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Léon Duguit and the Social Function of Property in Argentina

M.C. Mirow

French jurist and law professor Léon Duguit enunciated the definitive form of the doctrine of the social function of property in Buenos Aires in 1911. Duguit's lectures in Argentina marked an important stage in concretizing this new paradigm of property into legal theory and positive law (Mirow 2016a). Despite this early enunciation of the concept of the social function of property in Argentina's academic community, the incorporation of this idea into the law of the country was circuitous and transitory. Apart from Duguit's lectures in Buenos Aires, the only other significant Argentine work adopting and expounding the social function of property was the Peronist Constitution of 1949. This chapter explores the way Duguit's thought fit into the construction of an autochthonous Argentine doctrine of the social function of property from the doctrine's first iteration in 1911 until the repeal of the Peronist constitution in 1956. Scholarship on the social function in Argentina has been understandably limited because until recently it has been difficult to extricate the historical study of property as a social function from this constitution and its political movement and moment (Ramella, 299). The seeds of the social function property were planted early in Argentina, but their yield was somewhat late for the region and not as lasting as in other countries.

This chapter begins with a brief discussion of the most important Argentine precursors to Duguit's lectures and his theory of property. This first part establishes the existence and use of

the classical liberal paradigm of an absolute right to property in the later nineteenth and early twentieth centuries in Argentina. This liberal construction of property was widespread throughout Europe and Latin America; it was the very notion against which Duguit reacted. The next part of this chapter analyses the manifestation of the social function of property adopted in the Argentine Constitution of 1949. The works of Arturo Enrique Sampay (1911-1987), other deputies to the constituent convention, and scholars are examined to understand their appropriation of this doctrine of property in light of Duguit's work. The final part assesses the work of Duguit in the Argentine context. It notes that Duguit's writings formed part of a broader understanding of the social function of property that was informed by various scholars and sources, and particularly by works on Christian humanism and the social doctrine of the Roman Catholic church as enunciated in papal encyclicals. Because this study focuses on national trends and materials, significant work remains to be done on the level of provincial constitutions and other sources. These concluding comments also observe that the path of Argentina to the social function of property in 1949 is an example of the diversity of legal development in Latin America. Although variations of the social function of property were found throughout the region in the twentieth century, the history of its adoption is unique in each country's legal and political moment.

I. Precursors

Before assessing the place of the social function of property in the Constitution of 1949, a few observations on the previous constitution, the Argentine Constitution of 1853/1860, are

necessary.[1] The Constitution of 1853/1860 was crafted from the work of one of Argentina's great jurists, Juan Bautista Alberdi (Mirow 2015, 159-163; Mirow 2016b). In *Bases y puntos de partida para la organización política de la República Argentina,* the most important book on comparative Latin American constitutions of its time, Alberdi advocated a new Argentine constitution that would promote economic growth, foreign investment, and increased population through immigration. Alberdi criticized both the Spanish colonial law (*derecho indiano*) and the constitutions of early Latin American independent republics for neglecting these essential aspects of political and social progress (Mirow 2015, 160-161). Alberdi and the resulting constitution he championed adopted classical liberal principles and subjective rights, including the right to property, a non-interventionist state, and foreign investment. His stance on property was not surprising; an unlimited and absolute right to property was by far the predominant conception of property available to any drafter of the period (Levaggi, 123-127, 130).

Adopting this classical liberal concept of property, the Constitution of 1853/1860, Article 17 states:

> Property is inviolable, and no one living in the Confederation may be deprived of it, unless by virtue of a judgment based on law. Expropriation for public use should be determined by law and prior indemnification. . . .

[1] The Constitution bears two years because it was first adopted by the Argentine Confederation excluding Buenos Aires. When Buenos Aires adopted the constitution, it became the constitution of the entire Argentine republic.

Thus, property had to be inviolable, and the owner of property had to have the fullest range of rights to use and to dispose of it (Koenig, 103-104). Here, Argentine constitutional law clearly echoed the French Civil Code of 1804 (the Code Napoléon) which stated in Article 544:

> Property is the right to enjoy and to dispose of things in the most absolute manner, provided that one does not undertake a usage prohibited by law (Mirow translation).

Similarly, a few decades later, the Argentine Civil Code of 1871, in Article 2513, was consistent in its enunciation of an absolute unfettered right to property:

> Inherent in property is the right to possess the thing, to dispose or to benefit from it, to use it, or to enjoy it according to the will of the owner. He may exploit it, degrade it, or destroy it (Pasquale, 102, Mirow translation).

It was precisely this Napoleonic formulation of property, as expressed in the French Civil Code of 1804 (the *Code Napoléon*), the Argentine Civil Code, and Argentina's constitution, that prompted Duguit's famous response in his lectures in Buenos Aires. Working against the backdrop of the rise of French and more generally European sociology and sociological approaches to law, Duguit explained the social function of property through a course of lectures spanning two months in 1911 in Buenos Aires, Argentina. The lectures addressed how civil law had changed since the French Civil Code. He addressed an admiring academic audience that was imbued with European culture, ideas, and sources. Duguit's polite flattery that Argentina and France were now equally civilized must have warmed his audience. Duguit subsequently

published as *Les transformations général du droit depuis le Code Napoléon*, the work that most fully set out his theory of the social function of property (Mirow 2010, 198-199, 207).

In bold contrast to the accepted characterizations of property established in works of classical liberalism, civil codes, and constitutions, Duguit objected, "But property is not a right; it is a social function" (Duguit, 21). With this assertion, he launched into uncharted waters and carefully navigated between established notions of an absolute right to property and socialist theories that sought to abolish all forms of private ownership. This statement reflected theoretical and methodological trends of the time towards the "social".

His sixth and final lecture of the series was the most unsettling and enduring. There he explained that "I have developed the idea that capitalist property, and particularly real property, is increasingly less of a subjective individual right and more of a social function" and he repeated and rephrased the idea this way "Property is no longer the subjective right of the owner; it is the social function of the possessor of wealth" (Duguit 1920, iv, v). This lecture and its subsequent publication became the seminal source for the doctrine of the social function of property (Mirow 2010, 199-200).

Duguit's theory purported to be descriptive rather than normative. He noted that he was following the most modern methods of empirical and sociological investigation. These approaches led Duguit to reject a deductive science of autonomous law, and thus to join a small school of French anti-formalists. This positivist and realist method was informed by the works of Émile Durkheim, Auguste Comte, and Charles Gide. The writings of lesser-known contemporary French theorists of property also served in Duguit's construction of the social function of property. Raymond Saleilles, a friend and colleague of Duguit's, wrote that rights,

even rights in property, were not absolute. Furthermore, his work bridged sociological approaches to law and the nascent development of Catholic social thought of the period. The recent works of Adolphe Landry, Maurice Hauriou, Joseph Charmont, and, above all, Henri Hayem served as the foundation for Duguit's social function of property (Mirow 2010, 200-202, 213-220, 225). In fact, the structure and arguments of Duguit's lecture in 1911 establishing the social function of property follow Hayem's doctoral dissertation at the University of Dijon in 1910 (Hayem; Mirow 2010, 216-219).

Duguit introduced the social function of property to Argentina in 1911 but it must have entered into a landscape of concepts and ideas about property extant in the country before then. With this in mind, Abelardo Levaggi has explored the extant academic literature for precursors to the social function of property in Argentina. Only two works specifically adopted socialist formulations of property, a formulation that was, of course, much further to the left of Duguit's social function of property. Luis A. Peyret's doctoral dissertation at the University of Buenos Aires in 1884 advocated the abolition of private ownership in land. In 1911, the same year Duguit delivered his lectures, another visiting Frenchman, socialist leader Jean Jaurès argued for placing limits on private property in a lecture on civilization and socialism. Shortly after Duguit's lectures, Enrique del Valle Iberlucea propounded a fully socialist conception of property in 1915 in his article "Socialism and the Evolution of Property" (Levaggi, 127-129).

In contrast, the works affirming or tacitly accepting a classical liberal absolute right to property set the tone during the period. This was the case, even though deputies at the constituent convention and scholars expounding on property immediately preceding the Constitution of 1949 attempted to justify the social function of property through historical

antecedents in Argentina. In the 1910s, socialist ideas of property were relegated to few and academic works outside the main stream of law students, professors, and jurists (Levaggi, 129-131). In this atmosphere, it is not surprising that Duguit's complex formulation of the social function of property was unable to make its way into the legal matrix of Argentina when it was expounded in 1911. Although Duguit's theory of property was delivered in Argentina and adopted elsewhere in Latin America shortly after its presentation, his theory remained dormant in Argentina for decades (Mirow 2011).

II. The Argentine Constitution of 1949

After consolidating power in 1945 and 1946, the Peronist government sought to reshape the national economy and to jettison the classical liberalism of the Constitution of 1853/1860 (Koenig, 85). In a new democratic structure, the state and property would serve the community and human dignity (Koenig, 89). By this time, there were many national models to follow, and many incorporated the social function of property. Constitutions from Weimar Germany (1919), Colombia (1945), Guatemala (1946), Ecuador (1946), Peru (1947), Bolivia (1947), and Italy (1947), amongst others, offered language explicitly adopting a social function of property or nationalized property. These texts were compiled by José Figuerola and were available to the constituent convention for its use in drafting the constitution (Ramella, 318-320). Although a clear example of the direct appropriation of Duguit's social function of property may be found in the Chilean Constitution of 1925, this source was inexplicably referred to only infrequently by Argentine scholars when considering the same formulation for Argentina in 1949 (Mirow 2011).

Political enmity across the Andes may have accounted for avoiding the recent work of a neighbour, particularly when such changes were associated with economic and social progress.

In addition to the powerful theoretical exposition of the social function of property by Duguit in Argentina, contemporary drafters and scholars found glimmers of the application of the social function during the pre-Peronist period, but these were weak and short-lived. For example, Argentine codifier Vélez Sarsfield, commenting on an article on property in his Civil Code stated that the general or collective interest could sometimes be superior to the individual interest. There were also some decisions from the 1920s to the 1940s by the Argentine Supreme Court in which the idea of the social function of property was employed to remedy specific injustices (Ramella, 310, 314, 333, 338-341). In 1922, the Argentine Supreme Court of Justice approved a law that permitted Congress to regulate urban leases, a clear step away from liberal principles of property (Diario, vol. 1, 323; Botano and Gallo, xxiv). And in the 1940s, there were several legislative proposals and acts for agrarian and land reform (Ramella, 342-346).

Additionally, proponents of the social function of property unsuccessfully urged this characterization of property during drafting sessions for a new civil code from 1926 until 1936. The draft code ultimately rejected the formulation; it was never enacted, and the existing code continued to enunciate the classical liberal paradigm of property (Parise, 233-235). These small and detached instances of the social function of property in Argentina between Duguit's lectures and the Constitution of 1949 provided little to pave the way for the language that was to be incorporated into the Constitution. These scattered instances of changes in the nature of property in Argentina must be understood in light of Levaggi's assessment that Argentina had few intellectual or legal precursors to the social function of property.

The Constitution of 1949 was a product of Juan Perón's election as president in 1946. Reforming society and promoting industrialization, Perón was supported by urban workers and their unions. Perón sought policies to favor all aspects of labor, to effect "social justice", and to aid the poor. He hoped to reassert national sovereignty against foreign encroachments into the country's political and economic life with particular attention paid to sectors controlled by foreign firms such as railroads, power plants, and other public services. (Rock, 214, 260-263). Peronism went deeper than fiscal policy and workers' benefits. As David Rock noted:

> Peronism, its constituents claimed, also made a major contribution to the nation's "spiritual" development. In a world divided by the Iron Curtain, the doctrines of *justicialismo* offered an alternative to both capitalism and communism. To its adherents *justicialismo* was a social-Christian philosophy rooted in Catholic and Aristotelian precepts of justice and harmony (Rock, 264).

Thus, Peronism called for a radical restructuring of Argentine politics, economy, society, and even the relationship between faith and public action. The preamble of the Constitution of 1949 incorporated these themes by declaring a "Nation socially just, economically free, and politically sovereign" (Rock, 289).

In the process of drafting a new constitution with the political and economic goals of Peronism, Colonel Domingo Mercante, Governor of the province of Buenos Aires and president of the constituent convention, steered the political side of constitution-making (Koenig, 93). Arturo Enrique Sampay adeptly led the legal side of drafting the constitution with a cadre of jurists of varying political allegiances, none of with whom Sampay perfectly aligned. He did,

however, share with the group a strong sense of nationalism and a Catholicism that had already schooled them in many of the foundational writings of the church's social teaching (Koenig, 95). In this way, Sampay's views of constitutionalism and economy were in accord with the cultural and spiritual revolution of Perón's Christian humanism of the 1940s and the social doctrine of the Roman Catholic Church (Madaria, 525, 555-565). Christian humanism and neo-Thomism were part of the national spirit, and Sampay shared in these movements (Arias Pelerano, 16-17). The constitution reflected the Church's social doctrine not only in the area of property but also in addressing areas of "special rights" related to work, strikes, family, old age, and education (Madaria, 560-562). Sampay, describing later the overall nature of the constitution, wrote:

> In summary, the so-called "Constitution of 1949" proposed to make an effective government from the popular sectors, to free the country from imperialism, placing financial resources, natural resources, and the principal goods of production in the control of the state with the goal of organizing them through planning to achieve an independent and harmonious development of the economy that produces modern well-being to all and to each of the members of the community. It attempted, in this way, to establish in Argentina the social revolution needed in the modern world (Sampay 1973, 121-122).

Peronist drafters did not turn immediately to the social function of property for the Argentine Constitution of 1949. In fact, the first formulation of property in the draft crafted by

José Figuerola directly reacted to the text of the prior constitution by negating its fundamental ideas of absolute rights. The draft stated:

> Property is neither inviolable nor even untouchable, but simply respected when it is useful not only to the individual but also to the collective (Koenig, 126).

Sampay and the constituent convention substantially modified this language to introduce the social function of property. Indeed, the social function of property became the theoretical and ideological core of an entire Chapter of the Preamble of the Constitution entitled "The Social Function of Property, Capital, and Economic Activity" (Argentine Constitution of 1949, Preamble, Chapter IV, translated in the Appendix). This Chapter has been viewed not only as a constitutional focal point for Argentina in 1949 but also as the core of Peronist political ideology (Koenig, 32). These aspects were singled out by Sampay as essential features of a constitution that eschewed both the brutalities of unbridled modern capitalism and statist totalitarian (Sampay 1963, 115-116, 121).

Central to Peronist constitutionalism, legality, and politics, Chapter IV contains three articles addressing the social function of property, capital, natural resources, and public services. The core of the Constitution's definition of property is found in Article 38 of the Constitution. An earlier draft stated that the:

> Nation shall guarantee private property *as* a social function and, as a consequence, the same shall be subject to the contributions, restrictions, and obligations established by law for general utility (Ramella, 302 n8; Mirow's emphasis).

This text was later changed to the language that would eventually be found in Article 38:

> Private property *has* a social function and, as a consequence, shall be subject to obligations established by law for the common good (Mirow's emphasis).

This text reveals a minor but extremely important change from the earlier draft submitted by the Peronist Party which equated property with a social function; property now had a social function. Ramella correctly observed that this change from "as" to "has," importantly shifted property from Duguit's concept of not being a subjective right in itself (using "as") to a juridical object that was limited by certain obligations (using "has") (Ramella, 302).

Without naming Duguit, his concept of property was apparently at the forefront of the formulation of the central article on property in the Constitution of 1949. This change made the restrictions on property in the Constitution of 1949 consistent with the general protection of the right to property found in the constitution in Article 26 that all the inhabitants of the nation enjoyed the right, amongst others, "to use and to dispose of their property" (Constitución de la Nación Argentina 1949, Art. 26). Further provisions in the constitution were modifications of this right rather than redefining the very substance of property itself. In his exposition of this provision, Sampay specifically remarked that his concept of property had a double function, individual and social, which worked together (Ramella, 305-307).

Articles following the adoption of the social function of property reveal that the formulation had clear instrumental aims. This definition of property in the Argentine Constitution of 1949 was not an aspirational statement or broadly based rejection of the absolute right to property without practical consequences. Instead, property's social function had an

immediate and contemplated effect on the legal order of ownership and the political structure of the country. As elsewhere in the region, the social function of property was often employed as a necessary step towards or justification for land or agrarian reform (Ankersen and Ruppert, 88-107; Mirow 2004, 219-227). The social function of property led in subsequent provisions to land reform, the control of capital, and the nationalization of natural resources and public services.

The principle of the social function of property was translated and interpreted by other articles within Chapter IV. The language provided for the expropriation of foreign capital and the nationalization of various sectors of the economy that had heretofore been in private, often foreign, hands. This was an about-face from Alberdi's constitutional vision and Argentina's political policy of encouraging and protecting foreign investment and capital (Koenig, 129-137).

In the context of Peronism, the social function of property implicated state control of some aspects of the economy, importantly the provision of public services often provided by foreign companies. The initial draft of the article dealing with state control, Article 40 within the draft of constitutional reform, was the work of José Figuerola from the President's Secretariat, but the final drafting was assigned to Sampay who incorporated the nationalization of public services. When the draft article was published, Perón was besieged by demands from American, British, Italian, and Swiss diplomats to soften the expropriatory aspect of the article. As principal drafters of the constitution, Sampay and Mercante held their ground, and the provisions for nationalization stood (Koenig, 112-113). Telephone service, transportation, gas, ports, and railroads – held mostly by foreign interests – were nationalized (Koenig, 163). Sampay's unwillingness to yield to external political presures and to soften the application of Article 40 as requested by Perón created a rift between the drafter and the president, and it appears that

relations between the two were never as cordial as before. From 1952 to 1973, they did not see each other (Madaria, 547-548, 552-553).

Even with the modification from "as" to "has", the formulation of Article 38 closely followed Duguit's construction of the doctrine. Nonetheless, despite Duguit's historic connection to Argentina, his work was only a minor source that shaped the Peronist ideas of the social function of property.

Well versed in constitutional theory, Sampay did not directly draw on Duguit (Sampay 1973, 6-70). Sampay's legal education placed him within the orbit of neo-Thomist Christian humanism. In addition to initial studies in Uruguay, he completed his legal training at the law and social sciences faculty of the National University of La Plata (Argentina) where he obtained his doctorate (Arias Pelerano, 10). Sampay then studied various aspects of law in Zurich, Milan, and Paris. Particularly important for our purposes was his attendance at lectures in Paris by Louis Le Fur on natural law and by Jacques Maritain (Madaria, 542-543) perhaps the era's most important proponent of the neo-Thomism, one of the underpinnings of *Rerum Novarum* (1891) and the social function of property (Mirow 2016a). Sampay later noted the *Thomist* doctrine of the social function of property in the Irish Constitutions of 1937 and 1940 (Buela). Thus, Catholic social teaching and neo-Thomism were at the heart of Sampay's understanding of the social function of property. His traditional Thomist approach to law clashed with those who moved Peronism to the left, and it appears his contributions were discounted by Peronists and later spurned by post-Peronist who returned Argentina to classical liberalism (Koenig, 30-31).

Just as the papal encyclical *Rerum Novarum* (1891) and Duguit's concept of the social function of property sought to establish a third way, a golden mean, between compassionless

absolute rights in property under the principles of classical liberalism on one hand and communal and state ownership of all property on the other, Sampay, following tenants of Christian humanism, sought a construction of property that would further the common good and just order (Koenig, 104). Indeed, it appears that Christian humanism served as a bridge between Sampay's construction of the social function of property and Duguit's original formulation.

Although the Argentine Constitution of 1949 adopted the social function of property, it must be noted at the outset that in the entire body of reported sessions of the constituent convention, Duguit is only mentioned once by name in relation to the social function of property (Sampay, 2012, vol. 3, p. 22; Diario, vol. 1, 315). This paucity of references to the founder of the social function of property, a founder who had significant ties to Argentina, Buenos Aires, and legal education in the country, is striking.

A. Interventions on the social function of property in the constituent convention

Legal historians are fortunate to have complete records of the sessions of the constituent convention related to the social function of property. This source shows a confluence of ideas concerning property and the constitution leading to the adoption of the social function doctrine. Within the constituent convention, four leading members advocated for the social function of property: Arturo Sampay; Rodolfo Valenzuela, a justice of the Supreme Court; Oscar Martini, a Socialist university professor; and Jorge Simini, a deputy from the province of Buenos Aires (Koenig, 116).

Sampay's interventions to the constituent convention reveal his justifications for introducing the social function of property into the constitution. Private property could not be abolished because it had important ties to human personhood and individual liberty. Private property, however, was also tied to community and social life (Diario, vol. 1, 277-278). From these dual aspects of private property, Sampay concluded:

> It follows, then, that private property – despite maintaining its individual character – assumes a double function, individual and social. . . . The proprietor – the concept is from Saint Thomas Aquinas – has the power of administration and just distribution of the benefits that the exterior goods possessed produce – *potestas procurandi et dispersandi* – with which property fills its double commitment. It meets an individual end covering the needs of the possessor, and a social end by shifting the rest to the community. The constitutional reform should be dedicated to this; together with the individual function of property, the obligatory nature of the social function that goes with it -- now legally sanctioned in the country through the law of agrarian transformation – and that makes this institution the indispensable piece of the new Argentine economic order (Diario, vol. 1, 278).

In Sampay's thought, Thomas Aquinas provided the theoretical basis for the social function of property which, in turn, could be put into practice through redistributive projects, such as agrarian reform, for the benefit of society.

Valenzuela argued along the same lines, but elaborated on these themes and cited Duguit in his intervention (Koenig, 117). Valenzuela asserted that individual liberties, such as the right to property, were not ends unto themselves, but rather were to serve the well-being and development of the collective. Such liberties had a social function (Ramella, 309).

Valenzuela's broad themes are the transformation of the state and the limitations social rights impose on individual rights. In this context, Valenzuela referenced Duguit to assert that states have transformed; "the state loses its Napoleonic form to adopt a wider, more flexible, more protective and more human form" (Diario, vol. 1, 315). Valenzuela illustrated this principle with various twentieth-century social constitutions, mentioning Mexico, the Weimar Republic, Estonia, Poland, Yugoslavia, Danzig, Brazil, and France (Diario, vol. 1, 315). Turning to the topic of private property, Valenzuela opined that Argentina must find a middle path between Soviet communism and classical liberalism; he suggested eschewing theories and schools of thought to reach a form of private property appropriate for Argentina (Diario, vol. 1, 322).

Seeking to justify the social function of property with historical practices, Valenzuela searched deeply for hints of the social function of property in texts that were uniformly associated only with the absolute right to property under classical liberalism. For example, he found that Napoléon had commented on the famous Article 544 of the French Civil Code of 1804 that the abuse of property should be avoided when it was prejudicial to society (Diario, vol. 1, 323; Ramella, 310). This slight nod in the direction of the public good appears to have been immediately forgotten; indeed Napoléon's French Civil Code of 1804 and its characterizaton of property were the ideas against which Duguit reacted to construct his theory of the social

function (Duguit, Mirow 2011, 1190). Valenzuela also carefully drew out language from comments by the Argentine codifier Vélez Sarsfield that appeared to soften a hardline approach to property as an absolute right. He noted that Vélez Sarsfield also recognized that absolute dominion was subject to "the limits and under the conditions established by law" (Diario, vol. 1, 323; Ramella, 310). This was wishful thinking in light of Vélez Sarsfeld's rather clear adoption of an absolute right to property, again the very intellectual construction of property that Duguit reacted against to put forth his doctrine of the social function. Nonetheless, Valenzuela's argument demonstrated the lengths proponents of the social function would go to rally historical sources to justify their position.

With his thought on private property informed by foreign constitutions, competing political theories, and recent examples of social limitations imposed on absolute ownership, Valenzuela stated:

> The solution to this important question is found in the characterization of the right to property as a social function. This is supported by current commentary, the observation of social phenomena in the last century, an appreciation of the present Argentine phenomenon, and the example of European and American countries that, before us, were pressed to adjust their constitutions to the necessities of the times (Diario, vol. 1, 323-324).

Valenzuela discussed several of these constitutional models with particular attention paid to the Mexican Constitution of 1917 and the Polish Constitution of 1921. He mentioned other

constitutions as examples: Peru (1938), Bolivia (1938), Cuba (1940), Ecuador (1946), Guatemala (1945), Chile (1925), Colombia (1936), Brazil (1946), Venezuela (1947), Dominican Republic (1947), and Nicaragua (1947) (Diario, vol. 1, 324). Supporting the social function of property in the Argentine Constitution, Valenzuela concluded:

> By proposing in Article 38 of our Constitution that it expressly state that private property has a social function, we intend to resolve juridically the economic disorder that the individualist concept of property has imposed on the social nucleus, we establish the true content of this right and in passing assign the principle of relativity to all other rights (Diario, vol. 1, 325)

This new concept of property led to concrete changes, such as state ownership of natural resources and state control of public services (Diario, vol. 1, 325-326).

Martini's views of property were also shaped by Saint Thomas Aquinas and Christian humanism, and, in this way, sought a balancing point between communism and capitalism in the social function of property (Koenig, 117). Martini spoke at length about the history and theory of property and was particularly influenced by Emmanuel Mounier's *De la propriété capitaliste à la propriété humaine* (Diario, vol. 1, 514-515; Ramella, 312). Mounier was a neo-Thomist Catholic convert and philosopher. The book, published in a series edited by Jacques Maritain, was a primer on Thomist property law reflecting Christian humanism and Catholic social doctrine. It is riddled with citations to Aquinas and peppered with references to the encyclicals of the church's social doctrine. It does not mention Duguit (Mounier).

In addition to Mounier, Martini drew from several other neo-Thomist writers including works by the Belgian Christian trade unionist Georges C. Rutten (1875-1952) and Louis Garriguet (1859-1927) (Lane, 828). Quoting a Spanish translation of Rutten's *La doctrine sociale de l'Eglise*, Martini asserted:

> According to the express doctrine of Saint Thomas, property of these goods is not an absolute and unconditional right, but a power of administration and distribution, marked with a kind of social obligation that directs the owner to use his property for the good of the collective (Diario, vol. 1, 515).

Through Thomism, Martini recognized the private and social function of property in the Constitution of 1949 (Diario, vol. 1, 515). Martini similarly employed Garriguet's *La propriété privée* to distinguish the social function of property from collective ownership and to set out the Thomist theory of the origin of property itself (Diario, vol. 1, 515-516). Like other proponents of the social function of property, Martini as deputy invoked Aquinas and Christian humanism to establish property's role in the physical and spiritual well-being of the community (Ramella, 312).

Jorge Simini's intervention operated on a more practical plane. He focused on the redistribution of lands and the transfer of ownership to agricultural workers of the land. His approach was more political than theoretical or legal. (Ramella, 314-315). Thus, deputies brought different levels of commitment to and comprehension of the social function of property to the constituent convention.

Unlike Simini's arguments, most of the interventions of these deputies revealed a focus Christian humanism as a component of a European legal thought. All proponents of the social function of property were versed in the social teaching of the Catholic church as an outgrowth of Christian humanism and neo-Thomist thought on society, economy, work, and property as found in the encyclicals *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931). This perspective on property was particularly important to Sampay and served as common ground in their approach to the topic (Madaria, 555-560). These underpinnings of the social function of property appeared to be much more influential than the tradition based on secular European sociological treatises that included Duguit and his works. This later tradition, however, was not completely absent.

B. Argentine legal culture and academic commentary

These drafters of the Constitution of 1949 shared a common heritage of Argentina's unique legal culture. The first half of the twentieth century was a particular rich and engaging moment for students, teachers, and practitioners of law. Sharing in a broader trend of the cultivation of knowledge, Argentine universities and their law faculties became centers for the serious academic investigation of their discipline. For example, the library at the faculty of law at the University of Buenos Aires was a significant research collection of approximately 12000 volumes replete with European and American sources (Tau Anzoátegui, 13-14). Students, professors, and lawyers were steeped not only in Argentine legal knowledge but also in materials and thought from throughout Europe. As Tau Anzoátegui summarizes:

> Argentina, a country of immigrants, was open to the reception of European juridical literature – French, Italian, Germany, Spanish – and in particular, Anglo-American works in some areas of law. The names of author-jurists such as Savigny, Ihering, Stammler and Kelsen; Gény, Saleilles, Planiol and *Duguit*; Ferri, Del Vecchio and Chiovenda; Altamira, Posada, Jiménez de Asúa, amongst others, were well known in the classrooms and in works written in the country, without neglecting the older classics of philosophy, politics, and jurisprudence (Tau Anzoátegui, 15; Mirow's emphasis).

Classroom lectures, books and their citations were supplemented with international correspondence, networks of scholars, and travel. The period from 1901 to 1945 also witnessed the adoption of broader sociological approaches to law, pushing lawyers away from a textual, code-centered analysis to questions of societal impact and later back again to doctrinal approaches (Tau Anzoátegui, 15-35). Despite such fluctuations over these decades, the drafters of the Constitution of 1949 would have been exposed to and adopted or critiqued such authors and their ideas, Duguit and his works among them. Thus, scant citation to Duguit's work and thought does not exclude familiarity with them and their influence on the provisions of the Constitution of 1949 addressing property.

Sources of the social function of property in the Argentine Constitution of 1949 are not limited to the debates by the deputies in the constituent convention. Ramella has uncovered and described an additional significant source for legal historians of the social function of property, a

set of questions to and responses from the law faculty of the University of Buenos Aires conducted in 1948 in light of the new constitution (Ramella, 324; Facultad de Derecho). Several professors raised the social function of property and the importance of placing this definition of property in the new constitution. These included Miguel Ángel Berçaitz, Máximo Gómez Forgues, Carlos Mouchet and Alfredo R. Zuanich who approved the incorporation of the social function of property as found in the draft constitution (Ramella, 327-328). Other professors explored the topic at greater length.

Recognizing the difference between Duguit's concept of "property as a social function" and the less transformative idea of "property having a social function," Professor of civil law Fernando Legón suggested that the second formulation would strike the appropriate balance between the individual and the collective (Ramella, 328). Without such direct references to Duguit, several other professors -- Héctor Llambías, Juan Villoldo, Bargallo Cirio, and Moyano Llerena -- noted the importance of the common good, service, and human life in relationship to property (Ramella, 328).

In addition to the answers to this questionnaire, Salvador Dana Montaño, the director of the same institute, offered his thoughts on property in a contribution to a conference on philosophy originally scheduled for 1948 but held a year later. Published as *Justicia social y reforma constitucional*, the book treated the question of property extensively in seven chapters. There is not one mention of Duguit, but Dana Montaño makes a rare reference to the Chilean Constitution of 1925 whose property provisions were based directly on Duguit's work (Dana Montaño, 117, Mirow 2011). His conclusions were in keeping with the ideas expressed above and specifically adopted the viewpoint of Christian humanism over European theorists to place

restrictions on the unbridled exercise of property (Dana Montaño; Ramella, 329-330). Although employing distinct terminology, these professors all sought to modify the idea of an absolute right to private property by tempering it with some sense of social obligations to the common good, the collective, and the human being (Ramella, 328).

Deputies and professors supported Sampay's adoption of the social function of property. Further support may have been found in Sampay's vision of constitutional goals. Apparently influenced by the political writings of Ferdinand Lassalle, Sampay sought constitutions that reflected reality as much as possible rather than those that expounded an ideal structure or goals detached from actual constitutional and state practice (Arias Pelerano, 20; Sampay 1973, 37-39). This view aligned well with Duguit's presentation of the social function of property in which he asserted that property as a social function was a presently accurate description of property based on numerous illustrations gathered by Duguit from French law (Mirow 2011, 1192). Thus, in the pursuit of real constitutionalism, Sampay, if he were directly aware of Duguit's arguments for the social function, would have been drawn to their present descriptive, rather than future normative, force.

Recognizing a second practical aspect of changing the nature of property in Argentina, Sampay also knew that this new definition of property had to be extended from constitutional language into the everyday applicable language of the civil law, a new civil code. As Sampay noted in this context, "with the exception of family law, the civil code is nothing more than the ordering of property law" (Diario, vol. 1, 279). Because a civil code was built on the concept of property, the social function of property would become the central aspect of a new civil code (Koenig, 136-137). As Sofanor Novillo Corvalán commented after the incorporation of the

social function of property into the Constitution of 1949, property in Argentina operated on at least two planes, a constitutional level dealing with the state and a codified level governing the day-to-day notions of title and ownership (Ramella, 330). Nonetheless, the projection of the social function of property into the sources of applicable private law in Argentina was not accomplished. This lack of penetration into the civil law meant that there were various levels within which the interpretation of property could take place (Ramella, 352).

Even on the constitutional level, the redefinition of property had striking consequences. Private property was not abolished; it now had a double function, one individual and another social. The social function of property justified "anti-imperialist" projects of nationalization and the expropriation of foreign capital within Perón's particular interpretation of Christian humanism (Koenig, 144-145). The debates of the drafters and particularly the work and interventions of Arturo Enrique Sampay reveal the rhetorical strategies used to incorporate this radically new, yet politically consistent, construction of property into the Peronist constitution. Successful constitutional reform only occurs at particular political moments. Peronists observed the compatibility of the social function of property with many of their constitutional and legal reforms. They surely noted the flexibility and utility of the doctrine.

The Constitution of 1949 was not long-lived. It was abolished by military dictators and erased from the political and legal history of Argentina (Koenig, 31-32). In 1955, anti-Peronists ushered in a coup under Eduardo Lonardi, a national Catholic military officer (Koenig, 211). On April 27, 1956, President Aramburu decreed that the Constitution of 1949 was derogated and that the Constitution of 1853/1860 with subsequent amendments was in force (Koenig, 231). This decree marked the end of the social function of property in Argentina and a return of the absolute

protection of private property under classical liberalism and the Constitution of 1853/1860 (Ramella, 308-309; Sampay 1973, 122-124). There were some unsuccessful attempts to introduce the social function of property during the constituent convention of 1957, especially as it was tied to agrarian reform and the redistribution of land (Ramella, 351). The most significant phase of the social function of property in Argentine positive law was over. The Argentine Constitution of 1853/1860 with its substantial revisions in 1994 recognized an inviolable right to private property unhindered by the imposition of property as or having a social function (Constitution of 1853/1860 revised 1994, Art. 17).

III. Assessing Duguit's Influence in Argentina

Tracing Duguit's work and influence in Argentina provides an example of the way legal and political ideas in seminal sources can be pulled into other sources, lose an identifiable connection to the original source, and continue as important features of legal development without direct attribution. For example, this challenge has been presented well in studies assessing the contributions of the United States Declaration of Independence and the United States Constitution of 1787 to constitutional and political thought in the world. George Athan Billias has used the metaphor of echoes to represent the untraceable reports of legal texts and their content as they travel the world over time, becoming reflected, absorbed, modified, and softened on each iteration (Billias). By 1949, Duguit's works and his theory of the social function of property had undergone similar appropriations, modifications, and assimilations into other works and, as Levaggi reminds us, into the mentality of cultured early twentieth-century

Argentine jurists. It had echoed back and forth across the Atlantic Ocean, off and over the Andes Mountains, throughout Europe and Latin America. Drafters of the Argentine Constitution of 1949 knew Duguit's writings and his concepts even if some of them did not mention his name. Duguit was, however, named, not only directly in the debates related to the social function of property in the constitution but also by scholars and writers outside this circle of drafters. We do not find, for example, the multiple references to Duguit in the constituent convention and direct quotations of his work by the president as in the case of the Chilean Constitution of 1925 (Mirow 2011, 1200-1205). Nonetheless, Duguit's works must be added to a list of multiple sources and influences that led to the adoption of the social function of property in Argentina.

The different paths that countries of Latin America took to incorporate the social function of property into their constitutions at different times serve to caution legal historians of the region. One must not jump to conclusions of similarity of development when observing similar ends. The examples of Argentina, Chile, and Colombia demonstrate this well (Bonilla; Mirow 2011). Nonetheless, similar approaches to sources, texts, foreign influences in Latin America meant that even in these three distinct cases, Duguit served in one way or another as an important author (Bonilla, 1154-1159). Brazil, however, adopted a social function of property without direct reference to Duguit, but the influence of Duguit's thought on developments in the country remains unsettled (Crawford, Cunha).

Just as Latin American countries adopted the social function of property in various ways and at different times, they employed the term and its theory in different political contexts and with different goals in mind. The Peronist adoption of the social function of property was consistent with contemporaneous constructions of a Peronist state, economy, and political

structure. Peronists interpreted "social function" in light of the political exigencies pressing on the state, the economy, and its legal system. Not recognizing the political and legal malleability of the term, those leading the coup of 1955 determined that such a term and its interpretation had best be abolished rather than adapted.

This rejection of the social function of property in Argentina may be contrasted with appropriation of the social function of property in Chile by left and right. Both Presidents Allende and Pinochet found the term useful because each could carefully design programs, policies, and actions around their own definition of the "social function" (Mirow 2011, 1216-1217). In these contexts, "social function" has no fixed meaning and suffered from indeterminacy (Esquirol, 340-341). Indeed, in the context of the Argentine Constitution of 1949, the scholar Carlos Enrique Mackinnon observed that an inherent danger in the social function of property was its openness to various interpretations by leaders and politicians with opposite ideas of government and the common good (Ramella, 330).

Diversity of legal experience exists not only in the exterior but also within the interior. This study has focused exclusively on national developments. In a country as varied as Argentina and with a history of strong regional distinctions and federalism, interesting work remains to be done on the provincial level and particularly with the incorporation of the social function of property into provincial constitutions. Indeed, Koenig noted the existence of 14 provincial constitutions that incorporated the social function doctrine, and Parise also mentioned the doctrine in several provincial constitutions (Koenig, 43; Parise, 217). The use of provincial sources in this national development remains unknown.

Similarly, this study has made only passing reference to civil codes and judicial opinions. In civil law countries, theoretical understandings of property are often transferred into positive law in civil codes as well as in constitutions. Judges may reveal their interpretation of these provisions through the jurisprudence of case law. While constitutional provisions are now widely accepted as governing the subsidiary law of codes and the content of private law, this hierarchical structure was not always clearly established. This ambiguity of hierarchy in sources was particularly apparent in the field of property where scholars and practitioners of private law often successfully asserted the primacy of civil code provisions and their underlying origins in Roman law and the *ius commune* against novel and broad definitions of the property found in the public law sources of constitutions. Thus, modern scholars attempting to understand the construction of property in early twentieth-century Argentina must be aware of the tensions and contradictions expressed by members of the legal academy and profession. This is particularly true in the exploration of the social function of property because Duguit's analysis purported to be descriptive of changes in property *that had already occurred* in the advanced legal and economic societies of Europe and Latin America.

Duguit's work was a source for the Argentine construction of the social function of property from its introduction in 1911, during the first half of the twentieth century, and until the repeal of the Peronist constitution in 1956. Although mentioned in the debates of the Argentine Constitution of 1949, Duguit was only one of a variety of sources employed by advocates of the doctrine, and his direct influence in the area is significantly less than one might expect considering the historical link between his lectures in Buenos Aires and the founding of the doctrine. Argentine proponents of the social function of property appear to have turned more

readily to emanations of the doctrine found in Catholic social teaching and its foundational documents such as the papal encyclicals *Rerum Novarum* and *Quadragesimo Anno*. Duguit's work was present, but it was not a singular voice in the field.

Appendix

Chapter IV of the Preamble of the Constitution of Argentina (1949)

Chapter IV. The Social Function of Property, Capital, and Economic Activity.

Article 38. - Private property has a social function and therefore is subject to the obligations towards a common good established by law. The State must control the distribution and use of farmlands or intervene in order to develop and enhance their productivity in the interest of the community, and ensure to all farmers or farmer-families the opportunity to become owners of the land they cultivate. Expropriation for reasons of public utility or general interest must be authorized by land and previously compensated. Only Congress imposes the taxes mentioned in Article 4 [of this constitution]. Every author or inventor is the exclusive owner of his work, inventory or discovery for the term provided by law. Confiscation of property is abolished forever from Argentine legislation. No armed group can make requisitions or require assistance of any kind during time of peace (translation from Parise, 216).

Article 39. - Capital should be for the service of the the national economy and have as its principal object the social well-being. Its diverse forms of exploitation may not be contrary to the ends of the public good of the Argentine people.

Article 40 - The organization of wealth and its exploitation have for its end the well-being of the people within an economic order conforming to the principles of social justice. The state by means of law shall be able to intervene in the economy, monopolize certain activity in safeguarding the general interest and within the limits established by fundamental rights guaranteed in the Constitution. Excepting importation and exportation, which shall be governed by the state in accordance with the limitations and procedures determined by law, all economic activity shall be conducted in accordance with free private initiative, as long as it does not have its ostensible or hidden goal of dominating national markets, eliminating competition or unfairly gaining benefits.

Minerals, water courses, deposits of oil, carbon and gas and the other natural sources of energy, with the exception of vegetables, are the unassignable and inalienable property of the Nation with the corresponding participation in their production as shall be convenient for the provinces.

Public services belong originally to the state and under no condition may they be transferred or conceded for their exploitation. Those that find themselves under the power of individuals shall be transferred to the state, through sale or expropriation with prior indemnification when determined by national law.

The price for the expropriation of business concessions of public services shall be the original cost of the goods as affected by the exploitation less the sums that have amortized during the lapse completed from the grant of the concession and the excess above a reasonable profit which shall also be considered as the recovery of investment capital.

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