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ARTICLES

TENSIONS IN CUBAN PROPERTY LAW

Steven E. Hendrix

THE ROLE OF THE JUDICIARY IN INDIA'S
CONSTITUTIONAL DEMOCRACY

Maureen Callahan VanderMay

NOTES

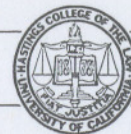
AFFIRMING OUR COMMON HUMANITY: REGULATING
LANDMINES TO PROTECT CIVILIANS AND CHILDREN
IN THE DEVELOPING WORLD

Mary A. Ferrer

SEARCHING FOR THE PERFECT SOLUTION:
INTERNATIONAL DISPUTE RESOLUTION
AND THE NEW WORLD
TRADE ORGANIZATION

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Tensions in Cuban Property Law

By STEVEN E. HENDRIX*

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I. Introduction

A. Cuba in Today's Policy Debate

Cuba, located ninety miles off the coast of Florida,¹ is the only Communist country in the Western Hemisphere.² It captivates the imagination of international policymakers as they try to predict what will

1. Trevor R. Jefferies, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 Hous. J. INT'L L. 75, 76 (1993).

2. Paul Bernstein, *Cuba: Last Look at an Alternative Legal System?*, 7 TEMP. INT'L & COMP. L.J. 191, 191 (1993) (stating that "Yankee pundits point to Cuba as the last bastion of communism").

happen when Castro "falls" and when that might be.³ Former land-owners seek to recover lost assets, or at least some measure of indemnification.⁴ Development experts strategize ways to invigorate the country's moribund economy.⁵ Pharmaceutical companies await privatizations.⁶ Cuba's future depends, in part, on whatever changes take place in Cuba's government. Cuba's future also depends, in part, on existing law and current legal reforms. Perhaps foremost among the current reforms being debated are the roles of tenure policy and property law.

3. Tad Thompson, *Agriculture Key to Cuba's Future*, 4 INT'L PRODUCE J. 35, 35 (1995); INTERNATIONAL REPUBLICAN INSTITUTE, *CUBA TRANSITION RESOURCE GUIDE* (1995); Marifeli Pérez, *The Field of Cuban Studies*, 26 LATIN AM. RESOURCE GUIDE 239, 239-40 (1991) (noting that "[t]he Cuban Revolution never fails to arouse controversy. A great schism divides its discussion: paradise or hell, progress or ruin, democracy or tyranny. Intellectual discourse on Cuba is rarely just about scholarship . . ."). See *Castro Takes One More Step Toward Capitalism*, ECONOMIST, Sept. 9, 1995, at 45 (asking "if China's leaders are finding it increasingly hard to keep capitalist economies out of communist politics, how long can Cuba's?"). Furthermore, according to press accounts, notable recent visitors to Cuba investigating investment opportunities include billionaire John Kluge, Ted Turner of CNN, and Robert Wright, NBC President. See Hugh Davies, *Bankrupt Castro Yields to Capitalism*, DAILY TELEGRAPH, Sept. 8, 1995, at 14.

4. See, e.g., Rosalind Resnick, *Bringing the Law Back Home: Cuban Exiles Prepare For the Day Castro Falls*, NAT'L L.J., June 28, 1993, at 1, 35.

5. The U.S. Agency for International Development, for example, created a Cuba Task Force in 1995 to study potential scenarios in any "Free Cuba." In the past year, representatives of the International Monetary Fund (IMF) met with Cuban officials to discuss how the IMF and World Bank could help the economy make a transition from communism's central planning. See Suzanne Bilello, *U.S. Companies Look Again to Cuba*, NEWSDAY, Feb. 20, 1994, at 106. Reportedly, a confidential report issued after a November IMF visit criticized the embargo. *Id.*

6. The pharmaceutical and tourism sectors are the two main areas in which letters of intent have been signed with the Cuban government to undertake new investments once the embargo is lifted. See Michael Becker, *Cuba Woos 'Top' U.S. Firms Eager to Invest*, MIAMI HERALD, Apr. 11, 1995, at A6. After developing a number of vaccines and medicines Cuba's biotechnology industry has attracted the attention of several major drug companies. *Id.* Observers see pharmaceutical companies making a big push to provide medical supplies in Cuba. See Mary Romano, *Growing Number of U.S. Companies Prepare for Future Business With Cuba*, WALL ST. J., Dec. 23, 1994, at B5. Both Merck & Co. and Johnson & Johnson have said that they have visited the island. *Id.* According to a company spokesperson, Eli Lilly & Co. has recently made a \$1.7 million donation of insulin and antibiotics to Cuba, and contributed \$1.2 million in a previous donation in January. *Id.* The United States permits these types of humanitarian donations. *Id.* Furthermore, in October 1995, 60 top U.S. corporate executives flew to Cuba on a fact finding visit. *U.S. Executives Head for Cuba*, FIN. TIMES, Oct. 7, 1995, at 3. The executives, representing more than 40 major U.S. business corporations, attended a dinner with Fidel Castro and questioned him about politics, economics, and his own personal views. World News Highlights, European Community Report, Reuters, Oct. 7, 1995, available in LEXIS, News Library, Reuec File.

Cuba's relationship with the United States has been long and tumultuous. In response to the expropriation of more than US\$1.8 billion worth of U.S. property in Cuba, President John F. Kennedy imposed a trade embargo on Cuba on February 6, 1962.⁷ In enacting the embargo, President Kennedy relied on the Foreign Assistance Act of 1961 that deals specifically with the restitution of confiscated property.⁸ This property confiscated by Cuba over thirty years ago is now valued at close to US\$6 billion.⁹

In a major change in Cuban policy, foreign investment in Cuba has recently been welcomed.¹⁰ Over the past two or three years, foreign investment in tourism, mining, and, most recently, agriculture have begun to increase.¹¹ Canadian entrepreneurs in particular have begun massive investments in Cuba, especially in the oil and mineral sector.¹² In 1994, Cuba's first large-scale privatization since 1959 resulted in a \$1.4 billion investment by Domos International, a Mexican investment group.¹³ In this venture, the group agreed to renovate Cuba's telephone system in exchange for a forty-nine percent share in the state telecommunications concern, ETEC.¹⁴ That same year, investment groups in Israel and Chile began investing in Cuban citrus

7. Jason S. Bell, Comment, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM. L. REV. 77, 81 (1993).

8. Tom Carter, *Cuba Unlikely To Be Next Trading Partner for U.S.*, WASH. TIMES, Feb. 23, 1994, at A10.

9. *Hearing on Free Trade with Cuba Act Before the Subcomm. on Select Revenue Measures and Trade of the House Comm. On Ways and Means*, 103rd Cong., 2nd Sess. 47 (Mar. 17, 1994) (testimony of Robert Menendez, New Jersey Congressman).

10. Cuban Decree No. 50, promulgated in 1982, allowed for foreign capital investment in Cuba. See Victor Figueroa Albelo, *La Reforma Económica en Cuba y Sus Direcciones Principales*, CONTRAPUNTO, May 1995, at 41. This policy was ratified by Party Resolution in 1991. *Id.* A London-based investment manager is planning to create a \$50 million fund to immediately start investing in Cuba. See *London-Based Fund Plans to Invest in Cuba*, MIAMI HERALD, Oct. 24, 1994, at C1. Beta Funds Ltd., which already manages funds for Vietnam and Poland, has set up what it claims is the first foreign investment management company on the island, Havana Asset Management. *Id.*

11. William A. Messina, Jr., Presentation at the Library of Congress in Washington D.C. (May 17, 1995) (presentation by Mr. Messina, the Executive Coordinator of International Agricultural Trade and Development Center at the University of Florida's Institute of Food and Agricultural Sciences) (notes from presentation on file with author) [hereinafter Messina Presentation]. For a discussion of private restaurants in Cuba, see Douglas Farah, *Cuba's Revolutionary Restaurants: Private Eateries, Catering to Local Clientele, Are Faring Well*, WASH. POST, Sept. 15, 1995, at A28.

12. Peter Benesh, *Canadian Trade with Cuba Growing: U.S. Embargo is Helping by Pushing Business Opportunities North*, STAR TRIBUNE, Aug. 16, 1993, at 8D.

13. Noll Scott, *Informality Belies the Castro Message*, GUARDIAN, June 17, 1994, at 13.

14. Sarah Cameron, *Cuba*, 1995 BRITANNICA BOOK OF THE YEAR 397, 398 (1995).

productions.¹⁵ Because of this foreign investment, Cuba has improved both the quality and the timing of its citrus production and is competing commercially with Florida in places such as Europe and Japan.¹⁶

In the agricultural sector, several foreign groups have provided investments. For example, investment groups from Spain and Greece have formed a consortium to invest in citrus.¹⁷ Canadian and French investment groups are investing in sugar, and the Spanish are investing in Cuban tobacco production.¹⁸ Canadians are very much involved in petroleum sector investments.¹⁹ There are currently 212 joint venture enterprises for foreign investment.²⁰ Nevertheless, analysts suggest that export volumes from these investments will not have any substantial effect on the general foreign exchange picture, because most of the foreign investment has been funneled toward production rather than hard assets.²¹ This uneven investment is fueled by investor concerns regarding the high risk of expropriation in Cuba.²²

Other communist countries have made the transition to private land ownership. For example, in Eastern Europe, little analysis of the property question was carried out before the changes in government. When the changes came, they took donor agencies and host governments by surprise, leaving no established strategy for addressing tenure issues. While substantial literature exists regarding privatization and resolution of American claims against Cuba for expropriation of property, most of it is of an advocacy nature rather than objective. Little else on general development strategies or tenure policy exists.

15. Larry Luxner, *Israelis Invest in Citrus Operation*, THE PACKER, Dec. 25, 1995, at 6C.

16. Messina Presentation, *supra* note 11. The Israeli investment is a joint venture with the largest state citrus enterprise, "Jaguey Grante," covering 40,000 hectares. See *Hearing on Agricultural Implications of Renewed Trade with Cuba Before the Subcomm. on Foreign Agriculture and Hunger Comm. on Agriculture*, 103rd Cong., 2nd Sess. 8, 10 (May 19, 1994) (testimony of Carmen Diana Deere, Professor of Economics and Director of the Latin American Studies Program at University of Massachusetts, Amherst) [hereinafter Deere Testimony]. This is a \$22 million operation. *Id.*

17. *Castro Says Approval of Investments Will Be 'Flexible' but Subject to Scrutiny*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 6, 1995, available in LEXIS, News Library, Bbcwb File.

18. Messina Presentation, *supra* note 11.

19. *Id.*

20. See Peter Benesh, *Canadians Profit from Connection with Cuba*, ST. PETERSBURG TIMES, Sept. 12, 1993, at 11. Canadian oil and gas companies are helping Cubans find their own sources of energy and providing the technology for Cuba to refine the sulfur-laden "heavy" oil it does have. *Id.*

21. Messina Presentation, *supra* note 11.

22. *Id.*

This Article seeks to address property ownership from a broader, objective view, providing a panorama of property law in Cuba that includes a general discussion of agrarian reform, property registries, and the property claims dispute with the United States. The Article then discusses possible issues that Cuba will need to resolve. The Article does not attempt to lay out a "master plan" for property in Cuba²³ or to record a history of expropriations and their possible resolution.²⁴ Instead, it attempts to summarize the past and present state of Cuban property law and flag issues that the Cuban government should address in reforming this system. How these issues are resolved will be a matter of participatory negotiation and diplomacy, both within Cuba and internationally. It is hoped that this Article will contribute to this discussion and provide the information base needed to begin that process.

B. Property as a Key Constraint and the Key Tool to Development

Land policy is directly related to the goals of private investors. These concerns include broadly based economic growth, the global environment, democracy, food and disaster assistance, and the stabilization of world population growth.²⁵ Consequently, tenure policy reform is a critical element in economic revitalization. Mark Schneider, the Assistant Administrator for Latin America at the U.S. Agency for International Development (USAID), has argued unequivocally:

One only has to look at the tragedy of events in Chiapas [Mexico] to illustrate the gravity of failing to address land security for the poor. There are also few issues as potentially destructive to our hopes for consolidating democracy and achieving sustainable development than the denial of access to land and property rights for the poor. . . . Formalizing land ownership gives a sense of purpose, a stake in society and a seat in the community council. It also is the key to unlocking the door to rural credit, to new technology and to

23. In proposing reforms in the British constitution, the Economist explained that "[o]ur goal is not to write a blueprint. That would be to side with angry uncompromisers bearing final solutions. It is, rather, to show that Britain's constitution does need repairing, and to offer some ideas for putting it right." *Reclaiming Britain's Constitution*, *ECONOMIST*, Oct. 14, 1995, at 18. This Article seeks to accomplish the same by offering suggestions for "repairing" Cuba's legal structure.

24. This topic is handled skillfully elsewhere. See, e.g., Matias F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 220 (1995).

25. See generally Steven E. Hendrix, *Tenure*, LAC TECH BULLETIN (USAID Agriculture and Rural Development Technical Services (LAC TECH) project), Sept. 1994 at 1, 2.

the infrastructure for rural development. . . . USAID is pledged . . . to promote land security for the poor²⁶

The agriculture sector is critical to the health of the Cuban economy. Until 1989, eighty-five percent of foreign exchange was generated by the agriculture sector.²⁷ In 1995, at least eighty percent of foreign exchange was generated in agriculture, while tourism contributed about ten percent.²⁸ Consequently, agriculture and tenure policy continue to be intimately related to general macroeconomic performance in Cuba.

Cuba maintains a large, affluent exile community in Miami. As a result, Cuba enjoys much greater economic strength than, for example, Nicaragua.²⁹ This may translate into greater potential for privatization or investment should there be a change in policy between Havana and Washington.³⁰ New foreign investment industries may also contribute if conditions are favorable. However, such investment would have to be predicated on reassurances of private property rights.³¹

II. Cuban Property Law

A. Constitutional and Civil Code Provisions

1. Historical Perspective: The Roots of Current Cuban Property Law

The original Cuban Constitution dates from 1901,³² and contains a strong provision on protection of private property. "No one shall be

26. Mark Schneider, Presentation at the conference, Property for the Poor: The Path to Development in Washington, D.C. (Apr. 12, 1994) (presentation by Mr. Schneider, Assistant Administrator for Latin America at USAID) (notes from presentation on file with author) [hereinafter Schneider Presentation]. The reference to Chiapas relates to a peasant uprising in southern Mexico that began on January 1, 1994. *Id.* Two of the main issues in that uprising were land rights and inequitable land distribution in the state of Chiapas. *Id.*

27. Messina Presentation, *supra* note 11.

28. *Id.*

29. David Willig, Presentation at the Organization of American States in Washington, D.C. (Sept. 18, 1992) (notes from presentation on file with author) [hereinafter Willig Presentation].

30. *Id.*

31. *Id.*

32. More technically, there were several "Cuban Constitutions" while the Spanish still controlled the island. However, this legal history is beyond the scope of this Article. Readers interested in earlier constitutional and quasi-constitutional arrangements should refer to William T. D'Zurilla, Comment, *Cuba's 1976 Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 *TULANE L. REV.* 1223, 1225-32 (1981).

deprived of his property, except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners and, if needed, restore to them the property."³³

As Cuban governments haphazardly enforced the 1901 Constitution with increasing inconsistency, observers in both Cuba and the United States began to doubt the existence of any legitimate constitutional rule.³⁴ Despite improvements in Cuba's standard of living during this period, political instability hindered socioeconomic advances and "created a sense of dissatisfaction with the overall status of individual rights on the island."³⁵ During the 1920s and 1930s, a period of considerable turmoil, political and academic leaders began to debate how to create a national, social, and economic commitment.³⁶ These political and academic leaders "created popular support for the creation of a new constitution that would reflect the progressive values of its citizens."³⁷

Between 1934 and 1940, Fulgencio Batista y Zaldívar was in command of the Army and effectively ruled the country.³⁸ He overpowered a series of politically weak presidents whom he replaced whenever they refused to agree with his recommendations.³⁹ In 1939, Batista attempted to improve Cuban relations with the international community by allowing Cubans to elect delegates for a new constitutional assembly "that would consolidate and formalize the gains the revolutionary government achieved."⁴⁰ The people of Cuba challenged Batista to implement a new constitution; in response, after winning the Cuban presidency he promulgated a new constitution on July 5, 1940.⁴¹ From 1940 to 1944, Batista served as a constitutionally elected president. The new constitution required a lapse of eight years before a president could seek a second term, so Batista did not

33. See Travieso-Díaz, *supra* note 24, at 228 (quoting and discussing CONSTITUCIÓN DE 1901 art. 32 (Cuba) [hereinafter 1901 CONSTITUTION]).

34. *Id.*

35. Jonathan Wachs, Comment, *Reviving the 1940 Cuban Constitution: Arguments for Social and Economic Rights in a Post-Castro Government*, 10 AM. U. J. INT'L L. & POL'Y 525, 540 (1994).

36. *Id.*

37. *Id.*

38. MARIO LAZO, AMERICAN POLICY FAILURES IN CUBA: DAGGER IN THE HEART! 59 (1968).

39. Wachs, *supra* note 35, at 543.

40. *Id.* at 542-43.

41. *Id.* at 543.

run for re-election in 1944.⁴² Between 1944 and 1948 Grau San Martín, considered the most incompetent and corrupt president in Cuban history, served as president.⁴³ This period was followed by the presidency of Carlos Prío Socarrás from 1948 to 1952, which was also marked by financial scandals.⁴⁴ After being out of office for eight years, Batista returned to power illegally and held it illegally until he was constitutionally elected in 1954 as the only candidate.⁴⁵ He remained President of Cuba until replaced by Fidel Castro on January 1, 1959.⁴⁶

Batista's November 1939 decision to hold elections for a constitutional convention greatly enhanced his popularity.⁴⁷ Since 1940, Cuba has had four constitutions: the 1940 Constitution, the 1959 Fundamental Law, the 1976 Constitution, and the 1992 Constitution.

Social and economic guarantees are prominent in the provisions of the 1940 Constitution.⁴⁸ Of the 286 articles, 61 dealt with social and economic issues.⁴⁹ Several provisions from the 1940 Constitution⁵⁰ addressed property concerns, including Article 24 of the 1940 Constitution which prohibited confiscations of property.⁵¹ That provision stated:

42. LAZO, *supra* note 38, at 79.

43. *Id.* at 80.

44. *Id.* at 84.

45. *Id.* at 92.

46. *Id.*

47. *Id.* at 73.

48. See Arturo Fournier F., *El Nuevo Derecho Agrario en Cuba*, 31 REVISTA DE CIENCIAS JURÍDICAS 72, 73 (1977) (citing CONSTITUCIÓN DE 1940 (G.O. No. 464, July 8, 1940) (Cuba) [hereinafter 1940 CONSTITUTION]). See also Wachs, *supra* note 35, at 543 (discussing these provisions).

49. LAZO, *supra* note 38, at 74.

50. See Fournier F., *supra* note 48, at 73.

51. *Id.* (quoting 1940 CONSTITUTION art. 24) (translation by author). By definition, confiscation is the taking back of property gained from an illicit activity, while expropriation is the taking of property for a public purpose with indemnification. The use of the word "confiscation" is significant. Unlike the word "expropriation," confiscation implies that the former owner will not be compensated, because the property being taken was illegally acquired. Cuba has often been compared to Nicaragua in terms of confiscated assets. Nicaraguan Sandinista reform of property law began July 19, 1979 with the confiscation of property belonging to Somoza. Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT'L & COMP. L. REV. 1, 17 (1995).

Presumably, the property was acquired illegally and was simply being returned to its rightful owners. See Decreto No. 172 (1979) (Nicar.). One law, signed by Daniel Ortega S. and Violeta B. de Chamorro, among others, authorized the *Procurador General de Justicia* (the Attorney General) to confiscate all goods belonging to Somoza's family, military officials, and other functionaries that were abandoned in the country after December, 1977. Decreto No. 3 (1977) (Nicar.) [hereinafter Decree No. 3]. The Attorney General's confis-

Confiscation of property is prohibited. No one can be deprived of their property except by competent judicial authority and for the justified cause of public or social utility, and always after payment of the corresponding indemnification in cash, as judicially determined. Non-compliance with these requirements will not change the right of the individual whose property has been expropriated to be protected by the courts, and, if the case so requires, to have their property restored.

The reality of the cause of public utility or social interest, and the necessity for expropriation, will be decided by the courts in case of a challenge.⁵²

Article 87 of the 1940 Constitution recognized the existence of private property within the broader framework of a "social function" of land.⁵³ This Article acknowledges the fact that Latin American countries generally recognize a social function for land, as distinct from the concept of land as strictly an economic resource.⁵⁴ This social function is considered a fundamental aspect of Latin American

ation powers were extended to goods belonging to *personas allegadas* (the followers) of Somoza. Decreto No. 38 (1979) (Nicar.) [hereinafter Decree No. 38]. This decree was also signed by Daniel Ortega, Violeta B. de Chamorro, and others. Decree No. 38 was later suspended as of August 8, 1979. The vague wording of this decree, allowing for confiscation of property from any "follower" of Somoza, may have led to much abuse.

52. *Id.* This Article of the Constitution provides the following:

La confiscación de la propiedad está prohibida. Ninguno puede ser privado de la suya a menos que sea por autoridad judicial competente y por causa justificada de utilidad pública o social, y siempre previo pago de la indemnización correspondiente en efectivo, fijada judicialmente. El no cumplimiento de estos requisitos no determinará el derecho de la persona cuya propiedad ha sido expropiada, a ser protegido por las cortes, y, si el caso así lo demandar, a tener restituida su propiedad.

La realidad de la causa de utilidad pública o interés social, y la necesidad de expropiación, serán decididos por las cortes en caso de impugnación.

Id. Compare this provision with Article 106 of the Constitution of El Salvador. CONSTITUCIÓN art. 106 (El Sal.) (1983) available in <<http://www.georgetown.edu/LatAmerPolitical/constitutions>> (prohibiting confiscation, permitting expropriation for public utility or social interest, and underscoring the need for compensation for such government actions). However, the Constitution of El Salvador limits properties to 245 hectares and requires that properties comply with the social function. *Id.* art. 105.

53. LEONELLO CHIUMINATTO C., *LEY DE REFORMA AGRARIA EN CUBA Y EL PROYECTO DE LEY CHILENO* 34-35 (1964) (quoting the 1940 CONSTITUTION art. 87). The 1940 Constitution was heavily influenced by the 1917 Mexican Constitution, the 1918 German (Weimar) Constitution, and the 1931 Spanish Constitution. See D'Zurilla, *supra* note 32, at 1237. For a general discussion of the Mexican Constitution's approach to the social function of land, agrarian reform, and expropriations, see Hendrix, *supra* note 51, at 27-38. For a discussion of the German and Spanish Constitutions in relation to the social function of land, see *id.* at 8 n.41.

54. See Hendrix, *supra* note 51, at 7-8 (describing constitutional provisions across Latin America and the Caribbean).

constitutional law,⁵⁵ and is found in standard Latin American jurisprudence and doctrine.⁵⁶ It embodies a national struggle against large estates and feudalistic land distribution, and envisions an agrarian policy in favor of the resource poor.⁵⁷ Defining land in terms of its social function implies that the person who personally and directly works the land owns it.⁵⁸

Article 90 of the 1940 Constitution allowed for size restrictions against large farms and against foreign ownership of land.⁵⁹ It stated:

Large estates are illegal and to effect their elimination, the Law will set forth the maximum expanse of property that each person or entity can possess (for each type of use that land is dedicated to, taking into account respective peculiarities).

The Law will restrictively limit the acquisition and possession of land by persons and foreign companies and adopt measures that require the land to revert to Cubans.⁶⁰

55. For an introduction to the social function of land and relevant Civil Code doctrine, see RAMON VICENTE CASANOVA, *DERECHO AGRARIO* 37-48 (1990).

56. This is the concept of "land to the tiller" or "*tierra a quien la trabaja*" found in many jurisdictions. See, e.g., CONSTITUCIÓN arts. 165, 166 (Bol.).

57. *Id.* See also Ley de Reforma Urbana whereas cl. 1 (G.O., Oct. 14, 1960) (Cuba) (extending the social function of land to housing) [hereinafter Urban Reform Law]. Interestingly, the NAFTA-era amendment to Article 27 of the Mexican Constitution also prohibits large estates. See CONSTITUCIÓN tit. I, art. 1, § 27 (Mex.).

58. However, this owner is distinct from the documentary owner, who ceases to own the land if his or her use does not conform to the social function. This concept is codified in the current Cuban Constitution. CONSTITUCIÓN DE 1992 art. 24 (Cuba) available in <<http://www.georgetown.edu/LatAmerPolitical/constitutions>> [hereinafter 1992 CONSTITUTION].

59. See Cratilio R. Navarrete Acevedo, *Apuntes Sobre Derecho Agrario Cubano* 77 (1984) (unpublished manuscript on file with the Land Tenure Center Library, University of Wisconsin) (quoting and discussing 1940 CONSTITUTION art. 90); see also CHIUMINATTO C., *supra* note 53, at 35 (same). Such restrictions against *latifundia*, or large estates, are very common in Latin America. See Hendrix, *supra* note 51, at 7-11. Furthermore, in places like Peru, which have recently enacted legislation aimed at encouraging foreign investment, some restrictions remain. *Id.* at 25.

60. See Navarrete Acevedo, *supra* note 59, at 76-77 (quoting 1940 CONSTITUTION art. 90) (translation by author). Article 90 of the Constitution provides the following: Se proscribe el latifundio y a los efectos de su desaparición la Ley señalará el máximo de extensión de la propiedad que cada persona o entidad pueda poseer (para cada tipo de explotación a que la tierra se dedique y tomando en cuenta las respectivas peculiaridades).

La Ley limitará restrictivamente la adquisición y posesión de la tierra por personas y compañías extranjeras y adoptará medidas que tienen a revertir la tierra al cubano.

Id.; see also ORLANDO VALDÉS GARCÍA, *LA SOCIALIZACIÓN DE LA TIERRA EN CUBA* 4 (1990) (discussing this provision) [hereinafter VALDÉS GARCÍA, *SOCIALIZACIÓN*]. Fidel Castro noted Article 90 in his famous speech entitled "La historia me absolverá" ("History will absolve me") in which he stated that the new revolutionary government would transfer

Article 91 of the 1940 Constitution permitted the paternal family head who occupied, cultivated, and directly exploited a farm of 2000 pesos or less to declare the land "irrevocable family property."⁶¹ Other provisions in the 1940 Constitution required the nation to "employ the resources within its reach to furnish employment to everyone who lacks it" and to assure workers "the economic conditions necessary to a fulfilling existence."⁶²

Before 1959, Article 349 of the Civil Code contemplated expropriation of privately-owned property, provided there was prior indemnification and the property was for a "public use."⁶³ For example, in 1958, the rebel movement promulgated Law Number 3, the first revolutionary piece of agrarian legislation.⁶⁴ That legislation allowed occupants of up to two *caballerías* of land to become owners of that land without payment.⁶⁵ The State then promised indemnification to the former owners.⁶⁶ Where there was a group of occupants possessing between two and five *caballerías*, the occupants could receive the first two *caballerías* free, and then demand the owner to sell the rest to the occupant, up to a maximum of five *caballerías*.⁶⁷ Law Number 3 also promulgated the following regulations: (a) forbade corporate ownership (except by a "matrimonial society" or married couple, or by an agrarian cooperative); (b) eliminated divisibility of land; (c) prohibited transfers of land except for inheritance, transfers of land to the state, trades authorized by the state, and public auctions in certain cases; (d) permitted inheritance by only a single heir (or to a community of heirs who would retain the property in indivisible form), or sale in a public auction; (e) limited auction participants to qualified agricultural workers or farmers, with rights of first refusal being granted to the state; and (f) promoted state financed agricultural credit.⁶⁸

lands to peasant occupants, paying indemnification to former owners equal to 10 years' rental payments. See *id.* at 5; Orlando Valdés García, *Antecedentes Jurídicos de la Revolución Agraria en Cuba*, 26 DERECHO Y REFORMA AGRARIA REVISTA 109, 109-110 (1995) [hereinafter Valdés García, *Antecedentes*].

61. See CHIUMINATTO C., *supra* note 53, at 35 (quoting 1940 CONSTITUTION art. 91).

62. See D'Zurilla, *supra* note 32, at 1228 (citing 1940 CONSTITUTION art. 60 and substituting the word "fulfilling" for the word "fitting" in the translation).

63. Willig Presentation, *supra* note 29.

64. See Navarrete Acevedo, *supra* note 59, at 82 (quoting Ley No. 3 (Oct. 10, 1958) (Cuba) [hereinafter Law No. 3]). As Law No. 3 was a rebel pronouncement, it was not printed in the official gazette. It is sometimes referred to as Ley No. 3 de la Sierra (Law No. 3 of the Mountains). See Fournier F., *supra* note 48, at 77.

65. Navarrete Acevedo, *supra* note 59, at 82. 1 *caballería* = 13.4 hectares = 33 acres.

66. *Id.*

67. *Id.*

68. *Id.* at 82-83.

On March 10, 1952, towards the end of Carlos Prío's term as President, Batista executed a military coup d'état.⁶⁹ On April 4, 1952, Batista's government issued a Constitutional Act that was to govern the country.⁷⁰ Nevertheless, at times throughout his tenure, constitutional guarantees were entirely suspended.⁷¹ Batista's coup and the suspension of constitutional guarantees served to break the legal continuity of the political system that was created with the enactment of the 1940 Constitution.⁷² In response, many opposition groups were established, including the 26th of July Movement, named after the assault led by Fidel Castro on the *Moncada* military barracks in the Cuban province of Oriente on July 26, 1953.⁷³ Because of Batista's suspension of all constitutional guarantees, restoration of the 1940 Constitution became a unifying goal among groups opposing Batista.⁷⁴

Many Cubans viewed the creation of the 1940 Constitution as "one of the most distinguished moments in Cuban history."⁷⁵ Indeed, it marked an important step in Cuba's progress toward democracy, even though in practice it was never fully implemented.⁷⁶ It was the first Cuban national charter "created by a diverse representation of the population without any influence from a foreign nation."⁷⁷ However, to fully implement its provisions, the government was required to spend vast amounts of scarce financial resources. Cuban leaders found it difficult to honor constitutional guarantees while also promoting the prosperity of the nation.⁷⁸ Consequently, many leaders ignored these rights and Batista formally suspended the entire 1940 Constitution between 1952 and 1954.⁷⁹ As a result, administration of the relevant constitutional provisions was inconsistent; many Cubans believed their social and economic rights, at least while Batista was in power, were legitimate but unenforceable.⁸⁰ Indeed each of the three presidents between 1940 and 1952 (Batista, Grau San Martín, and Prío

69. Ignacio E. Sanchez, *Cuban Property Rights and the 1940 Constitution*, 3 J. TRANS-NAT'L L. & POL'Y 135, 135 (1994).

70. *Id.* at 142.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Wachs, *supra* note 35, at 544.

76. LAZO, *supra* note 38, at 75.

77. Wachs, *supra* note 35, at 544.

78. *Id.*

79. *Id.*

80. *Id.*

Socarrás) violated provisions of the 1940 Constitution.⁸¹ In particular, Grau openly flaunted his disregard for the constitution.⁸²

One author suggests that the 1940 Constitution attempted to increase judicial independence by addressing the problem of presidential control over the appointment of justices.⁸³ However, the effort was not entirely successful because "the administration of justice continued to be subject to the problems and pressures arising from a patronage system and the general level of political morality."⁸⁴ The police did little to ameliorate this situation; although police were considered "reasonably efficient" in carrying out their regular police duties, they were "subjects of patronage and favoritism, especially where Havana's gambling and prostitution businesses were concerned."⁸⁵

Unemployment and underemployment increased throughout the 1940s and 1950s.⁸⁶ By 1956 and 1957, the unemployment rate reached a combined total of about thirty percent of the labor force.⁸⁷ During the early 1950's, Fidel Castro, a young lawyer, ardent nationalist, and former student agitator, was extremely vocal in his hostility towards the Batista government. Castro's rise to popularity in the 1950s occurred largely because "he presented his movement to the Cuban people as the legitimate heir of the 1933 Revolution and the 1940 Constitution."⁸⁸ In a famous speech given to defend himself at trial for his assault on Batista's military barracks, Castro made an impassioned plea in favor of Cuba's social and economic goals.⁸⁹ After his rebel movement solidified several years later, Castro formally declared that his movement "foresees the establishment of an order in which all the inalienable rights of a human being—political, social, economic, and cultural—will be fully met and guaranteed."⁹⁰

Castro became prominent in Cuba in 1958.⁹¹ By 1957, the Cuban economy had reached record heights, while that same year a pro-Cas-

81. LAZO, *supra* note 38, at 75.

82. *Id.*

83. Bernstein, *supra* note 2, at 193.

84. *Id.*

85. *Id.*

86. CARMELO MESA-LAGO, *THE LABOR FORCE, EMPLOYMENT, UNEMPLOYMENT, AND UNDEREMPLOYMENT IN CUBA: 1899-1970* 28 (1972) [hereinafter MESA-LAGO, *LABOR FORCE*].

87. *Id.*

88. Wachs, *supra* note 35, at 545.

89. Valdés García, *Antecedentes*, *supra* note 60, at 111.

90. Wachs, *supra* note 35, at 545.

91. LAZO, *supra* note 38, at 146.

tro press campaign had begun in the United States.⁹² U.S. Embassy political aides and Central Intelligence Agency (CIA) advisors sided with Castro, equating Batista with evil and Castro with good.⁹³ On March 14, 1958, the United States imposed an arms embargo on Cuba. Castro announced "total war" on the Batista regime on March 17, 1958, despite having fewer than two hundred men in its command.⁹⁴ Although Batista reinstated constitutional guarantees on January 25, 1958, a campaign of bombing and arson led the government to again suspend these guarantees on March 12, 1958.⁹⁵ Similarly, general elections were postponed from June 1 to November 3, 1958, with Castro calling for the assassination of all candidates.⁹⁶ Under accusations of voter fraud, the government's candidate, Dr. Andrés Rivero, was declared the victor.⁹⁷ Diplomatically, the United States began to tell Batista to leave the country, which he did on New Year's Eve, 1958, leaving Castro the island.⁹⁸

Following Batista's abdication of power, Manuel Urrutia became President of Cuba.⁹⁹ The first amendment to the 1940 Constitution was published on January 13, 1959.¹⁰⁰ This amendment introduced the use of constituent power by the Council of Ministers.¹⁰¹ In effect, it gave the Council of Ministers the right to amend the Constitution in derogation of the requirements set forth in Articles 285 and 286.¹⁰² Using the constituent power, the Council of Ministers, as part of that first amendment, modified Article 24.¹⁰³ The revised Article read as follows:

Confiscation of property is prohibited. However, confiscation is authorized in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public

92. *Id.* at 151.

93. *Id.* at 152. Even Richard Nixon noted Castro's favorable press, acknowledging that Castro was viewed as the leader of a successful revolution against a right-wing dictator. See RICHARD NIXON, *THE MEMOIRS OF RICHARD NIXON* 201-02 (1978). Most of the U.S. Department of State's Latin American experts were ready to recognize Castro in leadership. *Id.* Nixon himself believed Castro to be "either incredibly naïve about communism or under Communist discipline." *Id.*

94. LAZO, *supra* note 38, at 156-57.

95. *Id.* at 158-59.

96. *Id.* at 168.

97. *Id.* at 168-69.

98. *Id.* at 178.

99. Sanchez, *supra* note 69, at 143.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 140.

treasury committed during the tyranny which ended on December 31, 1958, as well as in the case of property of the tyrant and his collaborators. No one can be deprived of his property except by competent judicial authority and for a justified cause of public utility or social interest, and always after payment of the corresponding indemnity in cash, as fixed by a court¹⁰⁴

2. *The Fundamental Law*

Later that same year, a new constitutional framework, called the Fundamental Law, came into effect, repeating provisions from the 1940 Constitution regarding property ownership.¹⁰⁵ The new Article 87, like Article 87 of the 1940 Constitution, recognized the social function of land.¹⁰⁶ This new framework was followed several months later by the first agrarian reform law.¹⁰⁷ Property immediately confiscated by the new Castro government included the following: "prop-

104. *Id.*

105. See Navarrete Acevedo, *supra* note 59, at 84 (quoting and discussing Ley Fundamental de 1959 (G.O., Feb. 7, 1959) (Cuba) [hereinafter 1959 Fundamental Law]). One of the goals of Castro's revolution was the restoration of the 1940 Constitution, which Batista had suspended. See William R. Baerg, Comment, *Judicial Institutionalization of the Revolution: the Legal Systems of the People's Republic of China and the Republic of Cuba*, 15 LOY. L.A. INT'L & COMP. L. J. 233, 248 (1992). Instead, Castro passed the 1959 Fundamental Law. *Id.* As a result, some observers questioned whether Castro had complied with his promise. D'Zurilla, *supra* note 32, at 1239.

Some *fidelistas* (Castro supporters) contended that the 1959 Fundamental Law updated or modified the 1940 Constitution rather than replacing it. *Id.* Cuba was, at least in theory, governed by the 1940 Constitution until 1976, when the new Socialist constitution came into effect. *Id.* The *fidelistas* distinguished between Batista, whose coup they considered unconstitutional, and Castro by asserting that Batista assumed power "to loot the country" while Castro assumed power "to carry out the mandate of the people" for a revolutionary program. *Id.* at 1240.

Cuba has often been compared with Nicaragua. In Nicaragua, the main thrust of Sandinista legislation beginning in July 1979 was support for organized labor and *campesinos*, especially in the area of agrarian law and reform. The Civil Code, taken over by Latin America from the French, had been in use in Nicaragua at the time of the revolution. See MIREYA MOLINA TORRES, MARCO JURÍDICO DE LA REFORMA AGRARIA 12 (1989). Yet the Sandinistas felt that the Code was incapable of resolving the problems the new government wished to address. *Id.* In short, the Sandinista government viewed the Civil Code law as static, while decrees could be used more freely. *Id.* at 13. This approach is consistent with the revolutionary nature of the Sandinista movement.

106. See D'Zurilla, *supra* note 32, at 1223.

107. See Navarrete Acevedo, *supra* note 59, at 84. This legislation is just one example of a stream of new laws passed shortly after the 1959 Fundamental Law. In fact, the 1959 Fundamental Law itself was amended twenty-two times between January 1959 and August 1961. See Luis Salas, *The Judicial System of Postrevolutionary Cuba*, 8 NOVA L. REV. 43, 46 (1983).

erty of the tyrant,"¹⁰⁸ property of persons engaged in criminal behavior, illegal or unjust enrichments in property, property of counter-revolutionaries, and abandoned property.¹⁰⁹

The February 7, 1959 constitutional amendments called for "all means of production" to remain in state hands.¹¹⁰ As a result, monopolies were created, consolidating government control over banking, public utilities, and other necessary elements of production.¹¹¹ Provisions permitting confiscation under the Fundamental Law represented a step back from earlier requirements of compensation at fair market value.¹¹²

The first and second agrarian reform laws were of constitutional rank.¹¹³ The Fundamental Law itself had constitutional rank.¹¹⁴ That document incorporated the agrarian reform law by reference.¹¹⁵ Consequently, these laws maintained constitutional priority until 1976, when a new constitution was enacted.¹¹⁶

108. To be more precise, the 1940 Constitution was amended to allow for "confiscation in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public treasure committed during the tyranny that ended December 31, 1958, as well as in the case of the property of the tyrant and his collaborators." See Travieso-Díaz, *supra* note 24, at 230 (quoting REFORMA CONSTITUCIONAL art. 2 (G.O., Jan. 14, 1959) (Cuba) [hereinafter 1959 CONSTITUTIONAL REFORM]). This new provision was then carried over into the 1959 Fundamental Law. *Id.* at 230 (discussing the ratification and enlargement of this exception to the prohibition against confiscation in 1959 Fundamental Law).

109. Willig Presentation, *supra* note 29. Abandoned property was taken via Ley 989 (G.O., Dec. 6, 1961) (Cuba) [hereinafter Law No. 989]. See Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873, 903 (1994). It has been argued that Law 989 was enacted to punish those who left the country for political reasons. *Id.* If this were so, Law 989 might be subject to attack on constitutional grounds because it discriminated against a class of people due to their political beliefs. Such discrimination violates Article 33 of the 1940 Constitution and the 1959 Fundamental Law. See *id.* at 904. Similar legislation has existed in other Latin American civil code jurisdictions. See Steven E. Hendrix, *The Crisis of Land Law and Policy in Nicaragua*, 29 COMP. JURID. REV. 3, 6-7 (1992) (discussing "abandoned" property under the Civil Code and later Sandinista legislation in Nicaragua).

110. Willig Presentation, *supra* note 29.

111. *Id.*

112. Travieso-Díaz, *supra* note 24, at 233.

113. Fournier F., *supra* note 48, at 93.

114. The passing of a new constitution together with agrarian reform legislation in Cuba parallels the experience in Bolivia. See VICENTE CASANOVA, *supra* note 55, at 180 (describing the enactment of the agrarian reform law following the approval of a new constitution in Bolivia).

115. Navarrete Acevedo, *supra* note 59, at 90.

116. *Id.* While the notion of a "constitutional agrarian law" seems quite foreign for common law attorneys, there is precedent for this result in Latin American civil code countries. See, e.g., GUILLERMO FIGALLO, *TIERRA Y CONSTITUCIÓN* 7 (1990) (discussing consti-