) by considering that property rights are always limited and therefore are always specific.

## II. Ownership claims

Property rights are set to protect the society (Bergson 1932) and the individual. Arendt (1958: 71) considers that the protective function of property rights is a condition of individual freedom: “*to guarantee the darkness of what needs to be hidden against the light of publicity*”. We suggest that this protective function of property rights can be related to the risk exposure of individuals and communities.

### A. *The definition of ownership*

We define ownership claims as the ethical counterpart of the risk exposure. Ownership claims emerge from one’s own risk exposure to the use of some asset dimensions. Three possibilities exist:

- (i) Individuals, or communities, have both ownership claims (i.e. are exposed to the risk generated by the use of some asset dimensions) and property rights.
- (ii) They have property rights without being exposed to the risk generated by the use of the asset (i.e. without having ownership, as it emerges from our definition).
- (iii) They are exposed to the risk generated by the use of some asset dimensions (i.e. have ownership claims) but have no corresponding property rights

*The instrumental legitimacy of property rights.*— Classic economic assumptions regard efficiency as an end in itself that is desirable whatever the means employed to get it. “*The general principle underlying the maximizing allocation of ownership is that the greater a party’s inclination to affect the mean income an asset can generate, the greater is the share of the residual (that is, ownership share) that party should assume. (...) The net income an asset will generate*

*depends on the delineation of rights, that is, on how secure rights are over it*" Barzel (1997: 9). According to this postulate, property rights should derive from their capacity to influence the actors' behavior in some risky situation. Property rights ought to have a strong instrumental legitimacy when they help secure the control of an asset by the actors that can maximize its economic use.

By contrast, we posit that efficiency is desirable, but only as a mean for attaining a better situation for the people involved. We also reverse the relation between the risk and the individuals (or the communities). We do not focus on the capacity to affect the risk but on the fact of being affected by the risk deriving from the use of a thing. The factor generating the ownership is the *risk exposure to the use of the thing*.

In the classic examples of Coase (1960), the doctor who built a consulting room against the confectioner's kitchen becomes affected by the noise of the confectioners' machinery. However, it is also obvious that the confectioner is exposed to the risk of his or her machine. Therefore, if the confectioner has property rights on his or her machine, both the doctor and the confectioner are exposed to the risk of the machine's use. The legal question is to settle and circumscribe their respective property rights.

Since Coase (1960), it is well known that the use of an asset can generate externalities that have to be compensated. This is particularly significant when a new asset dimension is emerging. As long as an asset dimension is unknown, there can be no property right on this unknown dimension. When new dimensions are emerging, they become subject to public scrutiny for setting the nature of their property rights<sup>7</sup>.

<sup>7</sup> For instance, many concepts were initially devised to grasp assets apparently limited to a single dimension. With modern scientific discoveries, it happened that new dimensions are appearing. See, for example, Bachelard (1940) on the mass concept. For some periods, following the discovery of a new technology, ownership may appear unrestricted, but eventually legal and contractual restrictions will emerge, property rights will appear. Moreover, most new dimensions, even if privately discovered, exist only when they are publicly recognized and appropriated.

*Ownership results from one's risk exposure to the use of a thing.*— We posit that the risk exposure to the use of a thing legitimates the claims that persons or groups hold on some of the asset's attributes<sup>8</sup>. We call these claims *ownership*. Legal or contractual property rights can ratify this risk exposure; nevertheless, ownership (or *pre-social* property) remains different from formal recognition of property rights (*post-social*). If property rights recognize one's ownership, he or she can protect him or her-self from the risk derived from the use of the thing<sup>9</sup>.

When considering Demsetz's (1967) difference between the American Indians from the mountains and those from the plains, we hold that both owned their land as a resource for use but only American Indians from the mountains have developed property rights.

The use of things legitimates the claims that persons or groups hold on some assets' dimensions. Legal or contractual property rights can ratify the use, but the legitimacy of the use is preliminary to the formal recognition of property rights. Legal or contractual property had no meaning for Robinson Crusoe so long as Robinson was alone. There are no legal or contractual questions when the other is absent, when the other cannot be involved in questions arising around the use of things. However, when the other is present, his or her presence legitimates moral questions about the use of things (Levinas 1969).

A main difference between ownership and property rights is the opposite relation with an asset's use. Property rights set the legal or contractual conditions of use, while use sets the legitimacy of ownership<sup>10</sup>. In the first case, the use is

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The setting of Lucas in the Supreme Court in 1992 (Sax 1993) is of interest for our analysis as regard the emergence of new dimensions for a land property. South Carolina enacted new restrictions in 1988 on beachfront properties resulting in a loss of value for two lots that David Lucas had bought in 1986. The central question was whether the use restrictions were part of the landowner's title to begin with: "*The Court correctly perceives that an ecological worldview presents a fundamental challenge to established property rights*" (Sax 1993: 1439). In this article we propose to extend the concept of ownership and property rights to encompass such previously neglected dimensions.

<sup>8</sup> For instance, agricultural production is an implicit claim on the ownership of land (Atwood, 1990).

<sup>9</sup> Or to protect oneself from the possible deprivation of the possibility to use.

<sup>10</sup> This postulate takes support from Locke's labor theory of property (Locke 1690; Becker 1977). However, it departs from Locke's postulate that commonly owned property is of no use without the application of labor, by considering the use

possible, or is regulated, while someone has property rights on some asset dimensions (the direction of the relation is from someone to the asset). In the second case, the use of some asset dimensions is a fact that generates ownership for the individual or the group exposed to it (the direction of the relation is from the asset to someone).

Ownership can be set apart from property rights. This was the case of slaves, who had almost no property rights on their own body. This case is mentioned by Demsetz (1967: 349), who considers that slavery is mainly a problem of internalization (“*to take into account the sums that slaves are willing to pay for their freedom*”). Legally, slaves had no property rights on their own body; they had to pay to recover their property rights. Philosophically and ethically, even if the law does not recognize the right of a person to own his or her own body, this body is nevertheless his or her own. Property rights can be dissociated from the ethical dimension of ownership<sup>11</sup>.

This distinction helps to define differences between the property rights held over an asset and the legitimate claims arising from involvement in an asset’s development, even if the person involved has no recognized property rights. If a scientist finds a valuable discovery while being employed by an organization, the discovery will be the property of the organization. Nevertheless, the scientist is a legitimate owner of his or her discovery. This is recognized in the Nobel process where the prize is attributed to the scientist and not to the organization that employs her or him.

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concept in its broad meaning. Something can be used without application of any labor. The aesthetic of a landscape, the smelling of flowers, the quality of mountain water, are not redeemable to human work. Moreover, even the contribution of ecosystems to production is prior to any labor (Haddad 2003); however, dependency on ecosystems signifies that there is a kind of use of ecosystems and therefore a relation of ownership between individuals or communities using the ecosystem and the ecosystem itself.

<sup>11</sup> In the same way, even if private ownership has usually been associated with sedentary lifestyle, nomads (or American Indians from the plains) retain some moral claims on the lands they travel around.

### *B. Risk exposure and asset use*

A person can be exposed to the risk of an asset either by using some of its attributes or while some other persons, communities, or organizations, are using its attributes.

American Indians from the plains had no property rights (Demsetz 1967); nevertheless, they were exposed to the risk attached of losing the access to the land that was vital for their way of life. When they were transferred to reserves, they lost something valuable even if they had not developed private property rights. *“Extant property rights theory enables us to relax the implicit resource-based view assumption that property rights to resources are secure, and thus take into account processes where there are struggles in establishing property rights that enhance the realized economic value of resources”* (Asher et al. 2005: 8-9).

Ownership claims are the recognition that one cannot consider the other person as a purely passive object that can endure the risk exposure of one's own actions. Assets, and even animals or vegetable life, have no ownership claims. They endure risk exposure without any ethical right to participate to the management of the assets' attributes. The risk exposure of individuals or communities resulting from the use of some assets' attributes can have four origins:

- The use by oneself: It can be the result of one's own actions, in which case, ownership claims refer to one's own responsibility toward one self.
- The use by another individual or community: It can result from the actions of a given community or individuals; in which case it refers to the settlement of one living with others. Most religions or ethical codes deal with these aspects. For instance, the Deuteronomy (Bible) set various solutions when one has injured someone else or damaged one's property.

- The natural phenomena: It can be the result of a natural phenomenon. Historically, religious people believed these phenomena to be the expression of God. Therefore, the risk exposure was interpreted as a kind of interaction with God. God was punishing or rewarding human actions. Actually, most people believe either that it is fatality, or that by better understanding the laws of the nature we can prevent some negative side effects.
- The use by an organization: It can result from the actions of an organization. In this case, ownership claims have an impact on corporate governance. Individuals or communities exposed to a risk due to the actions or decisions of an organization are ethically entitled to be part of the process of the organization corporate governance.

### *C. The limits of market mechanisms*

In classical economic approaches, market price is supposed to subsume all the dimensions of an asset in a single component whose value is assessed in market transactions. We observe that some of these dimensions cannot be evaluated with a market price and that various owners of the same asset can coexist. The impossibility to systematically single out one owner helps to explain the diversity of property rights. Legal or contractual property rights due to local institutions can back the legitimate claims on an asset's perceived dimensions. The fundamental role of courts is to settle the conflicts between diverging ownership claims.

*Priceless asset's attributes.*— In a liberal market economy, asset dimensions are supposed to be synthesized in the market price of the asset. Even if an asset is recognized as having several dimensions with distinctive features, it is assumed

that perfect ownership consists in the full property of every dimension (Welch 1983) and that the market price will synthesize the value of all dimensions. If some dimensions are unknown, or badly grasped, this appears as market imperfections that should be corrected.

Without distinguishing between asset essence and asset dimensions, Arrow (1974: 22-23) observes that there are goods and commodities which have real, practical, economic value, for which trade on the open market is neither technically possible nor even meaningful. And he continues: *“from the point of view of efficiency as well as from the point of view of distributive justice, something more than the market is called for”*. Some dimensions of an asset cannot be priced and cannot have a market value.

*“And Nabuthai the Jezraelite had a vineyard, near the threshing floor of Achaab king of Samaria. And Achaab spoke to Nabuthai, saying, ‘Give me thy vineyard, and I will have it for a garden of herbs, for it is near my house: and I will give thee another vineyard better than it; or if it please thee, I will give thee the money, the price of this thy vineyard, and I will have it for a garden of herbs’. And Nabuthai said to Achaab, ‘My God forbid me that I should give thee the inheritance of my fathers’.”* (Bible, 3 Kings 20, 1-3).

Some assets have a symbolic value that cannot be the object of a market price. The Bible passage set that some attributes of an asset are related to human life and cannot be appropriated excepted by death (as is apparent in the following verses of the Bible – 3 Kings 20, 4-16 – and in more contemporary litigations).

*A government representative told the finquero that there was no record of his legal title to the land, and asked him to bring evidence of ownership to the meeting. The afternoon before the meeting, the finquero canceled the meeting via telephone, claiming that he would handle the problem ‘by other means’. It was impossible to notify the campesinos, because they did not have a telephone. The*



*following morning, three of the campesinos on their way to the meeting were murdered by the finquero's men.”(Ybarra 2008: 50)<sup>12</sup>.*

Facts reported by Ybarra (2008) confirm that the settlement of ownership disputes may involve human consequences as serious as death. One could dismiss this story as being the proof of market imperfections and, therefore, the proof of local institutions' failure to offer the framework for regular and perfect economic transactions. This standpoint would miss our main point of focus. Ybarra's study makes it clear that even when markets exist, the market price does not integrate all dimensions of an asset.

On the one hand, this market failure is due to the specificities of some dimensions of an asset but, on the other hand, it is due to the nature of the actors involved in the market transaction. A price market is always relative to other goods. Prices are only a common practice to express the economic value of any items in the same currency. However, for some dimensions related to specific individuals or communities, there are no comparable goods to which the assets could be exchanged.

*Potlatch exchanges.*— Boas (1898) explains that potlatch involved exchanges of gifts. Some gifts were circulating and, finally, came back to their initial owner but, in the process, these gifts were acquiring value, a social value due to their successive owners<sup>13</sup>. This social value is meaningful only if one has a specific relationship with the asset. A bibelot or a talisman can be considered as invaluable or worth only its price on *eBay*. The difference depends on the relationship between the person, or the community, and the asset. Life is full of attachment

<sup>12</sup> Ybarra (2008: 50) footnoted the term 'finquero': "*finquero usually refers to someone who owns a large plot of land used for livestock and / or farming, in present day Petén is generally understood that most cattle ranchers who own large plots of land rely on illicit revenues to maintain their holdings, usually drug trafficking.*" Ybarra (2008: 49) states that the term 'campesino' is usually translated as 'peasant' but that it reflects a smallholder agrarian lifestyle and encompasses mixed-race people and indigenous Maya.

<sup>13</sup> The same exists today with real estates having belonged to some famous persons.

between oneself and things, lands, or even firms. An entrepreneur could refuse to sell his or her stakes in an enterprise if he or she feels some deep attachment to the work of his or her life. In the same way, someone could refuse to sell the land of his or her ancestors or the wedding ring of his or her spouse. The value of a property is not only economic, it is also social and it relates to history, culture, custom.

Moreover, if people who value a specific dimension do not have the monetary capability to acquire the entire asset, this attribute is priceless. Market prices only reflect the dimensions valued by people who have access to the market. Markets are never completely open; they only allow people with the needed disposable revenue to participate. They exclude all other people. However, if exclusion can involve the negation of the market value of a dimension; it cannot be the negation of the dimension itself. Ownership of some dimensions of an asset can exist without any market price (Mauss 1923). Some individuals or communities do not have the economic endowments to participate in markets. They cannot overbid, even if the object of the transaction is of vital necessity for them. Therefore, in such cases, the market price is not the result of equilibrium of offer and demand but only the price that results from the only actor who has sufficient economic endowments to participate in the market (Ybarra 2008).

This situation has been recognized by the International Financial Reporting Standards (IFRS), which state that the fair value of an asset is the market price only when there is an active market. *“An active market is a market in which all the following conditions exist:*

- (i) the items traded within the market are homogeneous;*
- (ii) willing buyers and sellers can normally be found at any time; and*
- (iii) prices are available to the public”* (Commission of the European Communities 2008, IAS 36 §6).

Market value cannot summarize all the dimensions of an asset, present and future. However, in modern economies and in most cases, market price can be a good approximation of the integrality of assets' known dimensions.

### **III. The consequences of the distinction between property rights and ownership**

The distinction proposed previously has two main applications. One regards the settlement of property rights on land ownership. It justifies the ethical right of small peasants to cultivate plots of land if it is a life necessity. The second application regards the corporate governance. Hence, in this article, we will develop this second point.

The most rigorous approach of corporate governance seems to rely on shareholders' property and agency theory. The alternative approach, which focuses on stakeholders, lacks from strong and rigorous foundations. We consider that the distinction between property rights and ownership is providing the theoretical, ethical and normative foundation that is necessary to develop further the stakeholder theory.

#### *A. Firms as entities with property rights on assets*

Firms are neither individuals nor communities, nor are they simple assets. They are a form of organization between both of them. They are entities dedicated to the pursuit of some economic or social concern for individuals and communities. To achieve their ends, they are legally and contractually entitled to have property rights on assets<sup>14</sup>.

*Firms differ from individuals and communities.*— Legally firms have a moral personality. However, they have no intrinsic humanity and they do not have ontological ethic. Firms are ethic when their managers, their employees and their stakeholders behave ethically. A firm, in the abstract, has no moral values, only

<sup>14</sup> IASB (2010: 8) proposes to define an entity as “a circumscribed area of economic activities”.

individuals (and therefore communities) have. Therefore, according to our definition of ownership, a firm cannot claim ownership on assets. A firm can have property rights, it cannot claim for any ethical recognition of ownership.

A firm can be grasped as a nexus of contracts<sup>15</sup> (REF). Therefore, if firms have no moral values by themselves, their stakeholders have moral values and these moral values are incorporated (formally or informally) in the contracts. If firms cannot be entitled to have ownership claims, their stakeholders can be entitled to.

*The nature of stakeholders' claims of ownership.*— We define stakeholders as the actors who hold a resource used by the firm. Stakeholders have ownership claims on a firm when they are exposed to the risk of the firm<sup>16</sup>. It is from this risk exposure that stakeholders derive legitimate claims on a firm's corporate governance<sup>17</sup>. This risk exposure can be mitigated with compensation mechanisms. For instance, if law, contracts or customs set devices that protect a particular class of stakeholders, their ownership claims to the corporate governance of the firm is reduced. The ethical status of stakeholders' claims is based on their residual exposure to the risk of the firm.

### *B. Efficiency and ethics, the case of firm's ownership*

The main argument for the primacy of one class of stakeholders (i.e. the shareholders) rests on the existence of specific incentives for pursuing economic efficiency (Fama REF). We consider that our definition of stakeholders and our

<sup>15</sup> "The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships" (Jensen and Meckling 1976: 311).

<sup>16</sup> Some authors have already proposed to narrow the definition of stakeholders by considering that primary stakeholders are those who bear some form of risk (Asher, Mahoney, & Mahoney, 2005; Hillman & Keim, 2001; Orts & Strudler, 2002). Placing some asset at risk should be considered a key characteristic of a proper conception of stakeholder (Clarkson, 1995).

<sup>17</sup> Hart and Moore (1990) equate ownership with residual rights of control over the firm's assets. One party is supposed to act just as if the firm's assets were its own. Firm is almost considered as a real legal fiction. We depart from this approach by considering the firm as an opaque entity. Therefore, the ownership claims of stakeholders do not rest on the assets possessed by the firm but on the firm itself.

approach of corporate governance is both normatively and instrumentally better. We have already developed the normative aspects based on the risk exposure concept. Now, we focus on the instrumental consequences.

*The failure of market mechanisms to grasp the entirety of economic and social value creation.*— The big economic failures (Enron, Lehman Brothers, BP, etc.) underlined that market mechanisms by themselves cannot ensure economic and social optimality. A main explanation is that some dimensions of economic and social life cannot be summarized in a market price (Arrow 1974). Even defenders of the primacy of shareholders suggest that firms are performing better on the long term when they closely associate their stakeholders' expectations with their strategic planning (Jensen, 2000).

*The economic and social performance is not only to attain the objectives but it is also in the choice of the means employed.*— The establishing of stakeholders' compensation is by itself a factor of performance<sup>18</sup>. To facilitate an optimal allocation, firms need to rely on corporate governance mechanisms of stakeholders' voicing (Hirshman, 1970). These mechanisms concur to both economic efficiency and loyalty (Womack and Jones 2003; Liker and Hoseus 2008).

Loyalty is the expression of a deep attachment that emerges from risk exposure. Loyalty appears when the firm acts fairly as regard a stakeholder's expectations. While a risk exposed stakeholder has no choice but to be involved in the organization to mitigate his or her risk exposure, loyalty is both the resultant and the underlying reason for the firm's attention to their expectations<sup>19</sup>.

<sup>18</sup> Most of stakeholders' compensation integrates informal agreements on side effects of contracts. These agreements are usually a main part of the stakeholders' satisfaction or dissatisfaction. Therefore, they are contributing to the overall performance of the firm.

<sup>19</sup> On the long term, only by being loyal can a stakeholder expect her interests to be recognized by the firm.

### *C. Top executive's function*

*“The function of management is to oversee the contracts among factors and to ensure the viability of the firm”* (Fama 1980: 292). If corporate governance is concerned with both exit and voice mechanisms, then top executives should promote the existence of strong stakeholder representatives.

*Top executives are referees and not agents.*— The CEO is the hierarchical supervisor of all employees and she/ he has the power to enforce the compliance of contracts with other stakeholders, or to terminate these contracts (while respecting the covenants and the legal obligations) and establish new ones. However, in the meantime, the CEO is also the one who, under the Board control, ensures the distribution of the firm economic surplus. Therefore, the CEO is more like a referee who can compensate the team players for their contribution to the success. Legal or contractual rules apply but the CEO has some informal power to attribute some part of the economic surplus, even before this surplus is measured in the accounting and is, therefore, legally devoted to shareholders. For instance, the distribution of bonuses to all the employees or the application of a general salary augmentation, the betterment of sale (or purchase) conditions without an increase (or a decrease) in the market price, or the allocation of a philanthropic gift to a public institution, are different methods to allocate the firm economic surplus.

Top executives should be compensated for both the results achieved and the means employed.— According to our stakeholder approach, the net profit is not measuring the overall economic efficiency of the firm since some of the economic surplus that is distributed to stakeholders appears as expenses in the financial statements<sup>20</sup>

<sup>20</sup> Some of this economic surplus distribution could even be missing in the financial statements if it relates to revenues that could have been collected but that did not; for instance, when a firm thanks some clients (or suppliers) for their loyalty

In the same way as the captain of a football team is authorized to defend his or her team interest with the referee

*Top executive's compensation.*— The agency theory suggests that top executives' compensation should be strictly aligned with the firm market value or the shareholders' wealth. Since the stakeholder approach considers that top executives act for the global entity and not for specific constituents, their compensation should be disconnected from any particular group of constituents. Their compensation should be related to their ability to achieve objectives while taking care of the means employed. Since the global environment is a main factor of performance, the assessment of top executives' performance cannot depend on *a priori* evaluation of economic and social conditions but it needs to rely on ex post assessment of the job done by top executives in a specific environment. Therefore, compensation should include a package of fixed salary (determined *ex ante* according to the level of responsibility) and bonuses (determined *ex post* according to the results achieved, the means employed and the state of the global economic and social environment).

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by giving them a free service (or economic advantage), or when a firm thanks employees by offering them a supplementary day of vacation (while keeping them paid).



## **Conclusion: the ownership claims on Organizations**

Having presented a sharp distinction between ownership and property rights, we propose a foundation for a stakeholder theory of the firm. Our analysis supposes that each asset or organization encompasses different attributes, which are the object of one or several property rights. We suggest that risk exposure is the key element of any ownership theory. Stakeholders exposed to the risk of a firm hold legitimate claims on corporate governance. A firm can manage its stakeholders either by managing their contracts (terminating or initiating new ones) or by taking care of their aspirations and expectations.

Firm's ownership differs from asset's ownership because the ownership is not so much related to the use of assets acquired by the firm than to the implementation of contracts and transactions (Eisenhardt 1989). Some stakeholders are entitled to legal or contractual property rights. However, only legitimate claims justify a participation in corporate governance mechanisms.

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