

**BOSTON COLLEGE
INTERNATIONAL AND COMPARATIVE
LAW REVIEW**

VOL. XVIII

WINTER, 1995

No. 1

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Property Law Innovation in Latin America with Recommendations

Steven E. Hendrix*

INTRODUCTION

In Latin America, the national civil codes are the traditional documents governing property ownership.¹ These codes are modeled after the French and Italian civil codes.² As such, they recognize standard property rights, including the right to buy, sell, trade, mortgage, and inherit property.³ Latin American agrarian reforms, however, have changed much of the conventional property law in rural areas.⁴ Thus, the agrarian reforms must be considered when analyzing tenure rights and related policy issues.

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The author acknowledges with gratitude the comments and suggestions of James Riordan (Chemonics International, LAC TECH Project, Washington, DC), Attorney Susan Bass (Environmental Law Institute, Global Climate Change Project/Mexico, Washington, DC), Steven Smith (Land Tenure Center, ACCESS II Project, Madison, WI), Douglas Southgate (IDEA, Quito, Ecuador), Carlos Camacho (IDEA, Quito, Ecuador), Attorney Rolando Eyzaguirre (Instituto Libertad y Democracia, Lima, Peru), Attorney Julio Rendón Cano (Tegucigalpa, Honduras), Attorney Mireya Molina (Managua, Nicaragua), David Gibson (US Department of Agriculture, LAC TECH Project), and Attorney Laureano del Castillo (Servicios Educativos Rurales, Lima, Peru). All views, interpretations, recommendations, and conclusions expressed in this publication are those of the author and not necessarily those of the supporting or cooperating organizations, or the publisher.

¹ See, e.g., CÓDIGO CIVIL [C. Civ.] arts. 599–929 (Hond.); CÓDIGO CIVIL [C. Civ.] arts. 464–1123 (Guat.); CÓDIGO CIVIL [C. Civ.] arts. 74–290 (Bol.); CÓDIGO CIVIL [C. Civ.] arts. 602–1014 (Ecuador); CÓDIGO CIVIL [C. Civ.] arts. 881–1131 (Peru); CÓDIGO CIVIL [C. Civ.] arts. 560–951 (El Sal.); CÓDIGO CIVIL [C. Civ.] arts. 525–1132 (Venez.).

² The Andrés Bello Code, first adopted in Chile and then adopted in most of Latin America, was modeled after the French Civil Code, with German and Italian influences. ARTURO VALENCIA ZEA, DERECHO CIVIL 29–40 (1981). The Nicaraguan Civil Code was taken from France. Steven E. Hendrix, *The Crisis of Land Law and Policy in Nicaragua*, 29 COMP. JUR. REV. 3, 4 (1992).

³ See generally *supra* note 1.

⁴ See, e.g., Hendrix, *supra* note 2, at 4–5.

In most Latin American agrarian reforms, governments created restrictions on rural land ownership.⁵ Often this took the form of restricting the size of the property and the ability to mortgage, inherit, sell, and rent as well as mandating land use such as agriculture.⁶ Governments took these measures to prevent a reconsolidation of landholdings and a return of *latifundios*, or large estates.⁷

Latin American agrarian reform legislation is preoccupied with *latifundios*. Currently, however, there is a great international movement toward individualization of ownership.⁸ In the developing world,

⁵ See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA art. 99.

⁶ See *infra* notes 44–66 and accompanying text.

⁷ See *infra* note 59 and accompanying text.

⁸ Changes toward privatization and agrarian reforms in other parts of the world are numerous. Generally, land or agrarian reforms seek agricultural land reallocation. Historically, in many countries, land distribution was skewed, resulting in what many authors have described as feudal economic systems. As a consequence, peasants have struggled to make land distribution more egalitarian.

Latin America is not the only place where land reform programs have been implemented. One of the first agrarian reforms occurred under the Roman Empire which, as part of peace processes, gave grants of state-held land to victorious former combatants. See John Strasma, *Coincidencias, Problemas y Oportunidades en la Implementación de los Acuerdos de la Paz, en Cuanto a la Tierra*, Presentation at the Agency for International Development in San Salvador, El Salvador (Aug. 19, 1992) (on file with author) [hereinafter Strasma Presentation].

Many governments even retain control over private property in order to promote certain policy objectives. To put the discussion on Latin America into context, a brief examination of similar programs and legal trends elsewhere is useful:

1. United States

The traditional view is that the United States has "absolute" property rights. University of Minnesota Law School Professor Gerald Torres, Address at the Nicaraguan Property Regime after Sandinista Land Reform Conference in León, Nicaragua (Aug. 18, 1992). The United States, however, has had numerous land reforms or reallocation schemes.

Until 1976, for example, the Homestead Act, not unlike Latin American colonization programs, provided land to colonists who after a specified number of years became fee-simple owners of the land. See Homestead Act of 1862, 43 U.S.C. § 161 (repealed 1976); see also GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 69–71 (1981); PETER DORNER, *LATIN AMERICAN LAND REFORMS IN THEORY AND PRACTICE* 3 (1992).

In Puerto Rico, the legislature gave squatters on sugar plantations certain property rights. The federal courts subsequently upheld this grant. See *People of Puerto Rico v. Eastern Sugar Assoc.*, 156 F.2d 316 (1st Cir. 1946), *cert. denied*, 329 U.S. 772 (1946).

In 1984, because most property was owned by only a few families, the U.S. Supreme Court upheld a Hawaii statute allowing renters to organize into neighborhoods and to demand the sale of property to themselves. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Similarly, the District of Columbia's urban renewal program, which used eminent domain power for the community's general welfare, was also upheld. See *Berman v. Parker*, 348 U.S. 26 (1954).

In addition, private property can be subjected to limitations pursuant to social policy objectives. See, e.g., *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

2. Japan, Taiwan and South Korea

After World War II, the United States was in a strong position to influence governments in Japan, Taiwan and South Korea to implement land reform programs. Cooperating with existing traditional farmer organizations, these governments focused their efforts on irrigated rice lands. The reforms broke the link between tenants and landlords by abolishing rent collection and control systems. See DORNER, *supra*, at 6-7. These successful reforms resulted in freehold interests by the possessors of the land and contributed to a subsequent boom in agriculture in these markets.

3. Vietnam

Recently, Vietnam has been liberalizing its agriculture policy and promoting commercialization. Small farmer producer cooperatives now have state backing. See Strasma Presentation, *supra*.

4. The People's Republic of China

In 1978, China began a process intended to end its system of agricultural communes. Article 10 of the 1982 Constitution established that land in the rural and suburban areas is owned by collectives, except for those portions which belong to the state. Article 12 provides that land held by collectives can be operated under contract by either collectives or individuals. These contracts can run from thirty to fifty years, and are inheritable. See generally JOHN W. BRUCE & PAULA HERRELL, *LAND REFORM IN THE PEOPLE'S REPUBLIC OF CHINA 1978-1988* (1989). While the land itself may not be sold and remains property of the state and of the rural collectives, an amendment to Article 10 of the Constitution—passed in April 1988—now allows land "use rights" to be transferred to workers.

5. The Former Soviet Union

In Russia, privatization of government-held properties is in progress. The 1917 Land to the Tiller Decree nationalized all land, and then allowed that land to be distributed to beneficiaries in any tenure form, including individual holdings. Because of the worldwide depression starting in 1929, however, the Soviet Union needed to industrialize and, consequently, required access to a cheap food source. Collectivization was used to achieve greater economies of scale and promote greater party control over agriculture. See William C. Thiesenhusen, *Restitution for Expropriated Property upon the Fall of Communist Regimes: Case Studies on Eastern Europe*, Address at The Inter-American Bar Association Program in Washington, D.C. (Sept. 18, 1992); Csaba Csaki et al., *Land Reform and Restructuring of the Kolkhoz and the Sovkhoz in the USSR and Russia* (Jan. 14, 1992) (unpublished manuscript, on file with author); Katie Rasmussen, *Land Reform in the Russian Federation* (undated, unpublished manuscript, on file with author); Michael G. Kitay, *Donor Efforts for Land Reform and Privatization in the NIS*, (Aug. 27, 1992) (unpublished manuscript, on file with author).

Today, about 94% of all Russian rural land is still controlled by the state or collective farms. President Boris Yeltsin's program aims to both eliminate all centrally planned targets and initiate a land reform. According to the plan, state properties and collectives would be reorganized as joint stock companies and would either be divided into individual units or privatized. As of July 1, 1992, however, only 135,000 individual farms existed in Russia, about 2-3% of total land area.

Like Russia, the Ukraine and Kazakhstan are also moving slowly. Armenia and Georgia are, however, progressing quicker to conversion of tenure, perhaps because their systems were shifted to collective ownership more recently than Russia, the Ukraine, or Kazakhstan.

6. Kenya

In the most systematic tenure conversion in Africa, the Kenyan government has recently enacted the "individualization" process, a reduction of community controls over land use and distribution which enhanced the rights of individual landholders. See John Bruce, *The Variety of Reform: A Review of Recent Experience with Land Reform and the Reform of Land Tenure, with Particular Reference to the African Experience 17-20* (Sept. 1989) (unpublished manuscript, on file with the *Land Tenure Center Library*, University of Wisconsin (Madison)) [hereinafter Bruce, *African Experience*].

this has translated into a shift away from paternalistic controls which have regulated property use and restricted property rights.⁹ Consequently, governmental policy often tries to establish private landholding possibilities that eliminate restrictions and allow free transferability.¹⁰ Efforts to privatize and make agricultural land use more efficient have overtaken land reform, at least in the popular media and politics.¹¹

Latin America is very much caught up in this movement. Since 1990, Mexico, Honduras, Nicaragua, and Peru each have radically changed their old legislation by eliminating at least some restrictions on agrarian reform properties. Further, with the possible exception of Cuba, Latin American and Caribbean countries are reevaluating their land law and past agrarian reforms and looking to these four experiences for guidance.¹²

7. Mozambique

Although land "use rights" still cannot be sold or mortgaged and land remains the property of the state, a new policy of state divestiture of farms has begun. As part of a broader national economic liberalization, land concession periods have been extended from 15 to 50 years and "use rights" are now both renewable and inheritable. Further changes in the law are being debated as well. See John Bruce et al., A Research Proposal: Land Policy and Divestiture in Mozambique (1991) (unpublished manuscript, on file with author) [hereinafter Bruce, Mozambique].

8. South Africa

There is great debate today whether there should be a land reform in South Africa to redress the grievances of the black, dispossessed majority. See Strasma Presentation, *supra*.

⁹John Strasma, Los Problemas de la Tenencia de la Tierra en el Mundo de Hoy, Address at the Tenencia de la Tierra Seminar in Quito, Ecuador (Feb. 5, 1992) [hereinafter Strasma, Quito Address].

¹⁰Interview with Johnny Guarenas Borges, Director General of the Ministry of Agriculture, in Venezuela (Dec. 12, 1991).

¹¹The liberal reforms introduced in virtually all South American countries after independence in the 19th century converted communal ownership by indigenous populations to private ownership, which in many cases led to these communities being dispossessed. The customary tenure forms that exist today in the Andes and Meso-America are, in general, accommodations and modifications of some of the precolonial tenure structures. See Eric B. Shearer et al., The Reform of Rural Land Markets in Latin America and the Caribbean: Research, Theory, and Policy Implications 11 (1991) (unpublished manuscript, on file with author); Roger Plant, Land Rights for Indigenous and Tribal Peoples in Developing Countries 2 (1992) (unpublished manuscript, on file with author). Thus, it is easy to understand why many indigenous groups are nervous about attempts once again to privatize landholdings.

¹²It should be noted that Guatemala's *Ley de Reforma Agraria* (Decreto 900 of 1952) from the Arbenz government was reversed by a coup in 1954. See generally Guillermo Pedroni Donnett, La Problemática Agraria Guatemalteca (1989) (unpublished manuscript, on file with author). Nevertheless, Guatemala may still be interested in reviewing its property legislation with a view towards providing greater access to land for the historically disadvantaged through market mechanisms.

This Article will compare and critique the four cases of Mexico, Honduras, Nicaragua, and Peru, and provide recommendations for these and other countries concerning property ownership. Proposals currently are being considered in Ecuador¹³ and Bolivia.¹⁴ This Article will present recommendations for changes in property law and will attempt to assist drafters of legislation in the promotion of broadly based, sustainable, environmentally-friendly economic growth.¹⁵

A. *Original Latin American Agrarian Reform Policies and Legislation*

In general, ancient Rome imposed no limits on property ownership.¹⁶ This model was followed in the Napoleonic Code, which grants property owners absolute rights of ownership in conformity with law,¹⁷ and was brought to Latin America. Latin American legal doctrine, however, often establishes relative, rather than absolute, rights to property.¹⁸ Latin American jurisprudence often views property ownership as involving a social function.¹⁹

Latin American property law also carried forward Italian and German notions of relative rights in property involving a social function, born in the legislation following World War I.²⁰ For example, the Venezuelan definition of "property," set forth in that coun-

¹³ See Mónica Naves, Marco de Referencia Para Una Nueva Estructura Legal de Tenencia de Predios Rústicos, Address at the Tenure Issues Conference in Quito, Ecuador (Feb. 2, 1992) (transcript available from author); Mónica Naves, Futuro de Comunas y Cooperativas, Address at the Tenure Issues Conference in Quito, Ecuador (Feb. 6, 1992) (transcript available from author).

¹⁴ See generally Miguel Urioste F. de C., *Segundo Borrador: Anteproyecto de Ley de Comunidades y de Nacionalidades* in SEMINARIO: COMUNIDAD CAMPESINA Y LEGISLACIÓN, (Honorable Cámara de Diputados—República de Bolivia ed., 1990); José Luis Roca, *Resumen de la Exposición*, in 18 DEBATE AGRARIO: PROPUESTA DE LEY AGRARIA, (Instituto Latinoamericano de Investigaciones Sociales ed., 1992).

¹⁵ It should also be noted that changes parallel to those in land are being proposed or enacted in water law in many parts of Latin America. Controls over water have often tended to be as or even more limiting than controls over land. Relaxation of restrictions in both land and water law could have major impacts on agriculture and the rural economies of many countries.

¹⁶ JOSÉ LUIS AGUILAR GORRONDONA, *COSAS, BIENES Y DERECHOS REALES* 171 (1991); RAMÓN VICENTE CASANOVA, *DERECHO AGRARIO* 39 (5th ed. 1990).

¹⁷ CASANOVA, *supra* note 16, at 39. Interestingly, Spanish doctrinists Colin and Capitant assert that the absolute nature of property under the French Civil Code is antisocial and antijuridical. *Id.* at 39 (citing COLIN & CAPITANT, *CURSO ELEMENTAL DE DERECHO CIVIL* 543 (1942)).

¹⁸ For a discussion of the Venezuelan property rights doctrine, see *id.* at 39.

¹⁹ See CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA art. 99.

²⁰ CASANOVA, *supra* note 16, at 40–41.

try's Civil Code, states, "[it is a] right to use, enjoy and dispose of an item in an exclusive manner in accordance with the restrictions and obligations imposed by law."²¹ This adaptation drops the term "absolute" contained in the French Civil Code's definition of property.²²

1. Definitions and Terms

In general, Latin American property is legally divided into real property and personal property.²³ Property belonging to countries, states, or municipalities can either be characterized as public or private property.²⁴ Public property, as defined by civil codes, usually includes roads, lakes, rivers, coasts, ports, and property held for national defense purposes.²⁵ Public property usually cannot be sold or given away, and cannot be subject to a mortgage or lien.²⁶

In contrast, private property belonging to the country, states, or municipalities includes anything other than public property.²⁷ These properties usually can be mortgaged, given away, or sold, provided that the proper formalities are followed.²⁸

Public land is either *ejido*²⁹ or *baldía*. Generally, *ejidal* land is land that belonged to the municipalities at the time of colonization,³⁰ although it also consists of other municipal lands subsequently acquired. This land cannot be sold or mortgaged.³¹ *Baldía* land basically consists of land belonging to the government which is not *ejidal* land and which has no other legal owner.³² The government may

²¹ C. Civ. art. 545 (Venez.) (translation by author). Article 99 of the Constitution of the Republic of Venezuela guarantees the right of property.

²² See AGUILAR, *supra* note 16, at 170-77.

²³ C. Civ. arts. 2311-14 (Arg.); C. Civ. art. 74 (Bol.); C. Civ. art. 603 (Ecuador); C. Civ. art. 600 (Hond.); C. Civ. arts. 885-86 (Peru).

²⁴ C. Civ. art. 539 (Venez.).

²⁵ *Id.*; see also AGUILAR, *supra* note 16, at 77.

²⁶ See C. Civ. art. 543 (Venez.); AGUILAR, *supra* note 16, at 81.

²⁷ See AGUILAR, *supra* note 16, at 83.

²⁸ Regarding Venezuela, see *id.* at 83-88.

²⁹ The history of *ejidal* land in Venezuela is discussed in LUÍS GONZÁLEZ VALE, ENSAYO SOBRE DERECHO AGRARIO Y REFORMA AGRARIA EN VENEZUELA 58-74 (1963).

³⁰ Ley de Tierras Baldías y Ejidos, art. 3 (1936) (Venez.).

³¹ See CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA art. 99.

³² Ley de Tierras Baldías y Colonización, art. 1 R.O. 342 de 28-IX64 (1936) (Ecuador); Ley de Tierras Baldías y Ejidos (1936) (Venez.).

sell or assign this land.³³ If, for example, the government assigns the land to a municipality, it becomes *ejido* land.³⁴

2. Social Function, Possession, and Land

Latin America has been influenced by many countries in terms of social policy and ownership issues. The ancient Greeks and Romans, revolutions in Russia and China, and other more recent social conflicts indicate an interrelationship between land and social policy.³⁵

The agrarian reform laws were designed to address land ownership questions and social policy.³⁶ More specifically, these laws were conceived as a means of transforming the agrarian structure from large estates to small, producer-owned plots.³⁷ The struggle against *latifundios* is of such national importance that the struggle was addressed in some countries' constitutions.³⁸ Furthermore, social policy dictated, as a means of promoting equality of land ownership and elimination of peasant worker exploitation, that whomever worked

³³ Ley de Tierras Baldías y Colonización, art. 6 (1964) (Ecuador); CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA art. 136.

³⁴ See Ley de Tierras Baldías y Ejidos, art. 30 (1936) (Venez.).

³⁵ CASANOVA, *supra* note 16, at 41, 113–17.

³⁶ Ley de Reforma Agraria, art. 1 G.O. 611 (1960) (Venez.). Regarding Argentina, Angel Ossorio defines the social function of property as "the right to use, enjoy and dispose of goods in accordance with its nature." (translation by author). This concept of property differs from that established in several codes, in which the owner can use and enjoy the property according to his wishes, even if he destroys or degrades the property. For a definition of "función social," see MANUEL OSSORIO, DICCIONARIO DE CIENCIAS JURÍDICAS, POLÍTICAS Y SOCIALES 330 (1981). For a discussion of the "psychological liberation" of the peasant in the agrarian reform in Bolivia, see EDMUNDO FLORES, UN AÑO DE REFORMA AGRARIA EN BOLIVIA (1956).

³⁷ Dwight Braley Heath argues that these laws virtually abolished feudalism. See DWIGHT BRALEY HEATH, LAND REFORM IN BOLIVIA (1959). As of that date, however, few other aspects of the reform's objectives had been achieved. See C. CIV. art. 213 (Bol.); Ley de Reforma Agraria, art. 1 G.O. 611 (Venez.); CASANOVA, *supra* note 16, at 42.

³⁸ See CONSTITUCIÓN POLÍTICA DEL ESTADO arts. 165–66 (Bol.) (stating that all land is originally owned by the state and that one obtains ownership of property through work); CHILE CONST. art. 19, ¶ 24 (stating that the social function of property includes the requirements of the nation's general interests, security, public use, and health, and the conservation of the environmental patrimony); see also CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 58 (stating that the social function of land includes an ecological mission); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 13(a); CONSTITUCIÓN DE LA REPÚBLICA art. 48 (Ecuador); CONSTITUCIÓN POLÍTICA DE NICARAGUA art. 103; CONSTITUCIONES POLÍTICAS DE HONDURAS art. 345; Nueva Legislación Agraria, art. 27, ¶ 15 (1991) (Mex.). For further pertinent commentary, see generally Joseph R. Thome, *Agrarian Reform Legislation: Chile*, in 3 LAND REFORM IN LATIN AMERICA 79, 81 (Peter Dorner ed., 1971). For the importance of land in the popular debate in Mexico, see generally Juan Rulfo, *Nos han dado la tierra*, in EL LLANO EN LLAMAS 9–15 (Colección Popular, Fondo de Cultura Económica México ed., 1982); MARI-

the land should also own it.³⁹ In fact, agrarian law generally was structured to protect farmers, rural workers, and *campesinos*.⁴⁰

"Social function" is a shorthand, catchall term which refers to the notion that land should be used to promote social and economic development,⁴¹ rather than simply be viewed as a market commodity. This approach to land policy is typical in Latin America. Social policy and concerns were behind the "land to the tiller" land reform programs in the 1960s.⁴² Implicit in this approach is a suspicion that market forces will act against the interest of the lower classes if left unchecked. As a result, Latin American governments have addressed social function concerns in their laws.⁴³

3. The *Dotación* and Limitations on Rural Property Rights

Latin American agrarian reform programs usually provide *dotaciones*, or land grants, subject to certain conditions.⁴⁴ These programs do not convey fee-simple titles. Rather, the programs generally pro-

ANO ANZUELA, LOS DE ABAJO (1990). Article 32 of the Constitution of Uruguay recognizes property as an inviolable right, subject to laws which advance the general interest. URUGUAY CONST. art. 32.

³⁹ Social policy in Brazil is focused on environmental issues. See Decree 433 of Jan. 24, 1992, D.O. 921027, 1992; Decree 432 of Jan. 27, 1992, D.O. 920127, 1992 (Brazil); CONSTITUCIÓN DE LA REPÚBLICA art. 51 (Ecuador); Ley de Reforma Agraria, art. 24 D.O. 21-482 (1974) (Hond.), amended in part and repealed in part by Ley para la Modernización y el Desarrollo del Sector Agrícola, D.O. 31-92 (1992) (Hond.); see also Ley de Reforma Agraria, art. 1, Decreto Ley No. 17716, Decreto Supremo No. 265-70-AG (1970) (Peru) ("The land constitutes, for the man who works it, a basis for his economic stability, foundation for his well-being and a guarantee of his dignity and liberty.") (translation by author); CASANOVA, *supra* note 16, at 48.

⁴⁰ CONSTITUCIÓN DE LA REPÚBLICA art. 51 (Ecuador). For Haiti, see Decree of July 14, 1989, L.M. 890727, 1989 (authorizing the Ministry of Economy and Public Finances to carry out a systematic survey of all arable land owned by the state for distribution to needy rural families). For Venezuela, see ALI JOSÉ VENTURINI, DERECHO AGRARIO VENEZOLANO 56-58 (1976).

⁴¹ For the Dominican Republic, see Decree 2960 of May 11, 1985, G.O. 850515 (1985) (discussing which lands can and should be seized under laws relating to quotas, untilled land, large rural estates, and recovery of state lands). Spain also recognized the concept of the "función social." "Bonner Grundgesetz," an equivalent concept, appears in the German Constitution. See CONST. F.R.G. art. 14. The notion of social function is also found in Italy. See Codice Civile [C. c.] art. 832 (Italy); see also RAUL ROMERO SANDOVAL, DERECHOS REALES 83-87 (2d ed. 1991). In Guatemala, where the 1952 Arbenz land reform was quickly reversed, the constitutional provision on property does not include the words "función social." See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art 39. It does, however, state that property owners can use and enjoy their property in a way that promotes "el progreso individual y el desarrollo nacional en beneficio de todos los guatemaltecos." *Id.*

⁴² See generally DORNER, *supra* note 8, at 11-12.

⁴³ CONSTITUCIÓN DE LA REPÚBLICA art. 48 (Ecuador).

⁴⁴ See *infra* notes 45-66 and accompanying text.

vide a "usufruct," or, more specifically, a determinable life estate with a restraint on alienation.⁴⁵ The beneficiary has the right to use the property while he works the land. If the land is abandoned, or not used to promote social policy, it can revert to state control and ownership.⁴⁶ The beneficiary usually cannot place a mortgage on the land because he or she is not the fee-simple owner.⁴⁷ Sometimes the land can also be passed to heirs in wills or through intestacy, assuming that subsequent holders continue to use the land in conformity with the government's social objectives.⁴⁸ For example, prior law in Peru required governmental authorization before the mortgage, transfer, or sale of agrarian reform property.⁴⁹

The *dotaciones* are distinct from other forms of landholdings contemplated in the civil codes.⁵⁰ First, *dotaciones* should not be confused with usufructs. A usufruct is a civil code equivalent to a right to use and enjoy the property of another.⁵¹ While a usufruct can be

⁴⁵ The idea of a "use right" or lease is common throughout agrarian reforms, not only in Latin America, but also in Africa. See Bruce, African Experience, *supra* note 8, at 9. In Africa, a leasehold system is commonly thought to be more consistent with indigenous tenure models which recognize tribal or other community interests in land. *Id.* The state is viewed as the successor to the tribe, exercising its land allocation prerogatives. *Id.* Where the state consists of a single tribe or ethnic group and the chief or king of the group is the head of state, the lease may simply be a new legal instrument for exercising traditional powers to allocate land. *Id.* The Latin American *dotación* may also be compared to the English common law concept of a determinable life estate with a restraint on alienation, in which a beneficiary owns the property for life (and thus cannot pass the property on through a will or through intestacy), so long as he farms or uses the land, and may not sell or transfer the land. *Cf.* General Property Law, art. 80 (1973) (Zaire) (stating that land is owned by the government, which in turn can grant concessions, even, for example, perpetual concessions—the right to enjoy the land indefinitely—as long as certain legal conditions are satisfied). See James C. Riddell et al., The National Land Law of Zaire and Indigenous Land Tenure in Central Bandundu, Zaire 13 (Jan. 1987) (unpublished manuscript, on file with author).

⁴⁶ See Ley de Reforma Agraria, art. 48 R.O. 877-18-VII (1979) (Ecuador); Ley de Reforma Agraria, art. 41(a) D.O. 21-482 (1975) (Hond.), amended in part by and repealed in part by Ley para la Modernización y el Desarrollo del Sector Agrícola, D.O. 31-92 (1992); see also Ley de Reforma Agraria, arts. 7, 8, 15, Decreto Ley No. 17716, Decreto Supremo No. 265-70-AG (1970) (Peru).

⁴⁷ Ley de Reforma Agraria, art. 86(c), Decreto Ley No. 17716, Decreto Supremo No. 265-70-AG (Peru); Agrarian Reform Law, art. 15 G.O. 611 (1960) (Venez.).

⁴⁸ Ley de Reforma Agraria, art. 73 G.O. 611 (1960) (Venez.).

⁴⁹ Ley de Reforma Agraria, arts. 86(a)-(c), Decreto Ley No. 17716, Decreto Supremo No. 265-70-AG (1970) (Peru).

⁵⁰ CASANOVA, *supra* note 16, at 254-55.

⁵¹ See C. Civ. arts. 796-842 (Ecuador); C. Civ. arts. 769-812 (El Sal.); C. Civ. arts. 745-89 (Hond.); C. Civ. arts. 999-1005 (Peru). For a general discussion of the usufruct in Venezuela, see EMILIO CALVO BACA, MANUAL DE DERECHO CIVIL VENEZOLANO 177-82 (1984). For a historical perspective, see ANÍBAL DOMINICI, I COMENTARIOS AL CÓDIGO CIVIL VENEZOLANO 634-90 (Rea ed., 1962) [hereinafter DOMINICI 1].

bought, sold, inherited, or transferred, a *dotación* cannot. Further, the *dotación* has only one owner and no one else can use the land; with a usufruct, one person owns the land while another has the right to use it. Second, the *dotación* should be distinguished from the *emphyteusis*, which is basically a long-term lease with a requirement to improve the land, allowing the right to use and enjoy the land as if it were owned outright.⁵² Third, the *dotación* is different from an *antichresis*, a loan in which the creditor is given access and permission to use the collateral, usually a house.⁵³ Finally, the *dotación* should be distinguished from a rental agreement and from sharecropping.⁵⁴

Most civil code property regimes allow for limitations on rural property rights. These limitations include the usufruct, the right of habitation, and the right of housing.⁵⁵ Servitudes are, likewise, contemplated in most jurisdictions.⁵⁶

The agrarian reform laws often imposed additional restrictions on land ownership rights in accordance with the notion of land and social policy. Under agrarian reform law, the *dotaciones* generally cannot be sold, rented, or inherited without the express approval of the national agrarian institute.⁵⁷ At the very least, they are subject to regulation and control.⁵⁸ The *dotaciones* were seen as a way to trans-

⁵² For a historical perspective of Venezuela, see ANÍBAL DOMINICI, 4 COMENTARIOS AL CÓDIGO CIVIL VENEZOLANO 10-16 (Rea ed., 1962) [hereinafter DOMINICI 4].

⁵³ C. Civ. arts. 1091-96 (Peru).

⁵⁴ The concept of rental agreements is discussed in RAMÓN JOSÉ DUQUE CORREDOR, CONTRATOS AGRARIOS 56-60 (1986) [hereinafter DUQUE, CONTRATOS]. For a historical perspective of Venezuela, see DOMINICI 4, *supra* note 52, at 17-80. Both sharecropping and rental of agricultural land are illegal in Bolivia. See C. Civ. art. 214 (Bol.).

⁵⁵ C. Civ. arts. 216-54 (Bol.); C. Civ. arts. 703-51 (Guat.); C. Civ. arts. 1026-29 (Peru); C. Civ. art. 582 (Venez.).

⁵⁶ C. Civ. arts. 255-90 (Bol.); C. Civ. arts. 876-88 (Ecuador); C. Civ. arts. 822-33 (El Sal.); C. Civ. arts. 752-59 (Guat.); C. Civ. arts. 799-867 (Hond.); C. Civ. arts. 1035-54 (Peru); C. Civ. art. 709 *et seq.* (Venez.). For a pertinent historical perspective, see DOMINICI 1, *supra* note 51, at 713-812.

⁵⁷ See generally *supra* notes 44-56 and accompanying text.

⁵⁸ For example, small landholder and *campesino* land in Bolivia is indivisible and cannot be mortgaged. CONSTITUCIÓN DE LA REPÚBLICA DE BOLIVIA art. 196. Land which exceeds certain size limits, however, may be the subject of encumbrances and mortgages. See Ley de Reforma Agraria, arts. 15, 32-33 (Bol.); Resolution 2491 G.O. 910408 (1991) (Cuba); Colonization Law No. 1783, arts. 9-12 (1948) (Dom. Rep.). The Dominican Republic's Colonization Law specifies that land received cannot be rented or otherwise passed to others before final issuance of a permanent title. Colonization Law No. 1783, arts. 9-12 (1948) (Dom. Rep.). Under that law, eight years of occupation and use are required before consideration for permanent title in colonies along the border. Under the post-Trujillo Agrarian Reform Law of 1962 and subsequent amendments, however, the period of provisional title, either individual or collective, is undefined. See J. DAVID STANFIELD ET AL., EVOLVING PROPERTY RELATIONS

form the agrarian structure, and legislatures often imposed these restrictions to prevent a return to a *latifundio* system.⁵⁹

Although the agrarian reform laws often provide for a size limitation, limits may also be set through administrative rule-making.⁶⁰ Thus, the laws try to prevent large land estates from being held by a single owner.⁶¹ In addition, laws may attempt to prevent parcelization of property (*minifundios*).⁶²

Most agrarian reforms recognized that land alone would not bring the *campesinos* into the economy.⁶³ Policy-makers, therefore, included rural credit.⁶⁴ In order to provide such credit, the governments created agriculture credit institutes, funds, and banks.

IN THE AGRARIAN REFORM OF THE DOMINICAN REPUBLIC 22-23 (1986); see also Ley del Régimen Especial de la Tierra y de los Derechos y Obligaciones de los Beneficiarios de la Reforma Agraria, art. 5 (1992) (El Sal.); Ley de Reforma Agraria, art. 127, Decreto Ley No. 17716, Decreto Supremo No. 265-70-AG (1970) (Peru) (illegalizing rental of agrarian reform land). In the case of Venezuela, see RAMÓN JOSÉ DUQUE CORREDOR, DERECHO AGRARIO: INSTITUCIONES 213 (1985) [hereinafter DUQUE, INSTITUCIONES]; Ley de Reforma Agraria, arts. 15, 74 G.O. 611 (1960) (Venez.); cf. Portugal: Decree 63-89 of Feb. 9, 1989 D.R. 890224 (1989); Law 109-88 of Sept. 7, 1988 D.R. 880926 (1988); Decree 199-88 of May 31, 1988 D.R. 880531 (1988).

⁵⁹ For Venezuela, see CASANOVA, *supra* note 16, at 260. In Chile, the military government moved to reverse the agrarian reform. See Lovell S. Jarvis, *The Unraveling of Chile's Agrarian Reform*, in SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA 240, 244 (William C. Thiesenhausen ed., 1989). For example, restrictions imposed on land transactions were gradually set aside to permit the subdivision and sale of all private properties. The rental or sale of reform-sector parcels was initially prohibited, but the government ignored the illegal sales that occurred. In 1979, free transaction in such parcels was legalized. See *id.*

⁶⁰ Yugoslavia imposes a maximum size limit of 10 hectares. CASANOVA, *supra* note 16, at 47. Cuba sets the limit at five *caballerías*. *Id.* See Interview with Ing. Manuel Cristobal Nuñez, Program Director for Cadastres and Titling, Department of Agriculture, Office of Titling, in Lima, Peru (June 28, 1991); Interview with Ing. Carlos Mendoza Mejía, Peruvian Department of Agriculture, Office of Titling, in Lima, Peru (June 28, 1991) [hereinafter Mejía Interview].

⁶¹ El Salvador sets a limit on agricultural land at 245 hectares. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 105. Venezuela does not provide for size limitations in its agrarian reform legislation. Land lots can be of any size, provided these parcels meet the social policy criteria. See Ley de Reforma Agraria, art. 19 G.O. 611 (1960) (Venez.).

⁶² See Ley de Reforma Agraria, art. 98 R.O. 877-98-VII (1979) (Ecuador); Ley de Reforma Agraria, art. 41(a) D.O. 21-482 (1975) (Hond.), amended in part by and repealed in part by Ley para la Modernización y el Desarrollo del Sector Agrícola D.O. 31-92 (1992); Ley de Reforma Agraria, art. 1, Decreto Ley No. 17716, Decreto Supremo No. 265-70-AG (1970) (Peru).

⁶³ For the case of Venezuela, see SALVADOR DE LA PLAZA ET AL., REFORMA AGRARIA VENEZOLANA: CONCEPCIÓN, EVALUACIÓN Y PERSPECTIVAS 56 (1968).

⁶⁴ See CONSTITUCIÓN DE LA REPÚBLICA DE COLOMBIA art. 64; Ley de Reforma Agraria, art. 126 D.O. 21-482 (1975) (Hond.), amended in part by and repealed in part by Ley para la Modernización y el Desarrollo del Sector Agrícola D.O. 31-92 (1992). For a Venezuelan example discussing the role of agricultural credit as an element in the plan for economic

In addition, each *dotación* often included technical assistance. Governments, through their agriculture ministries, often created an extensive system of agricultural extension.⁶⁵ Further, each agricultural center often provided additional extension and outreach services.⁶⁶

4. Limitations on Ownership of the Subsoil

Latin American law differentiates between the soil and the subsoil. Generally, the soil belongs to the owner, while the government owns the subsoil.⁶⁷ Soil encompasses the depth necessary to work the land or to construct buildings. Mineral rights and mining are often governed by special law.⁶⁸ Subsoil and the extraction of mineral substances are regulated by this legislation.⁶⁹ In some cases, even trees cannot be cut without official permission.⁷⁰

Because property owners do not possess subsoil rights, they have little incentive to invest in the exploitation or preservation of these resources. In indigenous reserves, where the quality of the land itself may be marginal, lack of subsoil rights also denies the indigenous community access to a potentially important source of self-sustaining revenue.

development, see BANCO AGRÍCOLA Y PECUARIO, *EL CRÉDITO AGRÍCOLA EN LOS SISTEMAS DE RIEGO 1* (1971).

⁶⁵ See CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 13(a) (1966); Ley de Reforma Agraria, arts. 125-27 G.O. 611 (1960) (Venez.).

⁶⁶ See Ley de Reforma Agraria, art. 80 G.O. 611 (1960) (Venez.).

⁶⁷ See, e.g., Código Mining [C. MINING] Laws 10273, 17319 (Arg.); SANDOVAL, *supra* note 41, at 123-34; Código Mining [C. MINING] Laws 18248, 18097 (Chile); CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 360; Código Mining [C. MINING]; Decree 2655 (Colom.); Código Petroleum [C. PETROLEUM] Decree 1056 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 100 (Dom. Rep.); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 103 (El Sal.); Código Mining [C. MINING] Laws 15242, 14, 181 (Uru.); see also Riddell, *supra* note 45, at 8; cf. ZAIRE CONST. art. 10 (stating that "Zairian soil and subsoil belong to the State. The conditions for their concession shall be fixed by law.")

⁶⁸ See, e.g., Law 1297 of Nov. 27, 1991, G.O. 920113 (Jan. 13, 1992) (Bol.); Decree 19789-MIRENEM of June 25, 1990 (L.G. 900803) (Aug. 3, 1990) (Costa Rica); Ley de Hidrocarburos R.O. 711: 15-XI-78 (Nov. 6, 1978) (Ecuador); Ley Especial de la Empresa Estatal Petróleos del Ecuador (Petroecuador) y Sus Empresas Filiales R.O. 283: 26-XI-89 (Sept. 18, 1989) (Ecuador); Law 1182 of Dec. 23, 1985 (CONAC, Congreso Nac. 851231) (Dec. 31, 1985) (Para.); Mining Law of Dec. 28, 1944; Decree 2039 of Feb. 15, 1977 (Venez.); Resolution 528 of Dec. 17, 1986; Resolution 429 of Nov. 11, 1982 (Venez.).

⁶⁹ In Chile, the state has absolute, exclusive, inalienable, and imprescriptible domain over all mines, deposits, and other fossil substances, despite the ownership held by individuals or legal entities over the land in which the deposits are contained. CHILE CONST. art. 19, ¶ 24.

⁷⁰ See Decree of July 7, 1987, L.M. 871012 (1987) (Haiti).

5. Collective Ownership Under Agrarian Reforms

When land is given to collective or cooperative organizations, the governments often create "agrarian centers"⁷¹ to provide the superstructure for coordinating the efforts of individual members. These agrarian institutions, however, lack the legal personality of corporations or other lawfully constituted and recognized organizations.⁷²

The agrarian centers have an organizational structure which allows for member participation. There is an assembly and an administrative committee which provide direction for the association.⁷³ The centers also provide to their members courses and seminars on agricultural production.⁷⁴

The agrarian centers or cooperatives furnish a number of additional services to *campesinos*: they operate under a democratic organizational structure, with certain formalities; and, they usually have a goal of furthering education among members.⁷⁵ Other forms of collective enterprise among producers include agrarian businesses, credit unions, and the *campesino* social companies, which receive property collectively from the agrarian reform institute on behalf of their members.⁷⁶

6. Women Under Agrarian Reform Legislation

Agrarian reform laws often make special provisions for women. While the laws, by granting land to the father figure, usually fail to recognize that women can be the "head of the household," they do allow women to show that the father has abandoned the family.⁷⁷ In this situation, the woman can receive benefits as if she were the head of the household.⁷⁸

In civil code jurisdictions, women usually have equal inheritance rights to men. Local groups that decide disputes, however, often give

⁷¹ See Ley de Reforma Agraria, art. 58 G.O. 611 (1960) (Venez.).

⁷² See CASANOVA, *supra* note 16, at 249. The agrarian centers should not be confused with agricultural cooperatives, which possess legal personality and are composed of individual members.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.* at 280.

⁷⁶ See *id.*

⁷⁷ See DUQUE, CONTRATOS, *supra* note 54, at 261-62; see also CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA arts. 73, 93.

⁷⁸ See DUQUE, CONTRATOS, *supra* note 54, at 261-62; see also CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA arts. 73, 93.

all the real property to the sons, irrespective of the law.⁷⁹ Under the customary tenure systems of many societies, sons, upon marriage, receive the real estate assets. Daughters, on the other hand, receive personal property, which they can take with them to their husband's land.⁸⁰

B. *The Modern Policy Agenda*

The 1992 congressional presentation of the U.S. Agency for International Development (AID) stated that the objectives of foreign aid include: (1) the promotion and consolidation of democratic values, and (2) the promotion of market principles.⁸¹ Efforts to liberalize land laws directly affect the legal system, and, hence, impact intimately on democratic values. Similarly, the elimination of barriers to trade in land, like restrictions on sale, mortgage, and inheritance, promotes market principles advanced by AID.

AID supports economic and political reforms which generate employment, promote broadly-based, sustainable, and environmentally-sound economic growth, and encourage political freedom and good governance.⁸² Further, AID invests in human resource development.⁸³ This type of development is not financially sustainable without providing support for projects that promote child survival, health, and education. Property taxation is an important element in a strategy for financing such projects. In addition, the reform of land policy, especially land registry systems, is a prerequisite to an effective system for property taxation.

Finally, AID looks to "strengthen the institutions . . . necessary to expand the production of goods and services."⁸⁴ In order to promote land market reform, legal institutions and infrastructure need to be developed to promote market-based principles.

AID's Latin America and Caribbean Bureau (LAC Bureau) concentrates on promoting investment, employment, and favorable pol-

⁷⁹ Interview with Dr. Santiago Pozo, Inspector from Cochabamba, in Bolivia (July 8, 1992).

⁸⁰ Although it is beyond the scope of this Article, a specific gender analysis of tenure policy might be an appropriate way for governments to identify what factors inhibit women's participation in the rural economy.

⁸¹ See AGENCY FOR INTERNATIONAL DEVELOPMENT, CONGRESSIONAL PRESENTATION: FISCAL YEAR 1993 10 (1992) [hereinafter AID PRESENTATION].

⁸² See *id.* at 12. The reforms in Mexico, Peru, and Honduras were at least nominally engineered to achieve these goals.

⁸³ *Id.*

⁸⁴ *Id.*