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THE SOCIAL FUNCTION OF PROPERTY IN BRAZILIAN LAW

*Alexandre dos Santos Cunha**

INTRODUCTION

The idea that rights serve a social function was first introduced into Brazilian legal culture about a century ago. Although the concept is historically linked to the French scholar Léon Duguit, the Brazilian version is distinct and does not share these French origins. Twentieth-century Italian jurists Pietro Cogliolo and Enrico Cimbali, who both exerted overwhelming influence over the so-called “Renovators” of Brazilian Private Law, are primarily responsible for Brazil’s version.¹ Unlike Duguit, Cogliolo and Cimbali construed the concept of a social function as a justification for imposing only external limits on the exercise of rights.² Consequently, Brazilian courts have never considered Duguit’s understanding of the social function of property as a source of internal limitations.

The concept of the social function of rights first appeared in the Brazilian Constitution in 1934, and has become considerably stronger since the country adopted a new Civil Code in 2002. This Essay focuses on the 2002 Code’s impact on the way jurists and courts understand the concept, especially with respect to the social function of property. This Essay is divided into four parts. Part I presents a brief history of Brazilian property law, Part II discusses the social function of property as a legal principle, Part III discusses it as a structural element of property, and Part IV discusses it as a structural element of rights.

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1. Cogliolo’s most influential work was his book *Filosofia del Diritto Privato* (The Philosophy of Private Law), published in 1912. Cimbali’s most influential work was his book *Nuova fase del Diritto Civile nei rapporti economici e sociali* (The Transformation of Civil Law in Economic and Social Relations), published in 1907.

2. Judith Hofmeister Martins-Costa, *Reflexões Sobre o Princípio da Função Social dos Contratos*, in *O DIREITO DA EMPRESA E DAS OBRIGAÇÕES E O NOVO CÓDIGO CIVIL BRASILEIRO* 218, 218–48 (Alexandre dos Santos Cunha coord., 2006). Cogliolo and Cimbali’s understanding developed from the ideas of German jurist Otto von Gierke. *See id.*

I. A BRIEF HISTORY OF BRAZILIAN PROPERTY LAW

Portugal's occupation of Brazil is a unique episode in the history of the European colonization of the Americas. Unlike Spain, Portugal applied a model of absolute centralized administration to her newly acquired territories, instead of promoting colonial institutions. The colonies utilized the same political, administrative, and judicial organization and the same legal norms—especially the *Ordenações do Reino* (the Kingdom's Legal Rules)—as the metropolitan territories. Brazil and Portugal's legal professionals were educated at Coimbra University in Portugal.³ Indeed, the Portuguese Crown considered the Brazilian territory as integral a part of its property as the Moorish territories that the Kingdom had reclaimed in the eleventh and fourteenth centuries.

As a result, the colonization of Brazil followed the same pattern of development that Portugal followed in the fourteenth century.⁴ The Crown employed the *sesmaria*—a system of land management first used under Ferdinand I in 1375—to distribute property among private entrepreneurs and to promote colonization.⁵ Because the land remained public property, we might describe the *sesmaria* in modern legal terminology as a kind of gratuitous concession of the right to use the land, subject to a series of conditions such as limiting the land's occupation and restricting its use to certain stipulated economic activities.⁶ The *sesmaria* could be transferred by contract or through inheritance, but restrictions on the right of use could not be altered. The Crown could reclaim the land if one failed to observe these conditions. Beginning in 1534, Portugal promoted the occupation of Brazilian territory through *sesmarias*, and by the time Brazil gained its independence between 1821 and 1824, it had distributed all land near the coast.⁷ The Brazilian *sesmarias* closely resembled those distributed in southern Portugal: they were attached to large tracts of land, concentrated in the hands of a small group of *latifundium* estate landowners, employed intensive slave labor, and specialized in cultivating monoculture crops for export.

The unique process that led to Brazil's independence meant that any changes from the Portuguese legal system developed extremely slowly,

3. LUIS WECKMANN, LA HERENCIA MEDIEVAL DEL BRASIL 81–105, 236–49 (1993).

4. See Luiz Antonio Ferraro Júnior & Marcel Bursztyn, *Das Sesmarias à Resistência ao Cercamento: razões históricas dos Fundos de Pasto*, 23 CADERNO CRH 385, 387 (2010) (Braz.).

5. WECKMANN, *supra* note 3, at 106–15.

6. LAURA BECK VARELA, DAS SESMARIAS À PROPRIEDADE MODERNA: UM ESTUDO DE HISTÓRIA DO DIREITO BRASILEIRO (2005).

7. RAYMUNDO FAORO, OS DONOS DO PODER: FORMAÇÃO DO PATRONATO POLÍTICO BRASILEIRO (1958). Brazil's independence was a peculiar affair. After Napoleon invaded Portugal in 1807, the Portuguese Royal Court was forced to move from Lisbon to Rio de Janeiro. This promoted Brazil from a mere colony to a formal part of the United Kingdom of Portugal, Brazil, and the Algarves. When King John VI returned to Lisbon in 1821, it was determined that the Crown Prince of Portugal would continue to rule Brazil. After a long series of quarrels with the Portuguese Parliament in Lisbon, however, the Crown Prince arranged to be crowned Brazil's first Emperor in 1822.

especially in the domain of Private Law.⁸ Although the Brazilian Constitution of 1824, which created the new Brazilian Empire, stipulated that a Civil Code would be written,⁹ a lack of consensus prevented the drafting of a definite version. And while nineteenth-century efforts to codify a Private Law statute did result in the creation of some important documents,¹⁰ the first Brazilian Civil Code was not adopted until 1916, twenty-seven years after the formation of the Brazilian Republic in 1889. Thus, the *Ordenações Filipinas*, decreed by King Philip II of Portugal and Spain in 1603, remained in effect in Brazilian territory until 1917, fifty years after they had been revoked in Portugal.

However, adopting norms concerning land disputes could not wait for the vicissitudes of codification. With independence came the dissolution of the *sesmaria* system, leaving Brazil with no legal instrument governing land appropriation. This made it extremely difficult to promote agrarian frontier expansion and to grant rural credit in the absence of reliable collateral. Thus, in 1850, the Brazilian Parliament approved Imperial Law No. 601,¹¹ popularly known as the *Lei de Terras* (Land Statute), along with other attempts at structural economic reform aimed at preparing the country for the gradual abolition of slavery.

The Land Statute created private property in Brazil for the first time. The statute mirrored the Continental Law's definition of the concept of *dominium* by treating private property as an individual and absolute right. It converted *sesmaria* rights holders into landowners of the estates they already held, and extended the same ownership rights to anyone who possessed public land for at least 100 years before the statute's passage. In this way, the statute perpetuated the concentration of rural property in the hands of the same few who held the land in colonial times, effectively blocking the distribution of land to the European and Japanese immigrants who came to Brazil after independence.

The Land Statute had no social concerns. Its main aim, successfully achieved, was preventing immigrants and former slaves from becoming landowners. Rather than promoting the settlement of new families in rural

8. Alexandre dos Santos Cunha, *O Ensino Jurídico e o Processo Codificatório Civil Brasileiro*, DIREITO EM REVISTA, May 2002, at 43 (Braz.).

9. CONSTITUIÇÃO POLITICA DO IMPERIO DO BRAZIL (1824) art. 179(XVIII).

10. The most important of the many code projects proposed during the Empire was the Esboço de Código Civil Brasileiro (A Draft Civil Code of Brazil), written by Augusto Teixeira de Freitas, a follower of Savigny and the Historical School, between 1857 and 1866. Although the Empire never adopted it, Freitas's text strongly influenced the Civil Codes of Argentina, Nicaragua, Paraguay, and Uruguay. Particularly remarkable is that the Esboço's assumptions were markedly different from the mainstream paradigms of the time, especially those established by the Code Napoléon and the Código Civil de Chile, and was three decades ahead of the model that would finally be adopted by the Buergerliches Gesetzbuch. To a certain extent, the Esboço also heralded the strong influence German thought would have over Brazilian legal doctrine throughout that country's history. Cf. Cunha, *supra* note 8.

11. Lei No. 601, de 18 de Setembro de 1850, COL. LEIS IMPERIO BRASIL, tomo 11, pt.1: 307.

areas and redistributing land, it deliberately inflated property values by creating a scarcity of estate deeds. In transforming rural estates into commodities, it created a substitute for slave ownership to deal with problems of capital immobilization, value reservation, and provision of debt collateral.¹² At the same time, the *dominium* concept authorized changes to the original use restrictions on the *sesmaria* grant. The ability to alter the land's use was essential to the diversification of the Brazilian economy from primarily sugar exports to the production of coffee, cotton, and rubber.

The 1916 Civil Code made only one substantial modification to the former Empire's Land Statute system. To strengthen the *dominium* deeds against alternative, informal modes of land appropriation or possession, publicly notarized registration of real estate—which the *Lei Hipotecária* (Mortgage Statute) originally authorized in 1864¹³—became compulsory. This introduced Brazil to the recording of deeds at a real estate registration, a mode of *dominium* acquisition borrowed from German Private Law.

The draft Civil Code originally contained an innovative limitation on the exercise of property rights by providing that “[t]his statute protects, *within the limits of the law*, the owner's right to make whatever use he sees fit of his property, and to claim this property, in the case of corporeal goods, from those who unlawfully possess it.”¹⁴ However, the Federal Parliament omitted this text from the final version, which simply provided that “[t]his law assures to the owner the right to use, enjoy and dispose of his property, and to recover it from the power of whoever unjustly possesses it.”¹⁵

II. THE SOCIAL FUNCTION OF PROPERTY APPLIED AS A LEGAL PRINCIPLE

Although the draft Code of 1916 did not expressly introduce the concept of a social function of property, its author, Clovis Bevilacqua, understood it as expressing that principle. In Bevilacqua's words, property rights must be subjected to “restrictions determined by considerations of social order,” which is why “modern Codes are leaning toward finding a balance between the individual's interest and that of society.”¹⁶ The balance does not spring from an individual's action, but rather from the statutory law, which “expresses the conditions of social life, at each moment.”¹⁷

12. See generally ZÉLIA MARIA CARDOSO DE MELLO, *METAMORFOSES DA RIQUEZA, SÃO PAULO, 1845-1895: CONTRIBUIÇÃO AO ESTUDO DA PASSAGEM DA ECONOMIA MERCANTIL-ESCRAVISTA À ECONOMIA EXPORTADORA CAPITALISTA* (1990).

13. Lei No. 1237, de 24 de Setembro de 1864, COL. LEIS IMPERIO BRASIL, tomo 24, pt.1: 69.

14. “A lei assegura ao proprietário, dentro dos limites por ella traçados, o direito de utilizar-se de seus bens, como entender e de reivindicar-os, quando corpóreos, do poder de quem, injustamente, os possui.” 1 CLOVIS BEVILACQUA, *DIREITO DAS COISAS* 134 (1941).

15. “A lei assegura ao proprietário o direito de usar, gozar e dispor de seus bens, e de reaver-los do poder de quem quer que injustamente os possui.” CÓDIGO CIVIL [C.C.] (1916) art. 524 (Braz.).

16. 1 BEVILACQUA, *supra* note 14, at 134.

17. *Id.*

In the same vein as other “Renovators” of Brazilian Private Law, Bevilacqua perceived the social function of property as a legal principle that was likely to justify external limitations on property rights imposed by statutory law. In the Renovators’ view, “the rights and restrictions belong to separate dimensions; the restrictions are always seen as ‘disadvantages,’ externally imposed upon the rights; the scope of protection of a right is wider than what it effectively ensures, because, upon unrestricted rights, limits are imposed that reduce the initial scope of protection.”¹⁸

Because the Federal Parliament omitted it from the 1916 Civil Code, the social function of property remained a mere legal principle until the Brazilian Constitution of 1934 established it as a constitutional principle. In its bill of individual rights, the Constitution established that “the right of property is protected, provided it is not exerted against any social or collective interests, in the forms determined by the law.”¹⁹ According to Brazilian legal doctrine, the idea of “any social or collective interests” encompasses the concept of a social function of property; it thus acquires constitutional status and may be put into effect according to “the forms determined by the law.”²⁰ In other words, social function becomes an external limitation that the government must impose on the exercise of property rights.²¹ Pursuant to this authorization, limitations were enacted in normative instruments of urban policy, such as the *Lei de Loteamento para Venda de Terrenos em Prestações*²² (Statute Concerning the Plotting of Land to be Sold in Installments) and the *Estatuto da Cidade*²³ (City Statute), as well as legislation concerning agrarian policy, such as the

18. Martins-Costa, *supra* note 2, at 232.

19. CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL (1934) art. 113.17.

20. *Id.*

21. All Brazilian Constitutions since 1934 have, more or less explicitly, made room for the social function of property. The 1937 text established the authoritarian regime of the *Estado Novo*, which stipulated that “the nature and limits [of property rights] shall be defined by the laws which regulate its use.” CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL (1937) art. 122(XIV) (Interdepartmental Comm. on Cooperation with the Am. Republics trans., 1939). When Brazil became a democracy again, the 1946 Constitution stated that “the use of property shall be conditioned upon social welfare.” CONSTITUIÇÃO DOS ESTADOS UNIDOS DO BRASIL (1946) art. 147 (A.J. Peaslee trans., 1950). During the Military Dictatorship, the 1967 Constitution determined that “[i]t is the purpose of the economic and social order to achieve social justice, on the basis of the following principles: . . . The social function of property.” CONSTITUIÇÃO DO BRASIL (1967) art. 157(III) (A.J. Peaslee trans., 1967). The current Constitution states that “property shall observe its social function.” CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL (1988) art. 5(XXIII) (Official Senate translation).

22. Decreto No. 58, de 10 de Dezembro de 1937, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.12.1937 (Braz.). For more about the *Lei de Loteamento para Venda de Terrenos em Prestações* as a normative instrument of urban policy, see Alexandre dos Santos Cunha, *Informal Land Subdivision and Real Estate Regularization: A Comparative Study Between Colombia and Brazil*, 40 U. MIAMI INTER-AM. L. REV. 315 (2009).

23. Lei No. 10.257, de 10 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.7.2001 (Braz.).

*Estatuto da Terra*²⁴ (Land Statute) and the *Lei da Reforma Agrária*²⁵ (Land Reform Law).

An analysis of *Supremo Tribunal Federal* (Supreme Federal Court) (STF) precedent clearly demonstrates that Brazil adopted this interpretation of the social function of property clause in the 1988 Constitution.²⁶ A simple query of STF court decisions interpreting this clause over the last five years returned thirty related opinions, which analyze its application in four different contexts: (1) the constitutionality of judicial instruments created by the City Statute; (2) the progressive taxation on urban property; (3) the expropriation of condominium land for land reform; and (4) the determination of the rights of the occupants of public land.

The City Statute established general guidelines concerning urban law and policies that must be observed by municipalities.²⁷ The statute also provided for the “onerous concession of the right to build” (*outorga onerosa do direito de construir*), a mechanism by which the municipality can force an individual to pay for any construction that exceeds the surface area of his or her own land.²⁸ In *Koerich Participações Administração e Construção LTDA v. Município de Florianópolis*²⁹ (*Koerich Inc. v. County of Florianópolis*), the STF held that this is “an instrument directed at the correction of distortions brought about by unruly urban growth, at the promotion of the full development of the functions of the city, and at the application of the principle of the social function of property.”³⁰ Therefore, it is an external limit imposed by a city’s Urban Development Plan and authorized by the social function principle.

The same understanding permeates the debate over the progressive taxation of urban real estate. The 1988 Constitution required that municipalities tax urban real estate.³¹ “[I]n order to ensure achievement of the social function of property,” such taxes should be graduated.³² In *Melo*

24. Lei No. 4.504, de 30 de Novembro de 1964, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.11.1964 (Braz.).

25. Lei No. 8.629, de 25 de Fevereiro de 1993, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.2.1993 (Braz.).

26. *See supra* note 21 (explaining that each Brazilian constitution has incorporated a social function of property clause). The STF was created by the 1891 Constitution, which also founded the republican regime and the federal system in Brazil. Throughout its history, the STF performed functions similar to those of the U.S. Supreme Court. Since the adoption of the 1988 Constitution, it has become closer in character to European constitutional courts, but retains its status as the highest court of the Judicial Branch.

27. *See* Lei No. 10.257, de 10 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.7.2001 (Braz.).

28. *See id.* The payment may be in money, land, work, or services. *See id.*

29. S.T.F., Recurso Extraordinário No. 387.047, Relator: Min. Eros Grau, 06.03.2008, 2317, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELECTRÔNICO [S.T.F.J.e.], 02.05.2008, 799 (Braz.).

30. *Id.* at 804.

31. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL (1988) art. 156 (Official Senate translation).

32. *Id.* ¶ 1.

*v. Município de Belo Horizonte*³³ (*Melo v. County of Belo Horizonte*), the STF severely curtailed the municipal power to levy such taxes. The STF held that while such taxes may be graduated in time, the municipalities could not base the tax rate on the real estate's use or value.³⁴ This decision spurred a political movement in support of municipalities that culminated in the passage of the Twenty-ninth Constitutional Amendment, which enlarged municipal taxing power.³⁵ Despite this development, the STF continues to strictly control property tax legislation through its interpretations of the social function principle.³⁶

III. THE SOCIAL FUNCTION OF PROPERTY APPLIED AS A STRUCTURAL ELEMENT OF PROPERTY

A survey of STF decisions over the last five years reveals that there are other, more exotic interpretations of the social function of property. In *Estácio de Souza Leão Filho v. Presidente da República*³⁷ (*Estácio de Souza Leão Filho v. President of the Republic*), *Rafaeli e outro v. Presidente da República*³⁸ (*Rafaeli et al. v. President of the Republic*), and *Siqueira e outro v. Presidente da República*³⁹ (*Siqueira et al. v. President of the Republic*), the STF deemed it necessary to determine whether the social function of property is a structural element of property rights themselves or the *land* to which the rights belong. The three cases were fairly similar. The plaintiffs, owners of *condominium* lands in rural areas, were attempting to annul a presidential act expropriating the estate for land reform. According to the 1988 Constitution:

It is within the power of the Union to expropriate on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from

33. S.T.F., Recurso Extraordinário No. 153.771, Relator: Min. Moreira Alves, 20.11.1996, 1881, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELECTRÔNICO [S.T.F.J.e.], 05.09.1997, 496 (Braz.).

34. *Id.* at 572.

35. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL (1988) amend. XXIX (Official Senate translation).

36. The most recent case on the matter is *Gasparin v. Município de Curitiba* (*Gasparin v. County of Curitiba*), S.T.F., Recurso Extraordinário No. 595.080, Relator: Min. Joaquim Barbosa, 31.08.2010, 2417, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELECTRÔNICO [S.T.F.J.e.], 01.10.2010, 1299 (Braz.).

37. S.T.F., Mandado de Segurança No. 24.573, Relator: Min. Eros Grau, 12.06.2006, 2260, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELECTRÔNICO [S.T.F.J.e.], 15.12.2006, 160 (Braz.).

38. S.T.F., Mandado de Segurança No. 25.299, Relator: Min. Sepúlveda Pertence, 14.06.2006, 2246, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELECTRÔNICO [S.T.F.J.e.], 08.09.2006, 178 (Braz.).

39. S.T.F. Mandado de Segurança No. 26.129, Relator: Min. Eros Grau, 14.06.2007, 2286, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELECTRÔNICO [S.T.F.J.e.], 24.08.2007, 563 (Braz.).

the second year of issue, and the use of which shall be defined in the law.⁴⁰

The Constitution further specifies:

The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

- (I) rational and adequate use;
- (II) adequate use of available natural resources and preservation of the environment;
- (III) compliance with the provisions that regulate labour relations;
- (IV) exploitation that favours the well-being of the owners and labourers.⁴¹

On the other hand, “[e]xpropriation of the following for agrarian reform purposes is not permitted: (I) small and medium-size rural property, as defined by law, provided its owner does not own other property; (II) productive property.”⁴²

In all three cases, the act of expropriation was imposed upon rural estates that were not following the constitutional principle of “rational and adequate use”: they did not reach the “degree of land use” nor the “degree of efficiency in the exploitation” of land required by the Land Reform Statute. Although the plaintiffs’ estates fell into the category of large-size rural property, they all belonged to more than one owner in a *condominium* regime.⁴³ Each individual owner’s share would only constitute a small or medium-size rural property and thus could not be expropriated for land reform.⁴⁴ For this reason, the owners asked the STF to pronounce that the act of expropriation was abusive.

From a Private Law perspective, these were easy cases. Brazilian statutes, like their counterparts in many civil law systems, do not provide for the coexistence of property rights on one parcel of land. When a piece of property is held in *condominium*, it has only one property right that is exercised simultaneously by multiple individuals. As they share this single right, they must exercise it in conformity with its social function. If they do not, the state may expropriate the estate.

However, this debate took a totally different direction when argued before a court with only one Private Law specialist. The STF justices split into two groups. The dissenters favored the plaintiffs and argued that, in the case of multiple owners, the ratio between the total area and the number

40. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL (1988) art. 184 (Official Senate translation).

41. *Id.* art. 186.

42. *Id.* art. 185.

43. Estácio de Souza Leão Filho v. Presidente da República, S.T.F., Mandado de Segurança No. 24.573, Relator: Min. Eros Grau, 12.06.2006, 2260, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELECTRÔNICO [S.T.F.J.e.], 15.12.2006, 160, 162–64 (Braz.).

44. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL (1988) art. 185 (Official Senate translation).

of *condominium* participants must factor into the land's categorization as small, medium, or large-size rural estates.⁴⁵ The majority argued that the social function is an attribute of the property itself, not of its owners or their property rights.⁴⁶ Thus, one must consider only whether the *land* conforms with its social function.

IV. THE SOCIAL FUNCTION OF PROPERTY APPLIED AS A STRUCTURAL ELEMENT OF RIGHTS

Debate concerning the convenience and necessity of a new Brazilian Civil Code started as early as the 1940s, during World War II. In 1969, the Ministry of Justice appointed a group of seven jurists, led by Miguel Reale, to write a draft. Their draft was sent to Parliament in 1975, approved by the Lower House in 1984, by the Senate in 2001, and finally promulgated in 2002.⁴⁷

Despite being created in the 1970s under the aegis of a right-wing military dictatorship whose economic policies favored social exclusion and income concentration, the 2002 Code is surprisingly socially oriented. Because Reale came from the *integralista* movement (the Brazilian equivalent of Catholic authoritarianism), he had a tendency toward communitarian thinking. He believed that “[e]ven though socialism has not triumphed, sociality has, and collective values must prevail over individual ones, without the loss, however, of the founding value of the human person.”⁴⁸ Therefore, a “social sense is one of the most remarkable traits of the draft, in contrast with the individualism conditioning the [1916] Civil Code.”⁴⁹

One way the 2002 Civil Code expresses this “social sense” is its provision for “a new concept of property, based upon the constitutional principle that the function of property must be social, [that] overcomes the interpretation according to which . . . property is an exclusive function of the interests of individuals, owners, or possessors.”⁵⁰ Although Reale mentions the “constitutional principle” of the social function of property to justify the legal imposition of limits on property rights, he is not among those jurists who view the social function merely as an authorization to impose external limits on those rights. Rather, he thinks that “the rights and

45. *Estácio de Souza Leão Filho*, 2260 S.T.F.J.e. at 165–71.

46. *Id.* at 177–87. The decision was reached by a vote of five to four. The majority justices were Sepulveda Pertence (appointed by President Sarney in 1989), Cezar Peluso (appointed by President Lula da Silva in 2003), Carlos Britto (appointed by President Lula da Silva in 2003), Joaquim Barbosa (appointed by President Lula da Silva in 2003), and Eros Grau (appointed by President Lula da Silva in 2004). The dissenting justices were Celso de Mello (appointed by President Sarney in 1989), Marco Aurelio (appointed by President Collor in 1990), Ellen Gracie (appointed by President Cardoso in 2000), and Gilmar Mendes (appointed by President Cardoso in 2002).

47. For a comprehensive history of the 2002 Brazilian Civil Code, see MIGUEL REALE, *O PROJETO DO NOVO CÓDIGO CIVIL* (2d ed. 1999).

48. *Id.* at 7.

49. *Id.*

50. *Id.* at 6.

the respective limits are immanent to any legal position; the definitive contents of rights are, precisely, the contents resulting from this understanding of rights 'being born' with limitations; therefore, the scope of protection of a right is the scope of the effective guarantees this right provides."⁵¹ This new understanding permeates the text of Article 1228 of the 2002 Civil Code, whose first paragraph reads:

The right of property must be exercised in accordance with its economic, social and environmental ends, so that the flora, fauna and natural beauties are preserved, as well as the ecological equilibrium and the historical and artistic patrimonies, and so that air and water pollution are averted, in obedience of the rules established by specific legislation.⁵²

Thus, the 2002 Civil Code broke with mainstream Brazilian legal thought by linking the exercise of property rights to economic, social, and environmental ends. The Code internalizes the social function of property by imposing a duty of solidarity upon the owner.

Although Reale's conception approaches Duguit's original theory, the social function of property still risks being misunderstood by justice professionals. STF precedents determining the rights of public land occupants illustrate this risk. For example, in *União v. Juíza Federal da Vara Ambiental, Agrária e Residual de Curitiba*⁵³ (*Federal Government v. Federal Environmental & Agrarian Court of Curitiba*), squatters had occupied public land since 1951 and had made significant investments to make the land productive. Brazilian legislation since the 1850 Land Statute, however, prohibited individuals from acquiring ownership of public land through adverse possession; it can only be sold or donated pursuant to government settlement programs or land reforms. Yet, because the squatters in *Curitiba* had given the occupied land a social function, while the Brazilian Union had done nothing to improve its use, Justice Ricardo Lewandowski argued in dissent that they should at least be compensated for their expenses.⁵⁴ The majority did not agree and held that the squatters had not obtained any right to the public land they occupied, nor any right to compensation for their investments.⁵⁵ Because the STF historically interpreted the social function of property as a source of state-imposed external limitations on property rights, it was very difficult for the justices to understand that, as an internal limitation, it should apply to the Brazilian Union in the same way it applies to private owners.

51. See Martins-Costa, *supra* note 2, at 232.

52. C.C. (2002) art. 1228 § 1 (Braz.).

53. S.T.F., Reclamação No. 3.437, Relator: Min. Carlos Britto, 18.10.2007, 2417, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA ELETRÔNICO [S.T.F.J.e.], 02.05.2008, 316 (Braz.).

54. *Id.* at 336–38.

55. *Id.* at 318–32.

CONCLUSION

Having been imported as a legal principle in the beginning of the twentieth century and codified some seventy years ago, the social function of property is not only well known and acknowledged by both legal professionals and the general public in Brazil, but is also a structural element of that country's legal order. Nevertheless, the Brazilian experience shows that certain legal models, like some wines, do not travel well. Even though the 2002 Civil Code finally adopted theoretical postulates similar to Duguit's original proposals, Brazil's original misunderstanding of this idea has seriously biased the local legal environment and hindered its application in accordance with the original French formulation and the Code authors' intent. It is probable that this tension will result in an important dispute over the proper meaning of the concept and, despite the efforts of some groups of thinkers, it is difficult to say whether Brazil will embrace the French understanding. If it does not, Brazilian law may forever remain a prisoner of exotic conceptions of the social function of property.

Given this context, the question remains whether there is any value in transplanting legal concepts. If another solution to the problem of land concentration and the abusive use of property had been adopted, perhaps a model closer to Brazil's national tradition, it may have obtained similar or even better results than the social function of property. It is possible that an authentically Brazilian solution might have been more adequate—or at least more easily understood by its legal professionals.