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**Thorsten Keiser**

## Social conceptions of Property and Labour – Private Law in the aftermath of the Mexican Revolution and European Legal Science

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## Abstract

This article tries to outline possible research topics in the field of comparative 20th century legal history between Europe and Latin-America. It seeks to examine changes both in Labour and Property law as core areas where social conceptions began to influence »liberal« private law. Focussing on an example from Mexican law in the aftermath of the revolution which took place in the first decades of the 20th century, it is argued that new conceptions in both fields were discussed using similar conceptual patterns in Europe and Latin-America. In the reaction of the jurists from both continents to the challenges of the new century lies a possibility for fruitful comparison. Conducting research in such a framework can also produce comparative results on the interplay between constitutional law and private law – especially when the focus lies on Germany and Mexico, where new constitutions at the beginning of the new century did evoke reactions in the discourses about private law. With regard to methodology it has to be observed that such research has to go far beyond the traditional pattern of »reception« of legal concepts from Europe in Latin-America, and to highlight more complex ways of transition of legal forms between the two continents.



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### I. Introduction

On 25<sup>th</sup> of May 1911, Mexican dictator Porfirio Díaz was forced to resign from power.<sup>1</sup> This marked the outset of political troubles, insurgencies and civil wars, but also of political reforms.<sup>2</sup> In the year 1916 in the town of Querétaro the drafting of a new constitution was initiated,<sup>3</sup> which came into force one year later. Important legal aims of the Constitution were distributive justice for landless farmers and protection of the workers against exploitation by their employers. Such claims of social justice were the crucial motivations of the Revolution, which caused people to fight against Díaz and his government. So it was clear that the »revolutionary« Constitution had to contain rules about what was regarded as social participation and protection of the poor. The greatest relevance of the latter is seen in the implementation of what was later called a social concept of property and a social conception of labour contracts. Art. 123 of the Constitution of 1917 contains an elaborate catalogue of protective rights for workers and farmhands. Their most important aim was to limit private autonomy regarding the conclusion and the contents of labour contracts. These provisions are described as a kind of mythical foundation of the contemporary Mexican legislation on labour law,<sup>4</sup> which reached its climax in a complex codification in 1970.<sup>5</sup>

Regarding the field of property law »social« elements were codified in Art. 27. Just like the new provision on labour law, this article is quoted very often and seen as the beginning of a new order, especially in the agricultural system of Mexico.

It is clear that these new provisions also had an impact on private law. Literature concerned with private law and labour law in Mexico describes the Revolution in the second decade of the 20th century as the outset of an important change regarding fundamental institutions of private law. A lot of research has been conducted about the Mexican Revolution, especially in the field of social history, political history, cultural studies and regional history.<sup>6</sup> Lawyers have mostly analyzed the two above mentioned articles of the Constitution from the perspective of current public law or labour law. But it can be said that very little research has been done by legal historians which are exclusively interested in the past and not so much in the reconstruction of prior models of positive legal institutions or problems of positive law. What has been above all neglected seems to be the effect which the Revolution produced on private law. In the aftermath of the Revolution the constitutional concepts of property and of labour were regarded as patterns that should help to shape a new private law. This is scope of the present paper. Besides, especially in this field it seems rewarding to look at interconnections between South American and European legal thinking. It can be shown that both the new labour law and the new property law in Mexico were strongly linked to European reflections on social elements in private law which were very influential at the time. But it shall be argued that this did not lead to mere »receptions« of law, but to a more complex circulation of ideas. After all Mexican legal science and legislation went on their own quest for modern law and found individual solu-

1 For literature on Díaz retreat and the Mexican revolution in general see BARRÓN (2004).

2 For a general overview CUMBERLAND (1972).

3 See e.g. COSSÍO DÍAZ (1998) with further references.

4 Most influentially by DE LA CUEVA (2007) 38: »El derecho mexicano de trabajo es un estatuto impuesto por la vida, un grito de los hombres que sólo sabían de explotación y que ignoraban el significado del término: *mis derechos como ser humano*. Nació en la primera revolución social del siglo XX

y encontró en la Constitución de 1917 su más bella cristalización histórica.« See also CARPIZO (1988) 93.

5 Called *Ley federal del trabajo*. For a short overview see CRUZ BARNEY (1999) 636–639.

6 For biographical references see BARRÓN (2004).

tions for problems typical of Mexican society, even if the discourse about law was strongly connected to Europe and often took over European examples.

## II. Private Law and social transformation: The Mexican *Código civil* of 1928 as a product of post revolutionary law

### 1. *Perceptions of a crisis*

An important milestone of the post revolutionary law in Mexico was the Civil code for the federal district of 1928.<sup>7</sup> It is praised for important reforms, such as equality between men and women with regard to legal capacity (art. 2). Besides, it set up a special rule for underprivileged people (Art. 21).<sup>8</sup> Exceptions could be made for poor people or those who were excluded from means of communication. This article is based on the recognition that freedom of action in private law relations can lead to imbalances and later on, as we know, the civil law systems of the 20th century made many distinctions to facilitate the emancipation of people, although they were not defined as poor or disadvantaged as such, but as consumers, workers or tenants. Legal persons were no longer perceived as what would have been called at the time »abstract« individuals, but as social beings. This shows that the new civil code from 1928 was seen as a response to social changes.<sup>9</sup> More about the perceptions of changes and cleavages in Mexican legal science in the 1920s can be learned from the *Motivos* placed in the head of the new code. We have one version subscribed by »the commission« that drafted the code<sup>10</sup> and another version published by one member of the draft commission, Ignacio García Tellez.<sup>11</sup> Both contain critical assessments of the social problems which the commission sought to tackle with new regulations and principles. As often occurs, the need for a new legislation is justified with the description of a

»crisis«. <sup>12</sup> The new code was seen as a reaction to a profound social transformation, as was expressed in the *Motivos* of the commission:

»La profunda transformación que los pueblos han experimentado a consecuencia de su desarrollo económico, de la preponderancia que ha adquirido el movimiento sindicalista, del crecimiento de las grandes urbes, de la generalización del espíritu democrático, de los nuevos descubrimientos científicos realizados y de la tendencia cooperativa cada vez más acentuada, han producido una crisis en todas las disciplinas sociales, y el derecho, que es un fenómeno social, no puede dejar de sufrir la influencia de esa crisis. El cambio de las condiciones sociales de la vida moderna, impone la necesidad de renovar la legislación, y el derecho civil, que forma parte de ella, no puede permanecer ajeno al colosal movimiento de transformación que las sociedades experimentan.«<sup>13</sup>

These were very general remarks. They do not refer to a particular social evolution in Mexico, but address »societies« in general rather than national problems. What the commission evokes are common patterns of modernity the law was supposed to react to. A necessity for reform seems not to be the question, because the law is presented as a factor that does not shape social progress, but has to catch up with it. But in what did the social change consist and which »past« was superseded by the effects of modernity in the view of the Mexican legislators? What they chose to observe was basically a decline of the individual as a focal point of legal conceptions:

»Nuestro actual Código Civil, producto de las necesidades económicas y jurídicas de otras épocas; elaborado cuando dominaba en el campo económico la pequeña industria y en el orden jurídico un exagerado individualismo,

7 On the draft CRUZ BARNEY (1999) 572 ss.

8 Art. 21 Código civil: »La ignorancia de las leyes no excusa su cumplimiento; pero los jueces teniendo en cuenta el notorio atraso intelectual de algunos individuos, su apartamiento de las vías de comunicación o su miserable situación económica, podrán, si está de acuerdo el Ministerio Pú-

blico, eximirlos de las sanciones en que hubieren incurrido por la falta de cumplimiento de la ley que ignoraban, o de ser posible, concederles un plazo para que la cumplan; siempre que no se trate de leyes que afecten directamente al interés público.« Quoted from Código civil para el distrito y territorios federales (1928).

9 On a crisis of codification in general NARVÁEZ HERNÁNDEZ (2003).

10 Exposición de motivos (1933) 5–26.

11 GARCÍA TELLEZ (1932). Biographical notes on Tellez NARVÁEZ HERNÁNDEZ (2004) 214 n. 70.

12 For general discriptions of crisis and codification see NARVÁEZ HERNÁNDEZ (2003) 208.

13 Exposición de motivos (1933) 5–6.

se ha vuelto incapaz de regir las nuevas necesidades sentidas y las relaciones que, aunque de carácter privado, se hallan fuertemente influenciadas por las diarias conquistas de la gran industria y por los progresivos triunfos del principio de solidaridad.»<sup>14</sup>

So what was modern was social, and what was social was modern.<sup>15</sup> The individual was put under pressure and defeated by mass society. Men live in larger social units such as factories or big cities and lose their individuality. This was seen as a problem which did not remain without effects for the legal system. Given that individualist society was overthrown, this meant that the »individualist« codification that once built this society – most of all the codifications shaped following the pattern of the French code civil of 1804 – were to be abolished or at least reformed.<sup>16</sup> One could try to interpret this as a hint to the Mexican political situation in the 19th century. Under the government of Porfirio Díaz, huge steps toward liberalisation of the economy had taken place. Some speak of a »liberal revolution« and the »liberal republic« in the second half of the nineteenth century.<sup>17</sup> Modern historiography underlines the fact that Díaz had accelerated the economic growth of the country by a number of reforms.<sup>18</sup> Mexican Legal history describes the establishment of a liberal Codification which came into force in 1871 for the district of the federal state.<sup>19</sup> It was republished without significant revisions under the reign of Díaz in 1884.<sup>20</sup> This Codification was shaped following the example of the French Code civil,<sup>21</sup> based on freedom of contract<sup>22</sup> and property.<sup>23</sup> And indeed it is the term »individualism« that in the vision of the draft commission of 1928 characterized the previous

Codification of 1884.<sup>24</sup> But was it really overcome by mass-society and the industrial revolution, as the *Motivos* of the 1928 Codification claim? This can be doubted when we look at the conclusions of economic history. The outset of an industrial revolution, causing a »milagro mexicano« does not date back to the beginning of the 20th century, but rather to the post revolutionary era in the 1940s.<sup>25</sup> »La gran industria« probably did not play such an important role for the transformation of society in Mexico as the legislator claimed. As will be described later, a social revolution indeed took place in Mexico, but the driving force was not industrial but agricultural workers. It seems more likely that this part of the legitimising basis of the new codification was shaped on European models and directly related to legal discourses that reflected the effects of capitalism on society earlier, due to experiences in European countries.

However, in Mexico clear conclusions were drawn from the diagnosis of a crisis: The most important aim of the new code is described as:

»Armonizar los intereses individuales con los sociales, corrigiendo el exceso de individualismo que impera en el Código Civil de 1884.«<sup>26</sup>

Mexican legal science went on a quest for *harmony between collective and individual interests*.<sup>27</sup> Yet it does not become obvious whose interests exactly were the collective interests – state interests, national interests or even economic interests? Such references can alter legal conceptions completely. This also applies to the conception of »social function«. It makes a difference if the »social function« of a legal institute is seen rather as economic, national, or whatever. At this point

14 Exposición de motivos (1933) 6.

15 This was confirmed some years later by RUIZ (1946).

16 This becomes even more obvious in the »motivos« drawn from the memory of the commission-member Tellez, who speaks of a revision of the »postulados del individualismo romanista y napoleónico«. See GARCIA TELLEZ (1932) 2.

17 E. g. BAZANT (1971) 256–286.

18 For further references see BERNECKER/PIETSCHMANN/TOBLER (2007) 230–240.

19 DEL REFUGIO GONZÁLES (1988) 106–114.

20 CRUZ BARNEY (1999) 569 referring to: Código civil del Distrito Federal y Territorio de la Baja California (1884).

21 See for a comparison from the perspective of the 19<sup>th</sup> century DE MONTLUC (1872) 1.

22 In the version of 1884 see art. 1419.

23 In the version of 1884 see art. 729.

24 Exposición de motivos (1933) 8.

25 BERNECKER/PIETSCHMANN/TOBLER (2007) 301–303.

26 Exposición de motivos (1933) 8.

27 See as well RUIZ (1946) 49: »El equilibrio resultará de la armonización de los fines individuales con los fines colectivos.«

the motives were not very clear. Instead, they clearly explain the consequences drawn from the conclusion that the individual should be perceived as a social being. This led in the legislation of 1928 to claims of a social law:

»Socializar el derecho significa extender la esfera del derecho del rico al pobre, del propietario al trabajador, del industrial al asalariado, del hombre a la mujer, sin ninguna restricción ni exclusivismo.«<sup>28</sup>

Here it becomes obvious what was at stake: The new law was supposed to respect the interests of the poor, of workers and women, but not in a revolutionary way that led to a class struggle. Emancipation of the poor was rather to be achieved by a harmonious evolution.

## 2. *European predecessors? Código privado social and Codice privato sociale*

Such critiques of the »individualist« codifications of the 19th century are very familiar to European legal historians. One frequently finds narratives of social cleavages created by an emerging industrial society which is said to cause a crisis of the legal subject as an individual, seen as free and equal. In order to compare the Mexican »anti-individualism« which comes to the fore in the outline of the *Motivos* we could chose many works of influential European legal scholars that developed theories about the step from individualist to social law. In France for example, Raymond Saleilles published extensively on a private law of solidarity.<sup>29</sup> Such thoughts could have inspired the Mexican legislators. Another track leads to Italy, even on a conceptual level. It has been explored in an article by José Narváez Hernández, who traced the lines between the Mexican Codification and what he calls »Solidarismo italiano«. <sup>30</sup> The new de-individualised code was labelled by the draftsmen:

*Código Privado Social*.<sup>31</sup> From 1880 on in Italy there have been several movements of reform of legal methods and legal policy.<sup>32</sup> An organ for the pioneers of progressive ideas was the Italian Journal »La scienza del diritto privato« founded in 1893 in Florence.<sup>33</sup> The first article of the first issue was entitled: »Diritto privato e Codice privato sociale«. <sup>34</sup> It was written by a lawyer called Giuseppe Vadalà-Papale.<sup>35</sup> We cannot verify if Mexican jurists knew this particular text or if there was a »reception« of this particular journal in Mexico. But this question is of minor importance. At any rate it is clear that the considerations of the Mexican jurists were linked to legal discussions which took place in European countries. The idea of a codification which was still part of private law but at the same time »social/sociale« was a common topic. Already before the journal »La scienza del diritto privato« was launched, a Roman professor named Enrico Cimbali announced the era of a new private law which responded to the needs of modern society. One of the core chapters was dedicated to a »Codice di Diritto privato sociale«. <sup>36</sup> Harmony between contrasting interests was one of Cimbali's claims, but it was embedded in a more general framework of philosophical materialism which conceived society as a »body«, composed of social units and associations which were to be regarded as real and not as legal fictions.<sup>37</sup> His principle of »social law« was more connected to an organic »social body« which incorporated the individual, attributing certain functions to it which could then be guidelines for law. <sup>38</sup>

Another author, Giuseppe D'Aguanno, can also be counted among the »movement« of critical innovative Italian jurists of the late 19th century. One of his works about legal reform was even translated into Spanish, although unfortunately we do not know exactly when. This translation transmitted to the Spanish speaking world, probably at the beginning of the 20th century, a concept of »derecho privado-social« which was as a syn-

28 *Exposición de motivos* (1933) 6–7.

29 For an overview see SABBIONETI (2010) 355–659.

30 NARVÁEZ HERNÁNDEZ (2004) 201–226. Narváez describes the Italian jurist Francesco Cosentini as an important inspirer of Mexican codifiers, in particular Tellez.

31 *Exposición de motivos* (1933) 6.

32 KEISER (2005) 151–160. On the relationships with Mexico see NARVÁEZ HERNÁNDEZ (2004) 207–210, who dedicated one chapter to this topic.

33 GROSSI (1988). In relation to Mexico: NARVÁEZ HERNÁNDEZ (2004) 209.

34 GROSSI (1988) 143. The similarity to Mexican concepts was pointed out before by NARVÁEZ HERNÁNDEZ (2004) 209.

35 For a more detailed critique of Italian legislation of his time see VADALÀ-PAPALE (1881) 19 ss.

36 CIMBALI (1885) 26 ss.

37 CIMBALI (1885) 29.

38 CIMBALI (1885) 30.

thesis between two elements previously seen as opponents:

»Nosotros aceptamos, por tanto, el concepto de derecho privado-social, creyendo que no hay contradicción entre estos dos términos, antes bien creyendo que el segundo apelativo sirva para precisar y aclarar el concepto del primero y para evitar equívocos.«<sup>39</sup>

D'Aguanno also proposed what was necessary in order to transform a »código privado« in a »código privado-social«. <sup>40</sup> Overcoming individualism meant of course the application of the principal of »socialidad«. <sup>41</sup> For D'Aguanno this meant not least an extension of rules and a larger Codification that covers areas which previously had been left to private autonomy. <sup>42</sup> Again, we do not know if these texts were familiar to Mexican legal science in the 20th century. But it is by no means excluded that they could have drawn some inspiration from it. The reconciliation between individual and collective interests without destruction of one by the other is the core pattern. However, differences must not be neglected. The draftsmen of the Mexican Codification showed no interest in anatomical metaphors. Even though they used similar or identical terms, their constructions seemed more political and less scientific, which is not so surprising, since we are dealing with motives and goals of existing legislation.

Here it is not possible to examine in detail how the social aims were translated into action in the Mexican Codification of 1927, even though this would be very interesting. But one example is often quoted to show that the idea of social law in Mexico was strongly connected to the idea of an emancipation of the weaker members of society. <sup>43</sup> In the »disposiciones generales« of the Codification, which can be regarded as a collection of core principles that characterize the whole book, we find one remarkable rule about the treatment of deprived people. According to Art. 21 of the »Disposiciones preliminares« judges were permitted to

excuse certain violations of law by disadvantaged people, whose lack of resources made it difficult to distinguish right and wrong:

»La ignorancia de las leyes no excusa su cumplimiento; pero los jueces teniendo en cuenta el notorio atraso intelectual de algunos individuos, su apartamiento de las vías de comunicación o su miserable situación económica, podrán, si está de acuerdo el Ministerio Público, eximirlos de los sanciones en que hubieren incurrido por la falta de cumplimiento de la ley que ignoraban ...«<sup>44</sup>

The dogma of Roman law »error iuris nocet«<sup>45</sup> was overcome by this provision that responded to a critique expressed also by movements of social jurisprudence, e. g. by Anton Menger in his discussion of the first draft of the German civil code (BGB). <sup>46</sup> This rule was in line with the claim of the »motivos« to seek the inclusion of poor and uneducated members of society. <sup>47</sup> With this rule the Mexican code translated the sometimes obscure concepts of solidarity by law into a political concept of emancipation that had predecessors in Mexican legislation, <sup>48</sup> but seemed extremely modern, also because it could be read as an attempt at social inclusion of the indigenous population, which often belonged to the lower social strata.

### 3. *Attitudes towards foreign models of legislation*

Mexican jurists were fully aware of the importance of foreign models for their new Codification. The »motivos« of commission-member Ignacio Garcia Tellez contain references to numerous foreign laws such as the civil codifications of Germany, Austria, Switzerland, Brazil and Guatemala, which were quoted as examples of a more social movement of law that aimed at levelling down the differences between civil and commercial law, since the latter was regarded as the law of a superior class of merchants, unequal to the others. <sup>49</sup> More-

39 D'AGUANNO (1920) 136.

40 Ibidem 138 ss.

41 Ibidem.

42 Ibidem.

43 NARVÁEZ HERNÁNDEZ (2004) 215.

44 Código civil Art. 21.

45 On the roman sources: WINKEL (1985).

46 MENGER (1890) 20–22.

47 Exposición de motivos (1933) 6. For a critical discussion of the »modernity« of this rule see NARVÁEZ HERNÁNDEZ (2004) 215–220.

48 This is stressed by NARVÁEZ HERNÁNDEZ (2004) 217.

49 At least for the German example this is surprising, because there was a distinction between private and commercial law. GARCIA TELLEZ (1932) 3.

over, Tellez quoted the Argentine civil code and the Weimar Constitution in a paragraph about the retroactivity of law.<sup>50</sup> Roman sources are not quoted and great jurists of the 19th century are rather neglected, only Savigny being mentioned once explicitly,<sup>51</sup> as well as Dalloz.<sup>52</sup> Not surprisingly, the code of 1927 was not supposed to be a product of 19th century legal scholarship. It was clearly stated that it should not be a collection of theoretical principles, deriving from logical deductions.<sup>53</sup> Here the common clichés against a jurisprudence shaping systems and concepts found an unmistakable echo in Mexico. Nevertheless, the »motivos« contain an implicit reference to Friedrich Carl von Savigny, ironically the most esteemed theorist of systematic jurisprudence, when they deal with the question of the import of foreign legislation into Mexico. It was said that according to the commission it was common ground that, legislation should be regarded as a »trasunto de las costumbres« and a »cristalización de las necesidades de una sociedad«.<sup>54</sup> Most likely this was a reference to Savigny's famous statement about the necessary development of legislation from a »Volksgeist«.<sup>55</sup> The Mexican legislators felt that they had to discuss this concept, because they were relying so much on foreign models, which might have been thought to be in contrast with national law or customs. The frequent quotation of foreign models seemed to create a need for justification. It was satisfied by a relativization of Savigny's ideas. The commission's opinion on the matter can be summarized as follows: One's own laws, customs and traditions are important but they can be an obstacle to progress. Who sticks to tradition risks ignoring new social conditions and necessities. In order to adapt law to life, it is indispensable to take over foreign legal patterns, as long as they are progressive.<sup>56</sup> Hence, the Mexican lawyers saw themselves in a sort of catching up process. They feared isolation and regression, and »modernity«

was a crucial argument. Interestingly, their inspirations were said to be drawn from »reputable European scholars«<sup>57</sup> and their theories. The centre of progress seemed to be located here, not in the USA or in other American countries.

In general it can be said that there was a strong tendency to look to Europe. But here it shall be argued that beside European antiliberal legal thought, there was another strong foundation of the new Codification. Its orientation towards »social« law was not only an implementation of European doctrines. As was already said in the introduction, it also came from an interplay with the Mexican constitution of 1917. This relationship was also stressed by the draftsmen of the 1927 Codification<sup>58</sup> and it shall be described in the following paragraphs.

### III. Property and labour as core elements of revolutionary law

The Mexican code of 1928 was supposed to complete the desire for an economic emancipation of the working class, which had been expressed in the legal form for the first time in the revolutionary document ten years before. Despite the »reception« of European doctrines, the commission members reminded the reader not to forget:

»... nuestros propios problemas y necesidades, y, sobre todo, procurando que enraizaran en el Código Civil los anhelos de emancipación económica de las clases populares que alentó nuestra última revolución social y que cristalizaron en los artículos 27, 28 y 123 de la Constitución Federal de 1917.«<sup>59</sup>

It was often repeated that the Mexican Constitution was built upon new concepts of property (Art. 27) and of work (Art. 123).<sup>60</sup>

50 GARCIA TELLEZ (1932) 7. On the sources of the codification in general BAITZA (1979).

51 GARCIA TELLEZ (1932) 4.

52 GARCIA TELLEZ (1932) 6.

53 Exposición de motivos (1933) 7.

54 Exposición de motivos (1933) 7.

55 Savigny states recently REUTIER (2011) 167–190.

56 Exposición de motivos (1933) 7.

57 »... reputados tratadistas europeos ...« Exposición de motivos (1933) 7.

58 GARCIA TELLEZ (1932) 1; Exposición de motivos (1933) 7.

59 Exposición de motivos (1933) 7.

60 See e. g. NORIEGA CANTÚ (1988) 11–16.



1. *The property concept of the Constitution (Art. 27)*

On this occasion we cannot make a lengthy description of the political events that led to the Mexican Constitution of 1917.<sup>61</sup> The concept of property is laid down in Art. 27. The first paragraph does not mention the word »social« even though the Constitution is reputed to be a sort of archetype of social property law:

»La propiedad de las tierras y aguas comprendidas dentro de los límites del territorio nacional corresponde originariamente a la Nación, la cual ha tenido y tiene el derecho de transmitir el dominio de ellas a los particulares constituyendo la propiedad privada.«<sup>62</sup>

But in any case it becomes very clear that this is a relativization of an individual concept of property. In the first place, real estate property is no longer attributed to individuals. Instead, private property depends on national property and is only a sort of sub category of national property. Due to this model, private property over land could only be created if the nation did transfer possession over land to private persons. The title to acquire property here was not an act under private law but an act of distribution under the control of the nation. Limitations of property could be more easily justified under such a regime. In consequence, the next paragraph of art. 27 formulated a right to expropriation for reasons of public interest, but only with compensation. Besides, property could be limited due to a »just distribution of national wealth«. This also makes a big difference for the legitimacy of property law. The proprietor received his property from the nation and therefore has to respond to the needs of that nation when enforcing his right.

»La Nación tendrá en todo tiempo el derecho de imponer a la propiedad privada las modalidades que dicte el interés público, así como el de

regular, en beneficio social, el aprovechamiento de los elementos naturales susceptibles de apropiación, con objeto de hacer una distribución equitativa de la riqueza pública, cuidar de su conservación, lograr el desarrollo equilibrado del país y el de su conservación, lograr el desarrollo equilibrado del país y el mejoramiento de las condiciones de vida de la población rural y urbana.«<sup>63</sup>

In this second paragraph the formula of »public interest« is introduced. But the text even goes further. The first paragraph sounds like a reintroduction of what was called in continental European thought the »divided concept of ownership« that was a fundamental element of feudalism because it attributed the property of land to a sovereign with the consequence that individuals could only get parts of this sovereign property but never the whole of it. Therefore one of the main targets of liberal continental private law in the 19th century was the abolition of any division of property rights. The Mexican Constitution sounds like a step back to an era of law which was pre-modern from the point of view of the late 19th century:

»Corresponde a la Nación el dominio directo de todos los recursos naturales de la plataforma continental y los zócalos submarinos de las islas ...«<sup>64</sup>

»Dominium directum« was the old terminus coined by the Glossators that meant sovereign property, in contrast to »dominium utile« which meant the concrete ownership, often of the person that cultivated the land.<sup>65</sup> Why did the text of the Constitution contain a term of feudal law? According to historical literature in Mexico, this is no coincidence. One of great issues raised in the course of the Revolution was the question of land ownership (propiedad de la tierra).<sup>66</sup> The Revolution was directed against hacendados, latifundistas and foreign investors. The reproach was made against Diaz that he destroyed forms of common or

61 For more details see CARPIZO (1988), still useful in German WEHNER (1978) 162–218.

62 Art. 27.

63 Art. 27.

64 Art. 27.

65 Still relevant on this development and the process of de-feudalization HEDEMANN (1930) 4. On dominium directum in the Mexican Constitution see NORIEGA CANTÙ (1988) 121.

66 See e. g. the detailed description from 1909 by MOLINA ENRIQUEZ, esp. 25.

Enriquez work was well known to politicians who participated in the draft of the 1917 Constitution and the article on property. See ROUAIX (1946) 183.

small properties which had existed during the Spanish reign and later, and sold them to real estate speculators and investors, only interested in self-enrichment.<sup>67</sup> A major goal of the revolution was seen in the re-conquest of the national territory and its mineral resources. It has been stated, that in order to achieve the supremacy over land and resources the new Constitution had returned to a »colonial« concept of property.<sup>68</sup> Like the Spanish crown, the new state saw itself as legitimate owner of the land with the exclusive right to concede to others titles of disposal. Indeed, in a proposal by some members of the constitutional council, a reference to the past was made in the sense that the nation could have inherited the absolute right of property over the land from the former colonists.<sup>69</sup> But this interpretation was rejected by Pastor Rouaix, maybe the most important member of a group of politicians who developed the new disposition on property.<sup>70</sup> Rouaix explained that it had never been the intention of the draftsmen of the Constitution to return to a concept of neo-colonial dominium directum.<sup>71</sup> In 1946 he stated that this had been a false interpretation of the Constitution by Molina Enriquez, author of the famous book »Las grandes problemas nacionales«. <sup>72</sup> According to Rouaix there was only a short time to redact the article on property. Otherwise the commission would have limited the text to mentioning the capacity of the state to modify private property according to the requirements of »utilidad social«. <sup>73</sup>

## 2. *Labour concepts of the Constitution* (Art. 123)

The famous article on labour law basically consists of a number of concrete prohibitions of contractual clauses which could be to the detriment of the workforce. Like the article on property, it does not state a principle of social labour. Instead, it sets up a catalogue of rules for further

labour regulations that are to be elaborated in detail by the regions of the federal state.<sup>74</sup> What the labour legislation of the future should respect is laid down in 30 articles. They cannot be discussed here in detail. Important elements were minimum wages (to be fixed by the regions, Art. 123 VI–IX) and a maximum of eight working hours for adults (Art. 123 I), principles of non discrimination (referring to sex and nationality Art. 123 VII) and maternity protection (Art. 123 V). The whole catalogue is a compendium of rules of social protection which today belong to the standard of »modern« legislation.<sup>75</sup> Mexican constitutionalists were well aware of the fact that they had introduced something new. A member of the constitutional congress proudly declared that the Mexican Constitution was the first document that presented to the world a constitution of the sacred rights of the workers, as France was the first country where a charter of human rights has been issued after the Revolution.<sup>76</sup> Workers' rights were regarded as particularly important in Mexico. A book by the U.S. Journalist John Kenneth Turner that appeared in 1910 was entitled: »Barbarous Mexico« which was referring to the government of Díaz, called barbarous because it permitted and facilitated the exploitation of workers by Mexican entrepreneurs and foreign investors.<sup>77</sup>

## 3. *Comparisons to constitutional law in Germany*

It is obvious that there are parallels between the development of constitutional law in Mexico and in Europe. For German scholars the new issues of »social« law in Mexico strongly recall the Constitution of Weimar which came into force in 1919 with its famous social provisions. The Weimar document was, like the Mexican Constitution of 1917, a product of a period of consolidation after the downfall of a government. Labour (Art. 157–165 Weimar Const.)<sup>78</sup> and prop-

67 This becomes very obvious in GONZÁLES ROA (1916), esp. 21–22.

68 WEHNER (1978) 175 with further references. See also NORIEGA CANTÙ (1988) 115, 121.

69 Iniciativa sobre el artículo 27 del proyecto de Constitución (1946) 205 (208).

70 For a general overview see SAYEG HELU (1974). This text contains many quotations from Rouaix.

71 ROUAIX (1946) 202.

72 Ibidem.

73 ROUAIX (1946) 203

74 On the drafting of the article CARPIZO (1988) 93–105.

75 Apart from that Art. 123 was interpreted as a result of class struggle and

Marxist dialectics. See TRUEBA-URBINA (1980) 111 ss.

76 See the quotation in CARPIZO (1988) 97. See also TRUEBA-URBINA (1980) Prologo de 1975.

77 TURNER (1969).

78 On labour in the Weimar Constitution NÖRR (1988) 181 ss.; see also NÖRR (1992).

erty (Art. 153 Weimar Const.) were also two crucial legal topics. The famous concept of property in die Weimar Constitution was a fundamental step towards a new perception of legal institutions, which did not only concern constitutional law, but private law in its dogmatic structure as well. When we compare the techniques of constitutional law-making in the German model and the previous rules of the Mexican revolution, it becomes obvious that those techniques were completely different. The Weimar legislation was focused on principles and legal propositions that were open to interpretation, whereas the Mexican legislators preferred precise and detailed rules. The Articles about labour and property in Mexico look more like small codifications within the Constitution since they are legal texts which contain solutions for single practical problems. This way of law-making was not common in Europe where since the French »Declaration des droits de l'homme et du citoyen« a constitution consisted of principles and left the detailed solutions to »simple« legislation. As noted before, the Mexican article on labour law declares a number of contractual clauses which do not meet the goals of the Constitution as void. So here we had what can be compared to »mandatory rules« of private law in a constitution, even though this was just seen as a model for further legislation and not as a system with direct effect in the contractual sphere. In Weimar the legislator left this task to the parliament simply instructing the legislator to draft a codification of labour law in the future (Art. 157 Weimar Const.). By contrast, in Mexico a division between private and public law was not so important to the legislators of the revolutionary period. Later this could be interpreted as a departure from the classical dichotomies of the liberal state which has been made on purpose to open the way for a new understanding of »social law«, that was indifferent to the old distinction between the state and the individual.<sup>79</sup> It was pointed out that during the revolution the political driving forces wanted to formulate their major claims in terms of constitutional law.<sup>80</sup> Theory was probably less important. This cannot be explained through an »inclination of Spanish lawyers to formalism«,<sup>81</sup> but springs

rather from political circumstances. The leader of the Mexican government of this time, Venustiano Carranza, has said explicitly that he wanted a constitution whose character was not »abstract and scientific«, but concrete.<sup>82</sup> This was a criticism of the former constitution of the so called »liberal state« from the year 1857, that was seen as a symbol of the »liberal system« which had failed. The new law had to be a response to the actual problems of the economic system in Mexico of the time. For example, Art. 123 X of the Constitution contains a provision that could be seen as a classical prohibition against truck systems in labour law, which is very common to European legal historians, as such rules belong to the core of protective laws for workers. But if we look precisely at the content of the norm, we can see that it only works together with another provision that reflects a typical problem of the Mexican agrarian system in the time of the Porfirio Diaz dictatorship. A ban on payments with goods instead of money is not useful if there is no market where goods can be purchased for fair prices. Often Mexican agricultural workers were forced to buy their food and clothes in so-called »tiendas de raya«.<sup>83</sup> Those were company stores run by the employers who could dictate the prices so that the wages they paid to the workers flowed back to them. In such a system a »fair wage« that was claimed by the Constitution becomes impossible if the offer is limited to one supplier. There still seem to be some open questions about the bargaining situation of the workers and if it was really that bad.<sup>84</sup> Anyway, it cannot be denied that a very frequent complaint during the revolution was that market access did not exist for many workers and that they lived in isolation and dependence from the *hacendados*. To provide a way out of this misery, the Mexican Constitution of 1917 did not only ban the truck system but also the »tiendas de raya« by declaring void such contractual clauses which forced the workers to buy goods only in certain shops owned by the employers. Here it becomes obvious again that Mexican law cannot be judged by European categories. The common political claim to connect wages with markets to improve the workers' situation required laws in Mexico different from those in

79 NAVÁEZ HERNÁNDEZ (2004) 12.

80 This seems to be of particular interest for European scholars. See WEHNER (1978) 175 with the observation that

in Mexico the proclamation of »abstract concepts« of liberty and equality seemed outdated.

81 WEHNER (1978) 177.

82 WEHNER (1978) 170.

83 See KATZ (1974) 9.

84 Ibidem.

Europe. The example again illustrates the importance of the functional context of legal rules and their institutional surrounding when they are to be compared with other norms.

#### IV. From free labour to a social concept of labour

Today the Mexican Constitution is praised as a milestone in the development towards a social concept of labour contracts. Even if there is no doubt about the importance of this development towards social labour, it must not be forgotten that free labour was also an issue in Mexican law in the early 20th century. Only rarely is it mentioned that Art. 5 of the Constitution still bans forced labour:

»Nadie podrá ser obligado a prestar trabajos personales sin la justa retribución y su pleno consentimiento, salvo el trabajo impuesto como pena por la autoridad judicial ...«

The earlier Constitution of 1857 formulated the human right to dispose of one's own labour even more explicitly:

»La ley no puede autorizar ningun contrato que tenga por objecto la pérdida ó el irrevocable sacrificio de la libertad des hombre, ya sea por causa de trabajo, de educación, ó de voto religioso«<sup>85</sup>

Here the tone was more solemn, mentioning the freedom of men as an inalienable right in general. In 1917 the question of consensual labour was combined with the problem of a just salary. But the problem of exploitation is still perceptible. This leads to the question to what extent forms of unfree labour<sup>86</sup> still existed in Mexico during the late Porfiriato. In this field we can examine some works from social and economic history which

describe the working conditions on the haciendas. Key words such as »servidumbre agraria« are used by historians,<sup>87</sup> but apparently such a phenomenon has not yet been studied extensively by legal historians yet. Rather they seem to focus their attention on social protection, which is seen as a major point of reference for the history of the development of contemporary labour law. Mexican legal scholars of the 20th century criticized the law on labour contracts as liberal and unjust, because it discriminated against the workers as weaker parts of the labour contract.<sup>88</sup> This perspective, plausible as it may be, neglects the fact that many labour relations were not based on entirely free private contracts. Many relations did contain elements of coercion. Of course, a legal survey of agricultural labour conditions in Mexico cannot be envisaged here since they are far too complex and there are remarkable regional differences. However, some remarks should be made about the development towards free labour and the legal institutions used in this connection.

Economic and social historians have often characterized agricultural labour conditions with the term »debt peonage«.<sup>89</sup> Debt peonage does not mean slavery in terms of lifelong ownership of one person. In Mexican peonage, bondage was created by contract.<sup>90</sup> Workers were given loans they could hardly repay for several reasons. Such debts may have bound them to one hacienda and created the danger of exploitation. The peonage system could have devastating effects on individual freedom. However, modern historiography has made more differentiated assessments of agricultural labour conditions in Mexico.<sup>91</sup> Several different groups of agricultural labourers have to be singled out, whose living and working conditions could be very different: sharecroppers, peones, small farmers and others.<sup>92</sup> Furthermore, there does not seem to be a reliable definition of the concept of »peonage«.<sup>93</sup> Many of the descriptions of unjust labour conditions might have been subjective views by

85 Constitución Federal de los Estados-  
Unidos de Mexico de 1857 (1991) 607.

86 On free labour in terms of legal  
history STEINFELD (1991).

87 For example the work of an Austrian  
scholar who started his academic ca-  
reer at Humboldt University (East  
Berlin) and then went to the United  
States: KATZ (1976).

88 E. g. DE LA CUEVA (2007) 44 ss.

89 KATZ (1974) 8.

90 NICKEL (1991) 12, 21, 22.

91 See e. g. NICKEL (1988) 376 ss.

92 For a detailed regional analysis  
NICKEL (1997) 7 ss. Nickel remarks  
that not many documents of Hacia-  
da-administration of the Porfiriato  
have been conserved. But those doc-

uments were crucial to examine the  
real amount of debts that was the  
justification of bondage.

93 NICKEL (1991) 12.

journalists or might even have been inspired by revolutionary propaganda. It is impossible here to measure degrees of freedom of Mexican labourers in general. It may however be helpful to give a short overview of some legal institutions of labour in pre-revolutionary Mexico. A relevant source in this respect that has only rarely been considered is the work of Karl Kaerger, a German diplomat who travelled widely in the United States and Mexico at the turn of the century. Kaerger was one of the major experts on labour relations in northern Germany<sup>94</sup> before he travelled to Latin America.<sup>95</sup> Even though his assessments are aimed at an audience of agricultural experts, as well as perhaps entrepreneurs who were thinking about investing in Mexico,<sup>96</sup> it contains some references to the legal status of labourers in various regions so that an examination of his work can give an insight into contemporary perceptions of problems of un-free agricultural labour in Mexico. Kaerger often reports that in many states of Mexico manpower was seen as a scarce resource.<sup>97</sup> Therefore employers sought for strategies to bind workers to the hacienda. Kaerger explains that the mere conclusion of a labour contract was not sufficient to force a worker to stay at one farm for lifetime.<sup>98</sup> Indeed, this would have been an infringement of Art. 5 of the Constitution of 1857. Instead, the compulsion of labourers seemed to happen rather on grounds of customary law, not in the sphere of formal contracts. Kaerger describes how, in Yucatan, an advance was given to young workers by the employer, usually before marriage, to allow the couple to set up home.<sup>99</sup> The money was then spent and the employer did not expect repayment. Instead, according to local custom, the worker had to stay and work on the hacienda forever. As compensation employers had to pay a certain daily salary and sometimes pay for medical assistance if needed.<sup>100</sup> This was the price for which a »young Yucateco sold his freedom«.<sup>101</sup>

If a worker escaped from the hacienda and refused to fulfil his duties, police forces could act

on behalf of the employer.<sup>102</sup> This did not mean though, according to Kaerger, that the police were acting to enforce a contract. Police sanctions were not directed against a breach of contract, but against a criminal act: Escaping without repaying the advance by the employer was seen as fraud.<sup>103</sup>

It is interesting to compare this system of labour regulation with the system of agricultural labour in Germany. At the same time, a kind of »Master and Servant Law«, which set up special standards for employees in household and agriculture, was still in force in Germany. The so called »Gesinderecht« contained elements of coercion against workers. But in contrast to the Mexican system they were contained in positive law of labour contracts (Gesindeordnungen) which could (as in Mexico) differ from region to region.<sup>104</sup> In these laws breach of contract was sanctioned with penalties by the police. Apart from that, in the Prussian agricultural industries, criminal law played a role in disciplining workers.<sup>105</sup> In Mexico, a combination of customary contract law and criminal law seems to have created indentures for the lifetime of workers, even though the Constitution was aiming at a protection of individual freedom, using concepts of later natural law. In Germany the contracts of the agricultural workers and household workers were usually not concluded for a longer period than one year. But until 1919 the contracts of servants and farmhands (Gesinde) were subject to police legislation and only to a very limited extent on principles of private law. A shift to free contracts can also be an advantage for workers if the market conditions are favourable. In Mexico, the Constitution of 1917 is praised for finally banning the coercive elements from the labour system. As soon as the labour contract was freed from its coercive elements, it was regarded as inappropriate for the challenges of the time. There was an immediate shift from coercive labour to social labour, at least on a textual level in the Constitutions of Weimar and Mexico. In Germany's revolutionary moment after the First World

94 The major publication is KAERGER (1893).

95 KAERGER (1901).

96 For a book giving advice to German investors see BALLOD (1902).

97 KAERGER (1901) Vol. 2, Die südamerikanischen Weststaaten und Mexiko, 509, 692.

98 KAERGER (1901) Vol. 2, 489, 490.

99 KAERGER (1901) Vol. 2, 490.

100 Ibidem.

101 Ibidem.

102 Ibidem.

103 See the surveys for the region of Puebla: KAERGER (1901) Vol. 2, 638, 639.

104 See VORMBAUM (1980) 63–66.

105 KEISER (forthcoming) 332 ss.

War, the restrictive elements of the labour legislation were abolished and at the same time<sup>106</sup> norms of social protection for agricultural labourers were enforced.<sup>107</sup> In Mexico similar things had happened before.<sup>108</sup> This is a remarkable circumstance that deserves further comparative research.

#### V. Private Law following constitutional principles: A social concept of property in the Codification of 1928?

It has already been said that the core principles labour and property in the Constitution were supposed to inspire the Codification of 1928.<sup>109</sup> The article about property in the Constitution of 1917 (Art. 27) was later identified with the formula »social function of property«.<sup>110</sup> Besides, there was a reflection in Mexico in the 1920s<sup>111</sup> about a social function of the legal order in general or even the social function of law, which could have a different meaning.<sup>112</sup> »Social function« of legal institutions is a term which usually refers to Léon Duguit and his writings about »fonction social« of property.<sup>113</sup> The French public lawyer held a number of lectures in Buenos Aires in 1911 and thereafter his ideas were well received in Latin America,<sup>114</sup> for instance in Mexico.<sup>115</sup> Yet, if we look at the text of the Constitution we do not find this term or any other mention of »functions«. Instead, the first paragraph of Art. 27 assigns property in Mexican soil to the nation in the first place. The concept of nation is important, not a technical term like »function«, which could belong to materialist philosophy or sociological jurisprudence. Just like the provision on labour, the article on property does not only contain principles, but concrete rules for single cases. They do not deal with mandatory private law, but rather with

administrative law. The term »social function« applies to them only in a very general sense. As in the labour article, those rules implement precise political claims which have to do with Mexico's specific agricultural structure. References to a »social function« in this context could have been unreflective repetition of a »buzzword« of the time, but also conscious links to Duguit and his undoubted authority.<sup>116</sup> This shows that the common pattern of »reception« is too narrow if we want to analyze the relations of legal science or legislation in a comparative perspective. In this case the model of reception does not apply even if it is clear that Mexican authors refer to a concept which was probably invented by a European scholar. But here this has not played any role in the process of legislation which was exclusively engaged in the solution of local problems and did not trouble about theory of any kind, whether it came from Europe or elsewhere. The Mexican Constitution of 1917 was a product of autonomous law making. In the same way, Duguit seemed to be often quoted by legal literature, but his opinions were also discussed critically.<sup>117</sup>

In these cases, references to Duguit are merely functional. Duguit is read as a representative of a superior legal theory as such, but is only quoted in order to emphasize that a local concept is correct and just because it can somehow be mirrored in the legal thought of another country. Duguit is often not only a model, but an argument. In the same way, references to a »legal culture« can be used as an argument. Such functional or strategic references to Europe might also be found in other southern American countries. Besides, it is doubtful if we can really identify Duguit with European legal thought in general. He was just one authority from a European country and, for instance, in Italy had as much success as in Mexico, maybe even

106 See e. g. SCHELLER (1919) 39, 42.

107 In an ordinance called »vorläufige Landarbeitsordnung«. See MÖHLE (1920) 18 ss. For a critical statement from the perspective of east German literature see HÜBNER (1977) LXIX.

108 The German attempts of drafting a general ordinance of agricultural work could be compared to similar attempts in Mexico such as the Proyecto de la Ley General del Trabajo Agrícola (1917). Further steps of legislation were taken some years la-

ter, see e. g. the Proyecto de Ley Federal des Trabajo (1931), Cap. XVIII with a special chapter on agricultural work.

109 See above chapter II.3.

110 See e. g. MANZANILLA SCHÄFFER (1961) 243.

111 RUIZ (1946) 80–84. »Social function« was also discussed in relation to labour law. See Gobierno del Distrito Federal, Concursos sobre temas de derecho industrial (1928) 25–28.

112 »Social function« was also discussed in relation to labour law.

113 See KEISER (2005) 162–167. On Duguit's whole oeuvre GRIMM (1973).

114 For a recent commentary see MAGALLÓN IBARRA (2009) 324.

115 See the reference to Duguit (misspelled Duguit) in a Mexican commentary: Código Civil (1923) 151.

116 See the quotation in MAGALLÓN IBARRA (2009) 334.

117 An example is RUIZ (1946) 80–84.

more. This also shows that we are dealing in this project not with simple »receptions« from one continent to another, but with complex interactions that we have to accept and to describe in their ambiguity.

If we look for the effects of a »social concept« of property created by the Constitution in the Codification, we do not find any references in the wording of the Codification. The norm is limited to the classical formula of »ius utendi et abutendi«, which is the core of the systems of property law in European codifications. As in the classical liberal model, the limitations of property had to be constituted by positive law (las leyes) and not by – for example – »functions«:

Art. 830: »El propietario de una cosa puede gozar y disponer de ella con las limitaciones y modalidades que fijen las leyes.«

This sounds like the individualist model of property. It even focuses on the person of the proprietor, because, unlike other codifications and unlike its predecessor, the code of 1928, it is a definition of a person's right, not of a right in general. It puts »el propietario« in the forefront instead of defining what property should mean.<sup>118</sup>

A »functional« element might be seen in the reference to »modalidades«. This was not in the code before and could be interpreted as a tribute to the use of the right »in action«, as an incorporation of a dynamic element in the codification, whereas the »limits« set up by the law could be seen as static boundaries. But there is no concrete evidence for this. The following article rather seems to confirm the individualist fashion of the rules on property, stating that a person can only be expropriated with payment of a just indemnity (Art. 831). What was cancelled from the previous version, though, was the programmatic sentence: »La propiedad es inviolable.«

Despite this, the mere text of the Constitution does not contain any traces of the important change in the social order of the country after the revolution which was so often mentioned. But it has to be considered that what was at stake during

the revolution was in the first place landownership. On this matter the code contains special sections. Special rules were designed for farm property (finca rustica, Art. 2453). The owner of farmland was not allowed to leave the land uncultivated. If he did so, he could be forced to lease it to others, according to special legislation.<sup>119</sup> It was at this point that draftsmen located the relevance of the »social function of property«. <sup>120</sup> This shows again that a social change in a property system does not necessarily need to modify the wording of the liberal core concept of property. It can be changed through single legislation that limits property rights. A duty to cultivate land was also a standard feature of legislation in Europe between the two world wars.

Apart from this, limits for the liberal conception of property could derive not only from legislation, but from judge made law. The code contains an article about the »abuse of property rights« which are another limit on the capacities of the owner:

Art. 840: »No es lícito ejercitar el derecho de propiedad de maera que su ejercicio no dé otro resultado que causar perjuicios a un tercero, sin utilidad para el propietario.«

The Mexican civil code has taken over some articles about the abuse of law from the German and the Swiss Law of Obligations<sup>121</sup> and it seemed especially important for the draftsmen to place one of these rules in the field of property law. How this was enacted, and whether it really could limit property to a significant extent can only be shown by an analysis of court decisions. Anyway, the new Mexican system of private property law shows some effects on the social claims of the time, but in substance it remains faithful to the old liberal structure. It might have been inspired by pattern from the social revolution, but does not turn the previous system upside down. In this respect it can be compared to other systems of property law, especially in Italy, where a new definition of property as »funzione sociale« has been intensively discussed, but the term has never entered the civil code.<sup>122</sup>

118 Like the famous French code civil (Art. 544) or the Mexican code before 1928, Art. 729: »La propiedad es el derecho de gozar y disponer de una

cosa, sin más limitaciones que fijen las leyes«. On the sources of the Codification see BATIZA (1978) 552.

119 Ley de Tierra ociosas, see Art. 2453.

120 Exposición de motivos (1933) 24.

121 RUIZ (1946) 87.

122 KEISER (2005) 145–189.

## VI. Conclusions

This overview hopefully has given some insight into the use of a model of social law or even jurisprudence in the fields of labour and property law. It emerges that in Mexico property and labour law were strongly connected and both debated by the anti-formalist and anti-individualist legal avant-garde of the first half of the 20th century. An analysis of such a process can give an insight into Mexican legal thinking, which is unfortunately relatively unknown in Europe, but also contribute to the understanding of the European attempts to seek a new private law apart from the abstract forms which were perceived as the Roman tradition. Seen from the outside, we might be able to discover new fashions of European legal thought in a different light, which might enhance our own understanding. This paper has perhaps shown some perspectives of historical comparison which could lead to further results in the future.

As far as Mexican legal thought is concerned, it can be observed, that European patterns and concepts were studied with great attention. What came from abroad could be of high authority. The names of European jurists are sometimes mentioned as if they were undoubted authorities. References to concepts like »codice private sociale« or »fonction sociale« do occur. But this does not necessarily mean, that those concepts were introduced into Mexican legal thinking or legislation without criticism or that they were applied without further reflection. Instead, they were adapted to concrete political needs. In times of revolution, Mexico

seemed to be more interested in a political solution than in scientific analysis. The particular social and economic circumstances have led to different shapes of social ideas, which might have existed previously in Europe in other fashions. It is important to underline the autonomy of Mexican law making, especially on a constitutional level.<sup>123</sup> Autonomous, local rules were produced, but with certain influences from European models. Already in the 1960s this phenomenon has been labelled with terms of cultural and ethnological hybridism, such as »mestizonez«. The Mexican Constitution of 1917 was thought to have a »mestizo« character, which was considered adequate to meet the goals of regulation.<sup>124</sup> Some years later the concept »mestizaje« has been influential in the field of cultural studies.<sup>125</sup> Such processes of hybridization can be interesting objects of study, also for legal history. The challenge will be to find out more about hybridisations in various sectors of the legal system. Further case studies have therefore to be made, and more sources from different areas have to be considered. Methodological problems have to be dealt with, such as the question of homogeneity, which might be a difficult and sometimes misleading attribute of a legal system, which is in a continuous process of communication with other social systems. Nevertheless, these challenges are not to be seen as obstacles, but as incentives which should stimulate curiosity in a new field of research.



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123 See with further references to Mexican authors: WEHNER (1978) 177 ss.

124 WEHNER (1978) 177 with reference to CARPIZO (1969).

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