The Concept of Property of the 1917 Mexican Constitution
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Property can be understood as a bundle of rights (and duties). By breaking up the concept of property into a bundle of rights, we have a general definition of property that can be used in any society. What has to be defined is which of those rights are called property rights.

From an abstract point of view, the rights (and duties) of the bundle of rights are, according to Becker, the following: the right to possess, to use, to manage, to receive income, to consume or destroy, to modify, to alienate (give other the thing owned), to transmit, to security, absence of term and to residuary rules. I think the rights listed are self explanatory, except the last two. “Absence of term” means that the right has no time limit. The right to property even includes, in most societies, the right to transmit (to bequeath). Residuary rules are “the rules governing the reversion to another of ownership which has expired or been abandoned.”

Becker also includes the prohibition of harmful use of other people’s rights and liability to execution, namely, “liability to the property taken away as payment for a debt”. Liability, however, should be understood in a more general sense. If my property destroys yours, due to an accident, I have to pay the damage that has been done. Thus, one should speak not just of a bundle of rights. As is usually the case, but of rights and duties.

Munzer correctly argues that the “idea of property rights is narrower than that of property”. When I use the idea of property rights, I will include duties of property holders, where “rights” indicates “rights and duties”. Used in this way, it is no longer narrower than the idea of property.

Of all these rights, security is crucial. Any of the other rights have to be secure in order to make any sense. To reverse the argument, following Becker, security can be conceived as parasitic to the other rights, security alone is not enough.

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1 This document is based on chapter two and some paragraphs of chapter one of Carlos Elizondo, Property Rights in Mexico: Government and Business After the 1982 Bank Nationalization, Oxford, D. Phil., March, 1993.


3 Although the owner is limited on the conditions he can impose to his heirs.


5 The specific limits of liability protected by the law are crucial in modern economies, where capitalists are only responsible up to the value of the capital they have invested in the particular firm that might be subjected to, for example, a debt claim.

The point is that any of the first eight rights, plus some degree of security, is enough to speak of property rights. The list of rights and duties, as described by Becker, and its possible combinations can be useful in understanding what property is. It is, however, just an abstraction of the different rights property can actually include. It is not only the combination of these rights and duties that matter, but more importantly, is their actual scope (that is, how absolute each right or duty is) what defines a system or property.

In each society, what varies is to which of these abstract rights one is entitled to and to what duties one is obliged. Property is a bundle of rights, but the actual rights are not as clear-cut as discussed above. The boundaries of these rights, including the right to security, are irregular and are the result of the historic and political context of each society. Each of the rights of the bundle is subject to specific limits.

A complete analysis of property system would have to include all the specific rules governing ownership of each thing. In some countries, for example, capital cannot be exported at all. This means that with respect to the ownership of capital, different rights exist in a country where capital can be exported without restriction.

The way each society defines the basic principle regulating property rights is the result of its history. The concept of property embodied in the United States’ legal framework recognizes the importance of the right to security. Property is regarded as natural right and must, in principle, be respected by public power. For property holders, this implies a position of relative strength vis à vis the state.

This document will describe the nature of the Mexican constitutional framework with respect to property. The most distinctive feature of this framework is the broad discretion assigned to the president concerning the definition of property rights. This legal capacity is augmented by the general power of the Mexican president.

The aim of this document is to portray how, at the root of Mexico’s political organization, there lies a concept of property where the right of security depends more on the discretion of the president than is envisaged in the Anglo Saxon liberal tradition. The philosophical roots of the concept of property of the 1917 Constitution act as an important source for legitimizing the relatively great autonomy of the state (and of the president within the state) in defining property rights. In contrast to the United States’ Constitution, the concept of property in the 1917 Constitution gives the Mexican president a legal basis and a powerful ideological justification for modifying property rights.

This document will first describe the concept of property as defined in the Constitution of 1917 and its philosophical justification. The analysis focuses in article 27, where property is defined. Although this article has suffered innumerable

changes since 1917, I will focus on the original version. Other articles of the constitution also limit private property, but only some of them will be briefly mentioned.

The formidable legal power the Mexican state has to define property rights acts as a strong ideological instrument, but makes sense because of the solid base of power of the president. After the Revolution, the government used authoritarian methods to govern the nation. As will be briefly described, the more important groups of society were organized by means of a corporatist pact that gave the state, and particularly the president, a significant degree of autonomy, especially at critical moments.

The legal power of the president to define property rights is enhanced by other features of the Mexican Constitution not directly related to property. This document will focus on one of these features: the political capacity of the Mexican government to modify the Constitution. This capacity has its basis in the legal framework, but has evolved into a potent instrument in the hands of the president, due to the way Mexican political institutions work. The power of the president also helps to explain the weakness of the judicial system. This will be briefly described.

The concept of property, as defined in the Constitution of 1917, was established at an historic moment of revolutionary turmoil. The Constitutional convention was not a social contract, either in the way it was elected (it was restricted to Carrancistas), or in the conditions surrounding its work. Article 27 was approved on the last day and under very inappropriate circumstances.

Once peace was regained, this definition, although used only in a limited way for nearly 25 years, was not revoked and it served as the basis of future limits on property rights, including important expropriations. In the 1930s, when the government decided to intervene in the economy, it promoted secondary legislation where the principle of the Constitution were interpreted in such a way that the power of the state to define property rights was enhanced. Some of these laws gave even broader discretionary power to the president for regulating property. One of these laws, the Law of Expropriation, will be described as it serves to justify the capacity of the state to suddenly exercise its right expropriate.

As the objective of the document is to present a broad pictures of the logic of the Mexican legal framework, it is quite general and schematic. For any of the points discussed in this document, there is a vast an detailed legal discussion, which cannot be addressed here.

The analysis that follows is based on legal material which in itself does not provide an adequate explanation of political disputes. Nevertheless, it helps to understand the political organization of a society. It is a blueprint of how things should be. The reality is shaped by many other factors which are, however, affected by the legal framework.

The legal framework can be seen as a manifestation of the historic balance of power in Mexico. This balance is not Static, and the legal framework tends to
reflect, albeit slowly, important changes in the power of the more relevant political figures.

The Constitution of 1917

Introduction

Property rights are just part of a more general conception of rights that regulate the relationship between state and society. This relationship is mediated through a constitutional framework that defines different kinds of rights. Individual rights, for example liberty, political rights such as the right to vote, and social rights as the right to have access to social security.9

The first article of the Constitution states how rights are conceived. For the constituent assembly, this article was intended to mean "recognizing the natural rights of men".10 The authority, in the words of the preamble "has to guarantee that everybody enjoys their natural rights". After all, the writers of the Constitution shared many of the liberal values of the Constitution of 1857.

Yet, the text of the first article, by saying that "[e]very person in the United Mexican States shall enjoy the guarantees granted by this Constitution", seemed, against the arguments of the debate and the logic of the preamble quoted above, to be giving special importance to the Constitution that "grants" the guarantees, as if there were no rights before this foundational pact. This interpretation is consistent with the logic of article 27 described below, and has been the preferred one by some members of the political class.11

The balance between individual and social rights is not clearly stated in the Constitution. It has been left to the discretionary power of the president. This clearly contrasts with the United States’ tradition, which is based on the idea of natural rights, and also with the previous Mexican constitution of 1857 that is briefly discussed below.

With respect to the right to property this tension is particularly acute. The conception of property of the 1917 Constitution, as defined in article 27, leaving aside the different interpretations that can be given to the first article, gives priority to the right of the nation (represented by the state) over the individual rights of prop-

9 An analysis of the history and meaning of each article of the Constitution can be found in Constitución política de los Estados Unidos Mexicanos: comentada, Mexico, Instituto de Investigaciones Jurídicas, 1990.

10 Deput Macías, in Diario de los debates del Congreso Constituyente 1916-1917, vol. I (México, 1960), p. 627. All further references to the debates will appear as DD.

11 According to López Portillo, the first article of the Constitutions is very important, although it is usually forgotten. In his view, this article gives emphasis to the role of the state in reaching an equilibrium between individual rights and social rights. José López Portillo, in private interview with the author, Mexico City, August 22, 1990. See also José López Portillo, Mis tiempos, Mexico, Fernández Editores, 1988, p. 413.
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property holders. It is left to the discretion of the president when such priority leads to the imposition of more restricted property rights. This has an obvious political effect: it leaves society with a high degree of uncertainty and highly dependent on the will of the president.

Article 27

The Mexican revolution of 1910 started as a political rebellion, but ended as a social revolution based on a popular mobilization that pressed for some kind of land redistribution. In article 27 of the Constitution, a new framework for defining property rights, especially with respect to land and water, was constructed. The conception of property described in article 27 restricts in a fundamental way the conception of private property found in the previous Constitution, enacted in 1857. This restriction was a reaction to the excesses unlimited private property had led to, in particular in terms of land concentration. Property had to be limited by public power to avoid an unjust distribution and the exercise of power by wealthy individuals. Moreover, the constitutional convention decided that the right to private property by foreigners had to be restricted even more.

Article 27 is a very long article that combines a theoretical statement of the nature of property with a more specific description of property rights. It gives a very strong legal foundation for recognizing legal rights to land that had already been given to the peasants by the revolutionary forces and for future land redistribution.

Article 27 deals basically with land and water property rights. For the writers of the Constitution, it was considered that “in our country land is almost the only

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12 The discussion that follows is based on the original version of the article. Up until 1988 this article had been amended as many as 24 times. See Constitución política de los Estados Unidos Mexicanos: comentada, pp. 120-133. The last amendment of article 27 that took place in the beginning of 1992 is briefly discussed in the conclusions. Quotations come from the final version approved by the convention in January 30, 1917 and based in the translation in the appendix of E. V. Niemeyer, Revolution at Queretaro: The Mexican Constitutional Convention of 1916-17, Austin, University of Texas Press, 1974, pp. 250-262.

13 Martín Díaz y Díaz, “Proceso constitucional y propiedad”, Revista de Investigaciones Jurídicas, no. 11, 1987, p. 229. The evils of the 1857 Constitution were a powerful myth of the revolution, how this really affected the distribution of property varied from region to region. See Knight, The Mexican Revolution, chap. 5.

14 As has been argued by Alan Knight, anti-foreigners provisions were not the result of a popular demand, but the decision of the elite with the objective to aid in the reconstruction of the country. See Alan Knight, Nationalism, Xenophobia and Revolution D. Phil. thesis (Oxford, 1974).

15 In classical liberal constitutional theory, which was followed when writing the 1857 Constitution and Carranza’s draft, specific provisions are left for laws to be written afterwards by Congress. The reasons for having introduced specific provisions in article 27 are discussed in Carlos Eliondo, The Concept of Property in the Mexican Constitution of 1917, M. Phil. thesis, Oxford, 1989, pp. 67-68.
source of wealth."^ The manufacturing industry was underdeveloped in 1917. Agriculture, mining and oil extraction were the most important economic activities. In these three activities landed property plays a central role.

However, in other articles, in particular number 28 and 123, property rights of capitalists were also qualified. Moreover, at least under the more common interpretation (including the government’s one), the qualification of landed property rights that are described in article 27, gave the basis for a more general restriction of property rights. In the preamble presented to the convention this was recognized, by stating that the conception of property of article 27 “enables the Nation to retain under its dominion anything that could be necessary for social development”.^ The spirit of article 27 is such that, as Tannenbaum argues, it “leaves room for the development of an unlimited variety of other types of limitations in the future”. The government would use these attributions widely to intervene in the economy, and, after the Second World War, to promote the industrialization of the country.

Government intervention existed during the pre-Revolutionary regime. Before the revolution, however, the aim of government intervention was just to create the basic conditions to develop the economy. Although this involved subsidies and trade protection,^ the pre-Revolutionary government believed that once economic growth had been accomplished, the forces of the market would be respected. The role of the government would then be limited to protect full property rights. The

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17 Some have even concluded from the first paragraph of article 27 that it implies a state control over all kinds of property. In the words of Katzarov, “since property in the soil and natural resources is vested in principle in the nation all industrial activity is organically depended on the function of the State”. See Konstantin Katzarov, *The Theory of Nationalisation*, The Hague, Martinus Nijhoff, 1964, p. 33. José Ayala argues that: “through article 27 of the Constitution, the state was transformed into the only source of private property. This would give the state an enormous political and economic power of intervention and regulation of private property”. See José Ayala Blanco, *Estado y desarrollo: la formación de la economía mixta mexicana, 1920-1982*, Mexico: Fondo de Cultura Económica, 1988, pp. 92-93. For the judicial decisions that justify this interpretation see Díaz y Díaz, “Proceso constitucional y propiedad”, p. 230. Furthermore, as Díaz y Díaz argues, through the reforms of the Constitution introduced by President Miguel de la Madrid in 1983, the government would reinforce its capacity to intervene directly in the productive process with a monopolistic character (p. 225). For a liberal interpretation of the Constitution that criticizes the government’s preferred interpretation see Germán Fernández del Castillo, *La propiedad y la expropiación*, Mexico, Escuela Libre de Derecho, 1987.


19 Ibid., pp. 38 and 91-93.

20 The complete preamble is in Rouaix, *Génesis de los artículos 27 y 123*, pp. 164-169.


22 In the last decade of the pre-Revolutionary regime, however, the government had increased its economic intervention. It had, for example, bought the main rail lines. It is worth under-
government, however, did play an important role in determining which individuals reaped the benefits of development.

The 1917 Constitution would give legal foundations for state intervention with the aim of promoting economic development and social justice. The new law discriminated against foreigners in a way the previous regime had never done, when foreign investment accounted (by the end of the pre-Revolutionary regime) for about 70% of total invested capital.

When compared to the previous regime, post-Revolutionary intervention was based on a different conception of the role of the state vis-à-vis the rights of society. After the Revolution, the government would have greater legal powers that gave it the right to limit or revoke property in moments of crisis.

Article 27 starts with a conception of property rights that is clearly different from the liberal article of the Constitution of 1857 and Carranza’s draft. In the 1857 Constitution, property was defined as existing before the act of creating the Constitution, as in classical liberal political theory.

It is worth pointing out, however, that the 1857 Constitution did not protect the property rights of corporations in general. It allowed a complete expropriation of all the church’s property. Under the previous Constitution, such expropriation would have been impossible. For example, Article 9 fraction 12 of the organic basis of the Mexican Republic of 1843 stated: “Property cannot be violated, whether in the hands of individuals or corporations”.

Peasant communities were also affected by the 1857 Constitution. They were obliged to transform their holdings into private property in a process that often led to their virtual expropriation by powerful individuals.

The Constitution of 1857 was favourable to private holders. The law protected them and created propitious circumstances for increasing their holdings. This scoring a crucial difference with post-revolutionary intervention, it was achieved by buying them (although exercising pressure), not by means of expropriation. In some areas, however, like mining legislation the law had become during the last decades of the Porfiriista regime less interventionist. The Mining Code of 1884 and the Petroleum Law of 1901 gave subsoil rights to the owner of the surface. The Constitution of 1917 gave this rights to the nation. See Oscar Morineau, Los derechos reales y el subsuelo en México, Mexico, Fondo de Cultura Económica, 1948, pp. 199-242; and Díaz y Díaz, “Proceso constitucional y propiedad,” pp. 208-210.

Guerrn puts it in an exaggerated way: The gifts given by the politician were “the source and condition of wealth”. See François-Xavier Guerra, Le Mexique: De l'Ancien Régime à la Révolution, Paris, Éditions L'Harmattan, 1985, vol. 1, p. 244.

Haber, Industry and Underdevelopment, p. 12.

For a comparison of the 1857 Constitution, the draft presented by Carranza, and the Constitution approved in 1917 see Elizondo, The Concept of Property in the Mexican Constitution of 1917, pp. 63-67.


protection would disappear in 1917 after the constitutional convention radically modified Carranza’s draft.

The first paragraph of article 27 of the 1917 Constitution states:

Ownership of lands and waters within the boundaries of the national territory is vested originally in the Nation which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.29

Property is originally in the hands of the nation, which is represented by the state.30 Property is not a natural right, that is prior to the foundational pact, but the consequence of the Constitution itself.31

This conception of property, quite alien to the modern Anglo-Saxon tradition, has historic roots in the New Spanish tradition. Some of the foundations of this theory of property as understood by the framers of the Constitution can be found in the preamble of the first draft presented by Rouaix’s commission.32

This preamble, written by Andrés Molina Enríquez, a nationalist intellectual, stated that the nation's original right over the landed property was based on the laws valid in New Spain. The king, as a result of the conquest, was then recognized as the absolute owner of all land and water, but gave the Indians already living there, and to the newcomers, property rights over the land. The rights given to the Indians were sometimes individual, but most were collective. Those given to the Spaniards were only individual. The property thus defined was, however, dependent on the will of the king, who had in theory an absolute power over his subjects and over the property he had conceded to them.

When Mexico achieved its independence, the king's absolute rights were transmitted "with the same character to the nation". However, the civil law created by the newly independent nation did not acknowledge this, nor did it respect the property of the Indians who started to lose it.33 According to Molina Enríquez, this was severely aggravated by the liberal laws of 1857 that made illegal any form of


30 That the state represents the nation is usually accepted, what some dispute (especially right wing businessmen) is that the state has wrongly been made equivalent to government and in some cases even to the president. In strict constitutional terms the nation is represented by the federal government, but there is a debate around this. See Díaz y Díaz, “Proceso constitucional y propiedad,” pp. 237-240. Those provisions that are in the hands of the federal government are more likely to be imposed. At the local level the state is always more subject to the pressures of those defending the statu quo.


32 For the complete preamble see Rouaix, Génesis de los artículos 27 y 123, pp. 164-169.

33 The evolution of this process is very complex because the colonial law was respected at the municipal level for many decades and the way it changed varied from region to region.
The result had been a massive concentration of land. In the words of the preamble, if "the nation has lived for a hundred years under the disturbances produced by the mistake of having adopted an alien and incomplete legislation with respect to property rights", it was time to change this.

For Molina Enríquez, the new article 27 was a restoration of the legal tradition valid in New Spain, openly broken in the Constitution of 1857. The "wise colonial legislation made it easy" according to Molina Enríquez, "to find a fundamental principle that could unite the recognition of the rights acquired and sanctioned in the past and the provision for those new rights that might be acquired in the future". Although criticized by Pastor Rouai, justifying article 27 according to colonial tradition enabled the government to argue that the only legitimate way to alienate the national patrimony to an individual was based on the same logic as that of a royal grant and thus "subject to reversion at the will of the giver". Any other way went against the original law of Mexico.

The commission presided over by Múgica received Rouaix's proposal and changed it slightly before presenting it to the convention. However, it did not include Molina Enriquez's argument for legitimizing the nation's rights. Instead, it argued that "property is a natural right", because it is "indispensable for the conservation of life". This seems to contradict Molina Enriquez's argument.

The concept of natural right here is, however, different from that of the Lockeian liberal tradition. What natural right means here is that all men need some kind of property to survive, and you cannot deprive any individual of this right. The state has to recognize this human necessity and thus make sure that each individual has enough property. This does not mean protecting full liberal private property rights, which would be inconsistent with the right every one has of owning something, but just protecting some limited version of private property, which is the one defined in article 27. It is stated that "clearly the exercise of the right to property is not absolute"; it has always been qualified. The problem is how to "specify those elements that are eliminated from private property". The state, "based on the obligation [...] it has to preserve the equal freedom" of all is entitled to limit private property. The nation (represented by the state) can therefore change property rights.

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35 See Rouai, Génesis de los artículos 27 y 123, p. 263. For an historiographic criticism of Molina Enríquez's thesis, see Germán Fernández del Castillo, La propiedad y la expropiación, pp. 34-35.
37 For the use of this argument by the Mexican post-revolutionary government to declare as illegal the legislation of the pre-Revolutionary government that had given mining rights to individuals see ibid., pp. 265-275.
38 This concept of property as a natural right is defended by radical liberal authors like Spence and Paine. See Richard Schlatter, Private Property: The History of an Idea, London, George Allen, 1951, pp. 174-175.
By defining more limited property rights, the constituent assembly was trying to construct a bridge between the liberal and individualistic tradition incorporated into the Mexican legal structure, with the logic of protecting pre-modern ways of life that had been incorporated into the legislation of the New Spain.  

For the administrations that came afterwards, what was important, especially at certain critical moments, was the superiority of the rights of the nation over individual property rights. This superiority is clearly stated in paragraph 3 of article 27: "The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand".

This paragraph gives the government wide scope for intervening in all matters regarding property rights, its only limit being the concept of public interest. Since in the paragraph quoted above it is also stated that the nation should "ensure an equitable distribution of the public wealth", the potential limits on property holders are significant. In the words of Díaz y Díaz, private property was constituted "as a kind of relative guarantee". This conception of property implies that there is always the potential menace to property holders—contrary to the classical liberal conception of property—that the state will revoke the right to private property.

The Spanish text does not use the word limitación but modalidad, which means kind or variety. It means that the form of a thing can vary, but without destroying it or extinguishing it. In the Mexican legal tradition, to impose a modalidad means a general legal provision by the competent authority that limits private property. When a modalidad is imposed, it does not destroy property, as expropriation does, although it does imply that the bundle of rights can be modified easily, and depends on each particular object and circumstance. The right to impose a modalidad is logically derived from the notion of original ownership of the first paragraph of article 27. Contrary to expropriation, the limitations imposed on private property are not subject to compensation. Moreover, the limitations on private property change when circumstances change. Expropriation, a radical way of limiting private property, is described in paragraph two of article 27: “Expropriation shall only be made for reasons of public interest and by means of compensation.” Expropriation is a common legal figure. What is specific to each country and to each historic period is the definition of public interest and the mechanism used to expropriate and to compensate.

Although the third paragraph of section 6 of article 27 states that if the nation decides to act according to the provisions of article 27, such an action “shall be made effective by judicial procedure”, the Mexican tradition has effectively left the main initiative of the process to the president. It has even been determined that the

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39 Paradoxically, however, this capacity to limit property rights with the objective of protecting the pre-modern and pre-liberal conception of rights and property would give the legal basis for the subsequent state led industrialization that would incorporate many pre-modern citizens into modern urban life.


41 Pérez Nieto, El derecho de reversión, pp. 24-26.
guarantee of a previous “trial by a duly created court” (art. 14) protected by the Constitution does not apply in cases of expropriation. As it is argued below, the Law of Expropriation, which regulates this paragraph of article 27, defended a broad concept of public interest not clearly defined at any stage that was thus left as a discretionary power of the president. The Supreme Court has tried to impose certain basic criteria for determining when public interest exists, although it has been unable to overcome the ambiguities of the Constitution.

A similar problem of interpretation is involved in the idea of “by means of compensation”. In the 1857 Constitution, and in very similar terms in Carranza’s proposal, property could be expropriated also for “public use”, but there was a more clear judiciary procedure in the hands of the expropriated. More importantly, expropriation could only be done with “prior compensation”, which in principle limits the government’s possibility of expropriation to the quantity of its resources. As Pérez Nieto has argued, the discretionary rule with respect to when the government will pay the compensation basically destroyed the notion of time with respect to this compensation.

The power to expropriate is extended in such a way that the Constitution allows expropriation of one individual in favor of other individuals. According to some authors, in the Mexican legal tradition, expropriation can be understood as a simple reversion to the original owner (the nation), which follows the legal tradition of New Spain.

Even though article 27 enhances the state’s power to intervene in property matters, the first commission argued that “property is a basic individual guarantee”. There seems to be a contradiction in trying to defend a conception of property that gives the state the right to re-mould property rights and simultaneously defending property as an individual right.

This apparent contradiction is only the result of believing that property is a priori absolute. For the writers of the Constitution, although property is an individual right, it is a right based on their own definition of property in article 27. As long as someone’s property does not transcend the limits imposed by the Constitution, it is respected and protected. But the scope of the limits imposed by the Constitution.

44 For an analysis of the Jurisprudence of the Supreme Court see Pérez Nieto, El derecho de reversión, pp. 46-54.
48 The commission’s proposal is in Roux, Génesis de los artículos 27 y 123, pp. 176-178.
49 This is the idea behind the second paragraph of article 14 of the Constitution: “No person shall be deprived of life, liberty, property, possessions or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act.” The law is, of course, the one that derives from the Constitution, which limits private property.
on property rights is open to debate. Any law is, by definition, abstract, and thus capable of different interpretations. However, in the Mexican case the ambiguities of the text have traditionally enabled each president to push for a particular interpretation of the law. The limits on property have depended largely on the objectives of each administration.

The law, at least as stated in the Constitution, provides the right to challenge in court any presidential decision that appears to violate the right to property (as defined in the Constitution). This might be done through what is called in the Mexican legal tradition writ of amparo (juicio de amparo), a decision of the Supreme Court that determines whether the executive power acts according to the Constitution.50

In any country, when an owner goes beyond the rights that are included in the bundle of rights that defines property, he can be sanctioned. The difference with a liberal constitution such as that of the United States is that in the Mexican text the limits imposed on property are greater or the rights included in the bundle are not so wide. As Tarmenbaum has argued, although the United States’ legal tradition could impose similar limitations on private property, in Mexico, the limitations are constitutional “and require no special justification or legal defense”.51

In spite of the restrictions imposed on property holders vis à vis other constitutional traditions, the Mexican Constitution does protect private property. What makes the Mexican case different when compared to more liberal concepts of property is the content of the bundle. In defining this content, there is a tension between the liberal foundations of the Constitution and the less liberal elements the Revolution included. These less liberal elements are the result of restoring the legal tradition of New Spain, which is basically pre-liberal, and of incorporating the contemporary ideas of labor rights.

The tension between classical liberal and less liberal conceptions of rights in the Constitution is not restricted to property issues.52 The first 28 articles of the Constitution approved in 1917 were intended to protect individual guarantees. But these individual guarantees can conflict with the idea of public interest and social rights included in article 27 which, although protecting property, gives priority to the nation’s right to impose limitations on property, and even to revoke it in order to give it to those in need of a piece of land.53

50 For a brief description of the writ of amparo see Héctor Fix Zamudio, “Síntesis del derecho de amparo”, Instituto de Derecho Comparado, Panorama del Derecho Mexicano, Mexico, UNAM, 1965, vol. 1, pp. 113-156; and Carpizo, La Constitución mexicana de 1917,pp. 269,279 For the autonomy of the judicial power see below.
52 This tension is normal in modern constitutions. See Edward McWhinney, Constitution-making, Toronto, University of Toronto Press, 1981, p. 86. It is, however, more acute in a constitution like the Mexican one.
53 Carpizo does not include property as an individual guarantee. He underscores the social element and calls it a social guarantee. See Jorge Carpizo, La Constitución mexicana de 1917, Mexico, UNAM, 1979, p. 160. For an interpretation that argues that even the initial paragraphs of article 27
The classical liberal elements derived from the 1857 Constitution have traditionally been very weak, and can be seen in a long historic perspective as an exception rather than the norm. In a polarized society like the Mexican one, governability, when achieved, has been possible through a state that has had less constraints than those found in classical liberal societies.\(^4\)

The more radical elements of the Constitution have given the government the justification for intervening in the economy with the objective of modernizing the country. Article 27 gave the government the legal instrument to expropriate those property holders that opposed the "revolutionary" project (which after 1940 was clearly pro-capitalist) namely, landlords and oil companies. In the words of Díaz y Díaz, the state "more than a mission of protection" has a "constructive role". A constitution like the one of 1917 is a project that has to be developed in the future.\(^5\)

This power to wipe out those opposing the new project undermines the security of all property holders assumed by liberal constitutions.

Trying to avoid as much future confusion as possible, the constitutional convention decided to describe with great detail those rights of the bundle which they wanted to define with precision. First, the right to subsoil property was restricted to the nation, which thus gained control over natural resources. This right was absolute and could not be lost under any circumstance. According to the original text, the nation could give any of these resources as a concession to individuals, thus creating a limited private property right.\(^6\) Yet the state retained the capacity to direct the use of these natural resources.

Second, the constitutional convention limited those persons entitled to property. foreigners had to accept being treated as nationals without being able to own land or water within 100 kilometers from the borders or 50 from the sea line.\(^7\)

The Mexican revolution was an effort to impose state power over any property holder, regardless of nationality.\(^8\) The church was forbidden to hold any real property, and severe limitations were imposed on institutions dedicated to charitable, educational or mutual aid purposes. Commercial stock companies and banks could

have a liberal implication and thus imply that the state has to protect private property, see Ignacio Burgos, *Derecho Constitucional Mexicano*, p. 157. See also Germán Fernández del Castillo, *La propiedad y la expropiación*, pp. 33-52. The interpretation I will follow is a combination of both: accepting that property in article 27 is in many ways a social guarantee, but also, as explicitly recognized by the first commission, an individual one. The tension between individual and social rights is inherent to the conception of property of the 1917 Constitution.

\(^5\) The extent to which this is true in contemporary Mexico is a contested issue.

\(^6\) Díaz y Díaz, "Las relaciones de propiedad en el proceso de constitución nacional", pp. 10 and 74.

\(^7\) For the discussion on the nature of these rights in the Mexican legal tradition see Díaz y Díaz, "Proceso constitucional y propiedad", pp. 231-233.


\(^9\) See Tannenbaum, *The Mexican Agrarian Revolution*, pp. 190-197. After the reform made to articles 3 and 27 in 1992, churches are allowed to own only the property needed to fulfill their duties.
not own rural property (few exceptions were allowed). The amount of land each individual could own was also restricted.

Article 27 further defined limited property rights; it undermined the right to security by promising peasants the right to land. As stated at the end of the third paragraph:

Villages, hamlets situated on private property, and communities which lack lands and water, or that do not have them in sufficient quantities for the needs of their inhabitants, shall have the right to be provided with them from adjoining properties, always having due regard for small landed holdings.  

The power of the president

The presidency is by law given a high degree of discretionary power. The legal powers of the president are significant when compared to previous constitutions. As Cline has argued:

[One] cannot rely wholly on constitutional texts to understand the operation of the Mexican government, but it is worth remarking that the dominant position which the president and his executive establishment occupy has a rather firm legal, constitutional base.

The constituent convention wanted to avoid what had happened under the previous Constitution. This had given less power to the president vis à vis the Congress. The result had been, either the control of the legislature over the executive and the risk of paralysis, or the constant violation of the law by the executive to be able to govern as exemplified by the Porfirista dictatorship.  

Although the distribution of land was the main objective of this article, I will not develop the specifics of how Mexican peasants were given the right to a piece of land. This document focuses on those elements that gave the state the power to alter or modify any kind of property right.

An initiative to reform article 27 sanctioned in January 1992 introduced a radical change; those ejidatarios who want to own their own plot of land as private owner will be allowed to do so. The reform will also facilitate the association between private property and ejido and communal property. Commercial firms can now own land, subject to certain conditions. More importantly, the peasants’ right to claim land has been revoked. This reform will increase the security of property. The government, however, maintained the concept of property discussed in this document and did not modify the president’s constitutional power to expropriate.

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*61* In the words of Rabasa: “All the presidents have been accused of being dictators [but] the dictatorship has been a consequence of the constitutional organization”. See Emilio Rabasa, *La Constitución y la dictadura*, Mexico: Editorial Porrúa, 1990, p. 111. For the influence of Rabasa in the Constitution of 1917, see Díaz y Díaz, “Proceso constitucional y propiedad”, pp. 226-227.
The strong presidency defined by the 1917 Constitution had been a demand of Carranza and was one of the few that the constitutional convention respected. Its original objective was political, namely the legal capacity to reinforce the president's role \textit{vis à vis} the legislative branch. But once the assembly included wider attributions to other areas Carranza had not expected, as was the case of article 27 and 123, the president was left with an enormous power that would enable him to promote the development of the country.\footnote{Córdovala, \textit{La ideología de la Revolución Mexicana}, pp. 26-27. See also Jorge Carpizo, \textit{El poder presidencial}, Mexico, Siglo XXI, 1972.}

The nation, according to the constitutional text, has the right to limit property. The state was often identified with the government and the government with the president. As the president is limited to one period (first of four years, then after 1934, to six years), the power of the president was more institutionalized than before the Revolution, and this was a significant difference with the pre-Revolutionary regime.

However, the extent of the legal powers that have been described makes sense in a context of a president with a strong power base. Mexico is formally a democracy. It has regular elections, a party system, an elected president and an elected Congress. Society, however, is managed by the government in an authoritarian way,\footnote{Mexico’s authoritarian regime is more inclusive and allows for more pluralism than typical bureaucratic-authoritarian states in South America. See Susan Purcell Kaufman, \textit{The Mexican Profit-Sharing Decision: Politics in an Authoritarian Regime}, Berkeley: University of California, 1975, pp. 3-11; and Guillermo A. O’Donnell, “Corporatism and the Question of the State”, in James M. Malloy (ed.), \textit{Authoritarianism and Corporatism in Latin America}, Pittsburgh, Pittsburgh University Press, 1977.} and the president clearly leads the government.

Peasants, workers, other "popular" sectors (ranging from bureaucrats and taxi-drivers to street vendors and urban poor) and, albeit differently, even businessmen are organized from the top in a corporatist pact that is not only a system of interest representation, but more importantly a way of controlling the popular sectors.\footnote{There are many books that describe Mexican political system. Three of the classics are: Pablo González Casanova, \textit{La democracia en México}, Mexico, Era, 1967, pp. 23-44; Arnaldo Córdova, \textit{La formación del poder político en México}, Mexico: Editorial Era, 1972; Daniel Cosío Villegas, \textit{El sistema político mexicano}, Mexico, Joaquín Mortiz, 1972, pp. 22-52; Ilán Bizberg, \textit{Estado y sindicalismo en México}, Mexico, El Colegio de México, 1990, chap. 1. On corporatism see the classical essay of Philippe C. Schmitter, “Still the Century of Corporatism?”, \textit{The Review of Politics}, vol. 36, no. 1, 1974, pp. 85-131. See also James M. Malloy, “Authoritarianism and Corporatism in Latin America: The Modal Pattern”, in Malloy, \textit{Authoritarianism and Corporatism in Latin America}.} The president has a strong leadership in these organizations except for business ones.

The president is at the head of the political pyramid. Although facing some constraints, he decides who will be in charge of all important positions in the bureaucracy, and even minor ones. He is the leader of the PRI (Institutional Revolutionary Party), the official party, and can determine who will be the candidate of the official party to electoral posts, including the presidential candidate.
Both for legal and political reasons, the president has a high discretionary power over the management of the whole economy. His policy objectives and his administrative capacity are important variables to understand the Mexican economy.

**Modifications of the Legal System**

A study of property rights would be incomplete without analyzing how property rights can change. In Mexico, the body in charge of modifying the Constitution is the so called *constituyente permanente*. It is formed by two-thirds of the federal Congress, and the majority of the states' Congress (art. 135).

Although similar to the United States Constitution in this respect, the fact that the PRI under the control of the president held more than two-thirds of the federal legislature and the majority in all the state legislatures until 1988 gave the president enormous power. This capacity to reform the Constitution has been a powerful instrument in the hands of the president. Each president has had the opportunity to impose, at least during his *sexenio*, his preferred version of certain articles. From 1917 to 1983, the *constituyente permanente* has been formed 87 times (14 from 1977 to 1983), and the Constitution has been reformed 300 times in 83 of its 136 articles.\(^{65}\) There is no agreement as to whether the Mexican Constitution has any part that cannot be modified. At least it is not explicitly stated in the Constitution.\(^{66}\)

The executive can control not only the process of modification of the law, but also the judicial power, formally independent, but under the influence of the executive in important cases. However, the lack of autonomy of the judicial branch should not be exaggerated. The president needs a strong political will to defend his case, as the courts, including the Supreme Court, have tended to enhance the liberal aspects of the Constitution and have stopped actions that affect property holders.\(^{67}\)

This was the case with the agrarian reform in the 1920s. Although not strongly defended by the federal government, it was stopped by the judicial branch. When the executive decided to pursue agrarian reform, to avoid judicial action, which would have implied a permanent effort to control the courts, it modified the Constitution and cancelled the right to a writ of *amparo* to matters related to the agrarian reform. In order to avoid being stopped by a liberal interpretation of the Constitution, the government reinforced the more radical elements of the Constitution.

When the government does not have enough power over the day to day functioning of the judiciary, it can control the legislative and modify the law.

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\(^{67}\) From 1917 to 1960, the Supreme Court decided a writ of *amparo* in favor of the claimant and against the president 34% of the time. Unfortunately, this data considers all kind of *amparos* either in favor of private property holders or ejidatarios. See González Casanova, *La democracia en México*, Mexico, Era, 1982, p. 34.
Moreover, it is in very sensitive decisions that the autonomy of the judiciary is undermined. As the judicial system in important cases and the legislative are dependent on the executive, there is in Mexico no real division of powers. This is one of the strongest sources of presidential autonomous power which goes beyond the broad discretionary faculties sanctioned by the legal framework.

**Secondary Legislation**

The legal capacity to define property rights under the Constitution of 1917 is not enough to understand the legal capacity of the president to expropriate. One should also study some of the secondary legislation. The post-Revolutionary governments legislated in specific terms many of the principles embodied into the Constitution, which gives content to the state’s capacity to alter property rights. It is within a historic tradition that evolved after the Revolution that the Constitution of 1917 is interpreted and specific laws created. The post-Revolutionary governments often went beyond the more liberal spirit of the constitutional convention, in particular in the populist decade of the 1930s. Many of these laws were made under political circumstances that were very different from the ones that would exist in Mexico afterwards. After 1940, the presidents in power would pursue other policies. Some of the laws issued in the 1930s would never be used. Others would be used when the president needed to impose limitations on property rights, usually for different purposes than originally thought. In any case, the government had a legal reservoir of power that it could use at any critical moment. Moreover, even during those administrations that were clearly marked by a pro-business attitude, the government continued developing a legal framework that expanded its powers to curtail property rights.

The Law of Expropriation (LE) of 1936 is one of the more important laws regarding limits on property rights and is a good example of the broad legal power that is given to the executive branch to define property rights. The LE, issued by Lázaro Cárdenas, gave the president the ability to state when the public interest justified an expropriation at its own discretion. For example, a sufficient reason to expropriate property according to this law is to achieve: “the fair distribution of the wealth hoarded or monopolized with an exclusive and undue advantage in favor of one or several persons against the collective as a whole or a particular class” (art. 1.8). The executive would state when this was the case, and the expropriation would proceed (art. 2).

As a study of the American Embassy of December of 1936 stated, this law “can be interpreted so that any expropriation can be made possible.” For one busi-

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68 A detailed analysis of the Mexican legislation in matters that affect property holders can be found in Del Villar, *The Rule of Law*, pp. 60-201.


70 Quoted in Lorenzo Meyer, *México y los Estados Unidos en el conflicto petrolero (1917-1942)*, Mexico, El Colegio de México, 1972, p. 204. However, the United States Embassy did not protest against the law. This reaction is surprising because, as Meyer extensively shows, the embassy
ness organization, Concanaco, the LE as well as the agrarian and labor legislation gave the executive “all the legal strength to attack capitalism.” The capacity to expropriate is, moreover, not only available to the federal government, but also to local states.

Important expropriations, except those related to the agrarian reform, which was at some stage a key element for politically incorporating peasants, have been relatively rare. However, the capacity to expropriate has been used by the president in cases where he has felt some powerful group was undermining the ability of the Mexican state to settle political disputes. The legal powers granted by the LE have been used at moments when the government perceived serious political vacuum.

The powers to expropriate at critical moments are not only a legal procedure of administrative nature, but also a political instrument for the consolidation of the Mexican state. By expropriating, the government uses one of its reservoirs of powers; revoking property rights. By means of this act of power the government can gain political control, at least in the short run, over a particular sector of society—the affected property holders.

Expropriation is, moreover, a strong signal to all property holders. By expropriating, the president has been able to dismantle economic groups that were perceived as threat to the state, as with oil companies in 1938. The last three important occasions on which it has been used were in the land expropriations of Sonora at the end of Echeverría’s administration, the nationalization of the banks in 1982, and the expropriation of urban land after the earthquake of 1985.

**Conclusion**

The Mexican legal framework is such that there is, in principle, no clear obstacle to future actions by the president that limit or cancel property rights. In spite of the liberal elements within the Constitution, the colonial tradition and the contemporary idea of social rights are legally strong enough to undermine private property, one of the “Rights of Man” according to the liberal tradition.

The Mexican Constitution does not protect property to the same degree as the United States Constitution. The discretionary power of the president in determining whether private property is to be reversed to its original owner (the nation it represents), makes the legal arrangement in some way similar to the absolutist monarchies of Europe. In absolutist Europe, before the bourgeois revolutions and the

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had been against any legislation that undermined the legal rights of oil companies. The LE would be used afterwards to expropriate them.

73 Less important expropriations are more common, like expropriating land for constructing a road. They can be based on the discretionary use of power, but usually imply no political message.
creation of the concept of natural rights, the government had no obligation to protect property, it was legally entitled to revoke it.\textsuperscript{74}

In the words of Francis Sejersted: "The main distinction between the rule of Man and the rule of Law was the abolition of arbitrariness and consequently the ensuring of predictability and of justice as regularity."\textsuperscript{75} But when the rule of law gives so much discretionary power to the president as in Mexico this distinction is blurred.

The law in Mexico gives the president a wide margin to impose his will. This discretionary power is part of the rules of the game. When property rights can be altered as the result of the discretionary power of the government, security is undermined, and property holders are more easily subject to control by the authority.

Mexican political institutions are different from the absolutist monarchies of Europe. There is a tension in the law between the classical liberal and the less liberal elements. There is some legal security for property holders, although it is limited.

The Mexican Constitution makes explicit the extent of the potential legal power of the state (and the role of the president within the state). A specific legal provision, even when rarely applied, can serve as a potent and legitimate reservoir of power for the government at critical moments. The concept of property of the 1917 Constitution, \textit{ceteris paribus}, makes certain state policies less difficult than they would be in the presence of a law that did not allow so much discretionary power.

Although the Mexican law is flexible and allows the president broad discretion, it plays a legitimizing role that could not be played by arbitrary power subject only to the will of the sovereign. The Mexican state has always made an effort to certify the legality of its actions, and the broad legal discretionary powers in the hand of the president have made this possible in most relevant cases. The fact that presidential power, although highly discretionary, is legally sanctioned gives a degree of stability that would not be achieved in the absence of legal institutions.

As a result of the conception of property of article 27, the ideal separation between the economic and political sphere of modern constitutional theory is not clear cut.\textsuperscript{76} The government in Mexico has the formal power to define, for political or economic reasons, the content of the bundle of rights.

The more important limits to the government are not legal, but come from the government’s objective of promoting economic development based on private property. This objective has implied that although at an abstract level the law gives the president the potential autonomous power to define property rights, in practice, it has usually been used to benefit a specific group of property holders, namely businessmen.

\textsuperscript{74} See Díaz y Díaz, "Proceso constitucional y propiedad", pp. 218-220 and 227. The absolutist monarchs, however, had important limits in their use of arbitrary power. See for the case of France, Theda Skocpol, \textit{States and Social Revolutions. A Comparative Analysis of France, Russia, and China}, Cambridge: Cambridge University Press, 1979, pp. 51-67.


\textsuperscript{76} Díaz y Díaz, "Proceso constitucional y propiedad," p. 224.
A legal framework that gives so much discretionary power, which is recognized by law, to the president would be unsustainable if informal rules did not exist. The discretionary capacity of the president to define property rights was used in a "friendly" way to promote industrialization. Before the Mexican economy liberalized, legal insecurity was exchanged for security against the rule of the market, but it implied a risk to property holders that would surface at critical moments.

As a result of the economic reforms initiated by President de la Madrid and deepened by President Salinas, the state now has fewer properties and intervenes less in the economy. Some important legal chances have increased the security of property holder, such as the reform of article 27 described in footnote 59. New institutions to ensure the stability of this economic project, like an autonomous central bank where the government has less discretionary power, have been approved, and the eventual signing of NAFTA (North American Free Trade Agreement) will impose important limits on the use of the governments' legal reservoir of power.

Furthermore, private property is more important in the new economic model than before, and the government has therefore to make sure property holders have the incentive to invest and save domestically. Using discretionary power against property holders implies a higher cost than before the reform.

Legally and politically the Mexican government, which has been the main figure behind the project of economic reform, has, however, retained autonomous power to potentially limit property rights in the future, as the fundamental institutions regarding the legal security of property rights discussed in this document remain virtually unchanged. The government has been unwilling to diminish the legal basis of its autonomous power beyond what is minimally required to launch its economic project. Both de la Madrid and Salinas have preserved the president's constitutional reservoir of power. There might be good political reasons for this strategy of maintaining the essence of the Mexican concept of property, perhaps giving certainty with respect to the power of the Mexican state to govern a complex and heterogeneous society, but it has implied giving less legal certainty to property holders.

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77 This is discussed in Elizondo, Property Rights in Mexico, chap. 3.

78 For example, to sell the banks to the private sector, the government only revoked the fifth paragraph of article 28 of the Constitution, which made banking an activity reserved to the state. The government did not alter those paragraph introduced by de la Madrid that had been opposed by the more radical businessmen.

79 This is discussed in ibid., pp. 297-310.
Novedades

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