**THE SOCIAL FUNCTION OF PROPERTY IN LATIN AMERICA**

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**Historical Evolution**

History shows that the pursuit of property in Latin America by the colonists was framed by European legal and moral traditions. These imported property systems were initially established to surmount the indigenous consuetudinary system of communal property and to accommodate the colonisers’ economic interests.[[1]](#footnote-1) In the contemporary era, the scope and application of property rights has seen adjustment according to political and economic environments, with public and social concerns also informing the review, enactment and application of property rights.[[2]](#footnote-2)

Certain individuals and groups who hold large land areas are in a position to control the allocation and distribution of property to others. Therefore, the call for property rights responds to increases in scarcity of natural resources, land value and population density in the context of contemporary democratic society. Such rights have been handled in national legal systems in different ways: some Constitutions have recognised the right to property as a fundamental right, equal in stature to other personal liberties, while others have limited the asserted interests in property to those defined by private-law sources. Most Latin American Constitutions have considered the right to private property in affirmative terms – in such a way as “the right to property is guaranteed” – and some legal systems have adopted a concept of the social function of property, expressing the idea that private ownership rights can be subordinated to the public interest. Moreover, in many Constitutions the right to property is inscribed under chapters that regulate economic and social rights instead of being labelled as an individual right.[[3]](#footnote-3)

The development of the social function concept was grounded in the opportunity offered by the national legal systems for state intervention in property relations to achieve state ends, especially agrarian reforms and land distribution – historical components of the social revolutions and mobilisations held in the region. This view, and the fact the lands and waters located within the boundaries of the newly independent national territories were originally owned by Nations and thus publicly managed, contributed to the development of what has been called the ‘socialisation of the law’ or ‘social constitutionalism’. The concept of the social function of property articulated by Leon Duguit and Karl Renner developed in this context and has influenced the inclusion of such principle in constitutional reforms in Latin America. Both were concerned with the adaptation of the property concept to social and economic uses and have explored the impact of economic and social forces upon the functioning and transformation of such institutions and the consequent changes in positive law. The contemporary application of the social function doctrine has evolved to include purposes such as an ecological function and compliance with urban land reforms, as the examples of Brazil, Colombia and Mexico show.[[4]](#footnote-4)

**Constitutional Approaches to Urban Property**

The contemporary application of the social function doctrine, first employed as a tool to restructure land policy and provide a juridical basis to justify agrarian reforms, has evolved to include other purposes, such as an ecological function and compliance with urban land reforms, as the examples of Brazil, Colombia and Mexico show. They constitute interesting examples of the evolution of the doctrine of the social function of property in legal systems and are representative of a pattern of unequal distribution and concentration of land in the region, which persists to the present day.

***Brazil***

The 1988 Brazilian Constitution includes explicit references to the social function of property, which are directly justiciable provisions, as well as, housing and land tenure rights. The social function of property figures in the Constitution as a founding principle, of immediate application, of the economic order intended to ensure everyone a life with dignity in accordance with the dictates of social justice. The Constitution links the fulfilment of the social function of urban property to the approval of municipal master plans, which instantiates a departure from its treatment under the 1916 Civil Code by bringing private ownership into the realm of the public law. The basis of this new paradigm for urban property was set out by the City Statute, a federal law approved in 2001, which has tried to reform the administrative and private law tradition in order to expand the scope of the social function of property.

The City Statute reinforces the power of municipal governments to regulate, induce and/or reverse urban land market trends, especially those of a speculative nature, according to criteria of social inclusion and environmental sustainability.[[5]](#footnote-5) It provides for concrete tools for the fulfilment of the social function of urban property, such as the compulsory obligation of land division or construction on vacant, underused or unused urban property, increases in property taxes over time and expropriation of land through payment of public debt bonds. The full development of the social functions of property entails compliance with the following guidelines: fair distribution of the benefits and burdens resulting from the urbanisation process; state’s central role in determining an adequate territorial order through a democratic planning and management system; detachment of the right to build from the right to property; regularisation and upgrading of informal settlements occupied by low income population through the establishment of special urban regulatory frameworks; equality of conditions for public and private agents in the promotion of urban development; reinforcement of the power of municipal governments to control urban development.

In 2002 a new Civil Code was enacted and it conditions the exercise of the owner’s powers – to use, enjoy and dispose of the property and get it restored from who unjustly possesses or detains it – to the fulfilment of social, economic and environmental functions. It therefore shapes and limits the owner’s subjective right to property. The Code provides that the owner can be deprived of property in case it consists of a large tract of land being possessed continuously and in good will, for more than five years, by a considerable number of people who have improved or served the land in a manner considered of social and economic relevance. Although it is not clear if fair compensation shall be paid to the owner in cases where the social function of property has been disregarded, the concept enshrined in the new Civil Code is significantly more compatible with the text of the Constitution than the previous Code of 1916.

Notwithstanding relevant case law has interpreted private ownership in light of the fundamental principles inscribed in the 1988 Constitution and recognised that the social function of property imposes obligations on the owner as a necessary condition to warrant protection from interference, it is difficult to sustain that there is a common understanding produced by the national jurisprudence regarding all changes and new aspects brought about by the social function approach.

***Colombia***

After the 1936 constitutional reform, which was influenced by the thought of Duguit, the Constitution of Colombia recognised the social function of property, and the current Constitution (1991) contains one of the most advanced regulations on this respect. Although it prohibits confiscation of property, it concedes that a judicial sentence may nullify ownership of property acquired by unjust enrichment when it is harmful to the public treasury or to social morality. It also establishes that when public necessity or social interest conflict with individual rights, private interests shall yield to the public interests and that property is a social function that implies obligations. The Constitution legitimates a system of recovery and redistribution of value increments or increases on prices of urban private property, deriving from public investments or from decisions related to territorial planning.

The jurisprudence of the Constitutional Court conceded that the Constitution relativized the fundamental right to property and submitted it to the interests of the collectivity by limiting the discretion of the owner.[[6]](#footnote-6) In case of the owner’s omission in fulfilling his obligations towards the social function, his ownership loses legal protection and can be extinct. The Court has held that compensation is not due in all types of restrictions inflicted to property, but rather, compensation is due when expropriation impinges in the form of excessive sacrifices on an owner in relation to other individuals in the same position. For the Court, ownership can also be limited by legislation issued for the benefit of society, such as for reasons of sanitation, urbanism, environmental conservation, and security. In this regard, it declared constitutional the Law n. 9 which imposes an obligation on private developers to grant an amount of their land gratuitously to the municipality to be set aside for certain uses, such as for roads, for open spaces and for social services.[[7]](#footnote-7) The Court has also recognised that where urban reform pursues a social purpose, such as the redistribution of property, it justifies the application of a special expropriation regime in the context of the cities or a reduction in the amount to be paid.[[8]](#footnote-8) In case the expropriated property was used as the family housing, compensation shall be fully paid in cash in order to assure that those affected are not rendered homeless and are able to afford the purchase of a new property to live in. The Court has also declared unconstitutional the part of Art. 699 of the Civil Code which provided for the ‘right to arbitrarily dispose of the thing owned’, as this concept of property was found to be in contradiction with that of the Constitution.[[9]](#footnote-9) For it, the term ‘arbitrarily’ denoted a marked individualistic interest which was not compatible with the principle of the social state governed by the rule of law (Estado Social de Derecho) in which the Constitution is rooted. The Social Function Doctrine of the Colombian Constitution imposes the positive obligation on the owner to use their property not only in a way that does not cause harm but that is beneficial to the community.

***Mexico***

The Mexican Constitution of 1917 and the German Weimar Constitution are said to have inaugurated the phase of social constitutionalism by having introduced a number of social rights which articulate different fundamental dimensions of the social and economic life of individuals. The ownership forms recognised by the Constitution – private, public and social – derive from original property rights vested in the Mexican Nation. The main objectives were the restitution of the original lands to indigenous peoples and the regulation of land distribution and ownership through the reintroduction of the *ejido*[[10]](#footnote-10) system as a means to expropriate large land holdings.[[11]](#footnote-11) The reform of 1992 introduced a range of changes in the 1917 Constitution:[[12]](#footnote-12) a) removal of the constitutional obligation of the Mexican State to redistribute land to peasants; b) the introduction of the possibility of selling and leasing *ejido* land under certain procedures; c) the encouragement of private investment through partnerships between *ejidatarios* and commercial companies to develop land; d) the creation of new types of owners and such as commercial societies, and the broadening of the size of such properties in order to reverse the multiplication of private small holdings (*minifundio*). The modification of the 1917 Constitution also resulted in the elimination of the requirement of use or exploitation from the legal definition of small, rural land holding protected from expropriation. This indicates that landowners became free to use their land as it pleases or even leave them idle, and it might have an impact on the levels of compensation to be paid in case of expropriation due to land reform and on the positive obligation of productive use of property.

Albeit such changes, the Constitution limits property rights by establishing a maximum area of property that can be owned according to the type of tenure and crops, defines the authorised uses and exploitation methods of different types of land, and imposes specific regulations for different types of land. In comparison to the Constitution of Colombia, it genuinely establishes a ceiling on the amount of landed property that can be privately owned and regulates the small properties being protected under such provision. Jurisprudence has evolved to recognise the competence of local authorities to likewise impose limitations on the right to private property, especially for the purposes of regulating the organisation of informal settlements.[[13]](#footnote-13) In urban areas alltypes of land are subject to limitations in the public interest[[14]](#footnote-14) although, as far as the regulation of human settlements is concerned, the dual property regimes established by the Constitution – individual private property and social property (*ejidos* and *nucleos agrarios*) – are said to have produced fragmentation of the control and management of the territory.[[15]](#footnote-15) Even though the Mexican Constitution does not use the term ‘social function’, the concept is clearly implicit and has been developed in the jurisprudence of the Supreme Court. The constitutional system has yet to recognise as part of the property regime the rights of the residents of informal settlements that resulted from illegal developments and sub-divisions of rural *ejidos*, which thus might have to fulfil a social function. Since theyare not recognised as such, they would not be subject to limitations imposed by the state on grounds of public interest considerations, as articulated in the Constitution.[[16]](#footnote-16) As a result, informal settlements have spread out throughout the Mexican territory and with almost no regulatory control over the social and environmental functions they should fulfil.

With regards to civil law, the Federal Civil Code enacted in 2000 embedded the constitutional concept of the social function of property. The proprietor can dispose of and enjoy property according to the limitations and modalities established by the law, which can restrict its usage or impose certain conditions for its enjoyment. The Civil Code limits to the exercise of ownership and prohibits the abuse of rights.

**Implementation of the Social Function of Property**

Mainstream characteristics of the approach taken to property rights and their social functions in the assessed countries can be identified. Firstly, protection of private property is conditioned on the fulfilment of social interests, which entails a systemic interpretation with fundamental constitutional values, such as the respect for human dignity, for solidarity, and for the prevalence of the general interest. This approach is grounded on the notion that the basic function of public law must be to promote social solidarity.[[17]](#footnote-17) Secondly, the conceptualisation of property as having a social function gives rise to positive obligations on states to regulate property rights towards a collective end. The duty of the state goes beyond restraint to include a positive duty to ensure that property fulfils a social function by imposing limitations and restrictions on the scope of property whilst affirming certain classes and functions of property. Thirdly, local authorities at state and at the municipal level are vested with powers to impose limitations and restrictions on private property in order to achieve collective benefits on behalf of public interest. In this context, local authorities acquired the right (and the duty) to interfere with property, through the application of the available legal instruments, where the owner fails to effectively utilise it in the benefit of society.

In Latin America the objectives of land reform aiming at the redistribution of land, provision of security of tenure to dwellers and access to other essential needs, such as food, housing and basic services, remained unimplemented, despite the legal and judicial developments that have taken place in a range of countries throughout the region. About 1.1 billion poor people are landless and almost 200 million do not have sufficient land to provide a decent standard of living. One of the barriers to universal access to housing and land is the strong protection assigned to private property which allows for resources and assets to be concentrated in the hands of the few to the exclusion of those coming from low-income sectors. This accrues to the vexing question of law enforcement in a region that has many well-crafted laws, but fall short of implementation.

Although the realisation of fundamental rights through the fulfilment of the social function of property, such as housing, environmental protection and work, is provided for in the Constitutions, not rarely their norms fall short of enforcement. In the case of Brazil, although many municipal master plans have alluded to the social function of property, the majority has not cleared stated how it will be incorporated into territorial and urban policies as to widen access to serviced land to the poor, prevent real estate speculation and induce the social use of vacant and underused property.[[18]](#footnote-18) They are silent about goals and timeframes for the approval and implementation of instruments to recover public investments that have led to the valorisation of urban property and to establish compulsory uses or determine forms of occupation of land in certain areas in the city, to be performed by the owners. Developers’ obligations are also few and the burden of infrastructure implementation and service provision has fallen largely on the state. Lack of social participation in urban development decision making, commoditization of land and housing driving up the value of the properties, and exclusive urban planning are undermining the concrete application of social function of property instruments. In 2014, some master plans will be reviewed, such as those of Curitiba and Sao Paulo, opening up opportunities for civil society to influence changes in urban legislation and policy with a view of implementing the social function of property.

In Colombia, land distribution remains highly inequitable, coupled millions of Internally Displaced Persons whose majority lacks tenure security and connection to basic services and employment opportunities. The retention of vacant or underused lands located in well-serviced areas for speculation is one of major policy issues facing municipal governments intending to implement land regularisation and social housing programmes. Since 2008 the city government of Bogotá has been implementing the Declaration of Priority Development (*Declaratoria de Desarrollo Prioritario*), an instrument intended to produce serviced land for housing through forcible sale by auction of vacant or underused properties.

A social use for housing purposes is attached to properties sold through auction, in order to induce the production of social housing. In regard to developers’ obligations towards the social function of property, the Constitutional Court of Colombia has supported the application of Law n. 9 of 1989 which imposes a duty on private developers to assign a certain portion of land for the installation of social housing, public services, parks or other features of collective use. Under the social function of property concept, non-exercise of possession may also be a justification for termination of property rights. Although Colombia passed regulations reinforcing the protection of collective tenure rights over urban informal settlements, the legal framework for adverse possession could also be explored as a tool for formalizing land rights of urban settlers.

**Conclusion**

The social function of property is more than a limitation to the right to property as it affects not only its exercise but also the right to property itself. The transformations of the institution of property were not restricted to the reduction of the powers of the owner or the volume of property rights *vis-à-vis* to legal limitations. The social function was consolidated into a general principle that dominated the new role of ownership, which is reflected in its structure and content. The social function became the foundation and justification of the owner’s powers over the domain of his property; that is to say a means to control the exercise of the subjective right to property.[[19]](#footnote-19) The right to property in its liberal sense is significantly modified by the social function approach which transforms the core elements of the traditional understanding of ownership. In transforming the structure of the right to property, the social function shapes the rights and duties of the owner and the role of property for the development of society. The ‘social interest’, as a lawful limitation to the right to property, means the social function of property contributes to the realisation of other social rights.

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