

Property in the Post-post-revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico

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Introduction

This Article is about the challenges of thinking about property as a constitutional issue in contemporary Mexico. Apart from showing the changes that have rendered obsolete a property regime that lasted for more than seven decades, I argue that the need for a constitutional debate on property is particularly serious given the fact that Mexican constitutional scholars have not paid attention to the vast array of problems that have emerged around property rights in Mexico.

In Part I, I present a synthesis of the Mexican “postrevolutionary model” of property, that is, the regime that had at its core Article 27 of the constitution.¹ In Part II, I describe six developments that, during the last decades, have called into question such a model. In Part III, I briefly discuss the theoretical options that we have to understand these developments. Finally, in Part IV, I argue that insofar as the crisis in our constitutional model derives from different social processes, its understanding goes beyond the mobilization of legal theories, and that we need to use social sciences more intensively.

The Mexican constitutional property regime is a very complex one. For many authors, Article 27 is the nucleus of the “social pact” of the postrevolutionary era.² In more than four thousand words, even after the neoliberal amendments of the early nineties, it deals with a wide variety of issues. Just as political analysts were intrigued by the fact that a political regime based on an organization called the “Institutional Revolutionary Party” (*Partido Revolucionario Institucional*, PRI) could last for so long,³ constitutional

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1. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.).

2. Probably the most representative author of this view is Arnaldo Córdova. See ARNALDO CÓRDOVA, LA IDEOLOGÍA DE LA REVOLUCIÓN MEXICANA: LA FORMACIÓN DEL NUEVO RÉGIMEN [THE IDEOLOGY OF THE MEXICAN REVOLUTION: THE FORMATION OF THE NEW REGIME] 221–31 (1973) (tracing the myriad interests represented in the formation and the text of Article 27).

3. Scholars have forwarded a number of reasons for the PRI’s long-standing rule. See, e.g., Joseph L. Klesner & Chappell Lawson, *Adiós to the PRI? Changing Voter Turnout in Mexico’s Political Transition*, 17 MEXICAN STUD. 17, 24 (2001) (“As observers of Mexico know well, the

lawyers might wonder how it was possible that a constitutional order that maintained the commitment to protect private property and, at the same time, the promise of distributing land to communities that need land, might be seen as a constitutional property regime just like any other.

As a point of departure, it is important to clarify in what sense property should be seen as a constitutional issue. This would not be necessary in other contexts, but it is necessary in the Mexican case because our constitutional scholars seem to have, in these crucial years, turned their backs on the subject. In order to illustrate the absence of constitutional scholarship on property, I explored a sample of the writings available on the web.⁴ None of the 342 texts written by five highly recognized Mexican constitutional scholars discussed property as a problem.⁵ This demonstrates that the crisis in Mexico's property regime that I describe in this Article has been ignored by our constitutional scholars. As I will demonstrate, the only significant jurist that took the question seriously was the late Martín Díaz y Díaz.⁶

Property can now be seen as a constitutional issue in two senses. First, it is something that constitutional texts must address. Even if it is only to assert that property is *not* a fundamental right, as in the Colombian constitution,⁷ it is necessary to at least refer to it precisely for that reason. Then, there is a second and more profound link between property and the constitution: from a sociohistorical point of view, state power (i.e., one of the building blocks of a constitution) is based, among other things, on a complex set of property relations. There is no constitution that does not presuppose (and is not built upon) some basic social arrangement as to who owns what—an arrangement that has to be understood not in the sense of social contract theory, but in a deeper sociohistorical sense, as in Carl Schmitt's *The Nomos of the Earth*.⁸

PRI long engaged in all manner of fraud to increase its vote shares at the expense of the opposition—from ballot stuffing to multiple voting by PRI partisans to outright fabrication of results.”); Victoria E. Rodríguez & Peter M. Ward, *Disentangling the PRI from the Government in Mexico*, 10 MEXICAN STUD. 163, 169 (1994) (discussing the PRI's ability to mobilize voters through fraud, “press-ganging,” and exertion of local political authority); *The Beginning of the End of the Longest-Ruling Party*, ECONOMIST, June 24, 2000, at 25, 26 (noting as an example that the PRI used land redistribution to gain voter loyalty).

4. The database was constructed by Lidia González-Malagón as part of a research project led by the author.

5. The scholars are Miguel Carbonell, Jorge Carpizo, Lorenzo Córdova, Pedro Salazar, and Diego Valadez. The collection includes 155 texts of an academic character, as well as 186 short texts in journals.

6. See *infra* notes 10, 38 and accompanying text.

7. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58 (Colom.) (stating that when private property interests are in conflict with the public interest, “the private interest must concede to the public or social interest”).

8. See CARL SCHMITT, *THE NOMOS OF THE EARTH: IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 208 (G.L. Ulmen trans., Telos Press 2003) (1950) (“The economy, in particular, belonged to the non-state private sphere. On both sides of hostilities, this constitutional

In fact, the most challenging aspect of thinking about property as a constitutional issue is that of reconstructing the dynamic relationship between changes in property relations (as social relations) and their meaning in the world of the constitution. This does not mean that we should disregard the importance of constitutional texts as such. They are relevant either because they describe arrangements that already exist or because they prescribe how to transform them. Mexico is a good example of the latter: the constitutional text contains what is commonly referred to as “a national project.”⁹ But the postrevolutionary state, as we knew it, did not appear the day after the enactment of the constitution in February 1917. It was the result of a great variety of interactions between state agents and social actors (peasants, corporations, local elites, etc.) through the granting of concessions, expropriation procedures, and settlements of all sorts—a process that took several decades. In short, the (trans)formation of property relations was at the same time the (trans)formation of the state. By looking at the constitution *as a process*, Martín Díaz y Díaz was probably the only jurist who recognized this intimate relationship between property and state formation.¹⁰

I. The Postrevolutionary Model

At the risk of oversimplification, we can divide the content of Article 27 into three main components: a general principle and two sets of rules.¹¹ The general principle refers to the nation’s “primary ownership” (*propiedad originaria*) over all land and water. The first set of rules refers to state interventions on private property (i.e., expropriation and regulations), and the second set of rules refers to who is entitled to own what. The general principle appears in the first paragraph of Article 27, which states, “The ownership of all water and land within the national territory belongs primarily (*originariamente*) to the Nation, who has had and has the right to transfer

standard was unspoken but presupposed, and also often spoken of as a general principle of international law.”).

9. See C.P. art. 26 (Mex.) (establishing the authority of the federal government to plan the economy to promote energy, development, permanency, and fairness to economic growth to assure Mexico’s independence as well as its political, social, and cultural democracy).

10. See Martín Díaz y Díaz, *Las Expropiaciones Urbanísticas en México: Aproximaciones a un Proceso sin Teoría* [*The Urban Expropriations in Mexico: Approaches to a Process Without Theory*], in DESARROLLO URBANO Y DERECHO [URBAN DEVELOPMENT AND LAW] 253, 261–62 (Fernando Serrano Migallón ed., 1988) (discussing the relationship between property issues and the constitution). This is consistent with the way many historians are approaching the formation of the state in Mexico and other Latin American countries. See, e.g., Gilbert M. Joseph & Daniel Nugent, *Popular Culture and State Formation in Revolutionary Mexico*, in EVERYDAY FORMS OF STATE FORMATION: REVOLUTION AND THE NEGOTIATION OF RULE IN MODERN MEXICO 3, 15 (Gilbert M. Joseph & Daniel Nugent eds., 1994) (“[Mexican] state formation can only be understood in relational terms . . .”).

11. For the distinction between principles and rules, see MANUEL ATIENZA & JUAN RUIZ MANERO, A THEORY OF LEGAL SENTENCES 6–19 (Ruth Zimmerling trans., Kluwer Academic Publishers 1998) (1996).

their ownership to individuals, thus constituting private property.”¹² Setting aside the translation problems of this text, it seems clear that the intention of its drafters was to locate private property as a lesser right compared to the right of the nation over the territory. It is no wonder that this principle has been subject to different interpretations. One can even be skeptical about its practical relevance,¹³ but for many authors, it is the foundation of the program of the Revolution, as it gives the state (although the text refers to the Nation)¹⁴ ample powers to distribute land and, in general, to direct economic activity.¹⁵ This principle was used as the basis of a robust state power vis-à-vis private owners.

The rest of Article 27 is organized into two sets of rules with more precise consequences. The first set refers to state interventions that restrict property rights, and this set is itself broken into two forms of intervention. The first form of state intervention is expropriation. The way expropriation is phrased in Article 27 is quite similar to how it is phrased in other liberal constitutions. Government cannot take private property unless it is for a public need (*utilidad pública*) and “by means of” compensation.¹⁶ Beyond this apparently harmless formulation in the constitutional text, the power to expropriate was one of the main components in the formation of the postrevolutionary regime. The 1938 nationalization of the oil industry, one of the landmarks of modern Mexico, took place through an exercise of the power to expropriate.¹⁷ Similarly, most land distribution in the context of agrarian reform also took place through expropriation of land that exceeded

12. C.P. art. 27 (Mex.).

13. Mainstream constitutional scholars are skeptical about this principle. See JORGE CARPIZO, ESTUDIOS CONSTITUCIONALES [CONSTITUTIONAL STUDIES] 428 (1980) (explaining that the principle of *propiedad originaria* is unnecessary); FELIPE TENA RAMÍREZ, DERECHO CONSTITUCIONAL MEXICANO [MEXICAN CONSTITUTIONAL LAW] 188 (35th ed. 2003) (noting that the government-imposed modalities of private property cannot constitutionally negate the “individual guarantee of property” embodied in Article 27). For my own skeptical rendition of the concept of *propiedad originaria*, see Antonio Azuela, *El problema con las ideas que están detrás* [The Problem with the Ideas Behind Legal Text], in EN BUSCA DE MOLINA ENRÍQUEZ: CIENTO AÑOS DE LOS GRANDES PROBLEMAS NACIONALES [IN SEARCH OF MOLINA ENRÍQUEZ: ONE HUNDRED YEARS OF THE GREAT NATIONAL PROBLEMS] 79, 92–97 (Emilio Kourí ed., 2009) [hereinafter EN BUSCA DE ENRÍQUEZ] (concluding that discussion of the idea of *propiedad originaria* is superfluous in the context of the modern property rights debate).

14. C.P. art. 27 (Mex.).

15. See, e.g., ROLANDO CORDERA & CARLOS TELLO, MÉXICO: LA DISPUTA POR LA NACIÓN: PERSPECTIVAS Y OPCIONES DEL DESARROLLO [MEXICO: THE CONTEST FOR THE NATION: PROSPECTS AND OPTIONS FOR DEVELOPMENT] 95 (15th ed. 2002) (describing how government control of private property defined the neoliberal project in agricultural activities).

16. The only hint of an authoritarian regime is the fact that the text does not make explicit whether compensation must be paid *before* the expropriation. The text uses the ambiguous formula “by means of compensation” (*mediante indemnización*). C.P. art. 27 (Mex.).

17. Arthur W. Macmahon & W.R. Dittmar, *The Mexican Oil Industry Since Expropriation I*, 57 POL. SCI. Q. 28, 28–29 (1942).

the maximum allowed.¹⁸ The idea that private property rights to land were legitimate as long as they did not exceed certain limits¹⁹ legitimized agrarian reform under the rule of law. However, everyone knew that those limits were not always respected, as many large landholdings remained untouched for decades and many small properties were taken illegally.²⁰ That was one of the taboos in postrevolutionary Mexico, and only conservative commentators would criticize these practices.²¹ Nevertheless, the political regime obtained a great deal of its legitimacy from the notion that it was honoring the commitments of the revolution. It suffices to say that when land distribution was declared finished, more than half of the national territory was already the property of agrarian communities (*ejidos* and *comunidades*);²² nowadays they comprise around thirty thousand communities.²³

The second form of state intervention on private property is established in the third paragraph of Article 27. There are some interesting technical

18. See Ewell E. Murphy, Jr., *Expropriation and Aftermath: The Prospects for Foreign Enterprise in the Mexico of Miguel de la Madrid*, 18 TEX. INT'L L.J. 431, 432 (1983) (citing C.P. art. 27 (Mex.)) ("After the 1910 Revolution the major *hacendados* in turn were expropriated, and holdings in excess of statutory maxima now remain subject to forced redistribution.").

19. In the case of agricultural land, the acreage depended on productivity (the minimum acreage was 100 hectares for land with irrigation and 800 hectares for the driest land); for cattle-raising land, legal criteria were more generous. Compare C.P. art. 27, § XV (Mex.) ("Small agricultural property is that which does not exceed one hundred hectares of first-class moist irrigated land . . . [O]ne hectare of irrigated land shall be computed as . . . eight of *monte* [scrub land] or arid pasturage."), with *id.* ("Small holdings for stockraising are lands not exceeding the area necessary to maintain up to five hundred heads of large livestock . . .").

20. See Nora Louise Hamilton, *Mexico: The Limits of State Autonomy*, 11 LATIN AM. PERSP. 81, 90 (1975) ("While [agrarian reform] had been sufficient to cause uncertainty among landowners and to lead to production cutbacks, the bulk of the peasants remained landless and the latifundia structure remained basically intact."); cf. James W. Russell, *Land and Identity in Mexico: Peasants Stop an Airport*, MONTHLY REV., Feb. 1, 2003, available at 2003 WLNR 16945216 (describing how the postrevolutionary governments "redistributed just enough land to assure peasant political support without completely undermining rural class structure").

21. See Hamilton, *supra* note 20, at 102 n.3 (describing how, in spite of agrarian reform, large landowners "circumvent[ed] the law restricting the size of landholdings (e.g., by distributing portions among relatives and friends) [which] led to the emergence of dual systems of agriculture in both the ejidal and private sectors, characterized by large-scale commercial units producing for the internal market").

22. These are the names of the two types of collective legal subjects that agrarian legislation recognizes. *Comunidades* are those that existed before the Revolution and *ejidos* are those that were created after—the latter amount to more than 90% of all agrarian communities. Héctor Robles Berlanga, *Tendencias del campo mexicano a la luz del Programa de Certificación de los Derechos Ejidales (Procede)* [Trends in the Mexican Countryside in Light of the Certification Program for the Rights of Ejidos], in POLÍTICAS Y REGULACIONES AGRARIAS: DINÁMICAS DE PODER Y JUEGOS DE ACTORES EN TORNO A LA TENENCIA DE LA TIERRA [AGRICULTURAL POLITICS AND REGULATIONS: POWER DYNAMICS AND SOCIAL INTERACTION IN LAND TENURE] 131, 131 (Éric Léonard et al. eds., 2003).

23. Monique Nuijten, *Family Property and the Limits of Intervention: The Article 27 Reforms and the PROCEDE Programme in Mexico*, 34 DEV. & CHANGE 475, 477 n.2 (2003) (Neth.) (noting that according to the Ministry of Agrarian Reform (SRA) there were 27,605 *ejidos* and 2,337 *comunidades* in Mexico in 2003).

problems in that paragraph, which are beyond the scope of this Article,²⁴ so I will refer only to the clause governing the power to “regulate the use of those natural elements that can be privately appropriated” (*regular el aprovechamiento de los elementos naturales susceptibles de apropiación*).²⁵ Interestingly, this rule explicitly states that regulations are meant to “make a fair distribution of public wealth and to look after its conservation.”²⁶ In spite of the sixteen amendments that have been introduced to Article 27 since 1917, and especially in spite of the neoliberal reforms of the early nineties,²⁷ these words remarkably remain part of the constitution. For many legal scholars, these words are proof that the Mexican constitution is the first “social constitution” of the twentieth century.²⁸ More modestly, other scholars simply say that these words indicate that Mexican doctrine views private property not as an absolute right, but as a “social function.”²⁹

This clause was amended in 1976 to authorize the regulation of urban development, and again in 1987 to authorize environmental legislation.³⁰ A vast array of legal instruments has been developed through legislation in these areas, with a tendency to place land use regulatory authority in the hands of municipalities.³¹ All of this seemed to be a natural development from the original ideas of the framers of the 1917 constitution, except that as I show in the following Part, the ability to implement land-use regulations—both in urban and rural settings—has proved highly problematic.

24. C.P. art. 27 (Mex.). This paragraph establishes the polemical concept of *modalidades a la propiedad*, which refers to the creation of different forms of property as part of the nation’s rights. See Emilio H. Kourí, *Interpreting the Expropriation of Indian Pueblo Lands in Porfirian Mexico: The Unexamined Legacies of Andrés Molina Enríquez*, 82 HISP. AM. HIST. REV. 69, 108 (2002); see also Antonio Azuela & Miguel Ángel Cancino, *Los asentamientos humanos y la mirada parcial del constitucionalismo mexicano* [Human Settlements and the Partial View of Mexican Constitutionalism], in LA CONSTITUCIÓN Y EL MEDIO AMBIENTE [THE CONSTITUTION AND THE ENVIRONMENT] 257, 261 (2007) (juxtaposing private and state control of property affecting natural resources and agriculture).

25. C.P. art. 27 (Mex.). Similar to contemporary mainstream economics, the drafters of Article 27 had the idea that some natural elements had certain intrinsic characteristics that made them more prone to private appropriation.

26. *Id.*

27. See *infra* subpart II(A).

28. TODD A. EISENSTADT, *COURTING DEMOCRACY IN MEXICO: PARTY STRATEGIES AND ELECTORAL INSTITUTIONS* 95 n.3 (2004); see also Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidentialismo*, 4 INT’L J. CONST. L. 411, 412–13 (2006) (identifying the constitution of 1917 as the “social constitution” due to its establishment of standards for the right to work, equal protection, and other social welfare measures).

29. Russell H. Fitzgibbon, *Constitutional Development in Latin America: A Synthesis*, 39 AM. POL. SCI. REV. 511, 519 (1945).

30. CLAUDIA GAMBOA MONTEJANO & MARÍA DE LA LUZ GARCÍA SAN VICENTE, *DIVISIÓN DE POLÍTICA INTERIOR* [DIVISION OF INTERIOR POLICY], *ARTÍCULO 27 CONSTITUCIONAL* [ARTICLE 27 OF THE CONSTITUTION] 18–24 (2005) (discussing amendments to Article 27 of the Mexican constitution).

31. See, e.g., Decreto por el que se reforma y adiciona el artículo 115 de la Constitución Política de los Estados Unidos Mexicanos [Decree Reforming and Adding to Article 115 of the Political Constitution of the United States of Mexico], DO, 3 de Febrero de 1983 (Mex.).

The second set of rules in Article 27 determines who can own what. It prohibits certain individuals and organizations from acquiring certain resources. Until 1994, churches did not even exist as legal entities, and therefore they were denied the right to own any kind of property.³² Citizens of other countries, even today, cannot own property in border and coastal regions. Then there is a list of the resources that are defined as national property—a list that expanded continuously from 1917 to 1982: mining and oil resources, almost all watercourses, islands, the sea bed, and electric power.³³

In some cases, like those of oil and electric power, “exploitation” is reserved to the state. For the rest, private corporations (and since 1992, even foreign firms) may have access to these resources, but only through administrative concessions, which do not confer property rights to those resources.³⁴

It would be impossible to address here all of the issues related to resources that are considered national property. What I want to stress here is the intention of the drafters of the constitution and subsequent amendments to create and consolidate a *national patrimony*. Apart from those resources that are explicitly mentioned in Article 27, secondary legislation has expanded the project: archaeological remains (all objects and buildings erected before the Spanish conquest in the sixteenth century), as well as national parks (that had to be created through expropriations) were also part of that ambitious project.³⁵ Both material progress and national identity were designed to flourish from a patrimony that would grow indefinitely. If every political regime has its own myths, or “civil religions,”³⁶ in postrevolutionary

32. Timothy D. Richards, *Trusts in Latin America: Mexico and Colombia*, 15 TR. & TRUSTEES 472, 475 (2009). Of course, churches used straw men for the administration of their properties. *Id.*

33. Even if electric power is not a thing that can be subject to ownership, like land, minerals, etc., its generation is part of the list of things that are the exclusive property of the nation, which prevents the participation of private (not to mention foreign) investors in the area. C.P. art. 27 (Mex.) (“Only the Nation shall be in charge of generating, conducting, transforming, distributing and providing electricity as a public service. No permit shall be issued to private individuals or corporations in order to provide such a public service . . .”).

34. See Ewell E. Murphy, Jr., *Back to the Future? The Prospects for State Monopoly in Hydrocarbons and Electric Power Under Article 27 of the Mexican Constitution*, 3 U.S.-MEX. L.J. 49, 54–55 (1995) (explaining that Mexico’s national oil company (PEMEX)—the only company that can conduct petroleum operations—may employ private contractors, including those from other countries, provided that the private contractors are paid in cash rather than through a production or profit-participation interest).

35. See Norma Rojas Delgadillo, *Cultural Property Legislation in Mexico: Past, Present, and Future*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 114, 115–16 (Barbara T. Hoffman ed., 2006) (describing the 1970 Federal Law on the Cultural Heritage of the Nation, which protects archaeological monuments and “areas of natural beauty”).

36. See Phillip E. Hammond, *Pluralism and Law in the Formation of American Civil Religion*, in VARIETIES OF CIVIL RELIGION 138, 138–39 (Robert N. Bellah & Phillip E. Hammond eds., 1980) (“[T]o the degree a collection of people is a society, it will exhibit a common (‘civil’) religion.”); see also John A. Coleman, *Civil Religion*, 31 SOC. ANALYSIS 67, 76 (1970) (defining “civil religion” as a collection of beliefs, rituals, and symbols that connect a society’s place in space and time to existential concepts).

Mexico it would be the national patrimony. That is why property issues have a powerful emotional impact on Mexican political discourse.

There is still one more aspect of Article 27, probably the most important of them all, to discuss—agrarian reform. Rural communities that did not have enough land and water were given the constitutional right to obtain these resources.³⁷ The drafters of both the constitutional text and the secondary legislation struggled to define which private property was subject to seizure for that purpose, so that land distribution was legal only if certain conditions were met. But in reality, agrarian reform did not always occur in strict compliance with the law. The political and ideological thrust behind land distribution was so strong that in many instances the government had to legitimize de facto land invasions, and in other cases, prevent the distribution of large landholdings that might be distributed. Thus, the rules of Article 27 became a source of legal ambivalence in the postrevolutionary regime. On the one hand, they expressed the commitment of the state to protect property; on the other, they gave rise to high expectations for land distribution—regardless of who was to bear the burden. Again, Martín Díaz y Díaz was the only legal scholar to make this ambivalence the subject of serious consideration.³⁸ In what follows, I will try to show that, for a number of reasons, the principles and rules in Article 27 are in crisis and that a new conception of property is necessary.

II. Making the Constitution Obsolete

In this Part, I will describe five different social processes that, taken together, have brought with them a profound crisis in the property regime that was originally established in the constitution of 1917.

A. *National Patrimony*

Every society has what anthropologists call “inalienable possessions.”³⁹ That is, a selection of resources that, for different reasons, cannot be private property and therefore belong to society as a whole—in fact, they help to

37. C.P. art. 27, § 10 (repealed 1991) (Mex.); see also James J. Kelly, Jr., *Article 27 and Mexican Land Reform: The Legacy of Zapata's Dream*, 25 COLUM. HUM. RTS. L. REV. 541, 544 (1994) (chronicling the repeal of Article 27, section 10).

38. See Martín Díaz y Díaz, *La Constitución ambivalente. Notas para un análisis de sus polos de tensión* [The Ambivalent Constitution. Notes for a Discussion of the Poles of Tension], in 80 ANIVERSARIO HOMENAJE: CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [80TH ANNIVERSARY HOMAGE: THE POLITICAL CONSTITUTION OF THE MEXICAN STATES] 59, 72 (1997) (identifying contradictions in Article 27).

39. See ANNETTE B. WEINER, *INALIENABLE POSSESSIONS: THE PARADOX OF KEEPING-WHILE-GIVING* 150 (1992) (defining inalienable possessions as “possessions [that] are embedded with culturally authenticating ideologies . . . that give shape and drive to political processes. They are imbued with history . . . and the beliefs and stories that surround their existence.”).

create the very wholeness of that society.⁴⁰ As we have seen, the idea of recognizing and preserving a rich national patrimony was an essential theme of the Mexican Revolution.⁴¹ However, at least three developments have put that project in crisis in the last decades. First, two of the components of Mexico's national cornucopia—national parks and archaeological sites—were supposed to be acquired (at some cost) from private landowners, and expropriation was seen as the usual procedure.⁴² For different reasons, those procedures were rarely completed.⁴³ Between 1917 and 1987, forty-seven areas were declared national parks⁴⁴ but they were not expropriated or purchased in any way.⁴⁵ Consequently, since the mid-eighties, the government has followed a different strategy for the conservation of biodiversity: the creation of biosphere reserves that do not require land to be taken from its owners.⁴⁶ As for national parks, most of them never became public property, and the uncertainty of their legal status is a constant source of conflict today between the owners of the land and the bureaucracies that try to manage those parks in the name of the nation.⁴⁷

40. For an in-depth discussion of inherently public property as a social good, see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). Rose describes the concept of inherently public property and argues that public property is a “comedy of the commons” because it helps to enhance sociability and thereby enriches and coalesces society. *Id.* But cf. Gareth A. Jones & Peter M. Ward, *Privatizing the Commons: Reforming the Ejido and Urban Development in Mexico*, 22 INT’L J. URB. & REGIONAL RES. 76 (1998) (describing how traditionally public land in Mexico was privatized through deregulation).

41. See *supra* notes 35–36 and accompanying text.

42. See C.P. art. 27 (Mex.) (“Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity”); Delgadillo, *supra* note 35, at 115–17 (describing how the Federal Law on the Cultural Heritage of the Nation provided for national ownership of areas of national heritage and beauty).

43. See, e.g., Ludger Brenner & Hubert Job, *Actor-Oriented Management of Protected Areas and Ecotourism in Mexico*, 5 J. LATIN AM. GEOGRAPHY 7, 16 (2006) (discussing a monarch butterfly preserve and noting that “no expropriation was ever carried out there”).

44. LANE SIMONIAN, *DEFENDING THE LAND OF THE JAGUAR: A HISTORY OF CONSERVATION IN MEXICO* 96–97 (1995).

45. See, e.g., *id.* at 155 (describing how Enrique Beltrán’s efforts to expropriate private land within areas designated as national parks failed).

46. See David Dumoulin & Aurélia Michel, *La communauté indienne participative: de quelques usages dans la politique mexicaine [The Participative Indian Community: Some Uses in Mexican Politics]*, in CULTURES ET PRATIQUES PARTICIPATIVES: PERSPECTIVES COMPARATIVES [PARTICIPATIVE CULTURES AND PRACTICES: COMPARATIVE PERSPECTIVES] 233, 240–41 (Catherine Neveu ed., 2007) (describing the development of biosphere reserves, which allow indigenous communities to remain on their tribal land).

47. See MARÍA FERNANDA PAZ SALINAS, *LA PARTICIPACIÓN EN EL MANEJO DE ÁREAS NATURALES PROTEGIDAS: ACTORES E INTERESES EN CONFLICTO EN EL CORREDOR BIOLÓGICO CHICHINAUTZIN, MORELOS [PARTICIPATION IN THE MANAGEMENT OF PROTECTED NATURAL AREAS: ACTORS AND INTERESTS IN CONFLICT IN THE BIOLOGICAL CORRIDOR OF CHICHINAUTZIN, MORELOS]* 85–96 (2005) (detailing ownership and boundary disputes that arose between the government and local communities in postrevolutionary Mexico); see also *id.* at 158 & 159 nn.71–72 (outlining myriad problems, legal and otherwise, with the administration of communal resources).

Archaeological sites have met a similar fate. Pre-Columbian buildings are national property but, alas, the land between them is not; which is why it is necessary to buy or expropriate archaeological sites so they become public property. While national parks number less than one hundred, archaeological sites number more than thirty thousand.⁴⁸ In a few of them—specifically, in those that are widely visited—the federal government has managed to establish some sort of de facto control. Both national and international tourists can visit them and feel that they are in a public area, but for the most part, legally, they are not.⁴⁹ Only recently, conflict over land ownership has emerged. One example is the famous Mayan city of Chichén Itzá, whose lands were bought at an allegedly high price by the government of the State of Yucatán in 2010 because of holdouts by private landowners.⁵⁰ Today, Chichén Itzá is not the property of the nation, but of one of the nation's states; the link between the nation and its most “original” patrimony is broken.

Beyond that particular case, there is a more generalized trend. Most archaeological sites are within lands that belong to agrarian communities (*ejidos* and *comunidades*), which until 1992 held inalienable property rights over such lands.⁵¹ But when a constitutional reform in that year opened the way for the alienation of such lands, a huge number of sites were in danger of becoming the property of individuals. Nevertheless, government officials have found ways to prevent that from happening.⁵² Only recently, however, has it become evident that land in archaeological sites is not public property. Here, as with national parks, legal scholars have been reluctant to recognize publicly that, as in Hans Christian Andersen's story,⁵³ the emperor is naked.

48. See COMISIÓN NACIONAL DE ÁREAS NATURALES PROTEGIDAS [NATIONAL COMMISSION OF PROTECTED NATURAL AREAS], <http://www.conanp.gob.mx/english.php> (last updated Nov. 5, 2010) (indicating that sixty-seven Mexican national parks exist today); Monica Drake, *Tourism to Mexico Is Up*, N.Y. TIMES: IN TRANSIT: EXPERT TRAVEL ADVICE (Oct. 28, 2010, 6:40 PM), <http://intransit.blogs.nytimes.com/2010/10/28/tourism-to-mexico-is-up/> (quoting Alfonso Sumano, the regional director for the Mexico Tourism Board for the Americas, as saying that “Mexico has 30,000 ecological sites”).

49. For example, the ethnography of Lisa Breglia shows us the sort of local arrangements that create such an illusion. LISA BREGLIA, *MONUMENTAL AMBIVALENCE: THE POLITICS OF HERITAGE* 65 (2006) (depicting the fact that, when Chichén Itzá was privately owned, this fact was “of little significance” to its thousands of daily visitors).

50. See *Mexican State of Yucatán Buys Archaeological Site of Chichen Itza from Private Landowner*, ARTDAILY.ORG (Apr. 1, 2010), http://www.artdaily.com/index.asp?int_sec=2&int_new=37171 (reporting that the land sold for USD17.8 million).

51. See Kelly, *supra* note 37, at 544 (including alienability of agrarian communities' land among the changes produced by the constitutional amendments approved in November 1991).

52. See DANIELA RODRÍGUEZ HERRERA, *LEY AGRARIA Y PROTECCIÓN DEL PATRIMONIO ARQUEOLÓGICO [AGRARIAN LAW AND THE PROTECTION OF ARCHAEOLOGICAL HERITAGE]* 55–165 (2000) (describing the “*Procede*” by which land certificates were given out and the later intervention into the process by the National Institute of Anthropology and History to protect archeological sites).

53. Hans Christian Andersen, *The Emperor's New Clothes*, in *THE ANNOTATED CLASSIC FAIRY TALES* 269, 276–77 (Maria Tatar ed., 2002).

In short, there are national patrimonies that existed as promises that never materialized.

There is a second process that calls into question the postrevolutionary national patrimony: the constant challenge by private individuals to the principle of national ownership of certain natural resources. The most salient instance of this dispute is over water rights; cities need water, but agrarian communities and individual landowners who have water rights are challenging attempts by federal authorities to take it to urban areas. This is happening throughout the country, but the most significant case is Mexico City. More than one million people (mostly poor) who live east of the metropolitan area do not get enough water, and the project of bringing it from outside the basin has been challenged by rural communities that see the water as theirs.⁵⁴ This is not the place to say which side is right in these conflicts, but only to assert that the postrevolutionary paradigm of water as national property is not working anymore. No one dares to support strict enforcement of the law, and government agencies are weak in front of both agrarian communities and rich individual landowners.⁵⁵

A third and more promising development is the change of the definition of wildlife. Up until 2000, legislation on hunting declared that wild animals were national property⁵⁶—just another component of Mexico's national patrimony. But then, in one stroke, new legislation declared that animal wildlife can become the property of the owner of the land.⁵⁷ Since then, landowners (including thousands in agrarian communities) have been able to manage animal wildlife as their own, with full legal support.⁵⁸ In an

54. See MANUEL PERLÓ COHEN & ARSENIO ERNESTO GONZÁLEZ REYNOSO, ¿GUERRA POR EL AGUA EN EL VALLE DE MÉXICO? ESTUDIO SOBRE LAS RELACIONES HIDRÁULICAS ENTRE EL DISTRITO FEDERAL Y EL ESTADO DE MÉXICO [WATER WARS IN MEXICO? A STUDY ON THE HYDROLOGIC RELATIONS BETWEEN MEXICO CITY AND THE STATE OF MEXICO] 109–10 (2005) (summarizing the position of authorities outside of Mexico City against permitting a federal entity to operate and administer their water supply); Cecilia Tortajada, *Water Management in Mexico City Metropolitan Area*, 22 WATER RESOURCES DEV. 353, 370 (2006) (identifying water shortages affecting over one million people near Mexico City).

55. See, e.g., Odile Hoffmann, *Políticas Agrarias, Reformas del Estado y Adscripciones Identitarias: Colombia y México* [Agrarian Policies, State Reform, and Ascription of Identities: Colombia and Mexico], 60 REVISTA MEXICANA DE SOCIOLOGÍA [MEXICAN J. SOC.] 99, 106 (1998) (describing, as an example, the inability of the government to respond to the resistance of the *campesinos ejidatarios* in Chiapas in 1994); Sergio Peña, *Land Use Planning on the U.S.–Mexico Border: A Comparison of the Legal Framework*, 17 J. BORDERLANDS STUD. 1, 13–14 (2002) (observing that municipal governments in Mexico have had a weaker role managing urban growth of the power of locals).

56. Ley Federal de Caza [LFC] [Federal Hunting Law], art. 3, DO, 5 de Enero de 1952 (Mex.).

57. Ley General de Vida Silvestre [LGVS] [General Law on Wildlife], art. 4, DO, 3 de Julio de 2000 (Mex.).

58. This has led, for example, to the recovery of the populations of certain species, such as the bighorn sheep (*Ovis canadensis*). See David S. Maehr, *Large Mammal Restoration: Too Real to Be Possible?*, in LARGE MAMMAL RESTORATION: ECOLOGICAL AND SOCIOLOGICAL CHALLENGES IN THE 21ST CENTURY 345, 352 (David S. Maehr et al. eds., 2001) (“[Some private landowners] have forged ahead with their own private initiatives to restore large-mammal communities. The bighorn

optimistic vein, perhaps this represents a good opportunity for a new way to define patrimony. The traditional definition, which sees patrimony as a collection of resources that are owned by the state on behalf of society, would give way to a definition that stresses the obligation of society to preserve those resources for future generations. In other words, the emphasis on rights would be replaced by an emphasis on obligations: whoever owns resources that are considered crucial for the future of society is subject to the obligation of using them wisely. This is nothing less than the idea of sustainable use translated into a legal concept.⁵⁹

Another change in the definition of patrimony is the idea that some of its components (like water) do not necessarily have to be maintained as state property. Although this incites well known criticisms about privatization,⁶⁰ sooner or later this will have to become part of the constitutional agenda.

Probably the most interesting aspect of the crisis of the patrimonial regime in the Mexican constitution is that constitutional lawyers do not seem to recognize it. In a recent debate about a presidential initiative to modify slightly the oil industry rules, some jurists made their voices heard, but only to offer what they saw as the right interpretation of the constitutional text, not to advance proposals about the content of the text.⁶¹

B. Expropriation

As we saw in the previous subpart, the power of eminent domain was the main instrument for the construction of the postrevolutionary state. It is important to recognize that the power of eminent domain was used in an arbitrary way, both in relation to the obligation to pay a fair compensation and in terms of due process. It suffices to mention that landowners affected by

(*Ovis canadensis*) is now reclaiming portions of its historic range through the privately funded efforts of the Turner Endangered Species Fund.”).

59. Martín Díaz y Díaz, *El aprovechamiento de los recursos naturales: Hacia un nuevo discurso patrimonial* [The Exploitation of Natural Resources: Toward a New Patrimonial Discourse], 24 REVISTA DE INVESTIGACIONES JURÍDICAS [LEGAL RES. J.] 91, 172 (2000) (Mex.).

60. See, e.g., Alberto Chong & Florencio López-de-Silanes, *The Truth About Privatization in Latin America*, in PRIVATIZATION IN LATIN AMERICA: MYTHS AND REALITY 1, 1 (Alberto Chong & Florencio López-de-Silanes eds., 2005) (noting that academia, politicians, and the media have voiced concerns about privatization's record, the sources of the gains, and its impact on social welfare and the poor).

61. For an example of the recent debate between Arnaldo Córdova and Miguel Carbonell about constitutional interpretation surrounding an initiative to reform the oil industry, compare Miguel Carbonell, Op-Ed., *La Constitución no es un Fetiche* [The Constitution Is Not a Fetish], EL UNIVERSAL, May 30, 2008, <http://www.eluniversal.com.mx/editoriales/40618.html> (Mex.) (referring to his debate with Córdova on the senate floor and continuing the debate) with Arnaldo Córdova, Op-Ed., *La letra y el espíritu de la Constitución* [The Letter and Spirit of the Constitution], LA JORNADA, June 8, 2008, <http://www.jornada.unam.mx/2008/06/08/index.php?section=politica&article=014a1pol> (Mex.) (“[T]he only thing clear [in this debate over constitutional reform] is that nothing is clear in Article 27.”). See also Arnaldo Córdova, Op-Ed., *El debate constitucional* [The Constitutional Debate], LA JORNADA, May 25, 2008, <http://www.jornada.unam.mx/2008/05/25/index.php?section=opinion&article=008a1pol> (Mex.).

eminent domain procedures did not have a right to be heard before their property was taken; a simple decree by the executive had the effect of transferring property rights to the state.⁶² However, a number of social changes (associated with the transition from a rural to an urban society) provoked changes in the use of expropriation. As land distribution moved forward, it affected not only individual landowners, but also agrarian communities whose lands were taken for the expansion of urban centres, infrastructure, or other purposes. Groups of peasants, who in the 1930s and 1940s were gaining access to land through expropriation procedures, were now the victims of the same procedures in order to give way to the needs of an urban society.⁶³

In the last two decades, expropriation entered a profound crisis. This has taken place in two different contexts. First, growing expectations for the consolidation of the rule of law, political pluralism, and a more independent judiciary have imposed new demands on the way eminent domain power is exercised. While governments in the postrevolutionary era were able to impose takings as an expression of the public will, and in some cases even ignore judicial decisions altogether,⁶⁴ this practice proved increasingly difficult under the new conditions. Today, federal judges take every opportunity to rule in favor of affected owners and against what they construe as arbitrary expropriations. Judicial activism has become so intense that even those who just one decade ago insisted on the arbitrary use of eminent domain are now worried about the possibility of a paralysis in public works that such activism is creating.⁶⁵

An emblematic case in this respect is that of *El Encino*, a piece of land that was expropriated for the completion of a road system in Mexico City.⁶⁶

62. The landowner does have the ability to publically protest and to present a reasonable appraisal of his land during a fifteen-day notice period, but he does not have the ability to stop or stay expropriation via judicial process. Ley de Expropiación [LE] [Expropriation Law], arts. 2, 4, DO, 25 de Noviembre de 1936 (Mex.).

63. See Russell, *supra* note 20 (explaining how the Mexican federal government tried to expropriate peasant land in order to build an international airport, and how Emiliano Zapata in the past had expropriated lands from landlords to give to the peasants).

64. This created the problem of *inejecución de sentencias* (judicial rulings that could not be executed), which is one of the most problematic issues that the supreme court faces nowadays. See, e.g., *Cancela SCJN fallo sobre “El Encino”* [Supreme Court’s Ruling Cancels “El Encino”], SIPSE.COM (Aug. 25, 2010), <http://www.sipse.com/noticias/62576-cancela-scn-fallo-sobre-encino.html> (reporting that the supreme court is to review the decision of a lower court due to the government’s failure to comply with the lower court’s judicial ruling).

65. See Carlos Elizondo Mayer-Serra & Luis Manuel Pérez de Acha, *¿Un nuevo derecho o el debilitamiento del estado? Garantía de audiencia previa en la expropiación* [A New Right or the Weakening of the State? The Right to a Judicial Hearing Before Expropriation], CUESTIONES CONSTITUCIONALES [CONSTITUTIONAL QUESTIONS], July–Dec. 2009, at 100, 101, 144 (lamenting that corruption in the judiciary turned expropriation from a tool of post-revolution reform to modern day abuse).

66. Carlos Aviles, *Corte reabre juicio por predio El Encino* [Court Reopens Trial Regarding El Encino Property], EL UNIVERSAL, Aug. 23, 2010, <http://www.eluniversal.com.mx/notas/703518.html> (Mex.) (“Mexico City authorities expropriated two plots of *El Encino* in 2000

A series of administrative and judicial pitfalls led to the allegation that judicial orders were being ignored by the authority responsible for the taking, the head of the Mexico City government, then the most relevant political leader of the left in the country.⁶⁷ As a result, he was accused of contempt of court and then impeached in 2005⁶⁸ this was the main precursor to the electoral conflict that divided public opinion over the result of the presidential elections of 2006 and called into question nothing less than the legitimacy of the electoral system. It all began with a seemingly simple takings case.

There is a second dimension in the crisis of expropriation that seems much more profound: the growing ability of one specific kind of landowner—agrarian communities—to prevent the expropriation of their lands for public works. The most illustrative case is that of San Salvador Atenco, a village on the periphery of Mexico City that managed to stop the building of a new airport for the main city in the country.⁶⁹ The airport was to be the main infrastructure project of Vicente Fox, the first president of what is commonly referred to as the Mexican transition to democracy.⁷⁰ Peasants not only displayed an ability to occupy the public space and to garner great public sympathy, but they also obtained an injunction in an *amparo* suit against the expropriation that would have taken more than 10,000 acres of their land.⁷¹ Here, the political legitimacy of the democratic

... in order to construct the avenues of Vasco de Quiroga and Carlos Graef Fernández in the Santa Fe zone.”).

67. *La Corte deja en el limbo jurídico caso de El Encino* [Court Leaves the Case of El Encino in Legal Limbo], CIUDADANOS EN RED, Nov. 26, 2010, <http://www.ciudadanosenred.org.mx/metroaldia/corte-deja-en-el-limbo-jur-dico-caso-el-encino> (Mex.) (“It is fitting to recall that this process has been litigated for over ten years and provoked the impeachment of then-Head of Government Andrés Manuel López Obrador for his contempt of the court by failing to pay a proportional indemnity.”).

68. See Aviles, *supra* note 66 (“The [Mexican supreme court] reopened, once again, the discussion concerning the expropriation of the property known as *El Encino*, which the Federal District had litigated for ten years and which even led to the impeachment of the former head of city government, Andrés Manuel López Obrador.”); John Authers, *Confusion Widens over López Obrador Impeachment*, FIN. TIMES, (Apr. 14, 2005), <http://www.ft.com/intl/cms/s/0/579182e6-ad2f-11d9-ad92-00000e2511c8.html#axzz1NJ34qOcK> (describing the vote to impeach Obrador over contempt of court allegations).

69. See Enrique Moreno Sánchez, *El aeropuerto y el movimiento social de Atenco* [The Airport and the Social Movement of Atenco], CONVERGENCIA, REVISTA DE CIENCIAS SOCIALES [CONVERGENCE, MAG. OF SOC. SCI.] (Mex.), Jan.–Apr. 2010, at 79, 84–87 (recounting the social movement against the airport proposal and describing its significance in social movements); Marfa de la Luz González, *Cronología del conflicto de San Salvador Atenco* [Chronology of the Conflict of San Salvador Atenco], EL UNIVERSAL, Jan. 21, 2008, <http://www.eluniversal.com.mx/notas/475742.html> (Mex.) (recounting the resistance of citizen groups, confrontations with police, and cancellation of the project).

70. See John Stolle-McAllister, *What Does Democracy Look Like? Local Movements Challenge the Mexican Transition*, LATIN AM. PERSP., July 2005, at 15, 24–25 (characterizing President Fox’s prioritization of the airport’s construction as “high”).

71. See Russell, *supra* note 20 (describing opposition of peasant groups in court actions and their occasional success in obtaining temporary injunctions).

election of the new government was not enough to justify the exercise of eminent domain over an agrarian community. The conflict over Atenco is, in fact, only the tip of a huge iceberg: in many parts of the country *ejidos* and *comunidades* are able to prevent expropriations through a combination of legal and political mechanisms, a process that is driving land prices upward and making the development of public works increasingly difficult.⁷²

In sum, postrevolutionary governments were able to subordinate private landowners to the needs of agrarian reform, but this very process paved the way for forms of community landownership that have managed to resist the public interest in post-postrevolutionary times. Even though the distribution of agrarian land came to an end almost two decades ago, peasant communities that obtained land through it now have more power and prestige than the government initiatives to expropriate their land for the public interest. Moreover, there is no legal doctrine to deal directly with this situation. More than twenty years ago, Martín Díaz y Díaz wrote that expropriation in Mexico was “a process without a theory.”⁷³ Today, the Mexican legal system is paying the price for not having given enough thought to the theoretical relationship between peasants’ property rights and the power of eminent domain.

C. Land Use Regulations

The power to regulate land use is one of the main instruments of urban and environmental policies in the world. For the legal profession, one of the problems with this power is determining how far regulations may go before generating the obligation to compensate landowners. As we saw in Part I, since 1917 the Mexican constitution has contained a provision that authorizes the regulation of the use of land and other natural resources in the urban and the rural contexts.⁷⁴ Here too, the promise that property could perform a social function has remained unfulfilled. But the main obstacle for translating all of those instruments into effective policies has *not* been of a legal nature.⁷⁵ Municipal governments have simply been too politically weak to impose urban and environmental regulations upon private landowners. Most cities have enacted their urban plans but, for a number of reasons, these plans

72. For a description of the manner in which *ejidos* and *comunidades* have been able to resist expropriation, see Gareth A. Jones, *Resistance and the Rule of Law in Mexico*, 29 DEV. & CHANGE 499 (1998) (Neth.).

73. Martín Díaz y Díaz, *Las expropiaciones urbanísticas en México: Aproximaciones a un proceso sin teoría* [Urbanistic Expropriations in Mexico: Approximations of a Process Without Theory], in DESARROLLO URBANO Y DERECHO: DIRECCIÓN E INTRODUCCIÓN GENERAL [URBAN DEVELOPMENT AND LAW: ADDRESS AND GENERAL INTRODUCTION] 253, 261 (Fernando Serrano Migallón ed., 1988).

74. C.P. art. 27 (Mex.).

75. See Jones, *supra* note 72, at 501–03 (describing the *ejidos*’ parallel or extralegal resistance to regulation).

have not met their goals.⁷⁶ In particular, plans are modified whenever developers decide to use this or that piece of land.⁷⁷ The result has been a pattern of urban development that consists of monotonous housing compounds isolated from each other and from urban areas.⁷⁸ The planning profession has been unanimous in denouncing this new urban model, but there are no signs that these tendencies may change in the short term.⁷⁹

It is worth mentioning that alongside this weakening of state regulatory power, some interesting land use initiatives have appeared. One of them is the proliferation of “compensation for environmental services” schemes. Both federal funds and contributions from cities are being allocated to rural communities in exchange for their commitment to preserve their forested areas to ensure the recovery of the aquifers from which urban areas obtain water.⁸⁰ This is a new sort of “social pact” through a legal form that departs from all previous forms of land use regulation: it is of a contractual character. For lawyers who belong to the postrevolutionary legal culture, these schemes amount to turning Article 27 on its head; the obligation to preserve natural resources, which was originally vested in those who owned them, is being replaced by compensation that society must provide. The pragmatic argument—that water tariffs from cities (the source of the compensation) can be used as incentive and compensation for the conservation of forests—clashes with the traditional idea that conservation is an inherent obligation for those who own natural resources, i.e., with the very idea of the social function of property.⁸¹

However, no matter how far one can go in the use of these new instruments, it is hard to envision a situation in which they replace traditional command and control instruments altogether. Particularly when, as we have said, state ownership of natural resources has ceased to be the only way of preserving national “patrimony.”⁸² Therefore, it is important to understand

76. See, e.g., *id.* at 518 (describing how the political backlash of *ejidos* cautioned government officials against using a public-utility argument for enacting urban development and slowed land use regulation).

77. See Pedro Moctezuma-Barragan, *Participatory Planning Under the Mexican Volcanoes*, in CITIES IN TRANSITION 71, 74 (Tasleem Shakur ed., 2005) (recognizing the ability of urban developers to influence the planning process through corruption of local government officials).

78. See, e.g., Irma Escamilla et al., *Cities of Middle America and the Caribbean*, in CITIES OF THE WORLD: WORLD REGIONAL URBAN DEVELOPMENT 103, 120 (Stanley D. Brunn et al. eds., 4th ed. 2008) (recounting the development of shantytowns outside of Mexico City and recent construction of higher income homes on the periphery).

79. See Emilio Duhau, *Los nuevos productores del espacio habitable [The New Producers of Living Space]*, CIUDADES [CITIES], July–Sept. 2008, at 21, 24–25 (criticizing the new model as not adapted to the socioeconomic status of urban residents).

80. See Francisco Chapela, *Communal Conservation in Mexico’s Protected Areas*, LEAD INTERNATIONAL, <http://www.lead.org/page/536> (summarizing the history of government-funded initiatives to promote forest preservation).

81. See *infra* text accompanying notes 118–25.

82. As soon as a private owner, and not a government agency, is responsible for the preservation of an element of a collective patrimony, the rules that ensure such preservation become

how it is that the *real* power of property owners, including both individuals and communities, is stronger than the power of the state to regulate the use of the land and its resources. This is not just another legal problem in a very strict sense, it is a *socio-legal* one. In Mexico, there is no equivalent to the *Lucas v. South Carolina Coastal Council*⁸³ case that expresses a constitutional doctrine about property.⁸⁴ What we have is a problem that is beyond the law, but nevertheless affects the balance between landowners and the public interest—a complex social problem about which we know very little.

D. Tenure Regularization in Low-Income Settlements

So far I have dealt only with the kinds of issues that would constitute a central chapter in a legal manual on property and the constitution. However, there is a legal practice through which millions of people have access to property, both in Mexico and in other countries—a practice that would never attract the attention of constitutional scholars. This refers to land-regularization programs, through which government agencies develop complicated legal procedures in order to provide property titles to families (or their dominant members) who have built their houses on what are commonly labeled “irregular human settlements.”

Since the early seventies, a federal agency called CORETT (Commission for the Regularization of Land Tenure) has conducted eminent domain procedures on lands located on the urban peripheries that members of agrarian communities had been selling to poor families.⁸⁵ It is important to recall that one of the most profound social changes in Mexico since the 1940s has been its transition from a rural to an urban society.⁸⁶ In that context, at least half of Mexico City’s expansion from 1970 to 2000 took place on land that had previously been distributed to peasants as part of the agrarian reform.⁸⁷

more relevant than ever. Leaving such rules to the possibility that private agents might arrive at virtuous agreements will seem too risky for state functionaries, especially if they have been elected through democratic processes.

83. 505 U.S. 1003 (1992).

84. *See id.* at 1019 (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”); *id.* at 1030 (“When . . . a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles [of state nuisance and property law] would dictate, compensation must be paid to sustain it.”).

85. EGYPT BROWN ET AL., *SECURE TENURE IN LATIN AMERICA AND THE CARIBBEAN: REGULARIZATION OF INFORMAL URBAN SETTLEMENTS IN PERU, MEXICO AND BRAZIL* 50 (2006), available at http://www.princeton.edu/research/final_reports/f05wws591g.pdf.

86. *See supra* notes 62–63 and accompanying text.

87. *See generally* MARTHA SCHTEINGART, *LOS PRODUCTORES DEL ESPACIO HABITABLE: ESTADO, EMPRESA Y SOCIEDAD EN LA CIUDAD DE MÉXICO* [PRODUCERS OF LIVING SPACE: STATE, ENTERPRISE AND SOCIETY IN MEXICO CITY] (1989) (describing the social, political, and economic challenges of the expansion of housing in Mexico City in the twentieth century).

Lack of secure tenure is a problem that affects millions of families.⁸⁸ But does this mean it is a constitutional problem? It is, as far as it concerns housing as a fundamental right: all legal practices that lead to (or stand in the way of) people's access to security of tenure over the house they inhabit should be considered part of the constitutional agenda of housing rights. However, constitutional lawyers do not seem to be aware of this. For example, a book by one of the most celebrated neoconstitutionalists in Mexico extensively discusses housing rights from a philosophical perspective, but fails to even mention CORETT or address the problem of tenure security at all.⁸⁹

In the field of housing and urban studies, there have been intense debates about the legal form that security of tenure should take. Thus, Hernando de Soto's proposal to deliver property titles to families in irregular settlements was seen by many (including the World Bank and President Ronald Reagan) as a panacea, not only for dealing with the problem of tenure insecurity, but as a recipe for economic progress in underdeveloped societies in general.⁹⁰ Similarly, the impact of property titles on family and gender relations has inspired socio-legal analysis that brings to light aspects of "the social life of property" that had previously been ignored.⁹¹

Even if constitutional lawyers cannot see this, regularization programs bring about a number of serious and substantive dilemmas about property rights. To illustrate, consider one of the most relevant conflicts of the first decade of this century in Mexican political life. *Paraje San Juan* was the name of a piece of land in Mexico City's periphery that was illegally subdivided and has been progressively urbanized since the end of the 1940s.⁹² In the late 1980s, when more than fifty thousand people inhabited the area without property titles, the city government initiated eminent domain procedures as part of a property-ownership-regularization program.⁹³ After almost fifteen years of litigation, a federal court awarded the (alleged) original

88. Ann Varley, *The Political Uses of Illegality: Evidence from Urban Mexico*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 172, 172 (Edésio Fernandes & Ann Varley eds., 1998) ("[M]illions of families liv[e] in illegal housing areas around many of [Mexico's] cities.").

89. See MIGUEL CARBONELL, *LOS DERECHOS FUNDAMENTALES EN MÉXICO* [FUNDAMENTAL RIGHTS IN MEXICO] (2004).

90. See HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 251 (June Abbott trans., 1989) (arguing for the proliferation of legal instruments that enable the widespread ownership of property); President Ronald Reagan, Project Economic Justice, Speech Presented at the White House (Aug. 3, 1987), available at <http://www.cesj.org/homestead/strategies/regional-global/pej-reagan.html> (praising de Soto's research).

91. See generally, e.g., Ann Varley, *Gender and Property Formalization: Conventional and Alternative Approaches*, 35 *WORLD DEV.* 1739 (2007) (detailing the gender implications of the effects of both conventional and alternative methods for securing tenure).

92. *Regularizará la SRA el 'Paraje San Juan'* [SRA to Regularize the 'Paraje San Juan'], *ES MAS [MORE]* (Mex.) (June 16, 2004), <http://www.esmas.com/noticierostelevisa/mexico/371534.html>.

93. *Id.*

owner compensation for the equivalent of some USD170 million.⁹⁴ That was an exorbitant figure, and the local government (again, the one led by Andrés Manuel López Obrador)⁹⁵ refused to pay.⁹⁶ Public opinion was polarized: sympathizers of the head of the local government urged him not to pay; others demanded that in the name of the rule of law, the government comply with the judicial decision and just pay.⁹⁷ The justices of the supreme court must have perceived that the whole issue was giving a bad image to the judiciary—indeed, the compensation looked too high. So, the supreme court “attracted” the case and reduced the compensation to less than one-tenth of the original figure.⁹⁸

This was one of the most embarrassing moments for the court in the post-post-authoritarian era. But no one seemed to realize that—behind the issue of the “rule of law”—what was at stake was nothing less than the idea of property rights. No one, both within and outside of the legal profession, posed the obvious question about the role that the landowner had played in the whole story: was he a victim of the invasion of his land? In such a case, did he at least try to prove that he resisted, by whatever means, that invasion? Or, conversely, was he the one who (contrary to the law) subdivided the land, made a profit at that time, and forty years later was ready to cash in an enormous amount of money just because our (constitutional) judges were unable to pose that question? The whole judicial procedure construed the landowner as a victim that should be compensated; as a result, the question about the social function of property was conveniently left out of the legal process.

There are many other interesting aspects in the case of *Paraje San Juan*, but there is one legal dilemma that we can recognize as relevant for the definition of property in urbanization processes: do landowners who were not diligent enough in relation to the urbanization of their lands deserve to be compensated when the time for regularization arrives? This should be a central issue in the debate over eminent domain in countries like Mexico—if

94. See Carlos Aviles Allende, *Desecha la Corte queja de PGR por Paraje San Juan* [Court Dismisses Complaint of PGR by Paraje San Juan], EL UNIVERSAL (Apr. 7, 2005), http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=123680&tabla=nacion (Mex.) (identifying judgment against the city, forcing payment of 1.81 billion pesos for expropriation of Paraje San Juan).

95. See *supra* notes 67–68.

96. See Allende, *supra* note 94 (noting the local government’s challenge to the court’s ruling).

97. See José Espina Von Roerich, *Paraje San Juan: el martirio de un indestructible* [Paraje San Juan: The Martyrdom of an Indestructible], LA CRÓNICA DE HOY [CHRON. TODAY] (Oct. 20, 2003), http://www.cronica.com.mx/nota.php?id_nota=90123 (Mex.) (describing the “fierce controversy among various political actors” over Obrador’s refusal to pay).

98. Fabiola Cancino, *Paragá GDF 60 mdp por Paraje San Juan* [GDF Will Pay 60 Million Pesos for Paraje San Juan], EL UNIVERSAL (Feb. 4, 2006), <http://www.eluniversal.com.mx/ciudad/73979.html> (Mex.) (reporting that the government of Mexico City will pay 60.5 million pesos for expropriation of Paraje San Juan, and not the 1.81 billion originally ordered, after the Mexican supreme court ordered a reappraisal of the property). “Attraction” is the mechanism through which the supreme court rules on cases that in principle are within the jurisdiction of lower federal courts. C.P. art. 107, § V (Mex.).

only because irregular urbanization is a chronic feature of urban processes,⁹⁹ and at some point, we have to come to terms with the situation of the original owner of the land.

E. The Ambivalence of Communitarian Claims

There is one issue that has appeared too frequently in the previous account: the growing power of agrarian communities (*ejidos* and *comunidades*), which, during the first decades of the postrevolutionary regime, were just a piece in the complex web of the Mexican political system. For a long time, they represented an emerging form of property that was marked by subordination to the federal government; this was a central feature in the postrevolutionary regime.¹⁰⁰

As agrarian reform was gradually consolidated, communities learned how to defend themselves from government manipulation, political pluralism established itself throughout the country, and new issues, such as public services in townships where the peasant population was gathered, became important in rural life. These developments produced an unintended consequence: agrarian communities ended up performing functions that local governments were unable to fulfill. Although this has been documented by a considerable number of field studies,¹⁰¹ constitutionalists have not seen a problem there that might interest them—at most, they see it as an enforcement problem. We are talking here about more than half of the national territory, where the power of municipalities is easily challenged by agrarian communities.

This is, without a doubt, the most serious problem of those I have discussed, because *ejidos* and *comunidades* ended up in an extremely ambivalent position: they have taken into their own hands the satisfaction of those collective needs that municipalities were not prepared to take care of. At the same time, they are seen by agrarian law as mere landowners. This is not the place to go deeper into this question, but it should be clear that these corporations are both a hope for communitarianism and a threat to statism. It

99. See Martim O. Smolka & Adriana de A. Larangeira, *Informality and Poverty in Latin American Urban Policies*, in *THE NEW GLOBAL FRONTIER: URBANIZATION, POVERTY AND ENVIRONMENT IN THE 21ST CENTURY* 99, 99–113 (George Martine et al. eds., 2008) (describing the “more than a century of short-sighted urban policies” in Latin America).

100. ARTURO WARMAN, *EL CAMPO MEXICANO EN EL SIGLO XX* [THE MEXICAN COUNTRYSIDE IN THE TWENTIETH CENTURY] 154 (2001).

101. See, e.g., PEDRO F. HERNÁNDEZ ORNELAS, *AUTORIDAD Y PODER SOCIAL EN EL EJIDO* [AUTHORITY AND SOCIAL POWER IN THE *EJIDO*] 155–57 (1973) (analyzing how different *ejidos* prioritize the community projects they undertake themselves, such as provision of electricity, irrigation, and construction of schools); Antonio Azuela, *Ciudadanía y Gestión Urbana en los Poblados Rurales de Los Tuxtlas* [Citizenship and Urban Management in the Rural Village of Los Tuxtlas], 28 *ESTUDIOS SOCIOLÓGICOS* [SOC. STUD.] 485, 485–86 (1995) (Mex.) (noting the weak presence of local authorities in *ejidos* and arguing that the process of urbanization that these villages have undergone has led to the creation of public goods managed by *ejido* communities).

should be obvious that this tension has a structural character and that it should be at the center of our constitutional agenda.

III. A Brief Visit to Theories

If the problems I discussed thus far constitute a crisis in the constitutional rules on property in Mexico, one of the ways to address that crisis is to consider the theories we have at hand. Anyone who seeks orientation as to how to conceptualize property will come across three groups of theories. First, we can use utilitarian theories, that is, theories that follow the “greatest happiness principle.”¹⁰² These assume that under certain circumstances, different property regimes will produce different results in terms of that principle.¹⁰³ They vary according to what sort of circumstance will be predominant, but they all aspire to an explanation of individual behavior as the basic focus of analysis.¹⁰⁴ What they have to offer is the possibility of getting the institutions right, that is, of identifying the sort of property rules that will incentivize the desired behavior.

There are at least two reasons why these theories cannot be ignored. First, they constitute the most straightforward way to analyze fundamental issues such as resource degradation. One cannot overstate how important it is for scholars to reflect about the impact of property arrangements on the use (or misuse) of valuable natural resources and ecosystems.

Second, the application of a utilitarian approach to common property arrangements over natural resources—which led to the awarding of the Nobel Prize in economics to Elinor Ostrom in 2009—has been a breakthrough in the study of property.¹⁰⁵ The possibility that common property regimes may not necessarily lead to the famous “tragedy of the commons”¹⁰⁶ has prompted the formation of a growing academic community devoted to the study of the social dynamics of resource use from a utilitarian

102. See generally Amnon Goldworth, *The Meaning of Bentham's Greatest Happiness Principle*, 17 J. HIST. PHIL. 315, 315–16 (1969) (discussing the “interesting history” of the “Greatest Happiness Principle”).

103. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 5–7 (1990) (setting out the operative factors and consequences of several utilitarian individual and collective welfare maximization theories).

104. See *id.* at 6 (noting that a common feature of such models is that they define “the accepted way of viewing many problems that individuals face when attempting to achieve collective benefits”).

105. See *id.* at xi (describing the content and perspective of Ostrom’s work).

106. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (arguing that common property causes a tragedy, as “[e]ach man is locked into a system that compels him to increase his [marginal utility] without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest Freedom in a commons brings ruin to all.”). But see Rose, *supra* note 40, at 766–71 (arguing that certain public resources and activities benefit from participation and are therefore “the reverse of the ‘tragedy of the commons’: it is a ‘comedy of the commons,’ as is so felicitously expressed in the phrase, ‘the more the merrier.’”).

perspective.¹⁰⁷ Constitutionalists cannot afford to ignore what this movement has to say about property. This cannot be exaggerated in the case of Mexico, where almost two-thirds of the forested land is owned collectively by agrarian communities.

In fact, utilitarian ideas have already been used, during the early 1990s, to modify Article 27, in order to give agrarian communities the right to transfer their lands and to allow foreign investment in mining.¹⁰⁸ Almost two decades later, constitutional scholars have not even tried to explain what sort of property regime we have after such a neoliberal surgery.

A second group of theories is built around the idea of fundamental rights. They constitute a strong link between legal scholarship and political philosophy. Despite their diversity, they all have in common the concern about the set of values that justify and give meaning to the constitutional order. Their importance cannot be overstated, as they provide substantive arguments about the legitimacy of legal institutions. The most influential school of constitutional thinking in Latin America, known as neoconstitutionalism, distinguishes itself precisely by recognizing fundamental rights as the organizing principles of contemporary constitutions.¹⁰⁹

It is interesting to note that the question of property stands at a very uncertain place in the arena of fundamental rights. To be sure, classical liberal thought is still present in most constitutional theories as the main source for a defense of private property, not only as a fundamental right, but even as the “guardian of every other right,” to use Ely’s expression.¹¹⁰ Against this version of the liberal tradition, there is a growing body of literature in which social, cultural, and economic rights seem to be in

107. See Brendan Fisher et al., *Common Pool Resource Management and PES: Lessons and Constraints for Water PES in Tanzania*, 69 *ECOLOGICAL ECON.* 1253, 1254 (2010) (describing Ostrom’s 1990 work as one of three “seminal works” that have spawned modern common pool resource analysis); see also, e.g., *infra* note 108.

108. See Jessa Lewis, *Agrarian Change and Privatization of Ejido Land in Northern Mexico*, 2 *J. AGRARIAN CHANGE* 401, 405 (2002) (stating that the purpose of the changes to Article 27 was to “moderniz[e] the *ejido*” which was seen as a “barrier[] to economic efficiency and progress”); *The Austin Memorandum on the Reform of Art. 27 and its Impact Upon Urbanization of the Ejido in Mexico*, 13 *BULL. LATIN AM. RES.* 327, 327 (1994) (describing the changes made to Article 27, including the right to “sell, rent, sharecrop or mortgage their land parcels” and the “opportunit[y] for private capital (including foreign) to purchase former *ejido* holdings”).

109. See Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 141, 152, 156 (Javier Couso et al. eds., 2010) (describing the “rising influence of neoconstitutionalism in Latin America” and its emphasis on natural law and the analysis of fundamental rights). Legal positivism, that dominated a good part of the twentieth century, is the “mainstream” against which neoconstitutionalism builds its own prestige. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 33–35 (1986) (defining and discussing legal positivism and noting that it “has attracted wide support”).

110. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (1992) (quoting Arthur Lee, an American diplomat during the American Revolution).

contradiction with private property. Debates about the privatization of water services (which for some represents a threat to the human right to water) are only one illustration of this tension.¹¹¹

Moreover, one of the leading figures of neoconstitutionalism, Luigi Ferrajoli, has advanced the argument that property should *not* be seen as a fundamental right.¹¹² It is beyond the scope of this Article to present and discuss that argument; it suffices to say that this represents the most recent attempt to call into question the status of property as a right.

When Mexican jurists finally decide to study property as a constitutional issue, it will be interesting to see what they have to say about its status as a fundamental right. But regardless of whether they embrace Ferrajoli's thesis or not, that would not be enough to resolve the problems I referred to in the previous Part.¹¹³ Unless conflicts reach courts under the form of conflicts between rights (and most conflicts do not), it does not matter whether property is a "second-class" right. As long as the law provides protection to property owners, and legal operators are ready to act accordingly, the fundamental dilemmas around property issues will be there as a challenge for the legal profession.

The third group of theories can be described as social function theories. As I mentioned earlier, this catch phrase was adopted in Mexico by many jurists, and even by the supreme court, as a way of making sense of our constitutional regime of property.¹¹⁴ Historically, these theories are linked to the welfare state and, in particular, to the idea that property rights are to be protected only as far as they contribute to the creation and circulation of wealth without becoming an obstacle to the satisfaction of collective needs.¹¹⁵ In the context of urban and environmental policy, these theories provide the rationale for the establishment of planning as a form of regulation that restricts the rights of land and property owners for the sake of the general welfare. Even if, to some observers, these theories might look profoundly anti-liberal, the truth is that they provided the theoretical justification for the maintenance of private property as the basic institution of capitalism.¹¹⁶

111. For a summary of the debate over the privatization of water, see generally KAREN BAKKER, *PRIVATIZING WATER: GOVERNANCE FAILURE AND THE WORLD'S URBAN WATER CRISIS* 78–108 (2010).

112. LUIGI FERRAJOLI, *DERECHOS Y GARANTÍAS. LA LEY DEL MÁS DÉBIL [RIGHTS AND GUARANTEES. THE LAW OF THE WEAKEST]* 45–46 (1999) (discussing the differences between fundamental liberty rights and property rights).

113. *See supra* Part II.

114. *See supra* note 29 and accompanying text.

115. *See, e.g.*, THEO R.G. VAN BANNING, *THE HUMAN RIGHT TO PROPERTY* 149 (2001) (discussing how the "concept of social function" is used in the German welfare state to balance the "protection of property rights between the individual and the communal interests").

116. A wide variety of new doctrines called for a redefinition of property rights in the context of the industrial society. *See, e.g.*, HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS, AND OF INCREASE OF WANT WITH INCREASE OF WEALTH: THE REMEDY* 295 (D. Appleton & Co. 1886) (1879) (advocating that common ownership

There are at least two main variants of social function theories. The first one can be found in the German constitution, which uses slightly different language. Instead of using the word *function*, it simply proclaims that property rights come with a set of inherent social obligations.¹¹⁷ Restrictions that are imposed upon property owners are not seen as external phenomena in relation to property rights, but as part and parcel of property as an institution.¹¹⁸

The second variant carries with it a bolder proposal. Legal scholars in Latin America who follow it make a distinction between saying that property is a right that *has* a social function and saying that property *is* a social function. The origin of this formulation is the work of Leon Duguit, a French jurist who tried to apply Comtian positivism and Durkheimian functionalism to legal phenomena.¹¹⁹ The idea was not to affirm a moral obligation on the part of property owners, but to assert that sociological concepts were enough to describe what already was happening in the field of property in industrial societies—solidarity as a social fact.¹²⁰ Therefore, such concepts substitute for old legal concepts. The very notion of “right” should then be replaced by the concept of “function.”¹²¹ Clearly, in this respect this theory failed: far from disappearing from legal thought, the idea of fundamental rights became central in postwar legal scholarship in the Western world, in a movement that has been described as “the rise and rise of human

of land “is the remedy for the unjust and unequal distribution of wealth apparent in modern civilization, and for all the evils which flow from it”); RICHARD TAWNEY, *THE ACQUISITIVE SOCIETY* 36–37 (1921) (decrying a system of inherited property and wealth that produced “irrational inequalities” and subverted principles of equal opportunity). Even the Catholic Church developed its new doctrine on property through the *Rerum Novarum* encyclical issued by Pope Leo XIII on May 15, 1891. *See generally* Pope Leo XIII, *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor* (1891), reprinted in 2 *THE PAPAL ENCYCLICALS 1878–1903*, at 241 (Claudia Carlen ed., 1981) (endorsing the unique human capability to possess private property).

117. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 14(2) (Ger.) (“Property entails obligations. Its use shall also serve the public good.”).

118. *See* GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 100 (2006) (stating that Article 14(2) “explicitly indicates that in the German constitutional scheme, a social obligation is inherent in ownership”).

119. *See* M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 *FLA. J. INT’L L.* 191, 201–02 (2010) (noting that Duguit adopted Durkheim’s idea of “social solidarity” and that Duguit’s method of observation originated in Comte’s positivism).

120. *See id.* (discussing Duguit’s approach to social solidarity); *see also* WOLFGANG GASTON FRIEDMANN, *LEGAL THEORY* 229–30 (1967) (summarizing Duguit’s “discovery of social solidarity as a fact and necessity of social life” and exploring its implications in his writings).

121. The idea of doing without the concept of “subjective rights” was part of the wider scientific project of legal positivism. *See, e.g.*, Alf Ross, Comment, *Tû-Tû*, 70 *HARV. L. REV.* 812, 818, 825 (1957) (stating that “the concept of rights is a tool for the technique of presentation serving exclusively systematic ends” and that what is really important is “the exercise of force (judgment and execution) by which the factual and apparent use and enjoyment of the right is effectuated”); *see also* HANS KELSEN, *PURE THEORY OF LAW* 129 (Max Knight trans., Univ. of Cal. Press 1978) (1934) (arguing that in a pure theory of law, the distinction between objective law and subjective rights is dissolved).

rights.”¹²² As for the idea of social function, it is simply impossible to find it in any relevant contemporary legal theory.

Nevertheless, in Latin America the idea of property as a social function is widely and highly regarded.¹²³ In fact, it has presided over the promotion and defense of some of the most innovative and progressive pieces of legislation in the region for the previous two or three decades.¹²⁴ Authors on the more conservative side of the ideological spectrum tend to disagree with this theory, favoring an approach that emphasizes the virtues of a market economy.¹²⁵ Obviously this is a question of political preference. For this author, even if talking about social function is theoretically weak (because the word “function” is meaningless in contemporary legal theory), its political implications are positive to the extent they express and reinforce the commitment of state institutions to counteract the negative aspects of a market economy. Further, the term *social function* highlights the importance of collective interests that, within certain limits, should prevail over those of property owners.

In Mexico, the idea of a social function of property can be used to bring the relationship between property and social justice back into the constitutional debate. In fact, if the core of social function theories is the idea that property implies the existence of an inherent social obligation, this idea can be used to respond to many of the challenges of our time. There is no obstacle between thinking about an intergenerational obligation inherent in property rights and imposing limitations that lead to the sustainable use of resources (particularly natural resources) that can be privately owned. This future depends on the social acceptance of this idea in the democratic process.

Even if one embraces the idea of a social function in the political arena, it has two additional limitations. First, it is not sensitive to the impact that different property regimes may have, under certain circumstances, upon the use of natural resources. In other words, it does not respond to the problems

122. See ANTHONY WOODIWISS, HUMAN RIGHTS 79–80 (2005) (introducing a discussion of what Kirsten Sellars has ironically termed the “‘rise and rise’ of human rights” in the United States and Japan, and conceding that the “Western-European aspect of the story of the revival of rights disclosure has been told sociologically and very well many times already”).

123. In Latin America, to a much larger extent than in Europe, Duguit’s ideas were used in the redefinition of property in the context of progressive–populist political regimes. See Mirow, *supra* note 119, at 195 (“Based on Duguit’s work, drafters of Latin American constitutions changed the way property was defined in the first decades of the twentieth century.”).

124. See EDESIO FERNANDES, LAW AND URBAN CHANGE IN BRAZIL 98 (1995) (noting that since 1988 in Brazil, there has been a slow process towards affirming the social function of property through the enactment of urban legislation).

125. See, e.g., Paul L. Poirot, *The War on Property*, in FREE MARKET ECONOMICS: A BASIC READER 29, 30 (Bettina Bien Greaves ed., 1975) (“Private ownership and control, of itself, does not assure the most efficient use of scarce resources in service to others. That assurance comes as a result of competition.”); Leonard E. Read, *Free Market Disciplines*, in FREE MARKET ECONOMICS: A BASIC READER, *supra*, at 265, 265 (“Contrary to socialistic tenets, the free market is the only mechanism that can sensibly, logically, intelligently discipline production and consumption.”).

that utilitarian theories pose, and those are real problems. Second, it does not address the status of property as a fundamental right, that is, it is not sensitive to the debates in the field of political philosophy and jurisprudence, which may potentially have an impact when courts construe the cases before them as conflicts between rights. In order to be convincing and to make sense of the institution of property, any theory of property must face the intellectual challenges that these two intellectual traditions pose.

In order to illustrate the limitations of all of the theories on property I have just mentioned, I will mention an issue for which none of the three groups of theories can give an answer—the social ambivalence of peasants' rights over land and natural resources. As we have seen, Mexican *ejidos* and *comunidades* are more than mere forms of private property. Even if they can be depicted as such by some rigorous theoretical standard, they functionally operate as forms of local government.¹²⁶ From the traditional point of view of public law, this situation is untenable, as they enjoy the privileges of both worlds and none of the responsibilities: they exert power over their "territory," but they are not subject to political accountability. At the same time, they have the legal protection of private owners, but they manage to escape the force of state institutions.

From a communitarian point of view (the opposite of a public law point of view), the emerging power of rural communities can be seen as promising. This is obviously not the place to discuss that issue, but it should be clear that it will be one of the main challenges for those who want to take property seriously as a constitutional problem.

IV. Final Remarks

I have referred to a variety of issues that, taken together, amount to a crisis in the constitutional regime of property in Mexico. I have emphasized variety to remind the reader that property is a complex and highly problematic field. It includes situations as diverse as corporations subject to government regulations, agrarian communities confronted with the depredatory practices of their own members (the tragedy of the commons), families (and individuals within them) seeking legal recognition for their homes, and government agencies that have to use eminent domain to complete public works. In other words, I have tried to show that even if one can speak of a crisis of the postrevolutionary property regime of Mexico, such a crisis is made up of several social issues, some of which are relatively independent from each other.

In the last Part, I suggested that the different theoretical approaches to property issues cannot be ignored, as they illuminate different aspects of the complex world of property as an institution. However, I have also argued that they do not provide enough elements to deal with the complex agenda

126. See *supra* subpart II(E).

we have in front of us. How, then, should we proceed? For the moment, I can only point in two directions. First, we must recognize that property is a constitutional issue—in the case of Mexico, it seems that this requires an explanation. Second, we have to listen to what social sciences have to tell us about property relations and their transformations.

Property is a constitutional problem to the extent that the social changes I have described are, at the same time, changes in the scope and intensity of state power: a weakened power of eminent domain; a failure of the government power to regulate land uses; the growing power of agrarian communities that act as local governments; and the growing challenge, both in public opinion and in actual practice, of the state ownership of certain natural resources (particularly water) and places with symbolic value (archaeological sites). All of these are not only “social” processes taking place outside state institutions, they are part and parcel of the transformation of the Mexican state in recent decades. These changes may not affect the words in the constitution, but they change their social and political meaning, as well as the expectations of relevant social actors before them.

On the other hand, the contribution of social sciences lies in the fact that they help us to understand the sorts of substantive dilemmas that administrative agencies and judges face in property cases—even if in many instances they do not recognize them. Let us recall some of the most relevant of those dilemmas in three different areas: the environmental agenda, the urban agenda, and the patrimonial agenda.

The environmental agenda calls for the sustainable use of resources. In rural areas, this issue has replaced that of land distribution. Today, the dominant legal question is the following: what should be the extent of property rights of agrarian communities and individuals who own land with special ecological value? In practical terms, what sort of land-use restrictions should give rise to a right to compensation? This is even more relevant given the fact that state organs with the legal power to regulate land uses (for the most part local governments) are extremely weak in the face of private landowners and agrarian communities. If we understand the social power of these stakeholders, and the way they exercise this power, we will surely be in a better position to determine how land-use regulations might be reinforced.

On the other hand, the urban agenda raises a number of dilemmas related to social justice. To name a few, in land regularization programs, what should be the rights of the original landowners given (or regardless of) the way they conducted themselves during the formation of irregular settlements? What is the correct policy to determine which members of the family should get the property title? How does the government ensure that increases in land prices that are the product of the collective effort of urbanization do not end up in the pockets of a handful of landowners and developers? By knowing how that power is exercised, we should be in a better position to know how to strengthen state institutions.

The patrimonial agenda is particularly important for a country like Mexico that has put so much effort into the formation of a national patrimony as a foundation of its identity. One main question to be addressed is this: is it possible to change the emphasis of our concept of national patrimony from a defensive institution to an active assumption of responsibilities toward future generations?

Finally, there are questions that affect both urban and rural life, local government, and a huge part of the national patrimony. Considering that agrarian communities have become, in many regions of the country, *de facto* local authorities, what should be their proper place within the constitutional order? Is it possible to think of them as a fourth level of government? If so, is it possible to transform them so that they recognize that all residents have the same rights as the peasants who originally received the land?

These dilemmas are of great importance, even as they remain invisible to constitutional lawyers and scholars. Of course, sociological approaches are a necessary, but not a sufficient, condition to achieve a new, proper framing of property as a constitutional issue. Framing property as a constitutional issue cannot be the direct outcome of sociological analysis alone—though this was the positivistic dream of Duguit and nineteenth century sociology. But ignoring what social sciences can tell us about property would amount to isolating legal scholarship from real life. It remains to be seen whether constitutional scholars are ready to take that risk.