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The Mexican Civil Code of 1928 and the Social Function of Property in Mexico and Latin America

M.C. Mirow

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**THE MEXICAN CIVIL CODE OF 1928
AND THE SOCIAL FUNCTION OF PROPERTY
IN MEXICO AND LATIN AMERICA**

*M.C. Mirow**

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I. INTRODUCTION

The doctrine of the social function of property is found in many twentieth-century constitutions in Latin America. For example, the Constitution of Ecuador of 1929 provided for “a right to property with the restrictions demanded by necessity and social progress.”¹ The Constitution of Peru of 1933 stated “[p]roperty must be used in harmony with social interests.”² And the Constitution of Bolivia of 1938 mandated, “[p]roperty is inviolable, as long as it fills a social function.”³ Similar provisions are found throughout the region.⁴ Once promulgated, constitutional definitions of property encompassing its social function often served as a basis for agrarian and land reform programs.⁵ Established in the first half of the twentieth century, land reform programs in Latin America were greatly encouraged during and after the 1960s through the Alliance for Progress.⁶ This external pressure linked land reform to peaceful development and the avoidance of communist revolutions in the region.⁷ One form or another of the social function of property is found in many present-day constitutions from the 1980s and 1990s in the region, including, for example, the constitutions of Bolivia, Brazil, Colombia, Ecuador, Honduras, Nicaragua, Paraguay, and El Salvador. Some constitutions in the region, such as the

¹ Constitution of Ecuador (1929), art. 151(14).

² Constitution of Peru (1933), art. 34.

³ *Constitución política de 30 de octubre de 1938*, BIBLIOTECA VIRTUAL MIGUEL DE CERVANTES, cervantesvirtual.com.

⁴ See generally Sheila R. Foster & Daniel Bonilla, *Symposium, The Social Function of Property: A Comparative Perspective, Introduction*, 80 FORDHAM L. REV. 1003, 1003 (2011); LA FUNCIÓN SOCIAL DE LA PROPIEDAD (Daniel Bonilla Maldonado ed., 2013; AGUSTÍN PARISE, OWNERSHIP PARADIGMS IN AMERICAN CIVIL LAW JURISDICTIONS: MANIFESTATIONS OF SHIFTS IN THE LEGISLATION OF LOUISIANA, CHILE, AND ARGENTINA (16TH – 20TH CENTURIES) 184–262 (2017) [hereinafter PARISE].

⁵ M.C. MIROW, LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CÁDIZ AND ITS LEGACY IN SPANISH AMERICA 202 (2015).

⁶ M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 223 (2004) [hereinafter, LATIN AMERICAN LAW]. In 1961, President John F Kennedy’s Alliance for Progress responded to the Cuban Revolution and the Cold War by encouraging signatories of the Charter of Punta del Este to undertake meaningful land reform in addition to other actions. Nineteen Latin American and Caribbean countries enacted land reform provisions. *Id.*

⁷ *Id.* at 222–24.

Argentine Constitution of 1994 and the Peruvian Constitution of 1992, do not contain the doctrine. There are other constitutions in the region where one might very well expect to find an explicitly stated doctrine of the social function of property, but it does not appear. Examples of these constitutions are the Mexican Constitution of 1917, the Cuban Constitution of 1976, and the Venezuelan Constitution of 1999.

A. *Mexico as the Origin of the Social Function of Law in Latin America*

There is a prevalent explanatory myth about the introduction of the doctrine of the social function of property to Latin America and how it spread throughout the region. Because the myth is consistent with common knowledge and makes common sense, it is particularly difficult to challenge it. In broad sweep, the narrative of this myth is that the social function of property in Latin America is the result of the Mexican Revolution, the Mexican Constitution of 1917, and the transfer, migration, borrowing, or translation of the ideas expressed in this political moment and documents to the rest of the Spanish-speaking world in the Americas.⁸ In this view, Mexico brought “the social” to the Americas. It is a compelling story. The political and social progress of the Mexican Revolution was enshrined in the Mexican Constitution of 1917, particularly in its two most famous social articles. Article 27 radically altered established ideas about property, land, private ownership, and natural resources. Article 123 did the same for labor, working conditions, and unions.⁹ Each article had rather extensive, code-like provisions reforming and regulating these areas of law. From the importation of social thought to Mexico through the Mexican Revolution and its associated documents, it was quite easy to assume that these gains were shared with neighbors to the south who followed Mexico in social progress through political changes and constitutional provisions.¹⁰ Subsequent

⁸ M.C. Mirow, *Origins of the Social Function of Property in Chile*, 80 *FORDHAM L. REV.* 1184, 1215–16 (2011) [hereinafter Mirow, *Origins of the Social Function*].

⁹ STEPHEN ZAMORA, JOSÉ RAMÓN COSSÍO, LEONEL PEREZNIETO, JOSÉ ROLDÁN-XOPA & DAVID LOPEZ, *MEXICAN LAW* 452 (2005) [hereinafter ZAMORA ET AL.].

¹⁰ Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function and Land Reform in Latin America*, 19 *TUL. ENV'T. L.J.* 95–96, 100–01 (2006) (“The 1917 Mexican Constitution and Duguit’s idea of social function were born of the same social ferment, and Article 27 of the Mexican Constitution served as an inspiration in Europe[.]”); Giselle Jordán Fernández, *La función social de la propiedad: Su desarrollo en el derecho constitucional cubano de la primera mitad del siglo xx*, 70 *REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO* 489–527 (2020) (“En la Historia Constitucional la propiedad ha evolucionado desde la concepción liberal hasta la doctrina de la función social. Esta teoría se acogió en las Constituciones sociales del siglo XX, siendo precursora la Constitución Mexicana de 1917.” [In Constitutional History property has evolved from the liberal concept to the social function doctrine. This theory was received in the social constitutions of the

constitutional drafters in the region must have, the narrative goes, noted these famous Mexican provisions, condensed them into shorter articles applicable to the new country, and promulgated some form of “social function” with Mexico as the model.¹¹

While a convenient and neat explanation of the dissemination of the social function of property in Spanish-speaking Latin America, this explanation is not borne out by the sources or autochthonous legal development in individual countries. Mexico and the Mexican Constitution of 1917 were rarely mentioned when countries in the region adopted this new construction of property.¹² Because of the centrality of Mexico in this commonly accepted explanation for the spread of the social function of property in Latin America, a closer examination of the way the doctrine played out in Mexico is merited. For example, the idea that the property provision of the Mexican Constitution of 1917, Article 27, was the intellectual product of the French legal sociologist Léon Duguit has been put to rest.¹³ After the Constitution of 1917, the Civil Code of 1928 has provided the next object of speculation about the incorporation of the social function of property into Mexican and Latin American law. This article examines this connection.

twentieth century, with the Mexican Constitution of 1917 as the precursor.]); PARISE, *supra* note 4, at 199–200 (“[S]tarting with the 1917 Mexican Constitution, the Duguitian idea was soon welcomed by other constitutions of Europe and of American Civil Law Jurisdictions.”); 4 CONGRESO DE LA UNIÓN, LOS DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES 579 (1978) (claiming the broad influence of the Constitution of 1917 on subsequent Latin American constitutional provisions related to property and natural resources). Article 27, in its second paragraph, states: “The Nation shall have at all times the right to impose on private property the limitations that the public interest dictates.” There were comments on its reading for debate. 4 CONGRESO DE LA UNIÓN, LOS DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES 661 (1978); 2 ESTADOS UNIDOS MEXICANOS, DIARIO DE LOS DEBATES DEL CONGRESO CONSTITUYENTE 787 (Querétaro, 29 de enero de 1917, 1922).

¹¹ Recent scholarship has thankfully abandoned notions of direct influence or reception and offered more complex, nuanced, and correct theories of circulation of ideas. Although Thorsten Keiser notes “social elements” in Article 27, he argues for a broader notion of the circulation of ideas rather than direct reception. Thorsten Keiser, *Social Conceptions of Property and Labour – Private Law in the Aftermath of the Mexican Revolution and European Legal Science*, 20 RECHTSGESCHICHTE 258, 258–69 (2012) (“The article about property in the Constitution of 1917 (Art. 27) was *later* identified with the formula ‘social function of property’.”) (Mirow’s emphasis). See also GABRIEL ONDETTI & BENJAMIN DAVY, SELECTIVE DIFFUSION: DUGUIT AND THE SOCIAL FUNCTION OF PROPERTY IN LATIN AMERICA AND EUROPE (2018) (prepared for the XXXVI International Congress of the Latin American Studies Association, Barcelona, Spain, May 23–6, 2018 and concluding that the Constitution of 1917 was not a common source for diffusion of the social function of property).

¹² M.C. Mirow, *Theorizing Revolutionary Property: Mexico’s Tardive Turn towards Léon Duguit and the Social Function of Property*, 32 TRANSNAT’L L. & CONTEMP. PROBS. (forthcoming Apr. 2023) (manuscript at 3-4) (on file with author) [hereinafter Mirow, *Theorizing*].

¹³ *Id.*

B. This Article and its Structure

In its broadest sweep, this article argues that the social function of property and Léon Duguit's ideas did not find a meaningful home in the provisions on property in the Civil Code of 1928. This advances previous literature establishing that the works of Duguit and general theories of the social function of property were not a direct influence on the property provisions in the Mexican Constitution of 1917.¹⁴ There was, of course, no use of Duguit's works or the social function of property in the Mexican civil codes before the 1920s.¹⁵ This means that Duguit's work and the social function of property were adopted as guiding principles for Mexican property law *after* the Mexican Civil Code of 1928. These approaches were brought into the intellectual history of the Mexican Civil Code during the preparation of the Code, but such advances were not successful in the text of the Code. After the promulgation of the Code, private law jurists read the social function of property and Duguit's works ahistorically into the property provisions of the Mexican Constitution of 1917 and the Civil Code of 1928. This intellectual work by jurists and commentators during and after the 1930s pulled European trends of the social function of property into the mainstream of Mexican legal thought. Thus, Mexican thinking on property joined this international trend and subsequently gained prestige as part of broader international developments in property theory. This concordance of Mexican property law with international trends was then mistakenly read back to place Mexico as the originator of the movement of the social function of property in Latin America.

Therefore, legal historians must realign the Mexican contribution to the social function of property in Latin America and place it in its proper chronological period. The later appropriation of Duguit's works and the social function of property by Mexico provides a fascinating narrative of the desire to incorporate international thought and trends into domestic law. Additionally, once the proper role of Duguit's works and the social function of law are ascribed to Mexican legal developments surrounding property, the true genius, originality, and nature of the Mexican law on property become evident. The provisions of the Civil Code of 1928 also deserve careful examination in light of the sources and a rereading of the surrounding commentary. The centennial of the Civil Code of 1928 will be upon us soon, and the greatest service to the celebration is an accurate understanding of what is being celebrated. This article

¹⁴ *Id.*

¹⁵ *See infra*, Part IV and notes 124–129 and accompanying text.

seeks to avoid the intellectual damage that uninformed celebration, rather than careful-historical understanding, may bring.

Part II of this article briefly sets out the social function of property and its two main intellectual sources, the work of Léon Duguit and other European sociological jurists on one hand and Catholic social doctrine on the other. Part III addresses the social function of property in Mexico with particular reference to the Civil Code of 1928. Part IV describes the genesis of the Code during the decade after the Mexican Revolution and explores the general theoretical atmosphere in which the Civil Code of 1928 was drafted with particular attention to ideas of property.

Part V discusses the Code provisions on property and notes the odd juxtaposition of the contemporaneous drive to socialize law and property with the relatively traditional positions related to property in the Code. The focus here is the text of the Code. Thus, comments and theories put forth before the drafting of the Code highlight the theoretical dissonance between the provisions of the Code related to property and what contemporary private law scholars asserted about them. Part VI explores the subsequent literature on property and the Code and notes a dramatic shift in the perception of property in Mexico towards the social function of property and Duguit's ideas. Shifts in agrarian law associated with property during the late 1920s and early 1930s were also a facet of this shift. Part VII concludes that the received history of the social function of property in Mexico needs correction. Article 27 of the Mexican Constitution of 1917 was not, as is commonly asserted, the moment when the country adopted modern and sweeping European notions of the social function of property and Léon Duguit's theoretical works on property.¹⁶ This change occurred during the drafting of the Civil Code of 1928 and the subsequent commentary by private law scholars then familiar with the works of Duguit and the theory of the social function of property. The peripheral work of these scholars on the Civil Code of 1928 became the core of Mexico's understanding of property, its social function, and the centrality of Duguit's work. This shift happened ten or more years after the Mexican Constitution of 1917, and not in Article 27 of the Constitution or in the provisions on property in the Civil Code of 1928. Part VIII expands on the contributions of this work from Mexico to the rest of Latin America through a comparative legal history of the social function of property. This part illustrates broader regional trends and variations in the appropriation of the social function of property. Examples are drawn from Chile in 1925, Colombia in 1936, Cuba

¹⁶ See *infra* notes 13–14 and accompanying text.

in 1940, and Argentina in 1949. Part IX offers suggestions to relocate the place of Mexican developments on the variety of origins and uses of the social function of property in the region and notes the different ways that it has been invoked and applied in Latin America.

II. THE SOCIAL FUNCTION OF PROPERTY: LÉON DUGUIT AND CATHOLIC SOCIAL DOCTRINE

Research on individual countries' adoption of the social function of property on the constitutional level indicates that drafters and scholars looked to two main sources for the doctrine as they reformed and replaced constitutions in early twentieth-century Latin America. These sources were the works of Léon Duguit and Catholic social doctrine.

A. *Léon Duguit*

Léon Duguit (1859-1928) was the dean of the law faculty of the University of Bordeaux, his intellectual home as a student, professor, and leader of the faculty.¹⁷ As a French scholar of international repute, Duguit delivered various lectures abroad during his career.¹⁸ The doctrine of the social function of property was most fully developed in a series of lectures he delivered at the University of Buenos Aires, Argentina, in 1911.¹⁹ The broad topic of these lectures was transformations in private law since the Code Napoléon,²⁰ which culminated in the lecture on the social function of property.²¹

Duguit's work generally, and as related to the doctrine of the social function of property, was an outgrowth of French sociological jurisprudence that adopted empirical, scientific, and anti-formalist approaches to the analysis of law.²² It was part of the general rise of "the social" in the world that affected society,

¹⁷ M.C. Mirow, *Léon Duguit*, in GREAT CHRISTIAN JURISTS IN FRENCH HISTORY 359–60 (Olivier Descamps & Rafael Domingo eds., 2019) [hereinafter Mirow, *Léon Duguit*].

¹⁸ *Id.* at 360–61. For additional biographical information on Duguit, see Paul Babie & Jessica Viven-Wilksch, *Léon Duguit and the Propriété Function Sociale*, in LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION 9–12 (2019).

¹⁹ Mirow, *Léon Duguit*, *supra* note 17, at 367.

²⁰ *Id.* at 368.

²¹ Babie & Viven-Wilksch, *supra* note 18, at 1–16; Foster & Bonilla, *supra* note 4, at 1004–08; M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191–226 (2010) [hereinafter Mirow, *Social-Obligation Norm of Property*]. Mirow, *Léon Duguit*, *supra* note 17, 358–71.

²² Mirow, *Social-Obligation Norm of Property*, *supra* note 21, at 200–01.

politics, and law.²³ Within the law, this movement embraced significant changes in labor, family, education, and property.²⁴ By applying these new methods of sociological and legal research, Duguit came to the conclusion that “[p]roperty is not a right; it is a social function.”²⁵ Duguit repeated this formulation from 1911 in various subsequent works, but the sixth lecture in Buenos Aires remains the clearest and fullest enunciation of Duguit’s construction of the doctrine.²⁶ Thus, with this reconstruction of the essence of property, Duguit rejected the established paradigm of an absolute, subjective right to property in which the owner had unlimited right to and dominion over property. It was a rejection of established formulations in the European and British traditions found in the French Civil Code, Article 544, and Blackstone’s writings on ownership in the English common law.²⁷ Duguit’s formulation of property as a social function was a new way of understanding property as a constituent of law and of the state.²⁸

B. Catholic Social Doctrine

The rise and application of Catholic social doctrine was mostly a parallel, independent development to Duguit’s discovery of the social function of property, but there is some evidence for the interplay of Duguit’s thought and Catholic social doctrine.²⁹ Both developments were prompted by the same concerns related to industry, labor, unions, capitalism, socialism, and communism.³⁰ Catholic social doctrine, however, found its roots in late nineteenth-century Neo-Scholasticism or Neo-Thomism rather than the scientific exploration of legal phenomena in society.³¹ These new social questions about the place of human beings in an industrial world led to new, deep, and perceptive readings of the works of Saint Thomas Aquinas and

²³ Duncan Kennedy, *Three Globalizations of Law and Legal Thought, 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 20 (David M. Trubek & Alvaro Santos eds., 2006).

²⁴ PARISE, *supra* note 4, at 185–89.

²⁵ LÉON DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 21 (2d ed., 1920).

²⁶ Jessica Viven-Wilksch, *English Translation of Léon Duguit’s 1920 Buenos Aires Lecture ‘propriété fonction sociale’*, in LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION 35–61 (Paul Babie & Jessica Viven-Wilksch eds., 2019) (stating French-English Parallel translation of Duguit’s lecture on the social function of property as published in 1920).

²⁷ Mirow, *Social-Obligation Norm*, *supra* note 21, at 193–94; PARISE, *supra* note 4, at 144–54.

²⁸ Babie & Viven-Wilksch, *supra* note 18, at 1–21.

²⁹ Mirow, *Léon Duguit*, *supra* note 17, at 358–71.

³⁰ PARISE, *supra* note 4, at 189–92; M.C. Mirow, *Rerum Novarum: New Things and Recent Paradigms of Property Law*, 47 U. PAC. L. REV. 183, 189–91 (2016) [hereinafter Mirow, *Rerum Novarum*].

³¹ Mirow, *Rerum Novarum*, *supra* note 30, at 191–94.

others.³² Many of the findings of such scholars were expressed in central encyclicals on labor, capital, and property, such as Pope Leo XIII's *Rerum Novarum* (1891) and Pope Pius XI's *Quadragesimo Anno* (1931).³³

Thus, readers of these encyclicals, the works of Duguit, and similar thinkers—importantly including Henri Hayem—will note a parallel development.³⁴ Duguit may be viewed as the main proponent of the shift to the “social” in property in the modern *secular* thought. Pope Leo XIII may be viewed as the main proponent of the shift to “the social” in property in modern *religious* thought. The papal encyclicals on Catholic social doctrine and property were particularly important in the Latin American context because the Roman Catholic Church was a powerful instrument of political and social change in the region.³⁵

Thus, the theory of the social function of property situates property between an unbridled, individualist, and absolute right, at one extreme, and socialist constructions of property with state ownership and no private property at the other.³⁶ It serves as a modern, alternative theory to the classical liberal theory of property, the dominant legal and political theory.³⁷ In the past one hundred years, this idea of the social function of property has significantly shaped ideas of property and ownership in Europe.³⁸ Similarly, Latin America has implemented the social function of property through constitutional provisions, often providing

³² *Id.* at 194–96.

³³ *Id.* at 184–96.

³⁴ Mirow, *Social-Obligation Norm*, *supra* note 21, at 213–33.

³⁵ M.C. Mirow, *Introduction*, in *LAW AND CHRISTIANITY IN LATIN AMERICA: THE WORK OF GREAT JURISTS* 8–10 (M.C. Mirow & Rafael Domingo eds., 2021).

³⁶ Foster & Bonilla, *supra* note 4, at 1007; PARISE, *supra* note 4, at 129–83.

³⁷ Foster & Bonilla, *supra* note 4, at 1003; PARISE, *supra* note 4, at 129–83.

³⁸ Babie & Viven-Wilksch, *supra* note 18, at 17–18, 22–24; Alexandre Deroche, *The Importance of the Social Function of Property: France*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 65–86 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Foster & Bonilla, *supra* note 4, at 1007–08; Katlijn Malfliet, *The Social Function of Property, Russia*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 143–67 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Mirow, *Social-Obligation Norm of Property*, *supra* note 21, at 191–226; M.F. Pasquale, *La función social de la propiedad en la obra de Léon Duguit: Una re-lectura desde la perspectiva historiográfica*, 15 *HISTORIA CONSTITUCIONAL* 93–111 (2014); Murray Raff, *Duguit and the German Property Law Tradition*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 87–121 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Geir Stenseth, *The Importance of the Social Function of Property: Norway*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 123–42 (Paul Babie & Jessica Viven-Wilksch eds., 2019).

a basis for land reform.³⁹ It has also served to influence contemporary theorists of property in the common law world, North America, and elsewhere.⁴⁰ There are even calls for property scholars in the United States to reconceptualize property as a social function.⁴¹ As Gregory Alexander urged the legal academy: “[t]he time has come for property scholars to come to grips with the social-

³⁹ Ankersen & Ruppert, *supra* note 10, at 120; Babie & Viven-Wilksch, *supra* note 18, at 24–26; Daniel Bonilla, *Liberalism and Property in Colombia: Property as a Right and Property as a Social Function*, 80 *FORDHAM L. REV.* 1135, 1170 (2011) [hereinafter Bonilla]; Colin Crawford, *A Curious Doctrinal Marriage: the Social Function of Property and the Right to the City in Brazil*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 253–66 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 *FORDHAM L. REV.* 1089, 1134 (2011); Alexandre dos Santos Cunha, *The Social Function of Property in Brazilian Law*, 80 *FORDHAM L. REV.* 1171, 1181 (2011); Giselle Jordán Fernández, *La función social de la propiedad: Su desarrollo en el derecho constitucional cubano de la primera mitad del siglo xx*, 70 *REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO* 489–527 (2020); M.C. Mirow, *Léon Duguit and the Social Function of Property in Argentina*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 267–85 (Paul Babie & Jessica Viven-Wilksch eds., 2019) [hereinafter Mirow, *Argentina*]; Mirow, *Origins of the Social Function*, *supra* note 8, at 1217; Mirow, *Theorizing*, *supra* note 12; José Ramón Narváez Hernández, *El Código Privado-social: Influencia de Francesco Cosentini en el Código Civil Mexicano de 1928*, 16 *ANUARIO MEXICANO DE HISTORIA DEL DERECHO* 201–26 (2004); PARISE, *supra* note 4, at 184–262; Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and the United States*, 39 *VAND. J. TRANSNAT’L L.* 435, 436 (2006) (on the social function of property and the social function of the city and the World Charter on the Right to the City); Susana T. Ramella, *Propiedad en función social en la Constitución de 1949: Una “mentalidad” del Antiguo Régimen representada en el constitucionalismo social de la época*, 35 *REVISTA DE HISTORIA DEL DERECHO* 297–354 (2007).

⁴⁰ SPECIAL ISSUE ON PROPERTY AND OBLIGATION, 94 *CORNELL L. REV.* 743, 1071 (2009); GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006); Gregory Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017–1052 (2011); Babie & Viven-Wilksch, *supra* note 18, at 3–8, 18–21, 26–28; Peter D. Burdon & James G. Stewart, *Can Social Property Survive under Neoliberalism? A View from Australia*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 355–70 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Lei Chen, Andrew Michalek & Jia Wang, *The Norm of Property’s Social Function: A Chinese Perspective*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 171–205 (Paul Babie & Jessica Viven-Wilksch eds., 2019) 331–54; Nestor Davidson, *Sketches for a Hamiltonian Vernacular as a Social Function of Property*, 80 *FORDHAM L. REV.* 1053, 1070 (2011); Foster & Bonilla, *supra* note 4, at 1008–14; Gaële Gidrol-Mistral & Alexandra Popovici, *Duguit Appropriated: Trusts and Collective Ownership in Québec*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 311–27 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Peter M. Gerhart, *Afterword: Property’s Form and Function*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 403–15 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Hanri Mostert & Cheri-Leigh Young, *Between Custom and Colony: Social-Norm Based Property Law in South Africa’s Post-constitutional “No-Man’s Land,”* in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 371–402 (Paul Babie & Jessica Viven-Wilksch eds., 2019); Christopher K. Oinet, *The Social Function of Property, Credit and Capital in the United States*, in *LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY: A TRANSLATION AND GLOBAL EXPLORATION* 289–309 (Paul Babie & Jessica Viven-Wilksch eds., 2019).

⁴¹ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *CORNELL L. REV.* 745, 754 (2009).

obligation norm. . . . It is high time for property scholars to begin developing a social-obligation theory."⁴² Thus, the social function of property and Duguit's works have had a varied and international life since their creation at the beginning of the twentieth century. These works continue in many manifestations in Europe and Latin America, and they have provided essential intellectual stimulus to scholars of property in the common law world from its origins to the present day.

III. MEXICO, ITS CIVIL CODE OF 1928, AND THE SOCIAL FUNCTION OF PROPERTY

As briefly surveyed above, Mexican legal developments have long been associated with the rise and dissemination of the social function of property. Without considering the sources closely, a seemingly obvious starting point in the Latin American and worldwide spread of this theory of property is Article 27 of the Mexican Constitution of 1917, a provision that some scholars have ascribed as the first practical application of theoretical writings on the social function of property, especially the works of French legal theorist Léon Duguit.⁴³ Common understanding has assumed a causal connection between Duguit's lecture in 1911, the Mexican Constitution of 1917, and the spread of the doctrine of the social function of property.⁴⁴ Despite the commonly-held belief, some scholars have recently challenged this facile interpretation for an approach delving into the historical sources and stressing the individual national contributions in each country.⁴⁵ Indeed, the rise of the social function of property, and the appropriation of Duguit as its champion in Mexico, was not fulfilled in drafting and promulgating Article 27 of the Mexican Constitution of 1917.⁴⁶ Instead, as argued here, this development in the theorization of the social function of property in Mexico was linked to later events over the following twenty-five years. The most important development was the legal thought associated with the Mexican Civil Code of 1928 as it was drafted and later as jurists commentated on its provisions.⁴⁷ These investigations have led to a much

⁴² *Id.* at 754.

⁴³ *See supra* notes 10–11 and accompanying text.

⁴⁴ *Id.*

⁴⁵ *See supra* notes 39–40 and accompanying text.

⁴⁶ Mirow, *Theorizing*, *supra* note 12, at 4–6, 11–21.

⁴⁷ *Id.* at 24–25.

more complex story about the circulation of the social function of property in Latin America.⁴⁸

The Mexican Civil Code of 1928, a short-hand form for the Civil Code for the Federal District in Ordinary Matters and for the Entire Republic in Federal Matters (*Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal*) was published in 1928 and came into effect in 1932.⁴⁹ Like its antecedents, the Civil Code of 1870 and Civil Code of 1884, the Code was divided into four main parts: persons, property, successions, and obligations or contract.⁵⁰ In fact, the Civil Code of 1928 borrowed substantially from these earlier codes, and over half the provisions of the Civil Code of 1928 were taken from the Civil Code of 1870, sometimes by way of the Civil Code of 1884.⁵¹ A drafting commission (*Comisión Redactora*, or *Comisión Técnica de Legislación en Materia Civil*)—composed of Rafael García Peña, Ignacio García Téllez, Fernando Moreno, and Francisco H. Ruiz—prepared the text of the Code from 1926 to 1928 over the course of approximately 20 months.⁵² One member of the commission, describing himself as a “radical reformer,” recounted substantial ideological debate among the commission during its preparation of the text.⁵³ Using extraordinary powers of his office, President Plutarco Elías Calles enacted the Code and decreed its entry into force on September 1, 1932.⁵⁴

Nonetheless, the relatively restrained position the Civil Code of 1928 took, when purportedly advancing new notions of the social function of property, is

⁴⁸ Bonilla, *supra* note 39, at 1170; Alexandre dos Santos Cunha, *The Social Function of Property in Brazilian Law*, 80 *FORDHAM L. REV.* 1171, 1181 (2011); Mirow, *Origins of the Social Function*, *supra* note 8, at 1217; Mirow, *Argentina*, *supra* note 39 at 267–85.

⁴⁹ OSCAR CRUZ BARNEY, *HISTORIA DEL DERECHO EN MÉXICO* 715 (2d. ed, 2004) [hereinafter *CRUZ BARNEY*]; JORGE A. VARGAS, *MEXICAN CIVIL CODE ANNOTATED: BILINGUAL EDITION* xxxv (2012). It is sometimes referred to as the Civil Code of 1932 because it came into effect in 1932. ZAMORA ET AL., *supra* note 9, at 452–56.

⁵⁰ VARGAS, *supra* note 49, at xli.

⁵¹ CRUZ BARNEY, *supra* note 49, at 716–17; VARGAS, *supra* note 49, at xlvii.

⁵² *Exposición de Motivos*, in *MOTIVOS, COLABORACIÓN Y CONCORDANCIAS DEL NUEVO CÓDIGO CIVIL MEXICANO* 18 (Ignacio García Téllez ed., 1932) [hereinafter *Exposición de Motivos*]; Ignacio García Téllez, *Prólogo*, in *MOTIVOS, COLABORACIÓN Y CONCORDANCIAS DEL NUEVO CÓDIGO CIVIL MEXICANO* 1–17 (Ignacio García Téllez ed., 1932); VARGAS, *supra* note 49, at xlix–l. The Secretary of State Adalberto Tejeda and the jurist Manuel Borja Soriano assisted the commission with technical, bibliographic, and intellectual support.

⁵³ García Téllez, *supra* note 52, at 14.

⁵⁴ CRUZ BARNEY, *supra* note 49, at 715; VARGAS, *supra* note 49, at 1 (The Mexican Congress conferred the power to undertake the codification on the executive which acted through the Secretary of State (*Secretaría de Gobernación*)). José Castán Tobeñas, *El Nuevo Código Civil Mexicano: Un Ensayo de Código Privado Social*, 1 *REVISTA GENERAL DE DERECHO Y JURISPRUDENCIA* 51 (1930) [hereinafter Castán Tobeñas]. The code was originally expected to take effect on August 31, 1928. *Exposición de Motivos*, *supra* note 52, at 51.

remarkable for its inconsistency with prevailing thought and contemporary statements.⁵⁵ The clear social advances in other areas of the Code, such as in family law, serve as sharp contrast to the lack of movement in the area of property.⁵⁶ Within the range of topics handled by the Civil Code of 1928, property has received surprisingly little attention in the academic literature.⁵⁷ Even ten years after the promulgation of the Mexican Constitution of 1917, and despite associated statements stressing the social nature of the new Civil Code, the provisions of the Code itself do very little to incorporate the established thought on the social function of property. This article argues that it was not the code provisions themselves but rather the commentary around the Code that produced the widely noted, paradigmatic shift in Mexican property law from the liberal idea of absolute subjective rights in property to the new perception of the social function of property as propounded by Duguit.

IV. COMMENTARY ON THE SOCIAL NATURE OF THE CIVIL CODE OF 1928

In the wake of the political and social change resulting from the Mexican Revolution, the country's president and legislators knew that a great deal of Mexican law would necessarily be reformed in accordance with the new perspectives and goals of the Revolution.⁵⁸ Constitutional law, agrarian reform, and labor law first received the pressing attention of the nation's leadership.⁵⁹ Changes to private law and civil codes followed in the decade after the Constitution of 1917. Nonetheless, these changes to private law had to be consistent with the multiple accomplishments, goals, and ideologies of the Revolution.

For a proposed text on civil law, this meant the adoption of a social idea of private law linked to social solidarity.⁶⁰ Historians of this important moment in the history of property are fortunate to have several contemporaneous statements giving us a window into the executive and legislative minds of those involved

⁵⁵ Castán Tobeñas, *supra* note 54, at 68. *See infra* Part IV.

⁵⁶ Castán Tobeñas, *supra* note 54, at 57–68 (the majority of the article is on family law).

⁵⁷ *Id.*; Sara Montero Duhalt, *La Socialización del Derecho en el Código Civil de 1928*, in LIBRO DEL CINCUENTENARIO DEL CÓDIGO CIVIL 157–76 (Jorge A. Sánchez-Cordero Dávila ed., 1978) (fleetingly addressing property).

⁵⁸ E. V. NIEMEYER, JR., *REVOLUTION AT QUERÉTARO: THE MEXICAN CONSTITUTIONAL CONVENTION OF 1916–17* (1974).

⁵⁹ HELGA BAITENMANN, *MATTERS OF JUSTICE: PUEBLOS, THE JUDICIARY, AND AGRARIAN REFORM IN REVOLUTIONARY MEXICO* 53–134 (2020); TIMOTHY J. JAMES, *MEXICO'S SUPREME COURT BETWEEN LIBERAL INDIVIDUAL AND REVOLUTIONARY SOCIAL RIGHTS*, 1867–934, 27–50 (2013).

⁶⁰ Castán Tobeñas, *supra* note 54, at 52.

with the new Code. For example, in 1928, President Calles viewed the undertaking as transforming a civil code into a code of private and social law (*Código privado social*).⁶¹ The new Code and its social projection were a product of the Revolution:

The reform of the Civil Code was an unavoidable consequence of the Revolution; that is, while the organization of the family, the concept of property, and the easy regulation and carrying out of daily transactions are not harmonized with the exigencies of modern life, the old regime, conquered on the battlefield, would continue governing our society.⁶²

The president himself spoke directly of the socialization of private law and the need to reform private law in accordance with the new society following the Revolution.⁶³

Similarly, the drafting commission of the Code left a useful piece of legislative history: an official set of Introductory Comments (*Exposición de Motivos*). These Introductory Comments provide a window into the processes, goals, and compromises in the commission's drafting of the text. The committee noted changes in society brought about by the Revolution, unionization, the increase in large cities, science, and democratic impulses.⁶⁴ Agreeing with President Calles's sentiments about a new society requiring new civil legislation, the commission stated that "The change in social conditions of modern life imposes the necessity of renewing legislation, and the civil law, which is part of it, cannot remain impassible to the colossal movement of transformation societies undergo."⁶⁵ With the overall goal of socializing the law in the context of social solidarity, the commission sought to transform the existing civil code

⁶¹ *Id.*

⁶² "La reforma del Código Civil era un deber ineludible de la Revolución, pues en tanto que la organización de la familia, el concepto de la propiedad y la reglamentación fácil y expedita de las transacciones diarias no se armonizaran con las exigencias de la vida moderna, el antiguo regimen, vencido en los campos de batalla, seguiría gobernando nuestra Sociedad." Castán Tobeñas, *supra* note 54, at 52 (citing President of the Republic [Plutarco Elías Calles], *Informe rendido por el señor Presidente de la República ante el Congreso, en la parte relativa a dicho Código*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 299 (1928)).

⁶³ *Id.*

⁶⁴ *Exposición de Motivos*, *supra* note 52, at 19.

⁶⁵ "El cambio de las condiciones sociales de la vida moderna, impone la necesidad de renovar la legislación, y el derecho civil, que forma parte de ella, no puede permanecer ajeno al colossal movimiento de transformación que las sociedades experimentan." *Id.*

into a “Private Social Code” (“*Código Privado Social*”).⁶⁶ As the commission expressed its task:

To transform a Civil Code in which the individualist aspect predominates, into a Private Social Code, it is necessary to reform it substantially, abolishing everything that exclusively favors the individual interest to the prejudice of the collectivity, and introducing new provisions that harmonize with the concept of solidarity.⁶⁷

Thus, the drafters sought to socialize private law in a manner consistent with the core provisions on property and labor in the Mexican Constitution of 1917 “trying to root in the Civil Code the desire for economic emancipation of the popular classes that encouraged our last social revolution and that were crystalized in Articles 27, 28, and 123 of the Federal Constitution of 1917.”⁶⁸ Describing its method another way, the committee sought “[t]o harmonize individual interests with social interests, correcting the excess of individualism that prevails in the Civil Code of 1884.”⁶⁹ Summarizing its accomplishments, the commission noted that all its changes and new provisions were guided by the main idea “to socialize, where it was possible, the Civil Law, preparing the way so that it is converted into a Private Social Law.”⁷⁰

⁶⁶ *Id.* Francisco Cosentini, a visiting professor at the National University from 1929 to 1932, was an important influence in the socialization of private law in Mexico. Two of the passages dealing generally with the socialization of law were adopted in the Introductory Comments from his work. Cosentini was in contact with Ignacio García Téllez and Francisco H. Ruiz, two of the drafters of the Civil Code of 1928. José Ramón Narváez Hernández, *El Código Privado-social: Influencia de Francesco Cosentini en el Código Civil Mexicano de 1928*, 16 ANUARIO MEXICANO DE HISTORIA DEL DERECHO 202–03, 213–14. (2004). See also Giselle Jordán Fernández, *supra* note 10, at 519–20.

⁶⁷ “Para transformar un Código Civil en que predomina el criterio individualista, en un Código Privado Social, es preciso reformarlo substancialmente, derogando todo cuanto favorece exclusivamente el interés particular con perjuicio de la colectividad, e introduciendo nuevas disposiciones que se armonicen con el concepto de solidaridad.” *Exposición de Motivos*, *supra* note 52, at 19. The language is taken from President Calles’s report on the subject. President of the Republic [Plutarco Elías Calles], *Informe rendido por el señor Presidente de la República ante el Congreso, en la parte relativa a dicho Código*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 299 (1928).

⁶⁸ “[P]rocurando que enraizaran en el Código Civil los anhelos de emancipación económica de las clases populares que alentó nuestra última revolución social y que cristalizaron en los artículos 27, 28 y 123 de la Constitución Federal de 1917.” *Exposición de Motivos*, *supra* note 52, at 22.

⁶⁹ “Armonizar los intereses individuales con los sociales, corrigiendo el exceso de individualismo que impera en el Código Civil de 1884.” *Id.* See also President of the Republic [Plutarco Elías Calles], *Informe rendido por el señor Presidente de la República ante el Congreso, en la parte relativa a dicho Código*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 300 (1928).

⁷⁰ “[L]a de socializar, en cuanto fuere posible, el Derecho Civil, preparando el camino para que se convierta en un Derecho Privado-Social.” *Exposición de Motivos*, *supra* note 52, at 50. The idea of “socializing private law” and the terms “Private Social Code” and “Private Social Law” have no precise, technical legal meaning. Rather they reflect the idea of reducing private law’s individual bias by instilling collective and societal aims into traditional areas of private law. PARISE, *supra* note 4, at 184–89.

These general considerations inform what the commission said about its treatment of property in the new code. Abandoning the individualist notion of property, the committee adopted a new definition; it:

[A]ccepted the progressive theory that considers the right of property as a means of fulfilling a true social function. So that property is not considered as an intangible and sacred right, subject in its exercise to the individual whims of the owner, but instead as a changeable right that ought to mold itself to the social necessities to which it is first called to respond.⁷¹

This approach led to early draft provisions that prohibited the owner from leaving property in a nonproductive state and guaranteed that, in the exercise of property, the owner would produce a social benefit.⁷²

Practicalities and the trenchant criticism of the Mexican bar led the commission to withdraw substantially from the provisions of the Code, most clearly advancing the social function of property.⁷³ In a report to the Secretary of State summarizing public input and the commission's responses related to Book II on Property of the Code, the commission first noted its desire to abandon individualistic concepts of property and to follow the social function of property as guided by Article 27 of the Mexican Constitution.⁷⁴ Approximately three months after submitting the initial draft of the Code on April 12, 1928, the commission reasserted its commitment to the social function of property and wrote on July 7, 1928:

Our Political Constitution, in its Article 27, establishes new guidelines for property, giving the social function main importance, which ought to be realized, and the commission, through duty and conviction, maintained in Book II of the Draft, the trend to make property a

⁷¹ “[A]ceptó la teoría progresista que considera el derecho de propiedad como el medio de cumplir una verdadera función social. Por tanto, no se considera la propiedad como un derecho intangible y Sagrado, sujeto en su ejercicio a la apreciación individual del propietario, sino como un derecho mutable que debe modelarse sobre las necesidades sociales a las cuales está llamado a responder preferentemente.” *Exposición de Motivos*, *supra* note 52, at 30. *See also*, President of the Republic [Plutarco Elías Calles], *Informe rendido por el señor Presidente de la República ante el Congreso, en la parte relativa a dicho Código*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 30 (1928).

⁷² *Exposición de Motivos*, *supra* note 52, at 31–32.

⁷³ *Revisión del Proyecto*, in MOTIVOS, COLABORACIÓN Y CONCORDANCIAS DEL NUEVO CÓDIGO CIVIL MEXICANO 71–72 (Ignacio García Téllez ed., 1932).

⁷⁴ *Id.*, at 77–81.

juridical institution that benefits not only the owner but also the collectivity.⁷⁵

Nonetheless, criticisms from the Mexican bar and notable jurists on civil law led the commission to abandon its most advanced provisions comportsing with the social function of property and to rework other provisions.⁷⁶ The commission's report to the Secretary of State chronicles these changes well. The commission deleted two articles that addressed property that was not being put to use to benefit society.⁷⁷ One article stated that rural fields not cultivated for ten consecutive years were considered abandoned.⁷⁸ Another stated that urban farms in poor or unhygienic conditions for ten years were considered abandoned.⁷⁹ The bar and the Secretary of Relations observed that these provisions would lead to excessive litigation when only minor cultivation or improvements were made during the requisite time period.⁸⁰

Another draft article attempted to attach a social function directly to the use of property. Draft article 816 stated:

The owner has the right to enjoy the property with the limitations established in the laws and respective regulations, and the duty *to exercise this right in a way that a social benefit is also obtained.*⁸¹

The italicized language would have imposed a social function on property. Numerous organizations, including the Mexican bar, property owners, the national chamber of commerce, and several sectors of the government itself, objected.⁸² They argued that this was too great a restriction on the owner of the property who would no longer own the property but rather administer it for the benefit of society.⁸³ Such new restrictions were exactly the point, but the commission deleted the offending phrase in italics in preparing the final text.⁸⁴

⁷⁵ “Nuestra Constitución Política, en su artículo 27, fija nuevas orientaciones a la propiedad, dándole capital importancia a la función social que debe desempeñar, y la Comisión por deber y por convicción, mantuvo en el Libro II del Proyecto, la tendencia a hacer de la propiedad una institución jurídica que beneficie no solamente al propietario sino también a la colectividad.” *Id.* at 71.

⁷⁶ *Id.* at 77–81.

⁷⁷ *Id.* at 77–78.

⁷⁸ *Id.* at 77.

⁷⁹ *Id.*

⁸⁰ *Id.* at 77–78.

⁸¹ “El propietario tiene derecho de disfrutar de su propiedad con las limitaciones establecidas en las leyes y reglamentos respectivos y el deber de ejercitar ese derecho de manera que se obtenga también un beneficio social.” *Id.* at 78 (Mirow's emphasis in English translation).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 78–79.

Substantially reducing the social function content of the draft, the commission relied on various reports and writings published in *El Foro: Revista Trimestral de Derecho y Legislación*, an official publication of the Mexican bar.⁸⁵ For example, Luis Cabrera, a member of the Legislative Reform Commission of the Mexican Bar, roundly attacked these steps toward the social function of property.⁸⁶ He argued that the articles of the draft code advancing the social function of property should be removed from the draft.⁸⁷ His main argument was that limitations imposed by a social benefit found in the language of draft Article 816 were too vague to be practical in enforcement.⁸⁸ Because these limitations were not expressed as clear prohibitions in the statutory language, these draft articles should be redrafted to express with complete precision the kind of activities prohibited.⁸⁹

The lawyer Manuel de la Peña objected that the second part of draft Article 816, which required that the use of property be exercised in a manner that produces a social benefit, was unconstitutional because Article 27 of the Constitution of 1917 did not contemplate such restrictions.⁹⁰ Furthermore, De la Peña argued because the use of movable property only benefits an individual, the language requiring social benefit should be removed.⁹¹ Additionally, draft Article 817 was unconstitutional in De la Peña's view because taking property for redistribution to another was not a restriction or modality under the constitution; it was an expropriation.⁹² Draft Article 818, requiring that an owner had an obligation to make property production, was historically accurate when addressing empty property or wastelands allocated to an individual but was overbroad when applied to all property.⁹³ De la Peña argued for the removal of

⁸⁵ See, e.g., Masthead page for No. 3, Jul., Aug., and Sept. 1928, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN (1928); Agustín Aragón, *El nuevo Código Civil Mexicano y la Barra Mexicana*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 277-99; President of the Republic [Plutarco Elías Calles], *Informe rendido por el señor Presidente de la República ante el Congreso, en la parte relativa a dicho Código*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 299-302 (1928); Manuel de la Peña, *El nuevo Código Civil: Comentarios al título II, Libro 2, por el Lic. Manuel de la Peña, posesión, propiedad*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 340-51 (1928) [hereinafter De la Peña].

⁸⁶ Luis Cabrera, *Los Bienes y la Propiedad Conforme al Nuevo Código Civil*, 9 EL FORO: REVISTA TRIMESTRAL DE DERECHO Y LEGISLACIÓN 125-34 (1928).

⁸⁷ *Id.* at 126, 132-33.

⁸⁸ *Id.* at 132.

⁸⁹ *Id.*

⁹⁰ De la Peña, *supra* note 85, at 345-46.

⁹¹ *Id.* at 347.

⁹² *Id.* at 346.

⁹³ *Id.* at 347-48.

this draft article from the Code.⁹⁴ These and other provisions advancing the social function of property ought to be omitted or revised.⁹⁵

Some commentaries in *El Foro* were warmer to the general ideas of the social function of property. Encouraged by the Mexican bar's solicitation of views from the public, the engineer Agustín Aragón launched into an extensive discussion of August Comte.⁹⁶ In this context, Aragón introduces a rare and early mention of Duguit's work in the context of the Code.⁹⁷ Aragón noted that Duguit cited Comte in Duguit's sixth lecture on the social function of property discussed above and in other works.⁹⁸ The entirety of the reference is: "Jurists who had not studied Comte began to know him. Léon Duguit in *Las Transformaciones Generales del Derecho Privado desde el Código de Napoleón* dedicates his sixth lecture to the study of property as a social function, and cites the master [Comte]."⁹⁹ As noted elsewhere here, this early mention of Duguit's work in relation to the topics of the social function of property did not gain traction with other commentators or drafters of the Code. It was a missed opportunity buried in a rather long, unrestrained lecture.

From the point of view of the social function of property, the commentaries of the Mexican bar were substantial setbacks. Nonetheless, to maintain some restrictions on the exercise of rights that injured society, the commission adopted language prohibiting the abuse of rights that required that one may not exercise a right of property so that the only result was to harm another without some concomitant benefit to the owner who exercised the right.¹⁰⁰ At this point in the study, it seems appropriate to note that practical and political considerations forced the commission to remove or tone down several provisions that stridently advanced the social function of property. The commission was aware of the underlying theory and knew how to implement it in various provisions of the Code. Other forces called for restraint and were successful.

In addition to the Introductory Comments and the commission's report to the Secretary of State, both collectively written by the commission, there were some

⁹⁴ *Id.* at 348.

⁹⁵ *Id.* at 344–51.

⁹⁶ Aragón, *supra* note 86, at 277–99.

⁹⁷ *Id.* at 296.

⁹⁸ *Id.*

⁹⁹ *Id.* "Los juristas, que no habían estudiado a Comte, empiezan a conocerlo. Léon Duguit en *Las Transformaciones Generales del Derecho Privado desde el Código de Napoleón* dedica su sexta conferencia al estudio de la propiedad como función social, y cita al maestro." *Id.* at 296.

¹⁰⁰ *Revisión del Proyecto*, *supra* note 73, at 79.

contemporaneous individual writings on the Civil Code of 1928. For example, students of the Code have the individual comments of Ignacio García Téllez, a member of the drafting commission, who published his observations in 1932, the year the Code came into effect.¹⁰¹ An influential member of the committee, his comments add to our understanding of the mindset of the drafters, their goals, and their accomplishments. García Téllez based his discussion of the new Code on the social transformations in Mexico during and since the Revolution and the related Constitutional Articles expressing these transformations: Article 27 on property, Article 28 on intellectual property, and Article 123 on labor.¹⁰² He noted that civil law was most resistant to such changes because of its predominantly individual quality.¹⁰³ Nonetheless, other countries had socialized their private law, and the present civil code (Civil Code of 1884) no longer fit Mexican society.¹⁰⁴ Property, too, in García Téllez's view, must yield to the needs of the collectivity.¹⁰⁵ Regarding property, the Code, however, did not go as far as he or others in the commission would have liked in letting the new social doctrine shape their work. He wrote: "The definitive text of the Code does not correspond to the aims that were diminished from the draft, that, in my humble opinion, would have remained more faithful to the doctrine described while only correcting some of the legal aberrations it contains."¹⁰⁶ In retrospect, García Téllez admits that more could have been accomplished in the chapters of the Code on property and possession.¹⁰⁷ Thus, statements found in the Introductory Comments and in García Téllez's individual comments lead the reader to conclude that the final provisions on property made relatively slight progress toward the socialization of the law in comparison to the wide-ranging goals and theoretical underpinnings advanced by the commission more generally. With this theoretical and political background in mind, let us assess the Code's most important articles on property.

¹⁰¹ García Téllez, *supra* note 52, at 1–17. For biographical information on García Téllez see José Ramón Narváez Hernández, *El Código Privado-social: Influencia de Francesco Cosentini en el Código Civil Mexicano de 1928*, 16 ANUARIO MEXICANO DE HISTORIA DEL DERECHO 201, 214 n70 (2004).

¹⁰² García Téllez, *supra* note 52, at 1.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.* at 11.

¹⁰⁶ "El texto definitivo del Código no corresponde a las intenciones que privaron en el Proyecto, el que, a mi modesto entender, se habría conservado más fiel a la doctrina expuesta con solo corregir algunas de las aberraciones jurídicas que contiene." *Id.*

¹⁰⁷ *Id.* at 15.

V. SITUATING REVOLUTIONARY PROPERTY IN THE CIVIL CODE OF 1928

Having surveyed the various positions staked out by drafters and commentators at the time of drafting the Code, we should now consider what was actually accomplished by the commission and what provisions of the Civil Code of 1928 reflect the social function of property. Although this study will focus on the provisions defining the nature of property under the Civil Code of 1928, these provisions must first be situated in the Code itself. Excluding transitory provisions, the Code contains 3,044 articles.¹⁰⁸ After a brief section of preliminary disposition describing the general aspects of laws, their effect, and their application, the Code is divided into four main books.¹⁰⁹ Book 1, on persons, addresses physical and legal persons, domicile, the civil register, the family, and family property.¹¹⁰ Setting aside Book 2, on property, for the moment, Book 3 addresses testate and intestate succession of property.¹¹¹ Book 4, on obligations, addresses all kinds of agreements, contracts, promises, sales, leases, agencies, corporations, pledges, loans, mortgages, transactions, and the public register.¹¹²

Within this classical structure for civil codes, Book 2 is on property (*de los bienes*).¹¹³ This book is divided into eight topics: (1) preliminary dispositions;¹¹⁴ (2) the classification of Property (*bienes*);¹¹⁵ (3) possession;¹¹⁶ (4) property (*propiedad*);¹¹⁷ (5) usufructs;¹¹⁸ (6) servitudes;¹¹⁹ (7) prescription;¹²⁰ and (8) intellectual property.¹²¹

Within these over 500 articles addressing all aspects of property, let us focus on those that reveal the social function of property most clearly or that illustrate a practical retreat from the social function in the face of individualist criticism. Our discussion must begin with Article 830, the first article in the section of the Code on property and the core definitional provision on the owner's right.

¹⁰⁸ Castán Tobeñas, *supra* note 54, at 52.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 52–53.

¹¹¹ *Id.* at 53.

¹¹² *Id.*

¹¹³ Código Civil [CC], Diario Oficial de la Federación [DOF] 14-07-1928 (Mex).

¹¹⁴ *Id.* arts. 747–49.

¹¹⁵ *Id.* arts. 750–89.

¹¹⁶ *Id.* arts. 790–829.

¹¹⁷ *Id.* arts. 830–979.

¹¹⁸ *Id.* arts. 980–1056.

¹¹⁹ *Id.* arts. 1057–134.

¹²⁰ *Id.* arts. 1135–180.

¹²¹ *Id.* arts. 1181–280.

Article 830 states: “The owner of a thing may use and dispose of it with the limitations and modalities fixed by law.”¹²² A reader familiar with the Mexican Constitution of 1917 will immediately notice the parallel language to Article 27 of the constitution. The opening paragraphs of Article 27, as approved in 1917, read:

The property of the lands and waters lying within the limits of the national territory corresponds originally to the Nation, which has had and has the right to transfer the ownership of them to individuals, constituting private property.

The Nation shall have at all times the right to impose on private property the limitations that the public interests dictate, such as the right to regulate the enjoyment of natural resources, susceptible to appropriation, to make an equitable distribution of the public wealth and to care for its conservation. With this object, necessary means shall be created for the breaking up of large estates, for the development of small properties, for the creation of new centers of agricultural populations with the lands and waters required for them, for the development of agriculture, and for the avoidance of the destruction of natural resources and the damages that property may suffer to the prejudice of society.

Expropriations may only be made by reason of public utility and with indemnification.¹²³

Thus, Article 830 of the Mexican Civil Code of 1928 is the legislative implementation into private law of the power given to the nation in the public, constitutional law of Article 27 of the Mexican Constitution of 1917. The Constitution states that private property is subject to limitations for the benefit of the public interest; the Civil Code says that the owner’s use and disposition

¹²² “El propietario de una cosa puede gozar y disponer de ella con las limitaciones y modalidades que fijen las leyes.” Código Civil [CC], art. 830, Diario Oficial de la Federación 26-05-1928 (Mex.).

¹²³ “La propiedad de las tierras y aguas comprendidas dentro de los límites del territorio nacional, corresponde originariamente a la Nación, la cual ha tenido y tiene el derecho de transmitir el dominio de ellas a los particulares, constituyendo la propiedad privada. La nación tendrá en todo tiempo, el derecho de imponer a la propiedad privada, las modalidades que dicte el interés público, así como el de regular el aprovechamiento de los elementos naturales, susceptibles de apropiación, para hacer una distribución equitativa de la riqueza pública y para cuidar de su conservación. Con ese objeto se dictarán las medidas necesarias para el fraccionamiento de los latifundios; para el desarrollo de la pequeña propiedad; para la creación de nuevos centros de población agrícola con las tierras y aguas que les sean indispensables; para el fomento de la agricultura; y para evitar la destrucción de los elementos naturales, y los daños que la propiedad pueda sufrir en perjuicio de la sociedad. Las expropiaciones sólo podrán hacerse por causa de utilidad pública y mediante indemnización.” ANDRÉS MOLINA ENRÍQUEZ, LA REVOLUCIÓN AGRARIA EN MÉXICO 500–01 (1985) (Mirow’s emphasis in English translation).

of property is subject to limitations imposed by law. Nonetheless, one is struck by the expansive, revolutionary positions taken in the Constitution; distributing wealth equitably and breaking up of large estates shortly follow in the Constitution. No such language is found in the Civil Code of 1928. This limitation was not a novel Mexican step towards the social function of property.

Indeed, although tracking the text of limitations found in the Constitution, the text of the Civil Code is not particularly novel or tied to the Mexican Revolution or Mexican Constitution. It followed a long tradition of absolute property rights. A paradigmatic, individualistic, and absolute right to property, the furthest thing away from the social function of property, is found in the French Civil Code of 1804 (*Code Napoléon*). Article 544 of this French Code states: “Property is the right to enjoy and to dispose of things in the most absolute manner, provided that one does not undertake a usage prohibited by law.”¹²⁴ This provision, like many other liberal provisions in the French Civil Code of 1804, served as the basis for numerous liberal codes on property in Latin America.¹²⁵ Although the paradigmatic language of the French Code includes the idea of absolute enjoyment and disposition, it also provides for limitations imposed by law, an interesting parallel to Article 830 of the Mexican Civil Code of 1928.

Similarly, the direct antecedent of this article in the Mexican Civil Code of 1870 and 1884 is the same text in both nineteenth-century codes: “Property is the right to enjoy and dispose of a thing without more limitations than those established by law.”¹²⁶ These observations comport the concordance to the Civil Code of 1928 prepared by García Téllez in 1932. He states that there were three sources for Article 830: (1) Article 729 of the Civil Code of 1884; (2) Article 27 of the Mexican Constitution of 1917; and (3) comments by Manuel Gual Vidal on property in the Code in general.¹²⁷

¹²⁴ “La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse pas un usage prohibé par les lois ou par les règlements.” Translation from JOHN SPRANKLING, RAYMOND COLETTA, AND M.C. MIROW, GLOBAL ISSUES IN PROPERTY LAW 27 (2006), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006428859/2021-06-01 (last visited Aug. 25, 2022).

¹²⁵ PARISE, *supra* note 4, at 144–83.

¹²⁶ Código Civil, art. 827 (1870, Mex.); Código Civil art. 729 (1884, Mex.); RODOLFO BATIZA, LAS FUENTES DEL CÓDIGO CIVIL DE 1928: INTRODUCCIÓN, NOTAS, Y TEXTOS DE SUS FUENTES ORIGINALES NO REVELADAS 552 (1979).

¹²⁷ IGNACIO GARCÍA TÉLLEZ, MOTIVOS, COLABORACIÓN Y CONCORDANCIAS DEL NUEVO CÓDIGO CIVIL MEXICANO 120 (1932).

The core provision on property in the Civil Code of 1928 is indistinguishable in meaning from the earlier versions of this provision in the two liberal civil codes from the nineteenth century. Although there was a significant and detailed discussion of the socialization of property by the commission and commentators, the actual text of the core provision, Article 830, did not budge from its earlier concept of property. Some drafters and scholars pushed the practical results from the application of the theoretical notions of the social function of property, but there was no movement in this foundational provision of the Code.

Three other provisions indicate slight success for the proponents of the social function of property: one dealing with the expropriation of property, another addressing water, and finally, another limiting the assertion of rights. The first provision reveals a slight modification in language from prior codes to indicate that the Civil Code of 1928 has moved away from an absolute right in property. Article 831 of the Civil Code of 1928 states: “Property may not be occupied against the will of its owner without reason of public utility and by means of indemnification.”¹²⁸ This is a notable shift from the prior iterations of the same provision in the Civil Code of 1870 and Civil Code of 1884, both of which state: “Property is inviolable: it may not be occupied without reason of public utility and prior indemnification.”¹²⁹ Comparing these two texts, one immediately notes that the general principle of property that it is inviolable was excised from the version in 1928. This indicates a movement away from an absolute, inviolable right to property toward something moderated by other interests, such as social needs. There is also the change in the temporal nature of the indemnification for a taking. The early provisions required prior compensation, and the provision in 1928 just requires compensation, perhaps sometime in the future. This provides greater latitude for the taker, such as an administrative agency effecting agrarian reform, to take now and pay later. Both changes in this provision on expropriation demonstrate a slight shift toward a social function of property.

The second example concerns the allocation of water, probably most important in the agricultural setting. This article provides that an owner who can only obtain water through expensive works may “expropriate” water from

¹²⁸ “La propiedad no puede ser ocupada contra la voluntad de su dueño, sino por causa de utilidad pública y mediante indemnización.” Código Civil [CC], art. 831, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex).

¹²⁹ “La propiedad es inviolable: no puede ser ocupada sino por causa de utilidad pública y previa indemnización.” Código Civil, art. 828 (1870, Mex.), Código Civil, art. 730 (1884, Mex.), BATIZA, *supra* note 126, at 552 (1979).

neighbors who have a surplus with the indemnification set by experts.¹³⁰ This claim about a neighbor's water is found in Article 937:

The owner of a piece of land who only with very costly works may provide the water needed to use conveniently this land, has the right to demand of the owners of the neighboring land with surplus water, that they provide the necessary amount, by means of the payment of an indemnification set by experts.¹³¹

This is a fascinating example of a taking for a private purpose to provide water for a neighboring owner, most likely with efficient agricultural production as the ultimate public or social benefit. There is also an element of economic efficiency in the provision.

The third provision incorporated the doctrine of the abuse of rights into Mexican property law. This provision was viewed as a significant gain for proponents of the social function of property, who were disappointed that the other provisions of the Civil Code of 1928 did not go far enough in advancing this view of property. Article 840 states: "It is not licit to exercise the right to property in a manner that its exercise gives no other result than causing injury to a third person, without utility to the owner."¹³² Yet again, this provision limits the absolute exercise of property rights by the owner, who now may not do something purely to the detriment of others without some concomitant benefit to the owner. In many ways, this provision is the other side of the coin of the social function of property because it restricts what the owner may do rather than searching for social benefit in transactions with property.

Article 840 was a new introduction to the Civil Code of 1928 and had no parallels to the earlier Mexican civil codes.¹³³ Commission member García Téllez noted only foreign sources for this new provision, particularly Article 2

¹³⁰ *Exposición de Motivos*, *supra* note 52, at 33–34.

¹³¹ "El propietario de un predio que solo con muy costosos trabajos pueda proveerse del agua que necesite para utilizar convenientemente ese predio, tiene derecho de exigir de los dueños de los predios vecinos que tengan aguas sobrantes, que le proporcionen la necesaria, mediante el pago de una indemnización fijada por peritos." Código Civil [CC], art. 830, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.).

¹³² "No es lícito ejercitar el derecho de propiedad de manera que su ejercicio no dé otro resultado que causar perjuicios a un tercero, sin utilidad para el propietario." Código Civil [CC], art. 830, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.). "A member of the drafting commission later wrote that this article was influenced by Article 226 of the German Civil Code and of Article 2 of the Swiss Code of Obligations." Francisco H. Ruiz, *La socialización del derecho privado y el Código Civil de 1928*, 8 REVISTA DE LA ESCUELA NACIONAL DE JURISPRUDENCIA 45–88 (1946).

¹³³ BATIZA, *supra* note 126, at 544.

of the Swiss Civil Code and Article 226 of the German Civil Code.¹³⁴ Commentary sources on civil law by Raymond Saleilles, René Demogue, and Georges Ripert are also listed as influences on this provision.¹³⁵ One drafter of the Code noted that this provision merely prohibits owners from undertaking antisocial behavior with their property, and because law itself is a social product, there is nothing inconsistent with adding this requirement to property.¹³⁶

This handful of provisions serve to illustrate the extent of influence the social function of property had on specific articles in the Code. Although there was some movement from the earlier, liberal codes, the movement was not nearly what one would expect after reading the general statements of the commentators or some of the drafters. Indeed, one honestly does not feel the expected shift from absolute, individual property to property as a social function carrying duties to the collective.

Subsequent scholars have differed in their opinion on how far the social aspects of property were advanced by these provisions. In 1930 Spanish jurists and civil law professor José Castán Tobeñas asked whether the Civil Code of 1928 fulfilled its goal of being a fully social code, a Code of Private Social Law (“*Código de Derecho privado social*”).¹³⁷ Concluding that the goal was elusive because of the close ties between the individual and civil law, Castán Tobeñas wrote:

[d]espite its radicalism, the new Code does not modify the sense and traditional content of the right of property, inasmuch as Article 830, in imitation of the classic civil codes, states that ‘the owner of a thing may enjoy and dispose of it with the limitations and modalities fixed by law.’ The early draft, more advanced and innovative, established, in accordance with the ideas of Duguit and other modern laws: that the owner has the duty to exercise this right so that a social benefit it obtained (Article 816), and also has the obligation to make his property

¹³⁴ TÉLLEZ, *supra* note 127, at 120.

¹³⁵ *Id.*; see Marco Sabbioneti, *Raymond Saleilles (1855-1912)*, in GREAT CHRISTIAN JURISTS IN FRENCH HISTORY 324–41 (Olivier Descamps & Rafael Domingo eds., 2019) (commenting on civil law by Saleilles); Frédéric Audren, *Georges Ripert (1880-1958)*, in GREAT CHRISTIAN JURISTS IN FRENCH HISTORY 372–86 (Olivier Descamps & Rafael Domingo eds., 2019) (commenting on civil law by Ripert); Christophe Jamin, *Demogue René*, in DICTIONNAIRE HISTORIQUE DES JURISTES FRANÇAIS (XIIe-XXe SIÈCLE) 243–44 (Patrick Arabeyre, Jean-Louis Halpérin & Jacques Krynen eds., 2007) (commenting on civil law by Demogue).

¹³⁶ Ruiz, *supra* note 132, at 87.

¹³⁷ Castán Tobeñas, *supra* note 54, at 48–49.

productive (Article 818); but the Mexican bar accurately emphasized the inconveniences of these demands, so lacking definition and so difficult to put into effect.¹³⁸

Arguing against the incorporation of greater social goals related to property in the draft Code, Luis Cabrera wrote that, particularly for transactions in moveable property, it was impossible for the owner to create some sort of social benefit or even to monitor or control what the owner does with such property.¹³⁹ Cabrera was the primary drafter of the Agrarian Reform Law of January 6, 1915, and a firm supporter of agrarian reform and redistribution of land.¹⁴⁰ His practical criticisms must be taken at face value considering his stance on property. Thus, these limitations, although theoretically positioned to advance the notion of the social function of property in the Code, were effectively countered by the more conservative and practically oriented criticism of the bar.

Despite his observation that these provisions did not advance the social function of property as much as they could, Castán Tobeñas noted that other provisions were consistent with this newer concept of property. For example, he noted the provision related to expropriation for public good, and especially the provision:

That provides the theory of the abuse of right, according to the following formula (inspired from the German code): “It is not licit to exercise the right to property in a manner that its exercise gives no result than causing injury to a third person, without utility to the owner” (Article 840).¹⁴¹

¹³⁸ “A pesar de sus radicalismos, no modifica el nuevo Código el sentido y contenido tradicional del derecho de propiedad, puesto que el art. 830, a imitación de los Códigos civiles clásicos, dice que ‘el propietario de una cosa puede gozar y disponer de ella con las limitaciones y modalidades que fijen las leyes.’ El primitivo Proyecto, más Avanzado e innovador, establecía, de acuerdo con las ideas de Duguit y de algunas leyes modernas (1), que el propietario tiene el deber de ejercitar ese derecho de manera que se obtenga un beneficio social (art. 816), y [(2)] tiene, además, la obligación de hacer productiva su propiedad (art. 818); pero con razón puso de relieve la Barra Mexicana los inconvenientes de esas exigencias, tan poco concretas y tan difíciles de hacer efectivas.” *Id.* at 68–69.

¹³⁹ *Id.* at 69 (citing Luis Cabrera, *Los bienes y la propiedad conforme al nuevo Código civil*, 9 EL FORO: REVISTA TRIMESTRAL DEL DERECHO Y LEGISLACIÓN 125–34 (1928)).

¹⁴⁰ Mirow, *Theorizing*, *supra* note 12, at 14.

¹⁴¹ “[L]a que consagra la teoría del abuso del derecho, conforme a la siguiente formula (inspirada en el Código alemán): ‘No es lícito ejercitar el derecho de propiedad de manera que su ejercicio no dé otro resultado que causar perjuicios a un tercero, sin utilidad para el propietario’ (artículo 840).” Castán Tobeñas, *supra* note 54, at 69. A member of the drafting commission later wrote that this article was influenced by Article 226 of the German Civil Code and of Article 2 of the Swiss Code of Obligations. Ruiz, *supra* note 132, at 87.

Viewing the entire Code, including the provisions on property, Castán Tobeñas concludes that while it makes marked advances towards social law, its provisions do not constitute a new Code of Private Social Law (*Código de Derecho privado social*) in part because civil law is fundamentally about the individual. Indeed, he projected that social law would only come about when private law is absorbed into public law, something perhaps not a good thing in his opinion.¹⁴² Nonetheless, Castán Tobeñas's study of the Code in 1930 provides clear insight into the degree to which the socialization of law was possible in the Civil Code of 1928. The study also notes the restraint in changing the law of property found in the actual provisions of the Code despite the broader language of socialization.

Other scholars seem to be more persuaded by the general statements of commentators rather than the Code provisions themselves. Writing on the social aspects of the Code on its fiftieth anniversary in 1978, Sara Montero Duhalt accurately observed that Article 830 of the Civil Code of 1928 was almost identical to the language of the liberal codes of 1870 and 1884.¹⁴³ She followed this observation with the assertion that despite such similarity, there are several instances of social property in the Code.¹⁴⁴ After surveying several provisions on expropriation that do very little to shift the Code towards the social function of property she concluded: "The institution of property in the present Code acquired characteristics of social solidarity completely different from those supported by the individual ideology of the past century."¹⁴⁵ Thus, it seems that Montero Duhalt was convinced by contemporary general statements and commentary about the Code and its property provisions rather than the relatively small movement the Code provisions actually made in the direction of the social function of property.

Similarly, summarizing the property provisions in the Civil Code of 1928, Jorge Vargas wrote:

Property continues to be under the influence of the legal philosophy that predicates that the legal notion of property – contrary to the individualist approach adopted by the Napoleonic Code and by the Mexican Civil Code of 1884 – is

¹⁴² Castán Tobeñas, *supra* note 54, at 78–79.

¹⁴³ Montero Duhalt, *supra* note 57, at 172.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ("La institución de la propiedad adquirió en el código actual, características de solidaridad social, totalmente diversas a las sustentadas por la ideología individualista del siglo pasado.").

to be utilized as a means of advancing the social function of the State. This philosophy is clearly reflected in the tenor of Article 27 of the Federal Constitution.¹⁴⁶

Another respected, modern treatise on Mexican law comes to the same conclusion. Writing of the Code, it states: “Under the new rules, property ownership and possession was understood as serving a social function.”¹⁴⁷ Such conclusions that the social function of property was significantly advanced in the text of the Civil Code of 1928 go too far. As discussed above, there were several instances where there appeared to be some incorporation of the social function of property. The wholesale shift to a new paradigm, although asserted by drafters, is not backed up by the provisions of the Code itself.

VI. THE SOCIAL FUNCTION OF PROPERTY IN MEXICO AFTER THE CIVIL CODE OF 1928

Although the provisions related to property in the Civil Code of 1928 were not as fully reflective of social law and the social function of property as contemporary commentary indicated, commentary after the Code brought these approaches into common legal knowledge and provided an opportunity for the social function of property to become inextricably tied to the relatively minor advances made in the Code. Private law scholars advanced these views. There were also developments in Mexican agrarian law through judicial hesitance, legislation, and administrative actions that shifted practical outcomes on the redistribution of property towards a fuller sense of the social function of property. This section addresses these changes chronologically; it looks first at changes in the theory and implementation of agrarian reform and then examines the writings of scholars in doctrinal works following the Civil Code of 1928.

A. *Agrarian Reform*

Although already in place for over a decade under the Agrarian Reform Law of 1915, agrarian reform programs underwent significant changes in their theoretical underpinnings and in their implementation in the mid-1920s.¹⁴⁸ Along with the movement to socialize private law in the Civil Code, there was

¹⁴⁶ VARGAS, *supra* note 49, at lxiii.

¹⁴⁷ ZAMORA ET AL., *supra* note 9, at 454.

¹⁴⁸ HELGA BAITENMANN, MATTERS OF JUSTICE: PUEBLOS, THE JUDICIARY, AND AGRARIAN REFORM IN REVOLUTIONARY MEXICO 135–90 (2020); SUSAN R. WALSH SANDERSON, LAND REFORM IN MEXICO: 1910–1980, 51–104 (1984).

also a movement to socialize the *amparo* action, the constitutional action traditionally associated with the protection of individual rights, such as the right to property.¹⁴⁹ Owners claimed that decisions taken under agrarian reform provisions deprived them of their constitutional right to property, and their *amparo* actions effectively blocked many attempts for land redistribution under the Agrarian Reform law of 1915, Article 27 of the Mexican Constitution of 1917, and an agrarian regulatory law of 1922.¹⁵⁰ As Timothy James notes of this successful use of *amparos* to hinder Revolutionary programs dealing with land: “As of January 1925, more than 1,400 *amparos* filed against agrarian reform were pending before the Supreme Court.”¹⁵¹ These initial judicial impediments to effective redistribution under existing agrarian laws were worn away through three significant changes in legislation and the constitution. First, in 1927, the list of types of communities that could take advantage of agrarian law was expanded to ensure that mere legal structure or recognition did not block communities from asserting their claims.¹⁵² Second, in 1928, an amendment to the Mexican Constitution of 1917 completely restricted the membership of the Supreme Court, leaving only justices who would be more amenable to the work of the reform agencies.¹⁵³ The latter change broke the constitutional logjam of *amparo* actions stopping the free flow of land distribution in Mexico. Noting the importance of this amendment, James writes:

This successful 1928 amendment to the judicial provisions of the 1917 Constitution ‘packed’ the Court (enlarging its membership to fourteen). . . . Although the justices retained lifetime tenure, the reform itself had purged the previous membership of the Court and only a few of the old justices were reappointed.¹⁵⁴

Third, in 1931, the Agrarian Reform Law of 1915 was amended so that owners could no longer seek *amparo* actions to protect property subject to agrarian reform. The amendment “completely barred those adversely affected

¹⁴⁹ JAMES, *supra* note 59, at 96–100; see CRUZ BARNEY, *supra* note 49, at 832–38 (discussing the *amparo* action); M.C. MIROW, LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CÁDIZ AND ITS LEGACY IN SPANISH AMERICA 255–57 (2015) (discussing the *amparo* action); see also Mirow, *Theorizing*, *supra* note 12, at 25–26.

¹⁵⁰ JAMES, *supra* note 59, at 81.

¹⁵¹ *Id.* at 89.

¹⁵² *Id.*

¹⁵³ *Id.* at 78.

¹⁵⁴ *Id.* at 93.

by the redistribution of land from seeking redress in the courts.”¹⁵⁵ By socializing the *amparo* action, the executive could proceed with widespread agrarian reform without a watchful Supreme Court protecting the property rights of former individual owners. As James observes: “In several articles published between 1929 and 1932, Rodolfo Reyes saw in the Court’s new agrarian jurisprudence an example of the increasing ‘socialization’ of the *amparo* suit . . . which he saw as both a positive and necessary adjustment to the times.”¹⁵⁶

Thus, in *amparo* jurisprudence of the late 1920s and early 1930s, the constitutional action protecting the right to individual property was socialized so that it no longer stood as an impediment to agrarian reform. Similarly, the more property was perceived as a social function, the greater the unhindered strength of the implementing administrative agencies to shift ownership from former individuals to new approved owners under these reforms. Socializing the *amparo* and property itself meant that agrarian programs could be undertaken without the traditional concerns or constitutional protections related to the rights held by individual owners.

While constitutional scholars and justices of the Supreme Court socialized *amparo* actions to effectuate agrarian reform, private law scholars increasingly moved toward a social function of property paradigm in their writings on property despite the modest gains made in the Civil Code itself.

B. *Private Law Scholars*

In 1942, Rafael Rojina Villegas made a great step toward the adoption of the social function of property and the works of Duguit as fundamental theories for property in the Civil Code of 1928. In his treatise on civil law, Rojina Villegas addressed the new social orientation of the Civil Code of 1928 in general and dedicated at least ten full pages on the social function of property and its immediate antecedents.¹⁵⁷ He described Duguit’s theory of property at length.¹⁵⁸ In overall structure, Rojina Villegas’s treatment of property under the Civil Code of 1928 paralleled Duguit’s exposition of the topic by tracking the historical path of different ideas of property from Roman law to the present.¹⁵⁹

¹⁵⁵ *Id.* at 76.

¹⁵⁶ *Id.* at 96.

¹⁵⁷ RAFAEL ROJINA VILLEGAS, *DERECHO CIVIL: BIENES, DERECHOS REALES Y POSESIÓN* 97–109 (1942).

¹⁵⁸ *Id.* at 101–08.

¹⁵⁹ Mirow, *Social-Obligation Norm*, *supra* note 21 at 209. Jessica Viven-Wilksch, *supra* note 26, at 38–47.

The nuance and depth of Rojina Villegas's treatment of this topic merit close attention. His exposition of the topic is divided into four sections focused on: Roman law, the French Civil Code of 1804 (the Code Napoléon), the Mexican civil codes of 1870 and 1884, and the present.¹⁶⁰ The broad contour of his argument is the rise of individual, absolute property rights and their transformation into a social function in the present day.¹⁶¹ Rojina Villegas's treatment of the Mexican Civil Codes of 1870 and 1884 asserts that even these codes began to move in the direction of social limitation. These codes, and notably Article 729 of the Civil Code of 1884, modified the absolute right of property found in earlier sources by stating that the right to use and dispose was subject to limitations imposed by law.¹⁶² Rojina Villegas argued that the classical, liberal notion of an absolute right to property was whittled down by these new restrictions.¹⁶³ Nonetheless, he was wary of placing too much meaning in these restrictions to conclude that these limitations formed a nascent kind of social function. Recognizing the new limitations, he wrote: "This concept now serves the later theories that deny the absolute character of the right of property and that consider property as a social function."¹⁶⁴ Later, however, he accurately concluded that the nature of property under Mexican law after the Revolution was distinct despite the modifications found in the nineteenth-century codes:

Neither Article 729 nor the later chapter on property indicates what are the restrictions that the legislator may impose, so that, notwithstanding the definition and its theoretical scope, in the regulation of property we do not find a group of limitations that are later established in the Constitution of 1917, in its Article 27, and in the current Civil Code; but at least the principle exists that the legislator may establish all kinds of modalities or limitations.¹⁶⁵

¹⁶⁰ ROJINA VILLEGAS, *supra* note 157, at 94.

¹⁶¹ *Id.* at 94–109.

¹⁶² *Id.* at 100.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 100 ("Este concepto sirve en la actualidad para las tesis posteriores que niegan el carácter absoluto al derecho de propiedad y que consideran a la propiedad como una función social.").

¹⁶⁵ "No indica el Artículo 729, ni posteriormente el capítulo que se dedica a la propiedad, cuales son esas restricciones que el legislador puede imponer, así que no obstante la definición y su alcance teórico, en la reglamentación de la propiedad no encontramos el conjunto de limitaciones que posteriormente se establecen en la Constitución de 17, en su Artículo 27, y en el Código civil vigente; pero por lo menos existe el principio para que el legislador pueda establecer toda clase de modalidades o limitaciones." *Id.* at 100–01.

Turning to the modern law of property, Rojina Villegas made a paradigmatic leap into modern theories of the social function of property. Without citation to the works of Duguit, Rojina Villegas relies heavily on his work and theories tying them closely to Mexican property law after the Civil Code of 1928. He writes:

Modern law has its doctrinal antecedents as in its legislative expression, among us, in constitutional Article 27 and the civil code of [19]28. One of the authors who in our view has put forth the best critique of the individualist doctrine, and at the same time has formulated a concept of property that is in agreement with the new orientations of law, is León Duguit, who studied the transformations undertaken by different juridical institutions of private law since the Code Napoleon and gave lectures in 1911 in the University of Buenos Aires, addressing such transformations. . . .¹⁶⁶

Summarizing the main points of Duguit's argument, Rojina Villegas asserted that the right to property arises out of society and is consequently subject to the limitations that society wishes to impose.¹⁶⁷ Thus, for Duguit and Rojina Villegas, property "is a social function and not a subjective, absolute, inviolable right anterior to society and the State that the juridical norm cannot touch."¹⁶⁸ According to Rojina Villegas, this new understanding of property was introduced by Auguste Comte and refined by Duguit.¹⁶⁹

Searching for Mexican iterations of this new concept of property, Rojina Villegas ahistorically turns to Article 27 of the Mexican Constitution of 1917. He writes: "For this reason Article 27 declares that the nation has at all times the right to impose on private property the limitations that the public interest

¹⁶⁶ "El derecho moderno tiene su antecedente doctrinal, como en su expresión legislativa, entre nosotros, en el Artículo 27 Constitucional y el código civil de 28. Uno de los autores que en nuestro concepto ha expuesto mayor la crítica a la doctrina individualista, y al propio tiempo ha formulado un concepto de propiedad que está de acuerdo con las nuevas orientaciones de derecho, es León Duguit, quien estudió las transformaciones sufridas por diferentes instituciones jurídicas del derecho privado a partir del Código de Napoleón, y sustentó unas conferencias en 1911 en la Universidad de Buenos Aires, tratando tales transformaciones . . ."

Id. at 101–02.

¹⁶⁷ *Id.* at 102–05.

¹⁶⁸ "[E]l derecho de propiedad . . . es una función social y no un derecho subjetivo, absoluto, inviolable, anterior a la sociedad y al Estado y que la norma jurídica no pueda tocar." *Id.* at 105.

¹⁶⁹ *Id.* at 107.

dictates, as well as to regulate the exploitation of natural resources.”¹⁷⁰ Considering the protection absolute property formerly enjoyed from the activities of the states, Rojina Villegas again finds this doctrine’s rebuttal in Article 27:

This aspect of the juridical impossibility to interfere [with property] remains completely discarded in the theory of Duguit, that is, in our view, the theory that inspired constitutional Article 27, and that may serve us to develop, at least in our law, the modern concept of property. If property is a social function, the law may intervene placing obligations on the owner. . . .¹⁷¹

How were such limitations reflected in the Civil Code of 1928, according to Rojina Villegas? He found several instances, but not all were gathered under the section of the Code dealing with property. His first example is found in a general provision that requires residents of the country to undertake their activities and use their goods “in a manner that does not prejudice the collectivity.”¹⁷² Giving the example that an owner may no longer abandon his wealth or use it contrary to the good of the collective, Rojina Villegas viewed this provision as evidence that the Civil Code of 1928 moved away from an absolute, liberal, unlimited right in individual property.¹⁷³

With this general principle in mind, Rojina Villegas looked for evidence of its application in the provisions of the Code on property. He first turned to the core property provision discussed above, Article 830, the first article in the Code’s section on property.¹⁷⁴ To refresh our memories, this article states: “The owner of a thing may use and dispose of it with the limitations and modalities

¹⁷⁰ “Por esto declara el Art. 27 constitucional que la nación tiene en todo tiempo el derecho de imponer a la propiedad privada las modalidades que dicte el interés público, así como regular el aprovechamiento de los elementos naturales. . .” *Id.*

¹⁷¹ “Este aspecto de imposibilidad jurídica para intervenir, queda completamente desechado en la teoría de Duguit, que es, en nuestro concepto, la que inspira el Art. 27 constitucional, y que puede servirnos para desarrollar, por lo menos en nuestro derecho, el concepto moderno de propiedad. Si la propiedad es una función social, el derecho sí podrá intervenir imponiendo obligaciones al propietario . . .” *Id.* at 107.

¹⁷² “Los habitantes . . . tienen obligación de ejercer sus actividades y de usar y disponer de sus bienes, en forma que no perjudique a la colectividad, bajo las sanciones establecidas en este Código y en las leyes relativas.” Inhabitants have the obligation to exercise their activities and to use and enjoy their property in a way that does not prejudice the collectivity, under the sanctions established in this Code and related laws. *Id.* at 108 (quoting Código Civil [CC], art. 16, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.)).

¹⁷³ *Id.* at 108.

¹⁷⁴ *Id.* at 109 (quoting Código Civil [CC], art. 830, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.)).

fixed by law.”¹⁷⁵ He read this provision in conjunction with Article 840.¹⁷⁶ If Article 830 permits use with restrictions, then Article 840 states the same principle in a restrictive manner. Article 840 states: “It is not licit to exercise the right to property in a manner that its exercise gives no result than causing injury to a third person, when the owner does not obtain any benefit exercising it.”¹⁷⁷ He further noted that the same principle is expanded to the exercise of any kind of right in Article 1912.¹⁷⁸

Rojina Villegas discussed three other provisions of the Code that he views as consistent with its social modifications of property. Article 836 provided for expropriation whenever the property was needed to advance a collective benefit.¹⁷⁹ Article 837 expanded the types of legally recognized injuries a third party may suffer from a neighbor’s improper use of property to include the third party’s security, quiet enjoyment, and health.¹⁸⁰ Article 839 provided for a third party’s lateral support rights in the excavation or construction on a neighbor’s property.¹⁸¹

Despite Rojina Villegas’s marshaling of examples to illustrate the Code’s adoption of the social function of property, there is a disconnect between the sweeping language and promises of the introductory section presenting a radical restriction of property and the relatively modest changes the Code itself made from the pre-Revolutionary paradigm of individual and absolute rights in property. The pages of Rojina Villegas’s treatise in 1942 present something enigmatic. On the one hand, Rojina Villegas presented the fullest and most in-depth presentation of the theoretical aspects of the social function of property and a detailed analysis of Duguit’s work. On the other, his examples from the Code are not persuasive. Thus, it was the commentary on the Code, such as Rojina Villega’s work, and the guiding principles of the Code, rather than the Code provisions themselves, that led Mexico firmly down the path of the social function of property and Duguit as its major proponent.

¹⁷⁵ “El propietario de una cosa puede gozar y disponer de ella con las limitaciones y modalidades que fijen las leyes.” Código Civil [CC], art. 830, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.).

¹⁷⁶ ROJINA VILLEGAS, *supra* note 157, at 109 (quoting Código Civil [CC], art. 840, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.)).

¹⁷⁷ “No es lícito ejercitar el derecho de propiedad de manera que su ejercicio no dé otro resultado que causar perjuicios a un tercero, sin utilidad para el propietario.” *Id.*

¹⁷⁸ *Id.* (citing Código Civil [CC], art. 1912, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.)).

¹⁷⁹ *Id.* (citing Código Civil [CC], art. 836, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.)).

¹⁸⁰ *Id.* at 109 (citing Código Civil [CC], art. 837, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.)).

¹⁸¹ *Id.* (citing Código Civil [CC], art. 839, Diario Oficial de la Federación [DOF] 26-05-1928 (Mex.)).

A few years later, in 1946, one of the members of the drafting commission and a professor at the National School of Jurisprudence (*Escuela Nacional de Jurisprudencia*), later the law faculty of the National Autonomous University of Mexico, Francisco H. Ruiz published his lectures on the socialization of law and the Civil Code.¹⁸² After surveying individualist and socialist approaches to property, Ruiz stated that “the doctrine that sees a social function in property asserts that the state should intervene so that property realizes its social end.”¹⁸³ Nonetheless, Ruiz was apparently a member of the commission who was not so certain about the advances attempted in the draft of the Code. He was not fully committed to the social function of property:

Property is not a social function, as some assert, in the sense that it is only justified when it satisfies collective needs and that it is only worthy of guarantee to the extent it provides this social service; property is also justified because it satisfies the rational needs of the owner. Property is a function of all rational human need, be it individual or collective.¹⁸⁴

The modern concept of property must harmonize these competing individual and collective interests.¹⁸⁵ In Ruiz’s view, one way of harmonizing these interests was through the abuse of the rights doctrine found in Article 840 discussed above.¹⁸⁶

By the 1940s, commentators on the Code explicated the social function of property when discussing property. Their general statements about the social function of property and Duguit formed a new point of departure for the discussion of property in Mexico. The path unfolded in the scholarship on property despite the limited gains towards the social function of property in the Code itself.

¹⁸² Ruiz, *supra* note 132, at 88.

¹⁸³ “La doctrina que ve en la propiedad una función social, sostiene que el Estado debe intervenir para que la propiedad realice su fin social.” *Id.* at 83.

¹⁸⁴ “La propiedad no es una función social, como algunos sostienen, en el sentido de que solo tiene justificación cuando satisface necesidades colectivas y merece ser garantizada únicamente en la medida que presta ese servicio social; la propiedad también se justifica porque satisface necesidades racionales de propietario. La propiedad es función de toda necesidad racional humana, ya sea individual o colectiva.” *Id.* at 84.

¹⁸⁵ *Id.* at 83.

¹⁸⁶ *Id.* at 87.

VII.OBSERVATIONS ON THE CIVIL CODE OF 1928 AND THE SOCIAL FUNCTION OF PROPERTY IN MEXICO

The Civil Code of 1928 has an important place in the development of the social function of property in Mexico, but a facile, direct line of legal theory, thought, and sources from European writers on the social function of property such as Duguit to Article 27 of the Mexican Constitution to the Civil Code of 1928 is not accurate. The path is curved and shaped by detours and unexpected, yet important, contributions. Surveying the provisions on property in the Civil Code of 1928, one finds they only slightly reflect the social function of property. The Code's core provision on property, Article 830, does not incorporate the social function of property at all. The most important contribution the Civil Code of 1928 made to the construction of the social function of property in Mexico was to provide years of intense and thoughtful reflection about what property was and might be under a doctrine fully incorporating these recent ideas. This discussion was reflected in the position of the drafters of the Code and in scholarly comment on this process.

The Introductory Comments to the Code fully exposit a new approach to socialize private law and create a Code of Private Social Law. One of the drafters also individually commented about these broad goals. Implementation was the stumbling block, particularly as socially-based text on property was subjected to the criticism of the practicing bar and more traditional commentators. This led the drafting commission to ease up on its drive to incorporate the social function of property into the Code.

Nonetheless, the discussion gave room to new voices about the social function of property. Subsequent commentators on the Code picked up on these new trends in thinking about property. At the same time, a push for effective agrarian reform also turned to the socialization of property and the *amparo* protecting property rights to limit, and later abolish, judicial interference with administrative redistribution of land. Shortly afterward, the writings of Rojina Villegas solidified the connection between Duguit's full description and analysis of the social function of property and the Civil Code of 1928 as a stop along the way to the adoption of this new theory. This theory lent cohesion to disparate historical and legal developments associated with property. The ahistorical application of Duguit's work to the Revolution, agrarian reform, the Mexican Constitution of 1917, and even the Civil Code of 1928 was a story so beautifully told it was impossible to resist.

The social function of property in Mexican law was evolving throughout the span of agrarian reform in Mexico from shortly before the Constitution of 1917 until the amendment of the constitution and the abolition of such programs in the early 1990s.¹⁸⁷ Article 27 of the Constitution provided the basis of agrarian reform and has been amended numerous times since its promulgation.¹⁸⁸ In the second half of the 1920s, under President Elias Calles, substantial agrarian reform led to over seven million acres of expropriated land redistributed to individuals and communal landholders (*ejidos*).¹⁸⁹ In the 1930s, a new Code of Agrarian Law was enacted, and President Lázaro Cárdenas's administration oversaw the similar distribution of forty-four million acres.¹⁹⁰ Different administrations were more or less active in agrarian reform over the mid to late twentieth century, with an important new Agrarian Reform Law enacted in 1971.¹⁹¹ Despite these efforts, public and political sentiment gathered that rural poverty and agricultural underproduction persisted.¹⁹² With new models of economic development, Presidents Salinas de Gortari and Zedillo shifted towards liberal notions of property.¹⁹³ A modern work on Mexican law succinctly states: "Agrarian Reform came to an abrupt end on January 6, 1992, when Article 27 of the Constitution was amended, repealing the provisions pertaining to land redistribution."¹⁹⁴ The new Agrarian Law of 1992 ended the government's duty to redistribute land, created agrarian tribunals to adjust the rights of communal and individual landholders, substantially increased the range of legal recognition and economic options of communal landholders, and expanded opportunities for foreign investment.¹⁹⁵ The most significant vestige of the social function of property in Mexico came to an end.

VIII. ADDING MEXICO TO THE LATIN AMERICAN DEVELOPMENT OF THE SOCIAL FUNCTION OF PROPERTY

With this proper relocation of Duguit's works and the social function of property in the development of Mexican law, a reexamination of the region's use and acceptance of these theories leads to some general observations. This

¹⁸⁷ ZAMORA ET AL., *supra* note 9, at 240, 435.

¹⁸⁸ *Id.* at 435.

¹⁸⁹ *Id.* at 436; *see id.* at 437 (discussing the *ejido*).

¹⁹⁰ *Id.* at 436.

¹⁹¹ *Id.* at 436; *see* SANDERSON, *supra* note 147 (discussing the quality, nature, and extent of land distributed from 1910 to 1980 in Mexico).

¹⁹² ZAMORA ET AL., *supra* note 9, at 438.

¹⁹³ *Id.* at 439.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 439-40.

contribution affords the author the opportunity to summarize and compare two other studies conducted by the author, one on Chile and the other on Argentina, with the works of Daniel Bonilla, who has examined a similar phenomenon in Colombia, and of Giselle Jordán Fernández, who has examined Cuban developments. These four studies form the core of this section. These cases imply that the diversity of uses and perspectives on the social function of property amongst these countries indicate that additional study of the rise of the social function of property in other countries of the region will fruitfully add nuances and layers to our understanding of a transformation that was both regionally widespread and locally distinct.

A. *Chile, 1925*

Chile serves as the clearest example so far of the works of Duguit as the main source for the incorporation of the social function of property into a Latin American constitution.¹⁹⁶ In 1923, Duguit wrote, “One may say that in fact the concept of property as a subjective right disappears, to be replaced by the concept of property as a social function.”¹⁹⁷ In 1925, President Arturo Alessandri, in a long speech urging a new constitution for Chile, stated, “One may say that in fact the concept of property as a subjective right disappears, to be replaced by the concept of property as a social function.”¹⁹⁸ These are identical passages. The President’s direct and forceful intervention in the debates over the text of the Constitution led to Chile’s incorporation of the social function of property into its Constitution of 1925.

What led to Duguit’s influence in the constitutional process of Chile in the mid-1920s? Chile, like all the countries of the region, adopted a classical liberal notion of property quite soon after its independence from Spain.¹⁹⁹ The Chilean Constitution of 1833 incorporated a classical liberal notion of absolute property rights. Andres Bello’s Civil Code of 1855 for Chile also entrenched this widely accepted notion of private property into Chilean law.²⁰⁰ This regime of property

¹⁹⁶ See generally Mirow, *Origins of the Social Function*, *supra* note 8, at 1183–217.

¹⁹⁷ “On peut dire qu’en fait la conception de la propriété droit subjectif disparaît pour faire place à la conception de la propriété fonction sociale.” LÉON DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 681 (2d ed., 1923).

¹⁹⁸ “Se puede decir que en el hecho el concepto de la propiedad como derecho subjetivo desaparece, para ser reemplazado por el concepto de la propiedad como función social.” MINISTERIO DEL INTERIOR, CHILE, *ACTAS OFICIALES DE LAS SESIONES CELEBRADAS POR LA COMISIÓN Y SUBCOMISIONES ENCARGADAS DEL ESTUDIO DEL PROYECTO DE NUEVA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA* 116 (1925) [hereinafter *MINISTERIO DEL INTERIOR, ACTAS OFICIALES*] (citing DUGUIT, *supra* note 196).

¹⁹⁹ Mirow, *Origins of the Social Function*, *supra* note 8, at 1189–91.

²⁰⁰ *Id.*

spanned slightly over a hundred years in Chile from its independence until the early 1920s.

In 1920, Chile entered into a period of rapid and profound political change.²⁰¹ A combination of electoral reforms, the strengthening of organized workers and unions, and the increased presence of the military in politics led to an uneven political road during the first half of the 1920s.²⁰² Supported by liberals, Arturo Alessandri was elected president in 1920 and was re-elected in 1924, only to be removed by the military the same year.²⁰³ Alessandri resigned but was installed as president by a separate faction of the military in 1925.²⁰⁴ President Alessandri's agenda was to advance a stronger executive, social reforms, and a new constitution that would respond to the "social question" confronting modern Chilean society.²⁰⁵ In 1925, a commission was organized to reform the constitution.²⁰⁶ Its work is well documented and reported in over five hundred pages of text, approximately fifty pages of which address the social function of property.²⁰⁷ Although the political affiliations and ideologies of the approximately one hundred members of the commission were varied and across a broad spectrum, on the question of the social function of property, there were three main groups.²⁰⁸ One group supported the notion of the social function of property, mainly as a means to land reform and the redistribution of the large landed estates known as *latifundios*.²⁰⁹ A second group was staunchly opposed to the social function of property.²¹⁰ It sought to maintain private property as an absolute right as expressed in the Chilean Constitution of 1833 and the Civil Code of 1855.²¹¹ A third group was not opposed to introducing social limitations on private property but wanted to keep property as a right whose use would yield to collective needs in particular instances.²¹²

²⁰¹ SIMON COLLIER & WILLIAM F. SATER, *A HISTORY OF CHILE, 1808–2002*, 201–12 (2d ed., 2002).

²⁰² *Id.* at 205–12.

²⁰³ *Id.* at 205–09.

²⁰⁴ *Id.* at 211–12.

²⁰⁵ Mirow, *Origins of the Social Function*, *supra* note 8, at 1187–88.

²⁰⁶ *Id.* at 1189.

²⁰⁷ MINISTERIO DEL INTERIOR, *ACTAS OFICIALES*, *supra* note 198, at 81–137.

²⁰⁸ Mirow, *Origins of the Social Function*, *supra* note 8, at 1191–200.

²⁰⁹ *Id.* at 1191–96.

²¹⁰ *Id.* at 1196–99.

²¹¹ *Id.*

²¹² *Id.* at 1199–200.

President Alessandri attended the commission when it debated the social function of property but did not intervene until the third day to shift the work of the members in the direction he preferred.²¹³ He stated:

To diminish a little the fear that some feel when the right of property is treated, please permit me to read some paragraphs of a text of Constitutional Law written by Léon Duguit, Dean of the Law Faculty of the University of Bordeaux, an author who is considered in Europe the leading authority on questions of Constitutional Law.²¹⁴

Extensive quotes from Duguit and analysis followed. With Chile's modern society in mind, Alessandri sought a concept of property that would match the reality of the country's present condition, its desire to modernize, and the hopes for a united Chile.²¹⁵ Indeed, Alessandri's extensive use of Duguit and his intervention in the commission's work led to a compromise of competing factions related to the definition of property in the Chilean Constitution of 1925 that stated, "The exercise of the right of property is subject to the limitations or rules that the maintenance of progress of the social order require."²¹⁶

The doctrine of the social function of property in Chile had a remarkable impact on the country's politics, society, and legal system. It was used as a constitutional basis for agrarian and land reform, colonization projects in the south of the country, urban construction projects in cities, and various mining and agricultural regimes.²¹⁷ These activities and their justifications under the doctrine of the social function of property were sometimes heavily pursued and sometimes less so.²¹⁸ From 1970 to 1973, President Salvador Allende unsurprisingly put the doctrine of the social function of the property to active use.²¹⁹ He pushed Duguit's original concept to the political left to redefine the social function of property as a notion of property that fit comfortably within socialism and the state ownership of such property.²²⁰ Industries, businesses, and general services were placed under state control, and significant steps were taken to subject banking and landholding to state regulation.²²¹

²¹³ *Id.* at 1200–04.

²¹⁴ MINISTERIO DEL INTERIOR, ACTAS OFICIALES, *supra* note 198, at 114.

²¹⁵ Mirow, *Origins of the Social Function*, *supra* note 8, at 1200–02.

²¹⁶ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 10(10).

²¹⁷ *See generally* ENRIQUE BRAHM GARCÍA, PROPIEDAD SIN LIBERTAD: CHILE 1925-1973 (1999); ENRIQUE EVANS DE LA CUADRA, ESTATUTO CONSTITUCIONAL DEL DERECHO DE PROPIEDAD EN CHILE: LA LEY 16.615 DE 20 DE ENERO DE 1967 (1967).

²¹⁸ Mirow, *Origins of the Social Function*, *supra* note 8, at 1205–11.

²¹⁹ BRAHM GARCÍA, *supra* note 217, at 230–43.

²²⁰ *Id.*

²²¹ *Id.*

While the political reinterpretation of Duguit's doctrine to the left by President Allende may be seen as an expected shift by a socialist government, a rather surprising turn occurred under Pinochet after the coup of September 11, 1973.²²² Instead of rejecting the social function of property as being tainted with socialist interpretations under Allende's presidency, Pinochet and his advisers co-opted the notion of the social function of property.²²³ Indeed, Pinochet was the first person to insert the precise term "social function" into a Chilean constitutional document.²²⁴ Pinochet's government skillfully redefined property's "social function" in the Constitutional Act of 1976:

The social function of property includes as much as required by the general interest of the State, national security, utility, and the public well-being, the best use of the sources of productive energy for the service of the collective and the elevation of the conditions of the common life of inhabitants.²²⁵

This language, with minor changes related to preserving the environment, continues today after Chile's transition to democracy in the 1990s.²²⁶

B. Colombia, 1936

Colombia serves as a second instance of the adoption of the social function of property by a country in the region.²²⁷ Before incorporating this doctrine, Colombia, like Chile, maintained a classical liberal concept of property from the time of independence and bolstered by the protections for private property in its conservative Constitution of 1886.²²⁸ The Colombian Civil Code provisions were modeled on Bello's Chilean Civil Code of 1855 and borrowed that Code's perspective on the absolute right to property.²²⁹

The doctrine of the social function of property entered Colombian legal thought in the 1930s.²³⁰ In 1930, the Liberal Party assumed power with Enrique

²²² Mirow, *Origins of the Social Function*, *supra* note 8, at 1212.

²²³ *Id.* at 1212–14.

²²⁴ Law No. 1533 preamble, para. 8, Septiembre 11, 1976, DIARIO OFICIAL [D.O.] (Chile).

²²⁵ "La función social de la propiedad comprende cuanto exijan los intereses generales del Estado, la seguridad nacional, la utilidad y la salubridad públicas, el mejor aprovechamiento de las fuentes de energía productiva para el servicio de la colectividad y la elevación de las condiciones de vida del común de los habitantes." Law No. 1552 art. 1(16), Septiembre 11, 1976, DIARIO OFICIAL [D.O.] (Chile).

²²⁶ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(24).

²²⁷ Bonilla, *supra* note 39, at 1170.

²²⁸ *Id.* at 1135, 1141–49.

²²⁹ Bonilla, *supra* note 39, at 1135, 1141–49.

²³⁰ *Id.* at 1139.

Olaya Herrera, who served as president until 1934.²³¹ Olaya Herrera was succeeded by another Liberal Party leader from 1934 to 1938, Alfonso López Pumarejo, who instituted a government program called *Revolución en Marcha*, the “forward moving revolution,” with a focus on land redistribution and agrarian reform.²³² Amending the conservative constitution of 1886, López Pumarejo’s Legislative Act 1 of 1936 imported the social function of property as a constitutional underpinning for the Agrarian Reform Law of 1936, which also defined property as a social function.²³³ This legislative act amended Article 26 of the Colombian Constitution of 1886 and redefined property on the constitutional level in Colombia.²³⁴ In addition to several statements that private interests must give way to public utility and social interest, the new text read, “Property is a social function which implies obligations.”²³⁵ Nonetheless, another part of the amendment continued to define property as a right, and Bonilla has noted the contradictory nature of the provision.²³⁶

Related to this process and the introduction of the social function of property into Colombian law, debates in the legislature and statements by judges of the Colombian Supreme Court indicate that Duguit’s doctrine of the social function of property was well known.²³⁷ There are direct references to his work and name.²³⁸ Bonilla writes, “The Court, the legislators, and the executive of 1936 all knew Duguit’s work and were aware of the differences between the concepts of property as a right and property as a social function.”²³⁹ Similarly, in 1935 and urging the adoption of the Legislative Act, President López Pumarejo echoed Duguit when noting that property “has its basis in the social function it plays.”²⁴⁰

To this point, the adoptions of the social function of property in Colombia and Chile were quite similar. A new government sought reforms, used the works of Duguit to instill a new understanding of property, and incorporated this notion into its constitutional provisions on property. These examples stand in contrast with the later adoption of Duguit’s work in Mexico, explored in the earlier parts

²³¹ *Id.* at 1139 n.23.

²³² *Id.* at 1138–39.

²³³ *Id.* at 1150–51.

²³⁴ *Id.*

²³⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 26 (as quoted in Bonilla, *supra* note 39, at 1150).

²³⁶ Bonilla, *supra* note 39, at 1150.

²³⁷ *Id.* at 1152–54.

²³⁸ *Id.*

²³⁹ *Id.* at 1154.

²⁴⁰ *Id.* at 1156 (citing MARCO A. MARTÍNEZ, RÉGIMEN DE TIERRAS EN COLOMBIA: ANTECEDENTES DE LA LEY 200 DE 1936 “SOBRE REGIMEN DE TIERRAS” Y DECRETOS REGLAMENTARIOS, 14–15 (1939)).

of this article.²⁴¹ The use, however, of Duguit's works in Colombia offers something distinct and quite interesting. Bonilla has uncovered the way that Duguit's influence continues to be recognized and given significant interpretive value in Colombia.²⁴² Analyzing and discussing numerous examples of cases from the Colombian Constitutional Court from the 1990s, Bonilla found that Duguit's work was and continues to be a touchstone for the interpretation of property in Colombia.²⁴³ Article 58 of the Colombian Constitution of 1991 states, "Property has a social dimension which implies obligations." In 2011 Bonilla wrote:

In the past twenty years, the Constitutional Court has established a consistent line of case law in which the concept of property as a social function is developed and protects the powers of the state to enforce compliance by the owners. In a set of ten rulings on abstract judicial review, the Court has protected the right of the state to limit the right to property, given its social function in matters as diverse as the environment, mining, and the distribution of urban land. In these rulings, the Court defended a standard interpretation of the social function of property.²⁴⁴

And to understand the standard interpretation of the social function of property, the highest constitutional court of Colombia makes use of and directly references Duguit.²⁴⁵

C. Cuba, 1940

The Cuban Constitution of 1940 contains a clear adoption of the social function of property. Article 87 of this constitution states, "[T]he Cuban state recognizes the existence and legitimacy of private property in its widest concept of a social function and without more limitations than those of reasons of public necessity or social interest established by law."²⁴⁶ This patent adoption of the social function of property on the constitutional level was a dramatic shift from the Cuban Constitution of 1901, which contained classically liberal and individualist provisions related to property.²⁴⁷ Thus, this section focuses on what

²⁴¹ See also Mirow, *Theorizing*, *supra* note 12.

²⁴² Bonilla, *supra* note 39, at 1152–69.

²⁴³ *Id.*

²⁴⁴ *Id.* at 1162–63.

²⁴⁵ *Id.* at 1162–69.

²⁴⁶ "Artículo 87: El Estado cubano reconoce la existencia y legitimidad de la propiedad privada en su más amplio concepto de función social y sin más limitaciones que aquellas que por motivos de necesidad pública o interés social establezca la Ley." CONSTITUCIÓN DE LA REPÚBLICA DE CUBA 1940, art. 87.

²⁴⁷ Jordán Fernández, *supra* note 10, at 504–06.

happened in the development of property law and theory in Cuba from 1901 to 1940.

From the early 1930s and throughout the decade, various drafts and proposals for a new constitution in Cuba propounded the social function of property.²⁴⁸ Authors of some of these drafts and proposals directly cited Duguit as a source of their constitutional thought. Jordán Fernández notes citations to Duguit in a book on constitutional reform by Arturo Mañas in 1931 and in a commentary on constitutional reform by Miguel Jorrín in 1938.²⁴⁹ Thus, Duguit's ideas of the social function were well-known among those working on Cuban constitutional reform in the 1930s. Political parties, factions of the military, and their leaders also advocated for the social function of property.²⁵⁰ In 1939, for example, Colonel Fulgencia Bastita, who would assume the presidency in 1940 and promulgate the new constitution that year, supported the notion of the social function of property.²⁵¹

In addition to those writing on constitutional reform, other influences shaped the path toward the social function of property in Cuba. Constitutional legislation from the mid-1930s moved in the direction of the social function of property by requiring that the use of private property be directed toward the wellbeing of the Cuban people.²⁵² Other constitutions of the region also served as examples, and, according to Jordán Fernández, commentators looked to the Mexican Constitution of 1917, by then strongly associated with the social function of property; the Weimar Constitution of 1919; the Spanish Constitution of 1931; and the Soviet Constitution of 1936.²⁵³

With substantial support from scholars, politicians, and the military, the constituents of the constitutional convention introduced the social function of property into the constitution with little debate; the approach was widely accepted.²⁵⁴ Conflict with another provision of the constitution that required prior compensation in cash for the taking of private property, Article 24, led to debate and commentary.²⁵⁵ Property's social function, found in Article 87, and

²⁴⁸ *Id.* at 506–09.

²⁴⁹ *Id.* at 507, 508 (citing ARTURO MAÑAS, *SOBRE UNA REFORMA DE LA CONSTITUCIÓN CUBANA* (1931); Miguel Jorrín, *Derecho estatal y Derecho social*, 1 *REVISTA DEL COLEGIO DE ABOGADOS DE LA HABANA* 141–149 (1938)).

²⁵⁰ *Id.* at 509–10.

²⁵¹ *Id.* at 510 n.83.

²⁵² *Id.* at 510.

²⁵³ *Id.* at 511–13.

²⁵⁴ *Id.* at 514.

²⁵⁵ *Id.* at 513–19.

the traditional, full protections it received under Article 24 could not be reconciled, and despite substantial attempts from the left to dilute the effect of the takings provision, the constitution was promulgated with both articles.²⁵⁶ This led to the weakness of the social function of property in Cuba, noted by Jordán Fernández, and the ambiguity of the meaning of the doctrine in Cuba.²⁵⁷

The relationship between the social function of property and agrarian reform was also present in Cuba. Article 90 of the Constitution of 1940 provided for the dissolution of large estates (*latifundios*).²⁵⁸ Jordán Fernández also rightly observes the important appearance of the publication of a work by Francesco Consentini in 1937 in the *Revista Cubana de Derecho*, his *Código Agrario para la República de México*, as an important link between the social function of property and agrarian reform in Cuba.²⁵⁹

Thus, according to Jordán Fernández, these conflicting provisions and the ambiguous meaning of “social function” gutted a complete implementation of the social function of property in Cuba after the doctrine’s incorporation into the Constitution of 1940.²⁶⁰ After the promulgation of the Constitution, commentators asserted that the dissonance created between the property provisions in the constitution led to the development of a golden mean between absolute, individual notions of property and a complete acceptance of property’s social function.²⁶¹ This dissonance also appeared in attempts to refashion the Civil Code along the lines of the ideas of property espoused in the Constitution of 1940, and several draft codes after the constitution attempted to codify the social function of property.²⁶² These drafts were unsuccessful, and Cuba continued with the constitutional dissonance on property found not only in the articles of its constitution but also in the articles of its classically liberal civil code.²⁶³ Thus, Cuba experienced a similar dissonance as that of Mexico in its attempts to incorporate the social function of property into its Civil Code. This further eroded Cuban attempts to implement impactfully the constitutional language adopting the social function of property.

²⁵⁶ *Id.* at 514–15.

²⁵⁷ *Id.* at 502, 520–24.

²⁵⁸ *Id.* at 519; see also, José Ramón Narváez Hernández, *El Código Privado-Social Influencia de Francesco Cosentini el del Código Civil Mexicano de 1928*, 16 ANUARIO MEXICANO DE HISTORIA DEL DERECHO 201–26 (2004) (assessing the influence of this Italian jurist on Mexico’s development of the social function).

²⁵⁹ Jordán Fernández, *supra* note 10, at 519.

²⁶⁰ *Id.* at 520–22.

²⁶¹ *Id.* at 522–24.

²⁶² *Id.* at 525–27.

²⁶³ *Id.* at 526–27.

With the Cuban Revolution in 1959, Fidel Castro's regime made drastic changes to Cuban private property. His first major law, the Agrarian Reform Law of May 17, 1959, addressed property. Within five years, the socialist state prohibited ownership of private houses for purposes other than habitation, reduced in size the permitted agricultural holdings, and expropriated commercial and rental real property.²⁶⁴ The social function of property was abandoned for state ownership of property.²⁶⁵

D. Argentina, 1949

Argentina, in light of the developments in Chile, Mexico, Cuba, and Colombia, presents an unexpected path to adoption of the social function of property. Although Buenos Aires was the location of the doctrine's fullest enunciation by Duguit in 1911, it was only after a period of more than thirty-five years that the social function of property found its way into an Argentine constitution.²⁶⁶ Rather than a direct path from the lectures of Duguit to immediate appropriation by Argentine legislators and jurists, the social function of property found expression only in the country's Peronist Constitution of 1949. The existence of the social function of property in Argentina lasted only a few years as the doctrine disappeared in Argentina with the derogation of the Peronist Constitution in 1956.²⁶⁷ Considering the importance of Argentina in the history of the social function of property, and the cases of Chile and Colombia, where its direct influence is clearly observed, the Argentine experience with the doctrine and Duguit's work is not what one might expect.²⁶⁸

Argentina maintained a classical liberal notion of property, and this view of property found expression in the Argentine Constitution of 1860, whose provisions were strongly influenced by the great Argentine comparative constitutionalist Juan Bautista Alberdi and his book on constitutionalism written in 1852.²⁶⁹ Alberdi sought subjective rights, a non-interventionist state, the protection of foreign investment, and the encouragement of population growth through immigration.²⁷⁰ Just as in Chile and Colombia, the Constitution and the

²⁶⁴ LATIN AMERICAN LAW, *supra* note 6, at 232.

²⁶⁵ *Id.*

²⁶⁶ Mirow, *Argentina*, *supra* note 39, at 267.

²⁶⁷ *Id.* at 280.

²⁶⁸ *See generally id.*

²⁶⁹ *Id.* at 268–69.

²⁷⁰ M.C. Mirow, *Bases y puntos de partida para la organización política de la República Argentina, Juan Bautista Alberdi (1810-1884)*, in THE FORMATION AND TRANSFORMATION OF WESTERN LEGAL CULTURE: 150 BOOKS THAT MADE THE LAW IN THE AGE OF PRINTING 368–60 (Serge Dauchy et al. eds., 2016).

Civil Code set out a classical liberal definition of property. Article 17 of the Argentine Constitution of 1860 stated, “Property is inviolable, and no one living in the Confederation may be deprived of it, unless by virtue of a judgment based on law.”²⁷¹ Moreover, the famous Argentine Civil Code of 1871 in Article 2513 enunciated an absolute, unfettered right to property, “Inherent in property is the right to possess the thing, to dispose or to benefit from it, to use it, or to enjoy it according to the will of the owner. He may exploit it, degrade it, or destroy it.”²⁷²

The idea of the social function of property became important only after Juan Perón consolidated power in the mid-1940s.²⁷³ Peronism favored labor, social justice, and aid to the poor; it sought to expel foreign firms and their power over railroads, power plants, and public services.²⁷⁴ Peronism even had a spiritual dimension expressed in the term “*justicialismo*,” itself grounded in Catholic ideas of justice and harmony.²⁷⁵

After their election to the presidency in 1946, Perón advanced these reforms in society, economics, politics, and law through the Constitution of 1949.²⁷⁶ The President of the Constituent Convention that drafted the Constitution, Colonel Domingo Mercante, was Governor of the province of Buenos Aires and guided the political processes of constitution-making.²⁷⁷ A significant portion of the legal work was by Arturo Enrique Sampay, who steered a group of jurists with varying political allegiances.²⁷⁸ Despite their different political outlooks, most, including Sampay, shared a strong sense of nationalism and the Catholic social

²⁷¹ “La propiedad es inviolable, y ningún habitante de la Confederación puede ser privado de ella, sino en virtud de sentencia fundada en ley.” Constitución de la Nación Argentina 1860, art. 17.

²⁷² “Es inherente a la propiedad, el derecho de poseer la cosa, de disponer o de servirse de ella, de usarla y gozarla según la voluntad del propietario. Él puede desnaturalizarla, degradarla o destruirla.” María Florencia Pasquale, *La función social de la propiedad en la obra de León Duguit: Una re-lectura desde la perspectiva historiográfica* [The Social-Function of Property in the Work of Leon Duguit: A Re-Read from the Historiography Perspective], 15 *HISTORIA CONSTITUCIONAL* 102 (Aug. 31, 2014).

²⁷³ Mirow, *Argentina*, *supra* note 39, at 272–73.

²⁷⁴ DAVID ROCK, *ARGENTINA 1516-1987: FROM SPANISH COLONIZATION TO ALFONSÍN* 263 (1987).

²⁷⁵ *Id.* at 264.

²⁷⁶ Mirow, *Argentina*, *supra* note 39, at 272.

²⁷⁷ *Id.*

²⁷⁸ See generally Susana T. Ramella, *Arturo Enrique Sampay (Argentina, 1911–77)*, in *LAW AND CHRISTIANITY IN LATIN AMERICA: THE WORK OF GREAT JURISTS* 470–82 (M.C. Mirow & Rafael Domingo eds., 2021).

doctrine.²⁷⁹ Indeed, the Catholic social doctrine and Christian humanism were core beliefs of Peronism.²⁸⁰

The drafters' turn toward the social function of property had many sources. The constituent convention was supplied with constitutions from the 1920s through the 1940s, many of which contained the social function of property.²⁸¹ Duguit's formulation of the social function of property was also present in the legal *mentalité* of mid-twentieth-century Argentina.²⁸² Nonetheless, it must be noted here that Duguit is mentioned only once by name in the debates on the social function of property in the constituent convention.²⁸³ Without direct reference to Duguit, professors from the University of Buenos Aires contributed to the national discussion about the constitution and wrote at length on the social function of property.²⁸⁴ Duguit's work was present but was not a singular or strong voice in Argentina as the country constructed its doctrine of the social function of property.

As the jurist most responsible for the incorporation of the social function of property into the Constitution of 1949, Sampay was much less in tune with Duguit and his sociological jurisprudence than with Neo-Thomistic Christian humanism.²⁸⁵ He had studied widely, and importantly, in Paris, where he attended lectures on natural law by Louis Le Fur and other lectures by Jacques Maritain, the well-known Neo-Thomist.²⁸⁶ Thus, Catholic Social Teaching and Neo-Thomism informed Sampay's understanding of the social function of property more than the works of Duguit and his progeny.

²⁷⁹ MARCELO KOENIG, UNA CONSTITUCIÓN PARA TODOS: UNA INTRODUCCIÓN AL PENSAMIENTO DE SAMPAY, LA CONSTITUCIÓN DE 1949 Y LA CONCEPCIÓN PERONISTA DE LA FUNCIÓN SOCIAL DE LA PROPIEDAD 93, 95 (2015).

²⁸⁰ Edgardo Madaria, *El aporte socialcristiano al constitucionalismo social en la etapa peronista: los doctores Arturo Sampay y Pablo Ramella*, in DOSCIENTOS AÑOS DEL HUMANISMO CRISTIANO EN LA ARGENTINA 525, 555–56 (Marcelo Camusso, Ignacio López & María M. Orfali eds., 2012) [hereinafter *El aporte socialcristiano*].

²⁸¹ I DIARIO DE SESIONES DE LA CONVENCION NACIONAL CONSTITUYENTE AÑO 1949, 324, 325 (Buenos Aires, Imprenta del Congreso Nacional, 1949) [hereinafter *1 Diario de Sesiones*]; Susana T. Ramella, *Propiedad en función social en la Constitución de 1949*, 35 REVISTA DE HISTORIA DEL DERECHO 297, 318, 320 (2007).

²⁸² Victor Tau Anzoátegui, *Introducción: Peculiaridad del pensamiento jurídico argentino*, in I ANTOLOGÍA DEL PENSAMIENTO JURÍDICO ARGENTINO (1901–1945) (Victor Tau Anzoátegui ed., 2007).

²⁸³ *1 Diario de Sesiones*, supra note 281, at 315.

²⁸⁴ Ramella, supra note 39, at 324; FACULTAD DE DERECHO Y CIENCIAS SOCIALES, ENCUESTA SOBRE LA REVISIÓN CONSTITUCIONAL, INSTITUTO DE INVESTIGACIONES DE DERECHO POLÍTICO, CONSTITUCIONAL Y DE LA ADMINISTRACIÓN DE BUENOS AIRES (1948).

²⁸⁵ *El aporte socialcristiano*, supra note 280, at 543.

²⁸⁶ *Id.*

Most of the other supporters of the social function of property in the constituent convention shared Sampay's approach to the subject. They quoted Saint Thomas Aquinas and other sources of Christian humanism.²⁸⁷ For example, Professor Oscar Martini referred to Emmanuel Mounier's study on property, based on Aquinas and the encyclicals of the church's social doctrine, and the writings of Georges Rutten, a Belgian Christian trade unionist, who wrote on the social doctrine of the church.²⁸⁸ Argentine proponents of the social function of property relied heavily on Catholic social teaching and the related papal encyclicals.

Sampay's efforts were successful. The Argentine Constitution of 1949 contains an entire chapter entitled "The Social Function of Property, Capital and Economic Activity."²⁸⁹ Some scholars have rightly seen this chapter, Chapter IV of the Constitution's preamble, as the intellectual and legal core of Peronist constitutionalism.²⁹⁰ A central provision on property, Article 38, states "[P]rivate property has a social function and, as a consequence, is subject to the obligations established by law for the common good."²⁹¹ This new definition of property enabled various land reform schemes and many projects of nationalization and expropriation.²⁹²

The successful incorporation of the social function of property into Argentina was short-lived. In 1955, anti-Peronists staged a coup, and President Aramburu abrogated the Constitution of 1949.²⁹³ The Constitution of 1860, with its classical liberal formulation of property came back into force.²⁹⁴ Instead of co-opting the social function of property, as in the Chilean case, the new government saw the social function of property as inconsistent with the classical liberal regime it sought to establish.²⁹⁵

²⁸⁷ *1 Diario de Sesiones*, *supra* note 281, at 514–15.

²⁸⁸ *Id.* See also Emmanuel Mounier, *De la propriété capitaliste à la propriété humaine*, 2 *ESPIRIT* 5 (1934); GEORGES C. RUTTEN, *LA DOCTRINE SOCIALE DE L'ÉGLISE: RÉSUMÉ DANS LES ENCYCLIQUES "RERUM NOVARUM" ET "QUADRAGESIMO ANNO"* (1932).

²⁸⁹ Mirow, *Argentina*, *supra* note 39, at 273.

²⁹⁰ KOENIG, *supra* note 279, at 32.

²⁹¹ Art. 38, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

²⁹² Mirow, *Argentina*, *supra* note 39, at 274.

²⁹³ *Id.* at 280.

²⁹⁴ *Id.*

²⁹⁵ KOENIG, *supra* note 279, at 231.

IX. CONCLUSION

The adoption of the social function of property in Latin America was not a uniform process in which one sweeping influence, such as the Mexican Revolution and its regional impact or, indeed, the works of Duguit, traveled through the region. Although many countries ended up with constitutional provisions incorporating the social function of property, the introduction of this idea in each country was a particularized or granular phenomenon. Nonetheless, some useful and broader patterns emerge from studying individual countries, such as those discussed here.

The cases of Mexico and other countries analyzed here show that countries began with a classical liberal concept of property entrenched in both public and private law. Absolute subjective rights to property found their expression in both constitutions and civil codes. Political change, often radical, led to a shift towards the “social” that was informed by the writings of Duguit and his progeny, recent constitutions, and Catholic social doctrine. These intellectual and jurisprudential trends led to the implementation of these ideas in constitutions that often produced direct effects on the legal system and political goals, such as agrarian reform. The constitutional redefinition of property was not always followed by subsequent adoptions in private law and civil codes.

The social function of property is imbued with political content, and the countries studied here expose the political context of the doctrine. With political change, the social function of property was left unchanged, co-opted, or abolished. The doctrine was legally and politically malleable; politicians and leaders who recognized the content of “social function” had no fixed meaning were able to shape it to their political aims.²⁹⁶ In Chile, Presidents Allende and Pinochet used the social function of property to divergent ends. In other countries of the region, the notion of the social function of property was perceived as having some fixed content that, under particular political circumstances, might be continued or rejected. In Mexico, Duguit’s work and the social function of property were later appropriations that shaped Mexican law to conform to wider regional and international trends. Mexico gained legal and intellectual prestige by borrowing, even belatedly, the myth of its appeal to Duguit and the social function of property as part of its revolutionary legal development. In Colombia, the doctrine continued in a more or less pure form where Duguit’s writings still meaningfully inform constitutional debate. In

²⁹⁶ Jordán Fernández, *supra* note 10, at 489, 502, 520–24 (noting the ambiguous quality of “social function” and listing other authors who have reached this conclusion).

Argentina, the social function of property was seen as inconsistent with a new regime and abolished.

Duguit's influence on the adoption of the social function of property in the region was variable; it was strong in Chile and Colombia, for example. The influence of the works of Duguit was surprisingly weak in Argentina, arguably the country of its birth. In Mexico, Duguit's influence, as examined here, was complex, belated, and indeed retroactive.²⁹⁷ The study of these countries leads one to expect additional country-specific variations in the adoption, use, and acceptance of the doctrine of the social function of property in the region. Additional study will reveal that Duguit's works in this process were important in some countries and less so in others. What appears, at first, to be a homogeneous regional event was, in fact, multiple parallel and distinct developments in which similar fruit was produced from different seeds, soil, and farmers.

²⁹⁷ See also Mirow, *Theorizing*, *supra* note 12, at 35–36.