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# Liberalism and Property in Colombia: Property as a Right and Property as a Social Function

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## INTRODUCTION

Liberalism has determined the structure of the property law regime in Colombia. A genealogical analysis of the legal forms of the recent past that define and regulate property provides evidence of three key periods in the creation and consolidation of the right to property in the country. These three moments revolve around different forms of interpreting and balancing three fundamental values in the liberal canon: autonomy, equality, and solidarity. The first period, beginning in 1886 and ending in 1936, was marked by a classical liberal property system in which the Constitution and civil law formed ideologically coherent machinery that prioritized the principle of autonomy over the principles of equality and solidarity. In this legal structure, the Civil Code defined property as a subjective and nearly absolute right. This form of conceiving the right to property was strongly influenced by classical liberalism and the codifying movement that had as its paradigmatic product the Civil Code of Napoleon of 1804.[1] The Colombian Civil Code of 1887 is a replica of the Chilean Civil Code drafted by Andrés Bello, which was strongly influenced by the Napoleonic Code.[2] The Constitution of 1886 recognizes property as an acquired right and mandates that the state not violate this right.[3] However, the Constitution also recognizes the right of the state to expropriate property for reasons of public use.

The second period, between 1936 and 1991, was structured as a mixed system that recognized the social function of property in the Constitution but that preserved an individualistic notion of property in the Civil Code. In this legal framework, there was tension between principles of autonomy

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1. M.C. Mirow, *The Code Napoléon: Buried but Ruling in Latin America*, 33 DENV. J. INT'L L. & POL'Y 179, 179 (2005).

2. M.C. Mirow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291, 291 (2001). The Chilean Civil Code was also strongly influenced by Justinian's *Corpus Iuris Civilis* and Alfonso X's Seven Parts (*Siete Partidas*). *Id.* at 304, 309.

3. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 58 (W.M. Gibson trans., 1948).

on the one hand, and solidarity and equality on the other. Amending the Constitution of 1886, Legislative Act 1 of 1936 states that property is a social function and includes reasoning of social interest (in addition to public use) to justify the expropriation of property.[4] In contrast, the constitutional reform of 1936 preserved the classical liberal definition of property from the Civil Code. Thus, although the Constitution defines property by means of the principle of solidarity, the Civil Code does so using the principle of autonomy.

Nevertheless, the tension between the principles of solidarity, autonomy, and equality that characterize this property system appears not only in the different concepts of property defended in the Constitution and civil law. It is also made explicit in the constitutional reform itself. Article 10 of Legislative Act 1 defines property as an individual right and as a social function. Thus, the concepts of property as right and property as social function, which are contradictory, structure the constitutional reform of 1936. This inconsistency was also made explicit with the issuance of Law 200 of 1936, the agrarian reform law,[5] and the issuance of Law 9 of 1989, the law of urban reform.[6] Both laws define property as a social function. These three norms are clearly based on León Duguit's critiques to the classical liberal concept of property and his definition of property as a social function.[7] However, Congress did not realize that the two concepts of property are incompatible, as noted by Duguit. The case law of the Supreme Court does not resolve this tension either. Rather, it maintains it. Although the Court defends and develops the constitutional clause that indicates that property is a social function, it also upholds the constitutionality of Article 669 of the Civil Code, which defines property from a classical liberal view.[8]

The inconsistency of the property system becomes more complex when examining the tensions that exist within the legal culture surrounding the concept of "Constitution." In one corner of the debate, a classical legal culture emerges that advocates for a radical separation between private and public law and a notion of the Constitution as a political program—not as the supreme norm of the legal system that can be immediately and directly applied. This legal culture, inherited from the classical French liberalism that influenced the Regeneration,[9] considers statutes to be supreme in the legal order. The Constitution can only be applied when the legislature

4. Legislative Act 1/36, agosto 5, 1936, DIARIO OFICIAL [D.O.] 23263, art. 10.

5. L. 200/36, diciembre 30, 1936, DIARIO OFICIAL [D.O.] 23388.

6. L. 9/89, enero 11, 1989, DIARIO OFICIAL [D.O.] 38650.

7. Eliécer Batista Pereira & James Iván Coral Lucero, *La función social de la propiedad: la recepción de León Duguit en Colombia*, 10 CRITERIO JURÍDICO, no. 1, 2010, at 59 (Colom.).

8. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Plena agosto 11, 1988, M.P: Jairo Duque Pérez. Cases decided by the Colombian Supreme Court since 1988 can be found at http://www.ramajudicial.gov.co/csj/csjt.jsp.

9. The Regeneration (*La Regeneración*) was the political movement led by Miguel Antonio Caro and Rafael Nuñez that was responsible for the drafting and approval of the 1886 Constitution. *See infra* notes 18–25 and accompanying text.

makes laws that specify its mandates. In the other corner, there was the Marching Revolution (*Revolución en Marcha*), the government program advocated by liberal president Alfonso López Pumarejo (1934–38).[10] This program focused on transforming the Constitution as a spearhead of political and social change. This movement has at its center the constitutional recognition of a strong interventionist state in Colombia. That transformation, however, was significantly affected by a legal culture that considered civil law the true law and the center of the legal system.

The third and final property system, instituted in 1991 and still in effect today, is an ideologically consistent constitutional and legal framework committed to the idea that the right to property must be defined through the principles of solidarity and equality. Consequently, in this third property system, the principle of autonomy is subordinated to the principles of solidarity and equality. Nevertheless, the ideological coherence of this third property system is a result of the case law of the Constitutional Court. The Constitution of 1991 preserved the contradictions that spanned the second property system of Colombia's recent history. Article 58 of the Constitution states that property is a social function, that the state should protect rights to justly acquired property, and that the state may expropriate property for reasons of public use and social interest.[11] Hence, the new Constitution reproduces the contents of Legislative Act 1 of 1936 and therefore preserves in its text the contradiction between property as right and property as function. Similarly, the Constitution of 1991 preserved Article 669 of the Civil Code and thus the contradiction between an individualistic concept of property and one grounded in solidarity.

Nevertheless, in ruling C-595 of 1999, the Constitutional Court declared unconstitutional the sections of Article 669 of the Civil Code that violated the constitutional right of property as a social function.[12] In this decision, the Court also resolved the contradiction in the text of Article 58 of the Constitution between property as right and property as function.[13] The Court stated that property is an individual right that has internal and external limits. The Court then defended and questioned Duguit, who was mentioned explicitly. For the Court, the social function of property is not inconsistent with the concept of a subjective individual right. The Court views property as a right-duty that imposes social obligations on the owner.

Yet, the Constitution of 1991 not only reproduces the text of the constitutional reform of 1936, but goes much further in defending the principle of solidarity. Article 58 of the Constitution states that property has an ecological function, that the state may expropriate property by administrative means (not merely judicial), and that the state has the duty to

10. DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 185–92 (1993).

11. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58 (Anna I. Vellvé Torras & Jefri J. Ruchti trans., 1991).

12. Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1999, M.P: Carlos Gaviria Díaz, Sentencia C-595/99. Cases decided by the Colombian Constitutional Court can be found at http://www.corteconstitucional.gov.co/.

13. *Id.*

protect associational and collective forms of property. The Constitution also expressly establishes that Colombia is a "social State of law" and that the principle of solidarity is one of the pillars of the Colombian State.[14] The Constitution makes clear that the social function of property is not an isolated legal form but is part of the institutional and ideological structure designed by the National Constituent Assembly of 1990 (NCA). The case law of the Constitutional Court confirms this interpretation. In a long line of case law, the Court develops the clause of the social function of property and protects the power of the state to regulate and limit this right.[15]

The three property systems were not built in a vacuum. They are a function of the political struggles since the nineteenth century, which sought to define the basic structure of the Colombian state. First, the individualistic property system emerged from the liberal authoritarian state established with the Constitution of 1886. The emergence of this legal framework was a direct consequence of the triumph of the political movement of the Regeneration led by Miguel Antonio Caro and Rafael Núñez. As a key instrument of the Regeneration project, the Constitution of 1886 had three primary objectives. First, the Constitution sought to strengthen the Colombian nation-state around a conservative ideology in the cultural field.[16] The Regeneration established the Catholic religion and the Spanish language as the axes of the Colombian nation.[17] Second, the Constitution aimed to ensure the order and unity of the country that had been challenged by the wars between federalists and centralists that dominated the Colombian political landscape during the second half of the nineteenth century. With this in mind, the Regeneration implemented a politically centralized but administratively decentralized state.[18] Similarly, it established a strong presidential system that recognized but limited classic individual freedoms.[19] Third, the Constitution intended to strengthen the emerging market economy that existed in the country in the late nineteenth century. The Regeneration sought to bring Colombia out of an incipient capitalist economy centered on the plantation and into a

14. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1 (Anna I. Vellvé Torras & Jefri J. Ruchti trans., 1991).

15. The Constitutional Court has decided ten cases directly related to the social function of property. *See infra* note 124.

16. *See, e.g.*, ANTONIO BARRETO ROZO, VENTURAS Y DESVENTURAS DE LA REGENERACIÓN: APUNTES DE HISTORIA JURÍDICA SOBRE EL PROYECTO POLÍTICO DE 1886 Y SUS TRANSFORMACIONES Y RUPTURAS EN EL SIGLO XX (2011).

17. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) arts. 38, 53 (W.M. Gibson trans., 1948). The 1886 Constitution does not explicitly protect Spanish. However, Spanish played a fundamental role in the conservative thought of the Regeneration. The defense of the "Spanish Soul," to which Colombia was a part, was directly linked with the protection of Spanish. For the role played by Spanish and the "Spanish Soul" in the Regeneration, see Rafael Rubiano Muñoz, *Derecho y Política: Miguel Antonio Caro y la regeneración en Colombia a finales del siglo XIX*, 6 OPINIÓN JURÍDICA, no. 12, 2007, at 141.

18. *See* CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 1, tit. XVIII (W.M. Gibson trans., 1948).

19. *Id.* tit. III, art. 59.

capitalist system connected to the international markets.[20] The classic liberal property system that was introduced with the Constitution of 1886 and the Civil Code of 1887 played a fundamental role in this project. On one hand, it expressed and promoted the economic program of the Regeneration, focusing on the protection of private property;[21] on the other hand, it facilitated the transfer and flow of goods in the weak Colombian market economy.[22]

After the rise of the individualistic property system, the mixed system (property as social function and individualist property) was born with the constitutionalization of the liberal interventionist state that occurred with Legislative Act 1 of 1936 (which amended the Constitution of 1886). This change in the legal framework governing property was a consequence of López Pumarejo's rise to the presidency and therefore the consolidation of the Liberal Party in power.[23] López Pumarejo's government program, the *Revolución en Marcha*, contained the foundation that allowed for the constitutional recognition of the interventionist state in Colombia[24]—a state committed to distributive justice and therefore having broad powers to regulate the economy. It is not surprising, then, that property was redefined as a social function under this government.[25] This reinterpretation of property would permit the state to attack one of the primary social and economic problems Colombia has historically faced: the inequitable distribution of land.[26] Consequently, it also negated one of the primary sources of conflict in the country. Property as a social function permitted the expropriation of land that was not put into production by the owners; it would, on paper, be the foundation of the most ambitious agrarian reform in Colombian history.[27]

Third, the property system based on solidarity was consolidated and expanded with the issuance of the Constitution of 1991 and the definition of

20. MARCO PALACIOS & FRANK SAFFORD, COLOMBIA: PAÍS FRAGMENTADO, SOCIEDAD DIVIDIDA: SU HISTORIA 469–71 (2002).

21. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) arts. 31–32 (W.M. Gibson trans., 1948).

22. *See id.* Articles 31 and 32 recognized the right to private property, the exceptional character of expropriation, and the obligation to compensate all expropriations. *Id.* Secure property rights are a precondition of any market economy.

23. *Revolución en Marcha*, a program of López Pumarejo's government, consolidated what has been called the liberal hegemony in Colombia that began with the government of Enrique Olaya Herrera (1930–34). Olaya Herrera's government signified the ascent of the Liberal Party after the conservative Republic was initiated in 1886. *See* BUSHNELL, *supra* note 10, at 181–85.

24. *See* Legislative Act 1/36, agosto 5, 1936, DIARIO OFICIAL [D.O.] 23263, art. 11.

25. *See id*. art. 10.

26. Sandra Botero, *La reforma constitucional de 1936, el Estado y las políticas sociales en Colombia*, 33 ANUARIO COLOMBIANO DE HISTORIA SOCIAL Y DE LA CULTURA 85, 92–97 (2006), *available at* http://redalyc.uaemex.mx/src/inicio/ArtPdfRed.jsp?iCve=127112581005.

27. *See generally* Catherine LeGrand, *Los antecedentes agrarios de la violencia: el conflicto social en la frontera colombiana, 1850–1936*, *in* PASADO Y PRESENTE DE LA VIOLENCIA EN COLOMBIA 87 (Gonzalo Sánchez & Ricardo Peñaranda eds., 1986).

the Colombian state as a Social State of Law.[28] This new property system was the result of broad political agreement reached in the NCA on the need to strengthen the constitutional foundations of the interventionist state in Colombia. Consequently, property as social function became a cornerstone of the constitutional edifice.[29] Again, this legal institution was presented as the instrument that would allow for attacking the unsolved problem of the inequitable distribution of land. Property as a social function was therefore presented as a tool that would help address some of the problems of inequality and poverty central in the history of Colombia. One cannot forget that the NCA was seen by broad sectors of Colombian society as a mechanism to rebuild the political community and to achieve peace and social justice in the country.[30] These sectors were convinced that an inclusive and democratic constitutional process in which all Colombians were represented would permit the creation of a legitimate state with the tools necessary to tackle contemporary Colombia's serious economic, political, and social problems.[31]

Nevertheless, the three periods that comprise the recent history of the right to property in Colombia are structured around a set of five conceptual oppositions: individualism–solidarity; limited intervention–general intervention; private–public; Constitution as political program–Constitution as norm; and property as a right–property as social function. These conceptual oppositions have defined the academic and political debate on property over the past 125 years in Colombia. In this dualistic debate, each of the components of the conceptual oppositions has been intertwined with its ideological "peer" in order to shape two theoretical camps continually in conflict. Thus, on one end, the classical liberal side is made up of the categories "individualism," "limited intervention," "private," "Constitution as a political program," and "ownership as a right"; on the other end, the liberal interventionist side is comprised of the categories of "solidarity," "general intervention," "public," "Constitution as a norm," and "property as social function." Thus, reconstructing the legal and political imagination on property in recent Colombian history has to evaluate how these conceptual oppositions interact, are interpreted, and accommodated.

To develop these ideas, I divide this Article into three parts. In the first Part, I reconstruct and examine the classical liberal system that constituted the first key period of the recent history of the right to property in Colombia (1886–1936). The proclamation of the Constitution of 1886 is a milestone in the consolidation of the modern nation-state in Colombia. The

28. María Mercedes Maldonado Copello, *La propiedad en la constitución colombiana de 1991: superando la tradición del codigo civil* 8 (Nov. 2001), http://info.worldbank.org/etools/docs/library/135756/M3-06-C-MariaMMaldonado-LA%20PROPIEDAD%20EN%20LA%20CONSTITUCI%D3N%20COLOMBIANA-Bogota2001.pdf.

29. Aleksey Herrera Robles, *Límites constitucionales y legales al derecho de dominio en Colombia: análisis desde el derecho público*, 20 REVISTA DE DERECHO, UNIVERSIDAD DEL NORTE 57 (2003).

30. Luis Alberto Restrepo, *Asamblea Nacional Constituyente en Colombia: ¿Concluirá por fin el Frente Nacional?*, *in* 12 ANÁLISIS POLÍTICO 61–65 (1991).

31. *Id.*

Constitution of the Regeneration remained in effect until 1991, with several modifications. In the second Part, I analyze the mixed system of property, classical liberal–liberal interventionist, which forms the second period in the recent history of the right to property in the country (1936–91). In the third and final Part, I study the liberal interventionist property system consolidated with the Constitution of 1991 and still in effect today. In each of these sections, I analyze the components of the conceptual oppositions that justify the three property systems. I also examine the contents of these categories and how they intertwine to build the models that have served to define and regulate property in the country. The Article thus does not aim to examine the effectiveness of the three property systems or their consequences. Rather, it seeks to describe their components, to analyze the legal and political categories that justify them, and to demonstrate the ties with the political contexts in which they emerge and are consolidated.

## I. THE CLASSICAL LIBERAL PROPERTY SYSTEM

The first stage of the recent history of property in Colombia has the Constitution of 1886 and the Civil Code of 1887 as its two major legal components, and classical liberalism as its political justification. During this period, both the Constitution and the law were committed to a system configured around the autonomy of the owner and in which the principle of equality was generally interpreted as the equality of all owners before the law. Similarly, in this legal framework, solidarity was not a relevant value for interpreting the right to property. Thus, this legal framework defines property as an individual and nearly absolute right. Article 669 of the Civil Code affirms, "Ownership (also called property) is the real right to a corporeal thing, to enjoy and dispose of it arbitrarily, not being against the law or against the rights of others."[32] Conversely, and consistent with the classical liberalism implicit in the Civil Code, the Constitution of 1886 required the state to protect citizens' right to property. The Constitution recognized property as an acquired right and prohibited the law from ignoring or violating rights to properties that were justly obtained. However, the Constitution of 1886 also established the right of the state to expropriate property for reasons of public use that are defined by law, provided that the owner receives just compensation. Article 31 of the Constitution of 1886 states:

> Rights acquired by individuals and corporations under a proper title and according to the civil law shall not be disavowed or violated by laws subsequently enacted. When in the application of a law enacted for the public welfare there should result a conflict between private rights and a recognized necessity for that law, private interests shall yield to public

32. CÓDIGO CIVIL (Civil Code) art. 669. The classical liberal property system is formed also by Articles 670 (ownership of intangible property) and 671 (intellectual property). *Id.* arts. 670, 671.

> interests. But for any expropriations which it may be necessary to make there shall be given full indemnity . . . .[33]

This property system reproduced the legal framework established in the French Civil Code of 1804. The Colombian Civil Code is a replica of the Chilean Civil Code drafted by Andrés Bello, which was strongly influenced by the Napoleonic Code.[34] Article 544 of the Civil Code of Napoleon, known as the owners' code, affirms, "Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes. . . . No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity."[35] The only difference between the two property systems is that the Colombian one separates the components of the right to property that in the French code appear united.[36] The Civil Code of 1887 defines the right to property and outlines its limits and the Constitution of 1886 declares the right of the state to expropriate goods for reasons of public use. Nevertheless, both documents are committed to a system of property that revolves around the autonomy and formal equality of owners.[37]

This system of property protects and controls the relationship between an autonomous, abstract, and isolated individual and an object.[38] In this regard, the owner has a high degree of autonomy over her own property. Owners have the power to make use of, gather the fruits of, and dispose of the material or immaterial reality they control in the way they deem appropriate. In the Colombian Civil Code, this broad degree of discretion is marked by the adverb "arbitrarily," which qualifies how the owner can make use of the object.[39] The only limits imposed are those of the rights of others and public use. The rule is the state's protection of the autonomy

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33. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 31 (W.M. Gibson trans., 1948).

34. DIEGO EDUARDO LÓPEZ MEDINA, EL DERECHO DE LOS JUECES: OBLIGATORIEDAD DEL PRECEDENTE CONSTITUCIONAL, ANÁLISIS DE SENTENCIAS Y LÍNEAS JURISPRUDENCIALES Y TEORÍA DEL DERECHO JUDICIAL 8–9 (Editorial Legis, 8th prtg., Julio 2009).

35. CODE NAPOLEON arts. 544–545 (London, Thomas Davison, 1824) (Fr. 1804). Article 582 of the Chilean Civil Code states that "Ownership (also called property) is the real right to a corporeal thing, to enjoy and dispose of it arbitrarily, not being against the law or against the rights of others." CÓDIGO CIVIL (Civil Code) art. 582 (Chile).

36. A minor difference between the texts of the French Civil Code and Bello's code is that in the latter the word "regulations" is replaced by the phrase "rights of others." This difference is not particularly relevant in that one of the liberal principles justifying the two codes is that the rights of third parties limit individual rights.

37. Moreover, both legal systems consider the right of property to be a natural right. Article 19 of the 1886 Political Constitution of Colombia states, "The authorities of the Republic are established in order to protect the lives, honor, and property of all persons residing in Colombia, and to assure the mutual observance of natural rights, and the prevention and punishment of crimes." CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 19 (W.M. Gibson trans., 1948). Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789 states, "The purpose of all civil associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression." DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 2 (Fr. 1789) (R. Helleu trans., 1918).

38. LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 111–51 (1987).

39. CÓDIGO CIVIL (Civil Code), art. 669.

that the owner has over her property. The exception is its limitation. The limits imposed on the right to property are therefore external. The owner has no obligation in connection with the object. She has no duty to relate to her property in a particular way. Her only duty is to act in a way that does not violate the rights of third parties. In the terms of the Colombian civil code, the owner cannot act "contrary to the law or the rights of others."[40]

In this way, the subject of right to property in the Constitution of 1886 and the Civil Code of 1887 is a person who has the ability to make decisions about the property she wants to acquire and how to use it. These are not marginal decisions. They are part of the process of choosing, modifying, and implementing a life plan. Property plays a fundamental role in this process of the construction and reconstruction of the subject.[41] An individual's property is both an expression and an instrument of their life plan. Property involves a series of decisions about the things that the subject considers valuable and the role these things play in the realization of her moral commitments. Consequently, property constructs and expresses individual identity. In classical liberalism, the individual and her property are closely intertwined.[42]

However, the content of the decisions that the subject makes with respect to her property is not relevant in classical liberalism,[43] nor is the type of identity that the subject constructs with these decisions. The subject of the right to property in classical liberalism is an abstract, disembodied subject. In classical liberalism, all that matters is protecting and enhancing the power characteristic of the members of the human species: autonomy.[44] In issues of property, this involves creating the conditions for individuals to obtain and protect the goods they consider valuable for their life plans. The liberal state does not aim to intervene in society so that all people become owners. It only intervenes to create and apply the legal and political framework that allows individuals to acquire and maintain the properties they deem valuable through their own efforts. The principle of equality in this property system can therefore be interpreted as formal equality. All individuals can become owners and all owners are equal before the law. Equality is thus a function of autonomy. Without the recognition and protection of property, people could not choose, transform, or realize their life plans.

Nevertheless, the relationship of domination over an object protected by the classical liberal right to property implies obligations for third parties.[45]

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40. *Id.*

41. Eric Mack, *Self-Ownership and the Right of Property*, 73 MONIST 519, 522–23 (1990).

42. *See* JAN NARVESON, THE LIBERTARIAN IDEA 66 (1988).

43. LOMASKY, *supra* note 38, at 84–110.

44. *Id.*

45. Richard A. Epstein, Property Rights and the Rule of Law: Classical Liberalism Confronts the Modern Administrative State (Aug. 5, 2009) (Hoover Inst. Task Force on Prop. Rights), http://www.law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_062726.pdf.

The owner has a right-duty that imposes obligations to both the state and others. The state has negative and positive obligations. It must refrain from any act that affects the decisions made by the individual over his property and must act to protect the property of its citizens and to resolve conflicts that arise over property rights or between them and the public interest. In the Constitution of 1886, this duty is evident in the right of the state to expropriate property when it conflicts with the principle of public use.[46] Individuals, meanwhile, have a duty to refrain from interfering with the property of others. The subjective right to property then manifests in two ways: duties of omission, which are the rule, and duties of action, which are the exception. Consequently, the subjective right to property is a relational right. It implies and regulates the interactions of the right to property held by individuals and the state.

However, this notion of subject (autonomous and abstract) presupposes the separation between the public sphere and the private sphere.[47] The first is the domain of justice, the space where the basic structure of the community is decided, political power is distributed, and the criteria for allocating scarce resources are agreed upon by the members of the polity. The second is the domain of morality, the area where the individual constructs, transforms, and tries to realize her life plan. Classical liberalism situates property in the private sphere. The individual, in the privacy of the home, makes decisions that seem relevant to her property. The main task of the state must therefore be ensuring the right of the subject to be left alone. The state should intervene only to create the legal and political framework that will protect property and allow for resolving the conflicts that arise around it. Hence the typical subject-owner of classical liberalism is also an isolated subject.[48] Social relationships represent a risk to her property and autonomy. The best way to protect this principle and right is therefore to keep a safe distance from other individuals. This is also why the classical liberal property right is fundamentally a negative right. Finally, this is why the principle of solidarity does not play a role in defining or exercising the classic liberal right to property. The interdependence between people is irrelevant to the property system that defends this political perspective. Property is a function of autonomy. Property is important for the role it plays in expressing and facilitating the realization of individuals' moral projects. From this perspective, the "other" only appears as a limit to the right to property.

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46. The Constitution states:

> When in the application of a law enacted for the public welfare there should result a conflict between private rights and a recognized necessity for that law, private interests shall yield to public interests. But for any expropriations which it may be necessary to make there shall be given full indemnity . . . .

CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 31 (W.M. Gibson trans., 1948).

47. *See generally* Gerald F. Gaus, *Public and Private Interests in Liberal Political Economy, Old and New*, *in* PUBLIC AND PRIVATE IN SOCIAL LIFE 183 (S.I. Benn & G.F. Gaus eds., 1983).

48. *See* Patricia J. Williams, *On Being the Object of Property*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 165, 165–80 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (examining the type of subject presupposed by classical liberalism).

The triumph of the classical liberal property system in Colombia was tied to the political and military struggles between centralists and federalists, liberals and conservatives, which characterized the second half of the nineteenth century. This legal framework emerges as a consequence of the political and military success of the Regeneration movement. This political movement, led by Rafael Núñez and Miguel Antonio Caro, had three primary objectives: strengthening the Colombian nation-state around a conservative ideology on social and cultural issues;[49] restoring order and ensuring the political stability that was lost with the wars between centralists and federalists;[50] and strengthening the country's emerging market economy.[51]

The imagined political community constructed during the Regeneration revolved around the idea that the Colombian state should reflect and protect the element that supposedly characterized the nation: Catholicism.[52] The Constitution of 1886 thus declared Catholicism to be the religion of the Colombian state.[53] Núñez and Caro believed that social cohesion should be achieved through the state's defense of the elements that constituted the ethos of the nation.[54] Similarly, the Regeneration structured the Colombian state around a monistic liberal interpretation of the state and the economy.[55] The Constitution of 1886 created a legal and political order that was centralized politically and decentralized administratively.[56] Similarly, the Constitution established a strong presidential system that recognized classical individual liberties but limited them in accordance with law and the public interest.[57] The social and cultural conservatism of the Regeneration intersects with its authoritarian political liberalism. Similarly, these two features intersect with its economic liberalism: the Constitution of 1886 establishes a market economy in Colombia.[58]

The classical liberal property system that was constructed with the Constitution of 1886 and the Civil Code of 1887 played a fundamental role in the political project of the Regeneration. The individualistic concept of

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49. *See generally* Jorge Orlando Melo, *La Constitución de 1886*, *in* 1 NUEVA HISTORIA DE COLOMBIA 43 (Jorge Orlando Melo & Jesús Antonio Bejarano eds., 1989).

50. *Id.*

51. *See* Jorge Orlando Melo González, *Las vicisitudes del modelo liberal (1850-1899)*, *in* HISTORIA ECONÓMICA DE COLOMBIA 135, 175–80 (José Antonio Ocampo ed., 2007) (describing the economic changes in Colombia beginning in 1878).

52. HERNANDO VALENCIA VILLA, CARTAS DE BATALLA: UNA CRÍTICA DEL CONSTITUCIONALISMO COLOMBIANO 140–48 (1987).

53. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) arts. 38–41 (W.M. Gibson trans., 1948).

54. The other element was language. For the Regeneration, Spanish was a fundamental component of the nation's ethos. Yet, there is no explicit reference to Spanish in the 1886 Constitution.

55. For a detailed analysis of the concept of legal monism and the values it defends, see Libardo Ariza Higuera & Daniel Bonilla Maldonado, *Estudio preliminar* to SALLY ENGLE MERRY, JOHN GRIFFITHS & BRIAN Z. TAMANAHA, PLURALISMO JURÍDICO 19 (2007).

56. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 1, tit. XVIII (W.M. Gibson trans., 1948).

57. *Id.* tit. III.

58. *Id.* arts. 19, 31–35, 37, 44.

property allowed a formal break with the incipient capitalist system, centered on plantations, which still existed in much of Colombia in the late nineteenth century.[59] A market economy is not possible without the circulation and use of property. In particular, in an agrarian society like Colombia in the second half of the nineteenth century, it was not possible to create a capitalist economy without the free and easy transfer of land between citizens.[60] Nor was this economic system possible in Colombia entering the twentieth century without the exploitation of this resource to produce the surplus of raw materials necessary for the country's industrial development. However, this free circulation and operation of land needs the recognition and demarcation of the right to property by the state and therefore its legal and political protection. The security and stability of the right to property are necessary for the proper functioning of any market economy.

The project of the Regeneration is differentiated from the federalist project imposed by the Constitution of 1863 in a notable fashion. The presidentialism, centralization of legal and political power, state identification with the Catholic religion, and the limited nature of individual rights that characterize the Constitution of 1886 contrast with the institutional priority of the legislative branch,[61] the federal structure,[62] the separation of church and state,[63] and the recognition and broad protection of individual rights that characterize the Constitution of 1863.[64] Nevertheless, there remain some important constants between the two projects. The continuities between the Radical Olympus[65] and the Regeneration are also significant.[66] The traditional historiography, which focuses on the differences between the liberal party and the conservative one in interpreting the second half of the nineteenth century in Colombia, obscures these continuities.[67] Formally, both projects are committed to democracy, the tripartite division of public power, individual rights, and the market economy. These values, principles, and institutions are reflected in the Constitution of 1863 and that of 1886. Both political projects are therefore committed to central components of liberalism. The two political projects are part of the liberal family.

However, each project has a different interpretation of the content of these components and their priority. The Regeneration is primarily an authoritarian liberal project that interprets liberal principles in a

59. Marco Palacios, *La Regeneración ante el espejo liberal y su importancia en el siglo XX*, *in* MIGUEL ANTONIO CARO Y LA CULTURA DE SU ÉPOCA 261 (Rubén Sierra Mejía ed., 2002).

60. *Id.*

61. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS DE COLOMBIA (1863) ch. 6 (W.M. Gibson trans., 1948).

62. *Id.* arts. 1, 36.

63. *Id.* arts. 15(16), 23.

64. *Id.* sec. 2.

65. The political movement behind the federalist project of 1863 was called the Radical Olympus.

66. Palacios, *supra* note 59, at 268–72.

67. *Id.*

conservative manner and occasionally departs from some of them, as in the case of the principle of separation of church and state.[68] Its primary objective is to ensure order and institutional stability. In contrast, the radical project reflects the classical liberal ideals well known in Latin America in the second half of the nineteenth century. Its primary objective is defending the principle of autonomy. The continuities between the two models become clearer when considering that the Civil Code issued by Congress in 1887 for the Unitary Republic of Colombia was the same code issued in 1873 for the United States of Colombia. Influenced by French liberalism, Bello's code regulates the relations between individuals in Colombia in both political models. In both, moreover, the code is the center of the legal order. In the two political projects, the right to property plays a fundamental role and is justified from a classical liberal perspective.[69] The autonomy and formal equality of citizens, along with the protection of private property, become the axes around which Colombian law revolves. The norms governing relations between individuals become the pillar of the legal order. The fundamental contents of the Napoleonic Civil Code are not different from the basic contents of the Colombian Civil Code and therefore the legal system of the Regeneration.

Nevertheless, to understand the role played by the property system in the political project of the Regeneration, it is important to examine the position of the civil law within the legal system and the concept of the Constitution that this political perspective defended. For the Regeneration, as well as a good part of the continental liberal legal tradition, civil law is the core of the legal system. The Civil Code, the core of civil law, regulates all matters concerning relations between individuals. It is all-inclusive. The code also consists of a set of general and abstract norms. The equality and freedom of citizens are thus guaranteed. The civil legal norms apply to all citizens and, in principle, have an "eternal vocation."[70] The code is a creation of reason. However, it is also a creation of the will. In liberal political communities,

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68. In relation to this issue, however, the Constitution of 1886 tries to find a balance between conflicting values. Article 40 recognizes freedom of worship, provided it not violate Christian morality, and Article 38 states that Catholicism, as the religion of the majority of Colombians, must be protected by the state. Nevertheless, Article 38 also indicates that Catholicism is not an official religion, stating,

> The Apostolic Roman Catholic Religion is the religion of the Nation. The public authorities shall protect it and cause it to be respected as an essential element of the social order. It is understood that the Catholic Church is not and shall not be an established Church, and it shall preserve its independence.

CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 38 (W.M. Gibson trans., 1948).

69. The classical liberal property system of the Regeneration is therefore in tension with its conservative interpretation of the liberal canon on cultural and social matters, particularly with the strong influence of the church in public and private issues. In other matters such as women's rights, however, the Civil Code fits well with the conservative Catholic values of the Regeneration.

70. Napoleon noted to this effect, "'My true glory is not that I have won forty battles. Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally is my Civil Code.'" Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1078–79 (1988).

legal norms should be a product of both reason and the will of the people.[71] Consequently, Congress should endorse the codes so that they can enjoy democratic legitimacy. Marginalizing reason in the lawmaking process implies allowing the whim of the majority to be imposed. Regardless of the content of the decision made, the legal norm must be understood as valid. Marginalizing will implies that the legal norm created does not have democratic legitimacy. The political community would be heteronomous.

Yet, in the balance of the Colombian political community, as imagined by the Regeneration, the will is subordinate to reason. The Civil Code adopted by the Colombian Congress is a copy of the Chilean Civil Code, which was in turn strongly influenced by the Civil Code of Napoleon. Without accepting that the code was primarily a result of reason, it would be very difficult to understand how it could be imported from France to contexts as diverse as the Colombian or Chilean.[72] The idea that the Civil Code is complete, coherent, and univocal is widely rooted in the Latin-American legal imagination. The argument that Latin America is part of the Roman-Germanic legal tradition is not sufficient to justify the transplant of a norm as important as the Civil Code. The differences of context would require changes between the French and Latin American norms. Variations in social, cultural, economic, and political issues create different kinds of needs and normative commitments that would require a distinct civil code for Latin America.

The central character of civil law in the Colombian legal system goes hand in hand with a concept of a weak Constitution.[73] From this point of view, the Constitution is exclusively a political program. It is not a legal norm with immediate and direct application. Hence, the Regeneration included Article 52 in the Constitution of 1886, which affirms, "The provisions contained in this title [of Civil Rights and Social Guarantees] shall be incorporated in the Civil Code as a preliminary title and may not be altered except by an act amending the Constitution."[74] Civil law is supreme in the legal system of the Regeneration, not the Constitution. The constitutional provisions are only applicable when Congress develops them by means of a law. Thus, with Article 52, the Regeneration ensures the application of civil rights and situates civil law at the heart of Colombia's legal and political order. The Constitution remains tied to the Civil Code. This interpretation of the Colombian legal order is consolidated in Article 6 of Law 153 of 1887, which states, "An express provision of a law subsequent to the Constitution is deemed constitutional, and shall be

71. PAUL W. KAHN, THE CULTURAL STUDY OF LAW ch. 1 (1999).

72. On this subject Portalis says, "Statutes are universal reason, the supreme reason based on the nature of things. Statutes are or should be the law reduced to positive rules." JEAN ETIENNE MARIE PORTALIS, DISCURSO PRELIMINAR AL CÓDIGO FRANCÉS 10–11 (1997).

73. VALENCIA VILLA, *supra* note 52, at 145–46.

74. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) art. 52 (W.M. Gibson trans., 1948).

applied even when it seems contrary to the Constitution."[75] The law (*la ley*) is then presumed constitutional.[76] This presumption cannot be questioned. The Constitution of 1886 did not grant the Supreme Court powers for the control of constitutionality, and in the ruling of September 14, 1889, the Court accepted that it did not have the power to declare the norms created by the national Congress to be unconstitutional.[77] Consequently, Article 10 of the Civil Code, which indicates that contradictions between the Constitution and the law should be resolved in favor of the former, is only a paper rule. Even though the constitutional reform of 1910 granted the Supreme Court judicial review powers,[78] in practice the law remained supreme in the legal order. The Supreme Court certainly declared a number of laws to be unconstitutional between 1910 and 1991. However, the legal community still considered civil law to be the core of the legal system and the Constitution a norm with no direct and immediate application. The legal culture did not begin to shift on this matter until the issuance of the Constitution of 1991.[79]

In sum, this first period in the recent history of property in Colombia is structured around the autonomy of owners. In this legal framework, the state should intervene only to recognize the right to property and to ensure its protection. The state should not cross the line separating the public sphere from the private sphere. Owners should be left alone so they can make the decisions that they deem necessary with respect to their property. Property, as well as the market, forms part of the sphere where individuals construct and realize their life plans. The state should only intervene to create and maintain the legal and political conditions that allow the free play of supply and demand. This property system is reinforced by the central role played by civil law in the Colombian legal system. The Civil Code is the core of the legal system. The Constitution, by contrast, is interpreted as a political program that has no immediate application. The Constitution is not ultimately a legal norm that can generate immediate and direct consequences for citizens. It is necessary that the law regulate it so that it can have an impact on society. The law is supreme in the classical French liberal order of the Regeneration.

## II. THE MIXED SYSTEM OF PROPERTY: CLASSICAL LIBERALISM AND INTERVENTIONIST LIBERALISM

The second key period for understanding the history of the right to property in Colombia has as its main components Legislative Act 1 of 1936, the Civil Code of 1887, Law 200 of 1936, Law 9 of 1989, and the Supreme

75. L. 153/87, agosto 28, 1887, DIARIO OFICIAL [D.O.] 7151 & 7152, art. 6; *see* Rodolfo Arango, *La construcción de la nacionalidad*, *in* MIGUEL ANTONIO CARO Y LA CULTURA DE SU ÉPOCA, *supra* note 59, at 125, 150.

76. Arango, *supra* note 59, at 125, 150.

77. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Plena septiembre 14, 1889.

78. Legislative Act 3/10, octubre 31, 1910, DIARIO OFICIAL [D.O.] 14131, art. 41.

79. *See infra* notes 116–22 and accompanying text.

Court's case law on property. In this second phase, beginning in 1936 and ending in 1991, a classical liberal concept of property coexisted with a liberal interventionist one. The concept of a subjective and nearly absolute right to property, which appears in Article 669 of the Civil Code, coexisted with the concept of property as a social function that enters the Colombian legal system with Legislative Act 1 of 1936, is consolidated with Law 200 of 1936, and developed with Law 9 of 1989. This conflict is also made explicit in the content of Article 10 of Legislative Act 1. Article 10 defines property as both a right and as a social function. The conceptual tension is then manifested in three areas of the legal system: in the Constitution itself, between the Constitution and the law, and between two laws in the same hierarchy. Unfortunately, the Supreme Court's case law on property does not resolve these structural conflicts in the Colombian legal system, but reproduces them.

The process of transition from a classical liberal property system to the mixed system, classical liberal and liberal interventionist, began with Legislative Act 1 of 1936. Article 10 of this act defines property as a social function, allows for expropriation for reasons of social interest (not just for public use), and allows for expropriation without compensation for reasons of equity when an absolute majority of the Senate and House of Representatives votes in favor of the measure.[80] The new Article 26 of the Constitution therefore introduced several elements in the Colombian property system. However, these new components of the legal framework of property did not repeal the rules established by the Regeneration. Congress simply broadened the original text of Article 31. It did not fully transform it. The property system established by the Constitution of 1886 survived the reform of 1936. The text of Article 26 of the Constitution remained as follows after its amendment:

> Private property and other rights legally acquired in accordance with the civil laws by natural or juridic persons shall be guaranteed, nor may they be disavowed by later laws. When the enforcement of a law passed for reasons of public utility or social interest conflicts with the rights of individuals, private interests must give way to the public or social interests.
>
> Property is a social function which implies obligations.
>
> For reasons of public utility or social interest, as defined by the legislature, property may be expropriated by judicial decree with prior indemnification.
>
> Nevertheless, the legislature, for reasons of equity, may deny indemnification by means of an absolute majority vote of the members of both Houses.[81]

Article 26 is therefore contradictory. It simultaneously defines property as a right and a social function. Property is simultaneously a subjective and

80. Legislative Act 1/36, agosto 5, 1936, DIARIO OFICIAL [D.O.] 23263, art. 10.

81. CONSTITUCIÓN DE LA REPUBLICA DE COLOMBIA (1886) (amended 1936), art. 26 (W.M. Gibson trans., 1948).

nearly absolute individual right and an obligation that is imposed on the subject as a consequence of the interdependence between members of a society. In the first concept of property, an individual holds a title that creates obligations toward third parties. In the second, the individual does not have any rights over her property. She has a duty to use it to generate benefits for society. The state only has an obligation to protect property when it fulfills its social function. The same contradiction exists between the constitutional concept of property as social function and Article 669 of the Civil Code. The constitutional reform of 1936 does not transform the civil norms on property.

This contradiction was furthered with the issuance of Law 200 of 1936 and Law 9 of 1989. Law 200, enacted a few months after the constitutional amendment, had the main objective of redistributing rural land in Colombia. This legal norm aimed to design and implement agrarian reform in the country.[82] To that end, Law 200 defined property as a social function,[83] granted the executive the tools to seize ownership of lands that were not being operated by their owners,[84] allowed for the adverse possession of vacant lands that were occupied in good faith,[85] and created the institutional and procedural tools (judges and land processes) to resolve conflicts related to the use, holding, and possession of land.[86] Law 9, on the other hand, sought to regulate the management and growth of Colombian cities as well as the distribution of land and the protection of public space.[87] One of its specific objectives was regulating the expropriation of urban property not meeting its social function.[88] Therefore, Law 9 develops the concept of property as a social function that appears in Article 26 of the Constitution (amended by Legislative Act 1). However, the Congress that passed the law did not even mention Article 669 of the Civil Code or the first paragraph of Article 26 of the Constitution, which define property as an individual right. Congress did not address the contradiction between the two concepts of property that coexisted in the legal system.

It is not surprising that a complex legal order such as the Colombian one would have some contradictions. Among other reasons, the enormous number of norms that make up the system and the ideological differences

82. Paulo Bernardo Arboleda Ramírez, *La concepción de la propiedad privada contenida en la ley de tierras de 1936*, 38 REVISTA FACULTAD DE DERECHO Y CIENCIAS POLÍTICAS 97 (2008).

83. Article 1 of Law 200 of 1936 states that "it is presumed that they are not vacant lots but private property, owned by private estates, understanding that such a possession consists of the economic exploitation of the land by positive acts of ownership, such as plantation or fields, the occupation with cattle and others of equal economic importance." L. 200/36, diciembre 30, 1936, DIARIO OFICIAL [D.O.] 23388, art. 1.

84. *See id.* art. 6.

85. *See id.* art. 12.

86. *See id.* art. 26.

87. L. 9/89, enero 11, 1989, DIARIO OFICIAL [D.O.] 38650, chs. 1 (planning of municipal development), 2 (public space), and 3 (acquisition of property by voluntary selling or expropriation).

88. *See id.* art. 79.

among legislators can easily generate these failures of legislative technique. In fact, the legal systems include institutional arrangements that allow for solving these contradictions. One of them is judicial review. This power allows the courts to contribute to maintaining the coherence of the legal system. Nevertheless, the Colombian Supreme Court did not fulfill this role in relation to the property system that was dominant between 1936 and 1991. The Supreme Court, which had judicial review powers, ruled on issues related to the social function of property ten times.[89] In its case law, the Court developed the concept of property as a social function and protected the powers of the state to regulate and restrict the right to property. However, the Supreme Court has not articulated an interpretation that would eliminate the contradictions in the property system in any of the rulings. In its case law, the Supreme Court simply recognizes and reproduces those contradictions. Two rulings are particularly important on this issue. The first is the decision of August 11, 1988 in which the Supreme Court asserted the constitutionality of Article 669 of the Civil Code.[90] The Court recognized the incompatibility of the concepts of property as a right and property as social function in this ruling. However, it stated that the adverb "arbitrarily," which qualifies how an owner can use her property, does not violate Article 26 of the Constitution, which established the social function of property. In this respect the Court indicated,

> There is no doubt that in the text of the Constitution the individualist theory is discarded and a thoroughly social content is given to ownership, which allows the law to impose limitations to situate it in this way, to serve community interest and social solidarity, being therefore illicit those acts involving abnormal exercise of that right, or contrary to the economic or social purposes thereof, or those who tend to be or are determined by the desire to harm others without any real interest for the owner . . . .
>
> [However] . . . [t]he arbitrary qualifier, which is given to the norm of the right to property [in Article 669 of the Civil Code] in question, is tempered by the same disposition for the prohibition by which in its

89. Corte Suprema de Justicia [C.S.J.] [Supreme Court], mayo 20, 1936, M.P: Eduardo Zuleta Ángel (principle of good faith and the exercise of rights); Corte Suprema de Justicia [C.S.J.] [Supreme Court], diciembre 12, 1936, M.P: Eduardo Zuleta Ángel (principle of good faith and contracts); Corte Suprema de Justicia [C.S.J.] [Supreme Court], febrero 21, 1938, M.P: Arturo Tapias Pilonieta (abuse of rights and expropriation); Corte Suprema de Justicia [C.S.J.] [Supreme Court], marzo 10, 1938, M.P: Juan Francisco Mujica (social function of property and unconstitutionality of civil law); Corte Suprema de Justicia [C.S.J.] [Supreme Court], marzo 24, 1939, M.P: Ricardo Hinestrosa Daza (abuse of rights in civil law; explicitly cites Duguit); Corte Suprema de Justicia [C.S.J.] [Supreme Court], marzo 24, 1943, M.P: Aníbal Cardozo Gaitán (Law 200 of 1936, unproductive lands and the social function of property); Corte Suprema de Justicia [C.S.J.] [Supreme Court], septiembre 14, 1989, M.P: Jaime Sanín Greiffenstein (examines constitutionality of Law 9 of 1989); Corte Suprema de Justicia [C.S.J.] [Supreme Court], septiembre 28, 1989, M.P: Dídimo Páez Velandia (same); Corte Suprema de Justicia [C.S.J.] [Supreme Court], noviembre 9, 1989, M.P: Fabio Morón Díaz (same); and Corte Suprema de Justicia [C.S.J.] [Supreme Court], noviembre 9, 1989, M.P: Jairo Duque Pérez (same).

90. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Plena agosto 11, 1988, M.P: Jairo Duque Pérez.

> exercise violates the law or the rights of others, all of which implies that it is not an absolute power as noted, and should thus be marked within the limits the legislature may specify. Note also that the meaning of the adverb "arbitrarily" should be understood as that of "*arbitrio*" [discretion], *i.e.*, according to the Dictionary of the Royal Academy of Language, "power that man (in this case the holder of the right) has to adopt a resolution with preference to another" and not that of the abuse that could result from a cursory reading of Article 669 of the civil code.[91]

Surprisingly, after recognizing the Constitution's commitment to the concept of property as function, the Supreme Court upheld the constitutionality of Article 669 of the Civil Code, appealing to the dictionary of the Royal Academy of Language to state that the word "*arbitrio*" (discretion) could be differentiated from a common understanding of "arbitrarily." In doing so, the Court lost sight of the conceptual problem it faced. There is no difference between leaving the use of property to the "discretion" of the property owner and permitting him or her to use it "arbitrarily." Ultimately it is the will of the owner that determines what should be done with her property. The individual using "discretion" may decide to use the asset "arbitrarily." In both cases, of course, individual autonomy has limits. The point is that these limits, from the perspective of the classical liberalism that supports the Civil Code, are external. Yet, from the perspective of the concept of property grounded in solidarity, the problem is not that the owner has a right to use his good with discretion and that the legislature in turn has the right to impose restrictions on ownership. The problem is that property as a social function imposes obligations on how an owner may use her property even if it does not adversely affect third parties. Property has internal limits. The owner, in this way, does not have an individual right over his or her good. The owner fulfills a social function. The Supreme Court thus did not realize that the conflict examined is not semantic and cannot be resolved by referring to the dictionary.

The second ruling is that of September 14, 1989. In this decision, the Supreme Court declared constitutional the power that Law 9 of 1989 gave the government to expropriate urban property not complying with its social function.[92] In the ruling, the Court recognized the origin and existence of

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91. *Id.*

92. Corte Suprema de Justicia [C.S.J.] [Supreme Court], septiembre 14, 1989, M.P: Jaime Sanín Greiffenstein. This decision reinforced principles that the Court had articulated in its ruling of December 3, 1937. There, the Court said that

> this criterion based on the double interest, social and individual, the laws impose new rational limits every day to the arbitrary exercise of the absolute right of ownership, as had been established in the old definition from the civil code, and thus may require the owner to cultivate them, as the title of ownership carries the implicit obligation to use one's right to perform a social activity, in the sense of solidarity that leads to the growth of general wealth and the common good.

Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Plena diciembre 3, 1937, M.P: Hugo Palacios Mejía.

Similarly, in the ruling of March 10, 1938, the Court said, "Under Article 31 of the Constitution, which assigns property a social function, private property has been relativized

the contradiction in the property system but did not resolve it. In this regard the Court said,

> It is well known that the Legislative Act No. 1 of 1936 introduced in Article [26] of the Constitution the concept that "property is a social function that implies obligations." As argued in the process of the constitutional reform, it might have been better to express that property is a right that has a social function, which fits with the natural law theory that guided the drafting of the National Constitution of 1886, instead of opting for Duguit's thesis, so in vogue in the thirties, that sought to reduce rights to social functions. In this case, though, adopting either philosophical orientation leads to the same conclusion: property must be used for a social purpose and not merely for the benefit of the individual property owner.[93]

The concrete solution to the case may be the same, as the Supreme Court suggests, but its basis varies considerably. The fact that the Court did not even attempt to articulate an interpretation of the Constitution and the law that would have resolved the contradiction is remarkable since the ruling highlights the influence that the ideas of Duguit had in transforming the Colombian property system in 1936. The Court, the legislators, and the executive of 1936 all knew Duguit's work and were aware of the differences between the concepts of property as a right and property as social function.[94] For Duguit, property as a right and property as social function are two incompatible concepts.[95] Duguit's work challenges the individualist and natural law concept of property that has prevailed in the continental legal tradition.[96] To Duguit, the main sources of this conception of property are Article 544 of the Civil Code of Napoleon and the French Declaration of the Rights of Man of 1789.[97] The first defines property as an individual, subjective, and nearly absolute right; the second, as a natural right.

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among us. In this sense it is no longer an absolute right, *ie*., legally unassailable, as originally consigned in our civil code." Corte Suprema de Justicia [C.S.J.] [Supreme Court], marzo 10, 1938, M.P: Ricardo Hinestrosa Daza.

93. Corte Suprema de Justicia [C.S.J.] [Supreme Court], septiembre 14, 1989, M.P: Jaime Sanín Greiffenstein.

94. In the debate of November 20, 1936, Senator Rodríguez Moya affirmed:

> The term "social function of property," rather than being interpreted as understood by liberalism, in the sense that the exercise of private ownership implies social burdens, more or less substantial, without being eliminated, is understood by the supporters of the project as the disappearance of the right, and substitution with a duty, in whose compliance the citizen has the protection of state powers, to the extent that it fulfills it, according to outdated and impractical theory, in the democracy of Auguste [Comte] and León Duguit.

2 MARCO A. MARTÍNEZ, RÉGIMEN DE TIERRAS EN COLOMBIA: ANTECEDENTES DE LA LEY 200 DE 1936 "SOBRE REGIMEN DE TIERRAS" Y DECRETOS REGLAMENTARIOS 266 (1939). Although Senator Rodríguez Moya was part of the Liberal Party, he decided to vote against the bill because it violated the values of classical liberalism. *Id.* at 265–66.

95. *See generally* LEÓN DUGUIT, LAS TRANSFORMACIÓNES DEL DERECHO PÚBLICO Y PRIVADO (Editorial Heliasta S.R.L. 1975).

96. *See generally* M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191 (2010).

97. DUGUIT, *supra* note 95, at 172.

For Duguit, this concept of property is based on a poor description of human beings. "The isolated and independent man is pure fiction,"[98] he wrote. An adequate description of social reality makes man's interdependence evident, not his individualism. Human beings have similar and different needs and need to cooperate in order to satisfy those needs. For Duguit, solidarity is a fact, not a doctrine or principle.[99] Interdependence, which for Duguit is a synonym for solidarity, constitutes the social structure. Similarly, it is the source of social cohesion. For Duguit, individual needs are satisfied through the social division of labor. Every human being has a function in society. Otherwise, "it would result in disorder or at least social harm."[100] Thus, for Duguit, property should not be thought of as a right having only external limits. Property must be defined through the principle of solidarity and therefore as a social function. Consequently, property as a social function imposes obligations on the owner regarding her use of property.[101] Property has internal limits. The owner must make productive use of her assets. Assets should be at the service of society. By property's operation, the owner creates economic and social benefits that contribute to satisfying the needs of the members of the political community.

Duguit also redefines property as a social function by criticizing the category "subjective right."[102] For Duguit, this category, and its intimate connection with property, is another example of the metaphysical character of the continental legal systems. From his perspective, the idea that having a right means that a third party has a corresponding duty is problematic. The notion of a right-duty implies the meeting of two wills in which one, stronger than the other, is imposed. For example, my subjective right to property implies the duty of third parties to refrain from using it without my permission. The notion of a subjective right therefore implies familiarity with the nature of the will, a standard to measure it, and a means to implement it. Nevertheless, for Duguit, although we can know its external manifestations, we cannot know "the will." It cannot be known empirically. Hence, "the notion of a subjective right is found [to be] totally ruined . . . ."[103] The right must be based on facts, not on metaphysical entities we cannot access through the scientific method.

Thus Duguit's criticism of the right to property is based on a commitment to both positivism and structural functionalism. Auguste Comte[104] and Emile Durkheim[105] are the sources of the theory of property as social function. Property as a right and property as social function are contradictory. Consequently, the contradictions running through the second legal system of property in Colombia's recent history cannot be resolved, as

98. *Id.* at 178.
99. *See id.* at 181.
100. *Id.*
101. *Id.* at 179.
102. *Id.* at 175.
103. *Id.*
104. *Id.* at 176.
105. *Id.* at 182.

the Supreme Court attempted, by appealing to the dictionary. The argument that the Civil Code and the Constitution are not in conflict because the adverb "arbitrarily" used in Article 669 of the Civil Code really refers to the owner's use of "discretion" is useless. The Supreme Court began with an inadequate description of the problem it sought to solve.

However, despite the theoretical contradictions, both the lawmakers of 1936 and 1989 sought to attack the classical liberal concept of property in the Colombian legal order.[106] The legislature of 1936 wanted to replace the concept of property established in the Constitution of 1886 with the concept of property as a function. In a message to Congress in 1935, to promote the enactment of Act 1, President López Pumarejo said:

> Property, as understood by the government, is not based solely on the registered title but also has its basis in the social function it plays, and possession consists in the economic use of land through the positive acts of those given the right to ownership, such as planting or sowing, the raising of cattle, the construction of buildings, enclosures and other equally significant things. . . . For the government the fundamental problem of land is economic use, and considers that titles to private property must be clarified and justified before society, linking work to the land, or make way for the colonization of uncultivated areas that cannot continue being indefinitely sterile reserves, to the expectation of distant recovery which would arise from circumstances beyond the owners' efforts.[107]

Similarly, Minister Dario Echandía, who presented the bill for Legislative Act 1 to Congress, summarized the purposes of constitutional reform as follows:

> As you see, honorable Representatives, the project replaces the excessively individualistic conception of private rights that characterizes the current Constitution, with another that considers that individual rights must be exercised as a social function and should be limited by the public convenience. The private right as a social function as opposed to the absolute private right: such is the ultimate rationale of the project that the government submits for your consideration.[108]

Finally, the legislature of 1989 wanted to consolidate the changes that had been made by Legislative Act 1 and Law 200 in the urban context. One of the main objectives of urban reform was to control owners protected by the classical liberal concept of property who did not use their property while waiting for housing market prices to improve. Law 9 of 1989 consolidated property as a social function, which was already part of the

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106. Opposition to the project on the part of the conservative party was clear. Esteban Jaramillo, former Minister of Finance, affirmed: "[With the reform] an attack was carried out on religion, the family, against honor, against property and against the dearest affections born of man . . . the fundamentals of the country's secular organization . . . have been threatened by destructive revolutionary tendencies." Fernando Londoño, *El Tiempo, El Siglo y la reforma constitucional de 1936*, 4 CUADERNOS DE FILOSOFÍA Y LETRAS 213 (1981).

107. 1 MARTÍNEZ, *supra* note 94, at 14–15.

108. ALVARO TIRADO MEJÍA & MAGDALA VELÁSQUEZ, LA REFORMA CONSTITUCIONAL DE 1936, at 162 (1982).

Colombian legal order, by having its sight set on urban properties in the country.

However, the three legal norms are part of a broader political project. Law 200, Legislative Act 1, and Law 9 were key instruments for the consolidation and development of the liberal interventionist state in Colombia.[109] Interventionist liberalism was constitutionalized with the election of the Liberal Party in 1934[110] and the commitment of President López Pumarejo to consolidating a strong interventionist state that would contribute to creating a fairer society in Colombia. Prior to Legislative Act 1 of 1936, the Colombian government had certainly intervened in the economy. The state often intervened in the economy between 1886 and 1936 to protect Colombian products.[111] However, this intervention ran counter to the classical liberal principles supporting the Civil Code's and the Constitution of 1886's regulation of property. With the constitutionalization of the interventionist state in 1936, the Colombian state was transformed from a minimally interventionist state on paper and a moderately interventionist role in practice to a continuous and systematic interventionist state on paper and in practice. The political project of López Pumarejo gathered not only the ideas of Duguit and French solidarism on legal matters, but also the ideas advocated by John Maynard Keynes in economics and Franklin D. Roosevelt in politics.[112]

The consolidation of the interventionist state in Colombia is not a coincidence. The liberal interventionist state was useful for the Colombian political elites of the 1930s and 1940s. This type of state gave them the tools to address the impacts of the economic crisis of 1929, facing political challenges generated by the emergence of the working class in Colombia and confronting the notable levels of poverty and inequality facing the country. The interventionist state was a convenient mechanism for the elites to address some of the needs of the subordinate classes, containing the influence of the leftist parties that represented them and protecting their own interests at the same time. The interventionist state became a good strategy for maintaining the political and economic stability of the fragile Colombian liberal democracy. Of course, this did not mean that López Pumarejo's government was not truly committed to liberal interventionist

109. Law 9 was a key tool for developing the Colombian state's commitments, acquired in 1936, to the principles of distributive justice and solidarity. Indeed, after the interventionist state was made constitutional in 1936, the legislature issued a number of legal norms that gave the state power to intervene in areas as diverse as telecommunications, the family, and the export and import of goods and services. However, Law 9 is of particular importance in this process in that it gives the state powers to intervene in a key area for any state committed to the material equality of its citizens: the ownership of urban land.

110. The government of López Pumarejo was the second government of the period known in Colombia as the liberal hegemony (1930–46). The first was that of Olaya Herrera (1930–34). BUSHNELL, *supra* note 10, at 181–200.

111. Melo González, *supra* note 51, at 175–80.

112. Catalina Botero Marino, *La Intervención del Estado en la Economía: Colombia 1880–1936*, 9 REVISTA DE DERECHO PRIVADO 5, 60 (1996).

ideas. It meant only that his government's liberal reform was both normative and strategic.[113]

Property as a social function played a fundamental role in the political project of the consolidation and development of the interventionist state in Colombia. The replacement of individualist property with property as a social function aimed to advance a profound redistribution of rural land in the country. The land reform promoted by the *Revolución en Marcha* had the goal of expropriating the large unproductive estates in Colombia, allowing the peasant masses access to land and thus negating one of the primary causes of inequality and conflict in Colombia: the unequal distribution of land.[114] This process was furthered by Law 9 of 1989. The urban reform law was designed and promoted by the liberal government of Virgilio Barco (1986–90). In a context where the actions of the interventionist state had become the rule, the government of President Barco articulated a legal strategy for the state to redistribute urban land and the benefits generated by its operation.

Thus, for the political project that sought to consolidate and expand the interventionist state in Colombia, the reasoning behind property as a social function in Duguit's work was irrelevant. For López Pumarejo and Barco, what was relevant to Duguit's theory was not the idea of interdependence as a social fact, but rather its relationship with the social division of labor or the objections to the metaphysical character of the concept of a subjective right. The political project of these two liberal Presidents was not a commitment to Durkheim's social theory or Comte's positivism. Duguit was relevant to this political project in that he provided the conceptual tools to challenge the classical liberal concept of property and to justify the state's intervention in unproductive lands. Thus, what the Colombian Congress did with Legislative Act 1, Law 200, and Law 9 was a reinterpretation of the liberal right to property. The right to property, understood via the concept of "social function," implies that owners have internal and external obligations. The owner must use her good so that it generates benefits for the political community. In particular, an owner must put her property in production in a way that generates economic and social returns that can benefit the community. For the liberal majorities in 1936 and 1989, property was not really a social function. Property was an individual right that *has* a social function.

In this second property system, however, the autonomy of the owner was recognized and respected. Property was a form through which individuals expressed their will, and this form allowed them to materialize their life plans. Nevertheless, since Colombia was—and remains—an unequal society, the Congresses of 1936 and 1989 affirmed that property should be understood through the principle of solidarity. Consequently, in this new property system, solidarity limited the autonomy of individuals. However, solidarity was not understood in this context as a social fact but as a

113. VALENCIA VILLA, *supra* note 52, at 154–59.
114. Marino, *supra* note 112, at 48–54.

principle of political morality. It referred to the duties that people have to support other members of society. Similarly, this property system was committed to equality from both formal and substantial standpoints. The issue was not only that all owners should be equal before the law but also that the state must act to ensure that all citizens, particularly the poorest, can become owners. The state must intervene in the economy for redistributive purposes. More specifically, in this context, it should expropriate all rural and urban properties not being used productively by their owners. It should expropriate all property that does not meet the social function of property in a political community committed to the values of interventionist liberalism.

Now, recognizing the objectives of the political project seeking to strengthen the interventionist state in Colombia and clarifying the use of Duguit's theory of property as function does not remove the contradiction between property as a right and property as social function at the heart of Legislative Act 1. Nor does it obviate the contradictions that the Legislative Act created when it preserved Article 669 of the Civil Code or issued Laws 200 of 1936 and 9 of 1989. Making the policy objectives of the liberal interventionist project explicit did not obscure the fact that the Supreme Court, which could have contributed to resolving these contradictions, did not do so. The second period in the recent history of Colombia's right to property is then structured around a set of five conceptual oppositions: property as a right–property as social function; individualism–solidarity; limited intervention–general intervention; private–public; and Constitution as political program–Constitution as norm. The first components of each of these oppositions come from the classical liberal property system that was established with the Constitution of 1886 and that survived the reform of 1936 in the Civil Code and in the first paragraph of Article 31 of the Constitution. The second components, with the exception of the category "Constitution as norm," entered the Colombian legal order with Legislative Act 1, Law 200, and Law 9.

In the two property systems, the separation between the public sphere and the private sphere was maintained. The first was still the realm of justice; the second, the realm of morality. However, in the liberal interventionist property system, the boundary between these two spheres shifted. The state became entitled to intervene in decisions made by the owner, even if those decisions did not affect third parties. Furthermore, the state's intervention in the right to property was only one of the many areas where it acted for purposes of distributive justice and the material equality it is required to implement. The individual to whom the interventionist state refers is both abstract and concrete. The state must protect the rights of every individual to make decisions about his or her property, but is also obliged to intervene to ensure that people, flesh and blood citizens, have access to property.

Similarly, the subject of the right to property in classical liberalism and interventionist liberalism remains an autonomous individual. Property is still a means for the articulation and realization of an individual's life plan. In the second model, however, the individual is not an isolated subject. The

individual is conceived through his relationship with others and the principle of solidarity. The subject of the right to property has positive obligations to other members of society. He must not only refrain from adversely affecting the rights of others. Understood not as a social fact but as a principle, solidarity also requires him to use his property productively. The right to property has a social function; it is not just an individual right limited by the rights of others. The subject is a social being, not a monad coexisting with other monads in common physical space.

Finally, this second property system coexisted with a thin concept of the Constitution. The Constitution was still conceived as a political project that must be developed by the legislature in order to be effectively implemented. The law remained supreme in this second period of the recent history of property in Colombia. Civil law, or the Civil Code in particular, was the core of the legal system. The relationships between individuals, typical of the private sphere in which subjects construct their life plans and in which the market functions, were the fundamental reference points for the legal order. The Constitution did not control the Civil Code. The code dominated the Constitution. Hence the liberal interventionist property system has had many obstacles to acceptance in Colombian legal culture. The classical liberal conception of property located in the Civil Code has dominated the legal and political imagination of Colombians. For most citizens, property remains a nearly absolute individual right. Colombian legal culture only moved toward a dense concept of the Constitution with the adoption of the Constitution of 1991. Nevertheless, the debate generated by the case law of the Constitutional Court seeking to constitutionalize the private right demonstrates the challenges inherent in consolidating a concept of the Constitution as the supreme norm with direct and immediate application in the country's legal culture.[115]

## III. THE LIBERAL INTERVENTIONIST PROPERTY SYSTEM (1991–2011)

The third period in the recent history of property in Colombia is structured around the Constitution of 1991 and the Constitutional Court's case law on property.[116] Article 58 of the Constitution reiterates that property has a social function, that the state has the right to expropriate property for reasons of public utility as well as social interest, and that the state has an obligation to protect rights to justly acquired property.[117] However, the Constitution also indicates that property has an ecological function, that the state has the duty to promote associational and collective forms of property, and that the state may expropriate property, whether by

115. NEOCONSTITUCIONALISMO Y DERECHO PRIVADO: EL DEBATE (Beatriz Espinosa Pérez & Lina Marcela Escobar Martínez eds., 2008).

116. Law 388 of 1997 amended Law 9 of 1989. L. 388/97, julio 24, 1997, DIARIO OFICIAL [D.O.] 43091. Nevertheless, these changes did not affect the core elements of the social function of the right to property as articulated in Law 9.

117. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58 (Anna I. Vellvé Torras & Jefri J. Ruchti trans., 1991).

judicial or administrative means.[118] Thus, although the Constitution of 1991 includes important new elements in the property system, it also reproduces the contents of Article 10 of Legislative Act 1 of 1936, which in turn reproduced the contents of the Constitution of 1886. The second and third periods in the recent history of property in Colombia are thus cumulative.[119] They do not replace the previous system, but transform it in part. In its classic and interventionist versions, liberalism remains constant under the legal framework regulating property in Colombia.[120]

In this way, and in the Civil Code that remained in effect after the issuance of the Constitution of 1991, the contradictions of the second property system are preserved in the third. One important difference between the two systems, though, is that the concept of property as a social function, set out in Article 58 of the Constitution of 1991, is intertwined with three key elements in the structure of the dogmatic part of the Constitution: the principle of solidarity, the definition of the Colombian state as a Social State of Law, and the principle of the supremacy of the Constitution. These are not marginal differences. The Constitution establishes in its first article that Colombia is a "social State of law" and recognizes solidarity as one of the principles underlying the Colombian State.[121] The fourth article states that the Constitution is the supreme norm

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118. *Id.*

119. The proposal presented by Jesús Pérez González-Rubio to the National Constituent Assembly illustrates the continuity between the two property systems:

> Free enterprise has its foundation in private property. It is the cornerstone of the economy. Hence the previous Constitution and the new one guarantee it as a right; but it can only be justified as such in the mind of the owner to the extent that it fulfills a social function. It is an idea expressed with the following phrase from 1936 and now repeated: "Property is a social function that implies obligations."

GACETA CONSTITUCIONAL No. 113, at 29.

120. Article 58 of the Constitution of 1991 indicates,

> Private property and the other rights acquired in accordance with the civil laws are guaranteed, which cannot be ignored or infringed by subsequent laws. When the application of a law passed on account of public utility or social interest should result in a conflict between the rights of persons and the necessity recognized [by the law], the private interest must concede to the public or social interest.
>
> Property is a social function that implies obligations. As such, an ecological function is inherent to it.
>
> The State will protect and promote associative and collective [*solidarias*] forms of ownership.
>
> For reasons of public utility or social interest defined by the legislator, there may be expropriation by means of a judicial sentence and prior indemnification. The latter will be determined in consultation with the interests of the community and the affected [party]. In the cases determined by the legislator, this expropriation may be pursued by administrative means, subject to subsequent contentious administrative action, including with respect to price.

CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58 (alterations in original) (Anna I. Vellvé Torras & Jefri J. Ruchti trans., 1991).

121. *Id.* art. 1. Article 2 of the Constitution states, "The essential goals of the State are: to serve the community, to promote the general prosperity, and guarantee the effectiveness of the principles, rights and duties consecrated in the Constitution . . . ." *Id.* art. 2.

of the legal system.[122] Thus, property as a social function is not a concept isolated in the Constitution. It is a significant part of the institutional machinery created by the National Constituent Assembly of 1990. Property as a social function became a key tool for the strong interventionist state established in the Constitution of 1991 to fulfill its objectives in terms of redistributive justice. This definition and these principles also play a key role in the case law of the Constitutional Court, which resolves the contradictions of the property system. The case law of the Constitutional Court forms the second central difference between the second and third property systems.

In the past twenty years, the Constitutional Court has established a consistent line of case law in which the concept of property as a social function is developed and protects the powers of the state to enforce compliance by the owners. In a set of ten rulings on abstract judicial review,[123] the Court has protected the right of the state to limit the right to property, given its social function in matters as diverse as the environment, mining, and the distribution of urban land.[124] In these rulings, the Court

122. Article 4 of the Constitution states, "The Constitution is the norm of norms. In any case of inconsistency between the Constitution and the law or other legal norm, the constitutional provisions will be applied." *Id.* art. 4.

123. The Court makes reference to the social function of property in just two rulings on the concrete control of constitutionality: Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1998, M.P: Alejandro Martínez Caballero, Sentencia T-427/98, and Corte Constitucional [C.C.] [Constitutional Court], julio 12, 2001, M.P: Alfredo Beltrán Sierra, Sentencia T-746/01. While the right to property is not a fundamental right, it cannot be protected by use of the action of *tutela*. The action of *tutela* allows for protecting the fundamental rights of individuals from the improper acts or omissions of public officials. In the two cases of *tutela* mentioned above, the Constitutional Court ruled on the right to property by making use of the so-called doctrine of connectedness. The Court has held that in cases of *tutela*, an economic and social right can be addressed when it has a direct connection with a fundamental right.

124. The ten rulings and issues they address are as follows: in the first ruling, the Constitutional Court upheld the constitutionality of Article 296 of the mining code, which provides for the termination of mining titles if they are not registered within one year after promulgation of the law. Corte Constitucional [C.C.] [Constitutional Court], enero 18, 1993, M.P: Eduardo Cifuentes Muñoz, Sentencia C-006/93. In the second, the Court upheld the constitutionality of the second article of Law 9 of 1989, which requires that the plan of municipal development include regulations on the free mandatory cessions to which builders are subject. Corte Constitucional [C.C.] [Constitutional Court], julio 29, 1993, M.P: Carlos Gaviria Díaz, Sentencia C-295/93. In the third, it declared constitutional Article 87 of Law 135 of 1961, which states that rural properties of less than three hectares may not be subdivided. Corte Constitucional [C.C.] [Constitutional Court], mayo 5, 1994, M.P: José Gregorio Hernández Galindo, Sentencia C-223/94. In the fourth, it upheld the constitutionality of Article 79 of 1988, which indicates that cooperatives cannot pursue profit while fulfilling a social function. Corte Constitucional [C.C.] [Constitutional Court], diciembre 7, 1995, M.P: Fabio Moron Díaz, Sentencia C-589/95. In the fifth, it upheld the constitutionality of Article 3 of Law 48 of 1882, Article 61 of Law 110 of 1912, and Article 65 of Law 160 of 1994, which define vacant public lands as inalienable. Corte Constitucional [C.C.] [Constitutional Court], diciembre 7, 1995, M.P: Carlos Gaviria Díaz, Sentencia C-595/95. In the sixth ruling, it declared Article 669 of the Civil Code to be unconstitutional. Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1999, M.P: Carlos Gaviria Díaz, Sentencia C-595/99. In the seventh, it declared that Article 217 of the national police code, which requires all owners to maintain the fronts of their houses or buildings, is constitutional. Corte Constitucional [C.C.] [Constitutional Court], junio 26,

defended a standard interpretation of the social function of property. For the Court, it was clear that the concept of property as social function was introduced into the Colombian legal order with Legislative Act 1 of 1936.[125] Similarly, it was clear to the Court that in 1936, Congress and the National Constitutional Assembly took this concept from Duguit.[126] In these decisions, the Constitutional Court recognized that property as a social function imposes internal limits on property.[127] The Court indicated

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2002, M.P: Marco Gerardo Monroy Cabra, Sentencia C-491/02. In the eighth, it upheld the constitutionality of the law governing the forfeiture of property. Corte Constitucional [C.C.] [Constitutional Court], junio 5, 2003, M.P: Jaime Cordoba Triviño, Sentencia C-740/03. In the ninth, it confirmed the constitutionality of Articles 86, 136, and 220 of the injunctive administrative code, which regulate the payment of indemnification that the state must provide when it permanently occupies an individual's property. Corte Constitucional [C.C.] [Constitutional Court], septiembre 7, 2004, M.P: Jaime Araújo Rentería, Sentencia C-864/04. In the tenth, it declared that Article 13 of Law 2 of 1959, which prohibits the sale of private lands that have been included in national parks, is constitutional. Corte Constitucional [C.C.] [Constitutional Court], marzo 15, 2006, M.P: Rodrigo Escobar Gil, Sentencia C-189/06.

125. In a 2003 ruling, the Court discussed the 1936 constitutional reform:

> The reforms introduced to the system in Article 10 of Legislative Act No. 1 of August 5, 1936 were substantial: i) First, the right to private property was expressly referenced. ii) Second, the motives by which social interest prevails over private interest were incorporated. iii) Third, a mandate was enacted by which "*Property is a social function that implies obligations.*" iv) And fourth, the legislature was empowered to order, for reasons of equity, expropriation without previous indemnification. These changes allowed for the definitive consolidation of Colombian constitutionalism, the foundations of the social state—based on solidarity, on the rationalization of economic relations, on the exercise of rights depending on the social context in which they are recognized, and committed to satisfying the primary needs of individuals. Hence, the nucleus of the individual subjective right par excellence—property—was affected in the Constitution, by displacing the arbitrary rule exercised over the property by its use for the social demands of generation of wealth and social welfare.

Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2003, M.P: Jaime Córdoba Triviño, Sentencia C-740/03.

126. On this point, the Constitutional Court has stated,

> The Court does not believe that, to resolve the lawsuit, an analysis should be done on the origins and development of the right to property through the centuries, given the existence of varied case law and doctrine on the subject, it was sufficient to remember that the concept of property has undergone change, as in principle it was seen as a natural and absolute right, then closely linked to the notion of freedom, due to which Sieyes affirmed that freedom was a property in itself. Subsequently, and with the passage of time, more credence was given to the thought of those who argued that property must yield to the social obligations of State and the community at large, leading to the thesis of property as a social function. León Duguit, whose thought greatly influenced the constitutional reform of 1936, an influence that survives in the notion gathered by the present Constitution, referred to the character of the property in these terms . . . .

Corte Constitucional [C.C.] [Constitutional Court], julio 29, 1993, M.P: Carlos Gaviria Díaz, Sentencia C-295/93.

127. The Constitutional Court has also stated that,

> The social function of property is incorporated into its contents to impose obligations on the owner for the benefit of society. In other words, the social content of the obligations internally limits the individual content of the powers of the owner, according to Duguit's concept of property as function. In the case of vacant rural land, this social function is translated into an obligation to exploit it economically and to designate it exclusively for agricultural activities, not to use

that the owner has an obligation to make productive use of her property.[128] Consequently, the state has the right to regulate the use of different types of property to ensure that their social function is fulfilled.[129] Similarly, the state has the right to regulate the consequences of the owner's breach of social obligations. As a consequence, the first major contribution of the Court on this matter was not on the content given to the institution of property as social function, but on its systematic and consistent application.

The second major contribution addressed how to confront the contradictions in the legal system between property as social function and property as a right. Two rulings, which are complementary, are particularly relevant with respect to this point. The first is the C-006 ruling of 1993, which precipitated the case law on property as social function. In this decision, the Court undertook a thoughtful analysis of the conceptual differences between the concepts of property as a right and property as a social function. For the Court, the main difference lay in the type of limit that each imposes on property.[130] While the former imposes external limits, the second imposes internal limits. In Colombia, the state must protect private property only when it is being used productively. Similarly, in this ruling, the Court examined the political and economic objectives that intersect with each concept of property. For the Court, it was clear that the change in the property system that occurred in 1936 was directly related to the economic changes in Colombia in the first three decades of the twentieth century. Similarly, it was clear to the Court that the political objective of this change was related to the possibility of redistributing land in Colombia. In this decision, the Court affirmed that property is a right that has internal and external limits. In this regard, the Court says:

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> the land if it is designated as a reserve or to conserve renewable natural resources, etc. In one word, the social function is that the right to property must be exercised not to harm but to benefit society, designating or using it according to the collective needs and respecting the rights of others.

Corte Constitucional [C.C.] [Constitutional Court], diciembre 7, 1995, M.P: Carlos Gaviria Díaz, Sentencia C-595/95.

128. *Id.*

129. The Constitutional Court has said:

> In this order of ideas and defending the concept of social function, the legislator may impose on the owner a number of restrictions on ownership rights for the sake of preserving social interests, respecting, however, the core of the right itself, relative to the minimum level of enjoyment and disposition of a good that enables its holder to obtain economic benefits in terms of value for use or exchange value to justify the presence of a private interest in the property. This is why property is protected by the Constitution in accordance with the analysis and the circumstances of each case, especially if found to be connected and related to other specific fundamental rights. Given its social role, it should also be understood as a duty, as a formative and internal limit that commits owners to the duty of solidarity embodied in the Constitution. . . . *The legal configuration of property, then, can point either to the suppression of certain powers, to their conditional exercise, or in some cases, the forced exercise of certain obligations.*

Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1998, M.P: Alejandro Martínez Caballero, Sentencia T-427/98.

130. Corte Constitucional [C.C.] [Constitutional Court], enero 18, 1993, M.P: Eduardo Cifuentes Muñoz, Sentencia C-006/93.

> Economic and social development is ultimately responsible for the mutation of the concept and the meaning that Colombian society has for and assigns to private property. Beginning in the thirties, the laws enacted are inscribed under the marker of sociability as evidenced by their texts and the copious case law that has dealt with them, constantly referring to the categories of social interest and the social function of property. The estrangement from the subjective matrix of the civil code is notorious and eloquently denounces a change in the economic base and the very foundation of the right to property, which is preserved and guaranteed, but by means of the constitutional principles of social interest and social function. In this sense, the express involvement of the legislature in activities and important areas from private property to social interest has allowed it to maintain expropriatory measures to strengthen and facilitate programs of social and economic development, and to articulate policies of distributive justice through these means. On their part, generally speaking, the intrinsic linkage of private property to social function has sought to subordinate ensuring the requirements of production and the generation of wealth.[131]

The second key ruling in the Court's line of case law on property is C-595 of 1999. In this ruling, the Court declared part of Article 669 of the Civil Code to be unconstitutional.[132] More specifically, the Court declared the adverb "arbitrarily," which described how the owner could use his good, to be unconstitutional. The argument for this decision is divided into three parts. In the first part, the Court affirms that the concept of property as a social function established in the Constitution limits the autonomy of the owner.[133] Therefore, the owner cannot use her property in any way that she deems appropriate. The issue is not that the exercise of property has external limits. Article 669 of the Civil Code indicates that the owner cannot use her property in a way that violates the law or the rights of others. The issue is that Article 58 of the Constitution redefines the concept of property. The owner, by definition, has obligations related to her property.[134] Not only should the owner not use it in a way that does not affect third parties, she also must use it productively.

In the second part of the argument, the Court explicitly recognized that the concepts of property as a function and property as a right are

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131. *Id.*

132. Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1999, M.P: Carlos Gaviria Díaz, Sentencia C-595/99.

133. *Id.*

134. The Court stated:

> Now, the entire theory of a subjective right was built, traditionally, keeping in mind the patrimonial right type par excellence: property. Analyzed with Duguit's criteria, the right of ownership becomes a social function, which means that the owner is not a privileged subject, as he had been until that point, but an official, which is to say, someone who should manage that which he possesses as a function of social interests (which take prevalence over his own), a possession that is only guaranteed, in the individual sphere, if the objectives of collective benefit are met.

Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1999, M.P: Carlos Gaviria Díaz, Sentencia C-595/99.

contradictory.[135] For the Court, the notion of a subjective right was incompatible with the notion of a social function. After making an analysis of Duguit's theory, the Court affirmed that the metaphysical character of the concept of a subjective right is irreconcilable with the concept of social function based on social facts.[136] The Court therefore recognized that Article 58 of the Constitution contradicts itself. However, the Court also recognized the utility of the concept of a subjective right and questions Duguit's conclusion that it is necessary to expel it from legal discourse.[137] This argument is significant. The Court recognized and understood the conceptual problem it faced.[138] This argument contrasts with the one put forward by the Supreme Court in the 1988 ruling which reviewed the constitutionality of Article 669 of the code.[139] In this ruling, as noted above,[140] the Supreme Court considered this article to be constitutional because the word "arbitrarily" actually signifies the "discretion" of the owner and is limited by law and the rights of others. In the end, the Supreme Court considered that the social function of property is an external limit that the legislature imposes on owners. The social function is a line that, like the rights of third parties, the owner should not cross. For the Supreme Court, there was therefore no conceptual difference between property as function and property as a right.

In the third part of the argument, the Constitutional Court argued that the best interpretation of Article 58 of the Constitution, which is contradictory, indicates that property is a right that has internal and external limits.[141] The legislature's objective was not to eliminate the notion of subjective rights from the Colombian legal system. Congress's objective was to redefine the right to property so it is understood that the owner has an obligation to use

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135. *Id.*

136. In this regard the Court says, "From [Duguit's] sociological positivism a supposition of this nature is repelled [that of the will], only understandable from a metaphysical perspective, incompatible with the scientific analysis of the right. The conclusion, undoubtedly puzzling, is this: 'Subjective rights do not exist.'" *Id.*

137. The Court indicated in relation to this point, "Reconciling the notion of acquired subjective rights *with that of social function of* is a nearly impossible task . . . which highlights the difficulty created by dispensing with such a useful conceptual tool (the subjective right) in both legislation and theorizing about the law." *Id.*

138. The Court affirmed:

> What seems clear is that the advice of any careful reader of the transcribed article would be incompatible with a highly individualistic stamp such as the one embodied in Article 669, particularly emphasized in the word arbitrarily, and the hermeneutic efforts made so artificial as to be innocuous in distinguishing two meanings: *capriciously*, or according to discretion, and opting in this context to attribute the latter meaning to the adverb. Both options preserve the individualistic conception underlying the norm in question, incompatible with the higher order provision incorporated in 1936, informed by a political philosophy specifically constructed against individualism.

*Id.*

139. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Plena agosto 11, 1988, M.P: Jairo Duque Pérez.

140. *See supra* text accompanying note 91.

141. Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1999, M.P: Carlos Gaviria Díaz, Sentencia C-595/99.

her object productively. The Court, citing the paragraph of Ruling C-006 of 1993 that appears above,[142] makes an analysis of the political and economic objectives for including the social function concept of property in the Colombian legal order.[143] In this analysis, the Court reiterates that this objective was the redistribution of land in Colombia. In sum, what the Court affirms is that property in Colombia is not a social function, as Duguit argued, but a subjective right that has a social function. The text of Article 58 is inconsistent. However, a systematic and teleological interpretation of the Constitution can solve this contradiction.

This third property system of Colombia's recent history emerges from the consolidation and expansion of interventionist liberalism resulting from the broad agreement between liberal, conservative, and progressive forces in the National Constituent Assembly for reshaping the Colombian political community in 1990. The NCA of 1991 was summoned to confront a deep political crisis in Colombia.[144] This crisis was caused primarily by two failings: the state's inability to curb the violence ravaging the country, and the existence of a corrupt, centralized, exclusionary, and inefficient political system.[145] For the populace that supported the constitutional process, a radical change in the institutional organization of the state was needed to respond to widespread violence generated by drug lords, guerrilla groups, and paramilitary organizations.[146] It was widely believed in the country that this drastic institutional change was necessary, moreover, to create an open, effective, and decentralized political system, in which the interests of all citizens would be represented. It was also thought that this political system should be given broad powers to confront the profound injustices affecting a huge number of Colombians. Consequently, the work of the NCA was structured around the following four issues: putting an end to violence, strengthening democracy, expanding the Bill of Rights, and redefining the basic structure of the state.[147]

With respect to the latter, the NCA decided that Colombia should be a Social State of Law. For the NCA, it was clear that the state should be obligated not only to protect the formal equality of citizens but also their material equality. The state should therefore have the tools to intervene in the economy in a continuous and systematic manner.[148] A little over fifty

142. *See supra* text accompanying note 131.

143. Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1999, M.P: Carlos Gaviria Díaz, Sentencia C-595/99.

144. John Dugas, *La Constitución Política de 1991: ¿un pacto político viable?*, *in* LA CONSTITUCION DE 1991: ¿UN PACTO POLITICO VIABLE? 15, 18 (John Dugas ed., 1993).

145. On the history of the NCA, see John Dugas, Rubén Sánchez & Elizabeth Úngar, *La Asamblea Nacional Constituyente, expresión de una voluntad general*, *in* LOS NUEVOS RETOS ELECTORALES: COLOMBIA 1990: ANTESALA DEL CAMBIO 187 (Rubén Sánchez David ed., 1991).

146. JAIME BUENHAORA FEBRES-CORDERO, EL PROCESO CONSTITUYENTE: DE LA PROPUESTA ESTUDIANTIL A LA QUIEBRA DEL BIPARTIDISMO 118–22 (1991).

147. *See generally* Dugas, *supra* note 144.

148. Article 334 of the Constitution states:

> The general management of the economy will be under the responsibility of the State. The latter will intervene, by mandate of the law, in the exploitation of the

years after being introduced in the Constitution with Legislative Act 1 of 1936, the idea of an interventionist state in Colombia was well recognized and accepted by the public.[149] However, the constituent assembly of 1990 strengthened it when it defined the Colombian state as a Social State of Law. The differences between the constitutional reform of 1936 and the Constitution of 1991 are substantial. In the first, Congress granted certain powers to the state to intervene in the economy; in the second, the state, by definition, must intervene to contribute continuously and in generalized fashion to realizing the objectives of material justice to which Colombian society is committed. The idea of a strong interventionist state is further reinforced in the Constitution of 1991 with the introduction of the principles of solidarity and dignity into the Constitution. Article 1 of the Constitution indicates that the Colombian state is based on solidarity and dignity. The purpose of the robust interventionist state in Colombia, then, is to put the resources at its disposal to the service of realizing these principles.

In this institutional machinery, property as a social function fits perfectly. The regulation of property is essential to any political project that aims to reduce inequality.[150] In a country like Colombia, moreover, this objective cannot be achieved without confronting the problem caused by the historically unjust distribution of rural and urban land and by the existence

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> natural resources, in the use of the soil, the production, distribution, use, and consumption of goods, and in the public and private services in order to rationalize the economy with the purpose of achieving the improvement of quality of life of the inhabitants, the equitable distribution of opportunities and the benefits of development and the preservation of a healthy environment.
>
> In a special manner, the State will intervene to give full employment to the human resources and to ascertain that all the persons, in particular those with lower incomes, have effective access to the basic goods and services. Also, to promote the productivity and competitiveness and harmonious development of the regions.

CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P] art. 334 (Anna I. Vellvé Torras & Jefri J. Ruchti trans., 1991).

149. Article 11 of Legislative Act 1 of 1936, which transformed the Constitution of 1886, stated, "The State can intervene in the operation of industries or public and private companies through legislation, with the objective of rationalizing the production, distribution and consumption of wealth, or giving the worker the proper protection to which he is entitled." Legislative Act 1/36, agosto 5, 1936, DIARIO OFICIAL [D.O.] 23263, art. 11.

150. On this subject, members of the Constituent Assembly Arias and Marulanda state in the bill they presented before the National Constituent Assembly,

> A party that believes in the intervention of the State in the economy and that has popular support can be found in this brief subsection we are addressing ["Everyone has a right to access property . . . . The State shall promote access to property, in accordance with the law . . ."] and refers to the right of all people to access property, a legal source for acting on the issue of redistribution, complemented by other legal pieces such as expropriation, in the terms of this article and that will be explained subsequently.

Iván Marulanda Gómez & Jaime Arias López, ARTÍCULO 58 DE LA CONSTITUCIÓN DE 1991, at 2 (Biblioteca Luis Ángel Arango). This volume gathers all the original documents about the right to property produced by the National Constituent Assembly. *See also* Francisco Rojas Birry, *Proyecto de Reforma de la Constitución Política de Colombia*, *in* GACETA CONSTITUCIONAL NO. 29, at 5 (1991); Jaime Arias López, *Propiedad: Proyecto de Acto Reformatorio de la Constitución Política de Colombia No. 77*, *in* GACETA CONSTITUCIONAL NO. 23, at 219 (1991); Cornelio Reyes, *El Derecho de Propiedad, una Disposición Anacrónica y Contradictoria*, *in* GACETA CONSTITUCIONAL NO. 107, at 15 (1991).

of a significant amount of unproductive land.[151] A Social State of Law must recognize that the right to property is not absolute, that owners are obliged to use their properties productively, and that the state must intervene in the event that this does not happen.[152]

Consequently, in this third system, property is defined based on the principles of material equality and solidarity. Indeed, the autonomy of the owner continues to have considerable importance. Property is a fundamental instrument for individuals to express and realize their life plans. Nevertheless, individual autonomy is limited by the obligations that the owner has to the other members of the political community. The use of property must recognize the social character of subjects, as well as their interdependence. The stability, prosperity, and justice of the political community depend on all members of the polity, certainly all owners. Similarly, in this type of property system it is clear that autonomy is not exercised in the abstract.[153] It is exercised within particular contexts that determine the options available to the subjects, as well as their value.[154]

These contexts are also directly related to the existence or absence of the material conditions necessary for the exercise of autonomy. The owners, with the productive use of their property, and the state, with its intervention, should help all citizens to access the basic material conditions that they need to truly exercise their autonomy. Thus, although the separation between public and private spheres is at the core of this third property system, its boundaries become more porous. Property and the market continue to be situated in the private sphere. However, the state has an obligation to intervene in these matters to ensure the material equality of its citizens. The Constitution is no longer a political program dependent on the will of legislators for its development and potential application. The Constitution is the norm of norms in the legal system, a norm that has immediate and direct application and that requires that individuals comply with the social function of their property.

## CONCLUSION

The three legal systems that define and regulate property in the recent history of Colombia are structured around three liberal values: autonomy, equality, and solidarity. However, each of these systems interprets and balances these values differently. The first is a classical liberal system that is structured around the autonomy and formal equality of owners. The second—a system with autonomy and formal equality on the one hand, and solidarity and substantive equality on the other—is in tension. The third is a system that gives priority to the principles of solidarity and substantive equality over autonomy and formal equality. These systems of property are intertwined with the political struggles for the definition and control of the

151. *See* Gómez & López, *supra* note 150, at 6.
152. *See id.* at 3–4.
153. CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 31–41 (1991).
154. *Id.*

Colombian state. The political programs of the Regeneration and *Revolución en Marcha*, as well as the process to recreate the polity that was attempted with the 1991 Constitution, determined the characteristics of the right to property in each of the moments analyzed in this Article.

Finally, the political and academic understanding of each of these systems of property is strongly influenced by five conceptual oppositions: individualism–solidarity; limited intervention–general intervention; private–public; Constitution as political program–Constitution as norm; and property as a right–property as social function. The components of each of these oppositions intertwine with its ideological peers to constitute the conflicting fields that have determined the way in which Colombians think about property.