



The social function of property, land rights and social welfare in Brazil



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ABSTRACT

Attempts to democratize access to land have a long history in Brazil. Although initially focused mainly on the rural sector, in recent decades they have also gained some momentum in the cities. The central notion that has oriented these efforts is the so-called social function of property, which asserts that the right of private ownership includes an obligation to use land in ways that benefit society as a whole. This paper examines the development of this principle in Brazil in terms of both legislation and policy implementation and evaluates the criticisms that have been leveled against attempts to put it into practice. It argues that the social function principle has been extensively integrated into Brazilian legislation, but actual implementation has thus far been modest, especially in the urban sector. These efforts have been criticized on economic, environmental and cost-effectiveness grounds, but none of these criticisms is entirely convincing. Given the marked inequality in landholding in Brazil, the social function continues to be an important tool for enhancing popular welfare.

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1. Introduction

Attempts to democratize access to land have a long history in Brazil. Although they initially focused mainly on the rural sector and the issue of agrarian reform, in recent decades they have also gained momentum in the cities, as activists have sought to reverse the chaotic and inequitable pattern of urban development. The central notion that has oriented these efforts is the so-called social function of property, which asserts that the right of private ownership includes an obligation to use land in ways that benefit society as a whole. The purpose of this paper is to examine the development of this principle in Brazil in terms of both legislation and policy implementation, as well as to evaluate the criticisms that have been leveled against attempts to put it into practice.

The social function principle has played an important role in land reform initiatives throughout Latin America, yet it has been the subject of relatively little scholarly research outside of the legal field. Thus, the objective of the present study is not so much to test a preexisting body of hypotheses as to explore empirically, drawing on a variety of qualitative and quantitative sources, the development of this principle in a country where it has an unusually rich history. Hopefully, this exercise will both illuminate directions for future research and provide guidance to policymakers in countries where experience with this principle is more limited.

There are many other scholarly works on land rights in Brazil, some of which are cited here. However, they almost invariably focus exclusively on either the rural sector or the cities.¹ This study innovates by emphasizing the social function as a general principle and comparing how it has been codified and implemented in these two very different contexts. One of the puzzles it seeks to shed light on is why this principle has, at least so far, been enforced more extensively in the rural sector than the urban one.

Although it focuses directly on laws and policies, this article is also about interests and power relations or, in other words, politics. The reason is simply that it is impossible to adequately understand the trajectory of the social function principle in Brazil without examining how it has interacted with the flow of national political events, or paying at least some attention to how it has been shaped by differences in political conditions across demographic contexts and subnational governments.

The analysis that follows shows that, despite an extensive body of legislation dedicated to putting the social function principle into practice, actual implementation has been modest. Even the left-ist Workers' Party (*Partido dos Trabalhadores*, PT), which has held Brazil's presidency since 2003 and has a long history of advocating land reform, has made only incremental gains. Those initiatives that have gone forward, moreover, have faced harsh criticism on a number of grounds. Nevertheless, these criticisms are not entirely

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¹ The major exceptions are certain legal analyses, such as Cunha (2011) and Dávila (2011), but these works do not explore issues of implementation.

convincing and must be weighed against the pronounced inequality of landholding. The paper thus concludes that the social function constitutes a useful tool for pursuing greater social equity in Brazil.

2. Meaning, origins and regional diffusion

As mentioned, the social function is the notion that the right of private ownership includes an obligation to use property in ways that contribute to the collective or common good (Van Banning, 2001; Foster and Bonilla, 2011). Owners are obligated to refrain from using their property in ways that harm others. In addition, ownership may involve positive obligations, such as the requirement that arable farmland be cultivated, or that vacant urban lots or abandoned buildings be used for housing. The social function does not, it should be underscored, imply a rejection of private property (Dávila 2011). Rather, it stems from the belief that the inevitable interdependence of individuals requires that limits be placed on private ownership.

Although the idea of a social function of property has diverse roots, scholars of Latin America usually trace its origins mainly to the writings of Léon Duguit, a French legal scholar of the late nineteenth and early twentieth centuries (Mirow, 2011, 2010). Duguit's body of work emphasized the role of law as an instrument for promoting social solidarity. His argument that ownership of property had an inherent social function, which was increasingly reflected in the legal codes of the time, was part of a broader contemporary critique of an absolute right to property.

Despite its European roots, this concept seems to have had a greater impact on Latin America than on the developed world. Some European constitutions make reference to a social function of property, but the positive obligations associated with this concept are usually not clearly articulated. The purpose seems mainly to protect the public from actively harmful uses of property. In Latin America, in contrast, the social function has been associated principally with the positive responsibility to use land for productive purposes. Over the course of the twentieth century, moreover, it was explicitly incorporated into the constitutions of most of the countries of the region (Ankersen and Ruppert, 2006, p. 99).

Historically, the diffusion of the social function across Latin America was propelled mainly by concerns about inequality in access to farmland. Marked inequality in rural landholding is one of the region's most distinctive characteristics and conflict over rural land rights has been chronic. For example, all the region's social revolutions, beginning with the Mexican Revolution of 1910–1920, featured significant agrarian reforms. Although attempts to extend the social function principle to the urban sector are not unprecedented, Brazil's efforts to create a legal framework that specifically outlines how this principle should be enforced in the urban context are rather exceptional (Ankersen and Ruppert, 2006, pp. 112).

The social function principle was widely adopted in the region because, in one way or another, it fit with rising demands to break up large landholdings. As articulated by Duguit, the concept was about ensuring that natural resources be fully utilized; it was not conceived of as a tool for redistribution (Mirow, 2011). Nevertheless, it could potentially be utilized by those whose aim was to promote equity by redistributing large estates to the landless or by turning abandoned buildings into low-income housing. In practice, the diffusion of the social function in Latin America has been propelled by a mixture of economic and distributive motives, with the latter arguably gaining greater prominence over time.²

² Mirow's (2011) study of the social function in Chile illustrates how the principle was originally promoted by middle class moderates, in large part to promote economic development, but eventually utilized by more leftist forces bent on redistribution.

3. Legal evolution in Brazil

Brazil tentatively joined the trend toward adoption of the social function principle with its 1934 constitution, which asserted that the right to property “cannot be exercised against the social or collective interest.” A new constitution adopted in 1946 moved more clearly in this direction, stating that, “The use of property will be conditional on social welfare. The law can, in observation of the provisions in Article 141, section 16, promote the just distribution of property with equal opportunity for all.”³ The referenced section allows the expropriation of private property based on among other things “social interest,” provided that the state compensates the owner in cash. Although the 1946 Constitution did not use the expression “social function” the debate leading up to its approval makes clear that the drafters drew on this concept (Bernardes, 2003, p. 4).

Compared to later Brazilian constitutions, the 1934 and 1946 constitutions were not crafted during a period of strong popular pressure for land redistribution. However, this period brought the increased political assertion of urban groups and the initiation, under President Getúlio Vargas, of an import-substitution industrialization program. The progress of the latter was threatened, according to some intellectuals and politicians, by the unequal distribution and underutilization of farmland, which raised food prices and limited the size of the domestic consumer market (Linhares and Silva, 1999, pp. 103–107). The inclusion of the social function in the constitution, although not done in a way that would easily permit a major agrarian reform, reflected these concerns.

The 1960s brought some important innovations in the incorporation of the social function principle into Brazilian law (Cehelsky, 1979; Dávila, 2011). A constitutional amendment approved in 1964 facilitated agrarian reform by allowing the state to compensate expropriated landowners in bonds, rather than cash, making reform more financially viable. The amendment also transferred an existing tax on rural land from the municipal to the federal level, with the goal of using it to stimulate farm production by taxing unproductive land at a higher rate. A law called the Land Statute was approved, also in 1964, which explicitly asserted the “social function” of rural land and created the legal basis for a potentially extensive agrarian reform. Finally, a new constitution formulated three years later became the first Brazilian constitution to refer explicitly to the social function.

Ironically, these reforms were advanced by a conservative military regime established in 1964 in part to smash left-wing efforts to bring about radical land redistribution. The early leadership of the regime apparently felt that the best way to quell the agrarian unrest that had arisen since the early 1960s was to implement a major but non-revolutionary reform under military control. Although the regime ultimately failed to implement such a reform, the Land Statute and accompanying constitutional changes further legitimized demands for reform, indirectly aiding subsequent attempts to mobilize support for agrarian reform during Brazil's extended transition to democracy in the late 1970s and early 1980s (Ondetti, 2008a).

Brazil's current constitution was ratified in 1988, less than three years after the return to civilian rule.⁴ It is often considered to be highly progressive because it incorporates an extensive set of social rights pertaining to education, health, social security and

³ An intervening constitution, crafted in 1937, at the outset of the authoritarian Estado Novo regime, omitted any provision that could be easily interpreted in social function terms.

⁴ The military transferred control of the federal executive to a civilian president elected by the Congress in March 1985. The legislature had continued to function, under important restrictions, during all but two years of the regime.

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