

# Commentary: Comparative Constitutional Law and Property: Responses to Alviar and Azuela

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I am pleased to have the opportunity to comment on two very rich and provocative articles: *Property in the Post-post-revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico* by Antonio Azuela and *The Unending Quest for Land: The Tale of Broken Constitutional Promises* by Helena Alviar García.<sup>1</sup> Both articles offer historical and contemporary accounts of the role of the social function of property in the constitutional framework of the countries they study (Mexico for Azuela and Colombia for Alviar).

I begin this Commentary with a few general thoughts on comparative method, and then engage in a comparison of the articles by discussing three issues they raise. In particular, I consider the tension between individual property rights and social function examined in each article, the possibilities the authors imagine for collective rights and conservation within the property rights regimes they examine, and the views about the role of law the articles express.

## I. Some Thoughts on Comparison

These articles were presented as part of an explicitly comparative Texas Law Review Symposium. Each panel at the Symposium included presentations from authors from various countries, generally about their own constitutional systems, with the purpose of enabling an analysis of the similarities and differences in the systems. Some of the speakers included brief or sustained reference to the constitutional law of other countries as well, while some even attempted to identify or describe a Latin American regional approach.<sup>2</sup>

We had surprisingly little discussion in the Symposium, however, about why and how we engage in comparison, and about what we hope to achieve by doing so. There are of course no single answers to these questions, as those engaged in comparative legal analysis deploy various methods and do

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1. Antonio Azuela, *Property in the Post-post-revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico*, 89 TEXAS L. REV. 1915 (2011); Helena Alviar García, *The Unending Quest for Land: The Tale of Broken Constitutional Promises*, 89 TEXAS L. REV. 1895 (2011).

2. See, e.g., Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEXAS L. REV. 1835 (2011); Roberto Gargarella, *Grafting Social Rights onto Hostile Constitutions*, 89 TEXAS L. REV. 1537 (2011); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEXAS L. REV. 1587 (2011).

so with different aims. Indeed, comparative lawyers, at least in the global north, have long been engaged in debates over how and what to compare, the biases reflected in the representations of both self and other in the discipline,<sup>3</sup> and the extent to which those from the site of study can aspire to play the role of comparativist rather than simply of native informant.<sup>4</sup>

Sometimes comparativists focus on similarities in otherwise seemingly disparate systems to show patterns or biases across systems. Other times they concentrate on differences between the systems. While some of those who focus on differences aim to recognize and preserve such differences, others seek a way to harmonize them.<sup>5</sup> Comparative *constitutional* law, which is a relatively new field, tends toward projects of harmonization.<sup>6</sup>

3. For an early and significant text outlining a critical approach to comparative law, see Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985). For an attempt to identify and pursue a variety of critical methodological approaches to the field, see the contributions to the 1997 Utah Law Review Symposium, *New Approaches to Comparative Law*, 1997 UTAH L. REV. 255. For examples of works that include critiques of the ways that those engaged in comparative analysis often represent their own legal system in the process of comparison, see Mitchel de S.-O.-l'E. Lasser, *Comparative Law and Comparative Literature: A Project in Process*, 1997 UTAH L. REV. 471; Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"*, 1997 UTAH L. REV. 287.

4. As David Kennedy put it some years ago, Generations of foreign lawyers trained by comparativists in the United States...have been valued here for their information, their perspective, rather than their ideas, and have been encouraged to spend their time studying their own legal systems, working out similarities and differences with ours, rather than taking on topics at the core of our own methodological or political concerns. In such a scheme, only the very exceptional native informant can aspire to become a comparativist, and then, for all the lip service paid to learning from one another, the job is clear—go home an agent of cosmopolitan sensibilities in the periphery, an expert in listening to your own legal culture and translating its peculiarities to a universal audience while importing to your own society the sophisticated results of cosmopolitan harmonization.

David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 591.

5. Annelise Riles identifies the following aims of the “masters” of mid-twentieth century comparative law, which are arguably not so different from the goals of many comparative lawyers today: “the colonial project,” “modernization and reconstruction,” “internationalism,” and “institution building.” Annelise Riles, *Introduction: The Projects of Comparison*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 1, 11–12 (2001).

6. For an attempt to name and situate the field, see *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki Jackson & Mark Tushnet eds., 2002). *But see* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 125 (2005) (referring to *Defining the Field of Comparative Constitutional Law* and stating that, “none of the essays in this collection, its bold title notwithstanding, address the issue of methodology in the study of comparative constitutional law”). The field has its own journal, the *International Journal of Constitutional Law*, which began in 2003. Sujit Choudry contends that the central preoccupation of the field of comparative constitutional law has been “The Rights Revolution,” a preoccupation he defines as relating to “[a] bill of rights that is entrenched and supreme over legislative and executive action, backed up by judicial review by independent courts.” Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Postconflict State*, 6 ANN. REV. L. & SOC. SCI. 301, 303 (2010). He connects that focus to transitional democracies and the drafting of new constitutions in Central and Eastern Europe and Latin America.

Even when the goal is harmonization, a question remains about which, if any, of the existing models one hopes to serve as the basis of that harmonization. Much of the discussion that took place at the Symposium revolved, if implicitly, around that question.

The Symposium raised additional issues with regard to comparison because it often relied on one presentation to understand the constitution, jurisprudence, or legal philosophy of a given country. When we read one article on the social function of property in Mexico and another on the same in Colombia (as with the two articles I discuss here), should we attribute differences in the pieces to local or national specificities or should we see them as stemming from differences in method, discipline, focus, or even affect? Similar questions emerged in discussion on other panels. On the panel on Social and Economic Rights, for example, one of the commentators noted that we saw a relatively pessimistic article from Octavio Luiz Motta Ferraz on Brazil<sup>7</sup> and a more optimistic one from Paola Bergallo on Argentina.<sup>8</sup> Are these differences due to judicial review in fact being more promising in Argentina than in Brazil, or are the differences in the articles more accurately attributed to different political or methodological approaches of the two authors? If so, to what extent are the latter related to the actual constitutions and constitutional jurisprudence of the countries from which the authors hail?

While many Latin American countries were unrepresented or underrepresented in the Symposium, others were arguably overrepresented. Colombia would fall into the latter category, not only because the Symposium included many articles from Colombian academics and jurists, but because the jurisprudence of the Colombian Constitutional Court has served as an object of admiration and aspiration for many from outside Colombia. An advantage to having so many articles by Colombians in the Symposium is that we could see disagreements among them, even if the authors come from relatively similar backgrounds and training.

I would like to keep in mind the role of (the idea of) the Colombian constitution and constitutional jurisprudence as I compare the articles by Azuela and Alviar. Azuela, though almost exclusively writing about Mexico, finds it useful to look to Colombia and Brazil, which he says have “some of the most innovative and progressive” law in the region with regard to recognizing the social function theory of property.<sup>9</sup>

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7. Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEXAS L. REV. 1643 (2011).

8. Paola Bergallo, *Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina*, 89 TEXAS L. REV. 1611 (2011).

9. Azuela, *supra* note 1, at 1939. He notes, for example, that the 1991 Colombian constitution makes it clear that property is not a fundamental right, *id.* at 1916, meaning that they cannot form the basis of a *tutela*, or direct claim, before the Constitutional Court.

While Alviar agrees with Azuela that much of the Colombian constitution is progressive in terms of its view of the social—as well as the ecological—function of property, she shows a myriad of ways in which its progressiveness is undermined, particularly in the context of expropriation. By calling attention to private law rules about property (including the definition of property itself), the failure of all three branches of the government (including the judiciary) to take seriously its redistributive impulses, and the development priorities of the state, her article calls into question some of the optimism others have expressed in the Colombian constitutional design, and which is repeated at some level in Azuela's article.

The two articles I address here are, I think, differently situated from much of the rest of the Symposium in that they are not only about comparing constitutions or constitutional jurisprudence. Rather, as I discuss more fully below, they both attend to structures and processes outside the formal constitutional frame.

## II. Indeterminacy of Both Social Function and Right to Property

The articles focus on the state's failure to engage in large-scale redistribution of property, despite recognition of the social function of property. They both at some level attribute this failure to competing impulses, as Alviar puts it, within constitutions over the past century. On one hand, they prioritize the state's right to distribute and redistribute property on an understanding of social function. On the other hand, they emphasize the sanctity of the right to private property. Azuela shows how even Mexico's 1917 constitution manifests this ambivalence. Although it recognizes that "ownership of all water and land within the national territory belongs primarily (*originariamente*) to the Nation,"<sup>10</sup> it also permits the state to "transfer . . . ownership to individuals, thus constituting private property,"<sup>11</sup> which then cannot be taken by the government "unless it is for a public need (*utilidad pública*) and 'by means of' compensation."<sup>12</sup>

All of the versions of the constitutions of Mexico and Colombia considered by Azuela and Alviar engage in a balancing of these two impulses. Of course, such weighing of interests can also be found in some form in most constitutions, and generally arises with regard to two issues—when a state can expropriate private property and how much it is required to pay in compensation. Additionally, international human rights documents

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10. I am using Azuela's translation of Article 27 of the Mexican constitution, though many translations use the word "originally" rather than "primarily." See Azuela, *supra* note 1, at 1917–18 (citing Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.)).

11. *Id.*

12. *Id.*

that recognize a right to property also engage in this balancing, whether or not they explicitly mention social function.<sup>13</sup>

Although both articles suggest the indeterminacy of the social function of property, they also both identify a bias. That is, the indeterminacy tends to work against redistribution, or at least has done so since the onset of neoliberalism. They both demonstrate that judges and administrative agencies (to whom some constitutions have delegated the authority to expropriate) have been more responsive to claims of property rights violations by property owners than to the state's interest in expropriation. For Azuela, federal judges are often (and problematically) engaged in "judicial activism," "tak[ing] every opportunity to rule in favor of affected owners and against what they construe as arbitrary expropriations."<sup>14</sup> For Alviar, even the fact that expropriations often need to be brought before a judge makes them more cumbersome and less likely to occur.

### III. Collective Property Rights and Conservation

Both articles, if implicitly, raise an issue about the extent to which communal or collective rights, if recognized, might disrupt the individual rights paradigm. In other words, could the right to property be deployed in a communal fashion that would undermine the dominant individual, private property paradigm? Or, as Audre Lorde put it in another context, can the master's tools ever dismantle the master's house?<sup>15</sup>

The question particularly resonates for me because I have been involved in some efforts to use the right to property in the American Declaration and

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13. See, e.g., Council of Europe, European Convention on Human Rights, Protocol 1, art. 1, March 20, 1952, E.T.S. No. 009 (recognizing the right to property subject to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"); Organization of American States, American Convention on Human Rights, art. 21(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention] ("Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."); see also Catarina Krause & Gudmunder Alfredsson, *Article 17: The Right to Property in Other Human Rights Instruments*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 359, 363–74 (Gudmunder Alfredsson & Asbjørn Eide eds., 1999) (discussing the debates over the right to property and whether it should be included in the International Convention on Civil and Political Rights and the International Convention on Economic, Social, and Cultural Rights); THEO R.G. VAN BANNING, THE HUMAN RIGHT TO PROPERTY 7 (2002) (arguing that while the end of the cold war in 1989 made the right to property an increasingly likely instrument for the protection of vulnerable groups, "[p]roperty rights have . . . often been perceived as an instrument to protect the rich and the powerful").

14. Azuela, *supra* note 1, at 1927.

15. See generally Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110 (2007).

Convention<sup>16</sup> to argue for the recognition of collective rights for indigenous peoples and Afro-descendants in the Americas and even for the recognition of individual rights for small property owners along the U.S.–Mexico border who have had part of their property taken to build the border wall. Those involved in the projects have in mind progressive aims, but a number of us have also expressed discomfort about reinforcing this monolithic idea of property rights with these kinds of claims.<sup>17</sup> The question, for me in any event, is whether there might exist a particularly robust and transformative idea of collective property rights.

Alviar seems somewhat hopeful about the prospects for collective rights, focusing in particular on the recognition achieved by Afro-descendants in the 1991 constitution and subsequent legislation, specifically Law 70 of 1993.<sup>18</sup> At the same time, she shows how Afro-descendant communities have been thwarted in their exercise of these collective rights by “strong economic interests backed by governmental policy,” such as the advancement of oil palm.<sup>19</sup> I think Alviar might enrich her story by considering the role that yet another competing impulse—the ecological function of property—might have played in the recognition of collective rights for ethnic communities in the first place. For example, though the state of Colombia was certainly conflicted about its development priorities in the early 1990s, it was encouraged by Afro-descendant groups, conservation groups, and some parts of the World Bank to essentially exchange the recognition of quasi-territorial rights for a guarantee that the land would be used in sustainable ways.<sup>20</sup> Thus, Law 70 of 1993, which recognizes collective title for certain Afro-descendant communities, stipulates that those who receive title “will develop practices of conservation and management that are compatible with ecological conditions.”<sup>21</sup> Additionally, it specifies that the land is inalienable, inseverable, and cannot be used for collateral.<sup>22</sup>

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16. See Organization of American States, American Declaration of the Rights and Duties of Man, art. XXIII, O.A.S. Official Rec., OEA/Ser.L./V./11.23, doc. 21, rev. 6 (1998) (“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”); American Convention, *supra* note 13, at Art. 21(1).

17. For a more general critique of reliance on a “monolithic slate” of property rights, see Jorge L. Esquirol, *Titling and Untitled Housing in Panama City*, 4 TENN. J.L. & POL’Y 243, 267 (2008).

18. L. 70, 27 de Agosto de 1993, Diario Oficial [D.O.] (Colom.).

19. Alviar García, *supra* note 1, at 1908.

20. See KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT 248–53 (2010) (describing the history of Law 70 of 1993); Karl H. Offen, *The Territorial Turn: Making Black Territories in Pacific Colombia*, 2 J. LATIN AM. GEO. 43, 43–44 (2003) (noting that this reform resulted from “a wide constellation of internal and external forces, including bottom-up localized pressures for social change and top-down global pressures for political-economic reform”).

21. L. 70 of 1993, art. 6(b).

22. *Id.* art. 7.

If the land cannot be used as collateral, of course, Afro-descendants have little access to credit. Although Law 70 addresses that concern directly, by providing alternative bases for credit,<sup>23</sup> the state has failed for close to two decades to promulgate regulations to implement those provisions.<sup>24</sup> Without such regulations, barriers to credit are essentially built into this legal form of communal property. This limitation within formalized, collective property might be usefully juxtaposed to Alviar's discussion in another part of the article, about how access to credit has posed significant problems for many rural communities because of the lack of formalization of their (presumably individual) property.<sup>25</sup>

Azuela, I think, is somewhat more ambivalent about the promise of collective property, even as an ideal. Or—more accurately perhaps—he is less pessimistic about the government's decision in 1992, as a part of its neoliberal market reforms, to make *ejido* lands individual and alienable.<sup>26</sup> This reform was highly criticized by indigenous groups and by the left more generally at the time for its break-up of communal lands and power. Azuela contends, however, that the reform has not had the consequences many of its critics expected, in large part because individuals in many agrarian communities have often chosen not to sell their land. The land intact, the communities have gained or retained political power as a result of the government's reluctance to expropriate land.

Azuela gives the well-known example of San Salvador Atenco, where a community managed to keep the government of Mexico from building a new airport in 2002. The community engaged in public protest, but filed an *amparo* suit against the expropriation of property it would have entailed.<sup>27</sup> Based on this and other examples, Azuela concludes that “postrevolutionary governments were able to subordinate private landowners to the needs of agrarian reform, but this very process paved the way for forms of community landownership that have managed to resist the public interest in post-postrevolutionary times.”<sup>28</sup>

It is not altogether clear to me whether this conclusion is promising or not for Azuela. The answer might well depend upon the asserted public interest and also on the type and politics of the community. I wonder how far Azuela would be willing to go in terms of permitting expropriation and

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23. *See, e.g., id.* art. 52.

24. For discussion of debates over these regulations, see ENGLE, *supra* note 20, at 243–46.

25. *See* Alviar García, *supra* note 1, at 1907 (“[A]ccess to credit turns on whether one is a property owner or not, which in turn depends on the formal categories of ‘property,’ —categories that do not reflect the de facto relationships of property in rural Colombia . . .”).

26. *Ejidos*, generally, are collective legal subjects recognized by agrarian legislation. Azuela, *supra* note 1, at 1919 n.22.

27. *Id.* at 1928.

28. *Id.* at 1929.

displacement of communities to exercise the ecological function of property. Would he draw a distinction between indigenous and non-indigenous communities? Should he?<sup>29</sup>

#### IV. Role of Law

I think there is some productive tension between the two articles with regard to their understanding of the extent to which law (including private law), as opposed to other social relations, is responsible for the failures of constitutional law. Azuela contends that he is discussing “a problem that is beyond the law, but nevertheless affects the balance between landowners and the public interest.”<sup>30</sup> He calls on constitutional lawyers to consider issues he identifies as “‘social’ processes taking place outside state institutions,” such as

weakened power of eminent domain; a failure of the government power to regulate land uses; the growing power of agrarian communities that act as local governments; and the growing challenge, both in public opinion and in actual practice, of the state ownership of certain natural resources (particularly water) and places with symbolic value (archaeological sites).<sup>31</sup>

While Azuela identifies such concerns as “beyond the law” (though he believes constitutional lawyers should attend to them),<sup>32</sup> Alviar generally locates similar problems within law itself. Like Azuela, she looks beyond the words of the constitution, but to courts and administrative agencies. She also looks to other types of law, specifically private law, and the impact they have on constitutional ordering. Thus, when she looks at the interaction between the state and the market, she does so with an eye toward how the “law is influential in structuring the market.” She aims to “look at the shifts and rigidities of the modes of legal reasoning, the interaction between the different legal regimes at particular times, and the changes in the relevance of certain actors.”<sup>33</sup>

In short, what Azuela might call extra-legal, Alviar might see as *enshrined* in and facilitated by law, particularly by a formalistic understanding of property that hasn’t really changed since 1887. While this difference in approach might be semantic or disciplinary, I think it is worth

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29. Azuela raises questions as well about the extent to which those whose land is not expropriated should be responsible for the preservation of natural resources on that land. He seems skeptical of the environmental compensation schemes and expresses some sympathy with those who claim that “these schemes amount to turning Article 27 on its head; the obligation to preserve natural resources, which was originally vested in those who owned them, is being replaced by compensation that society must provide.” *Id.* at 1930.

30. *Id.* at 1931.

31. *Id.* at 1941.

32. *Id.* at 1931.

33. Alviar García, *supra* note 1, at 1897.



exploring in consideration of the promises and pitfalls of various constitutional and private law arrangements with regard to the (re)distribution of property, as well as of the hopes for and limitations to different political interventions.

One point on which the articles agree is that constitutions cannot or should not be the sole site of struggle over property. I think their view on the limitation of the constitution and constitutional law might usefully be applied by others to the distribution of resources more generally.

#### V. Concluding Thoughts

Over the past two decades, international human rights has become the *lingua franca* of states and social movements, from the left to the right. Even claims for economic redistribution are largely made today in the name of human rights, economic and social as well as civil and political. The left has long been skeptical of human rights for multiple reasons, including its inability to challenge the primacy of property rights. Yet, much of the left is now largely mobilized around human rights, including property rights. Azuela and Alviar offer useful insight into the extent to which different articulations of property rights both open up and limit the possibilities for attending to ongoing distributional inequality as well as to ecological degradation.