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**THE DE-CONSTITUTIONALIZATION
OF PROPERTY RIGHTS:
CASTRO'S SYSTEMATIC ASSAULT ON
PRIVATE OWNERSHIP IN CUBA**

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I. INTRODUCTION

My intention throughout this paper is to present an overview of Castro's systematic assault on private ownership spanning the last four decades and give the reader a sense of the inextricable intertwining of constitutional, political, and economic liberties in Cuba (as illustrated by the United Nations' 1948 Universal Declaration of Human Rights) and how effectively this delicate fabric can be torn asunder. There are several serious problems with conducting a legal analysis of the structure of a totalitarian regime. In addition to the indisputable fact that official reports emanating from the Castro regime are frequently manipulated, often anecdotal and even contradictory, there is also considerable divergence between the *de jure* "laws on the books" and *de facto* reality on the island. Despite the existence of some state decrees which, on their face, seem to sanction something akin to the private ownership of some homes and small farms, as well as the more recent establishment of commercial joint ventures between the Cuban regime and certain foreign companies (*empresas mixtas*), these relatively insignificant "property rights" are too restricted to approach classical or Western notions of private property.¹

II. THE 1940 CONSTITUTION

Cuba's 1940 Constitution [hereinafter Constitution], which Fidel Castro and his followers professed an intention to restore after its partial suspension by General Fulgencio Batista's 1952 *coup d'etat*, was already being amended within the first fortnight of the revolutionary regime's reign. On January 13, 1959, Castro's Council of Ministers [hereinafter Council] usurped the right to amend the Constitution, in derogation of the requirements set forth in Articles 285 and 286. In order to amend the Constitution, these articles required: (1) popular or congressional initiatives approved by a super-majority of the National Assembly or (2) the convening

1. Douglas E. Matthews, *Real Property Law Under the Current Cuban Regime*, 3 U. MIAMI Y.B. INT'L L. 137 (1995).

of a plebiscitary assembly, in order to approve an amendment to the Constitution.²

With its new-found power, the Council, as part of this first amendment, promptly modified Article 24 of the Constitution protecting private property. This revision (in italics) read, in pertinent part:

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 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 the payment of the corresponding indemnity in cash, as fixed by a court³

The Council, however, did not limit the initiation of its assault on human rights to the area of economic liberties. Its first amendment also authorized for the first time the retroactive application of criminal laws and the death penalty for political causes.⁴

2. Ignacio E. Sanchez, *Cuban Property Rights and the 1940 Constitution*, 3 FLA. ST. U. J. TRANSNAT'L. L. & POLICY. 135, at 141 (1994).

3. *Cuba and the Rule of Law*, INTERNATIONAL COMMISSION OF JURISTS 87 (1962).

4. *Id.*

III. THE FUNDAMENTAL LAW

In order to provide further quasi-legal cover for its scheme to confiscate all private property in Cuba, from the large sugar mills and cattle ranches down to the smallest *bodegas* (small groceries) and homes, the Castro regime effectively repealed the Constitution on February 7, 1959, replacing it with the Fundamental Law [hereinafter the Law]. Going a substantial step further than General Batista's (extra-constitutional) Constitutional Act of 1952, the Law incorporated much of the Constitution, but went on to make the unelected Council the supreme legislative body, giving it the authority to amend the Law. This effectively "constitutionalized" the January 13th amendment to Article 24 of the Constitution.⁵

The Law was intended to be in effect for only one year, in order to facilitate the introduction of the revolutionary regime's "reforms."⁶ Although the Law did not specifically purport to repeal the Constitution, and it was not enacted under the Constitution's amendment mechanism, the Castro regime proceeded for the next seventeen years as though the Law had indeed replaced the Constitution.⁷ Although the text of the Law did not vary from that of the Constitution with respect to its private property clause,⁸ the expropriation clause of the Law⁹ now included an exception (which would swallow the rule) with the retroactive effect of allowing the confiscation of those properties which belonged to the former Batista dictatorship and its "collaborators."¹⁰

5. Sanchez, *supra* note 2, at 13.

6. Juan C. Consuegra-Barquin, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, RUTGERS LAW REV., 873, 896 (1994).

7. *Id.* at 897-898.

8. LEY FUNDAMENTAL [Constitution] art. LXXXVII (Cuba).

9. *Id.* at art. XXIV; 1940 Constitution art. XXIV (Cuba).

10. LEY FUNDAMENTAL art. XXI, XXIV (Cuba).

IV. THE AGRARIAN REFORM ACT

Seriously undermining the revolutionary regime's commitment to the rule of law in general, and the protection of private property in particular, between February 7, 1959 and August 23, 1961, the Law was amended sixteen times.¹¹ It was significantly amended by the proclamation of the Agrarian Reform Act [hereinafter the Act] on June 3, 1959.¹² The Act, coupled with another agrarian reform law in 1963, effectively confiscated approximately 63% of Cuba's arable land from its legitimate owners.¹³ These enactments involved the confiscation of all farms, whose area exceeded five *caballerias*.¹⁴ Although about 45,000 farmers retained smaller farms, and smaller parcels were allotted to almost 100,000 tenants, sharecroppers, and squatters, the Castro regime has steadily forced, rather than persuaded,¹⁵ these small land holders to "sell" their holdings to the State at a price the State deemed appropriate. As a result, the State currently directly occupies approximately 83% of Cuba's cultivated land.¹⁶ The remainder breaks down into collective farms or cooperatives covering 15% of the cultivated land, mostly *Cooperativas de Produccion Agropecuaria* and small private farms comprising 2% of the cultivated land worked by about 20,000 small farmers.¹⁷ Although the Cuban regime has recently denounced an expansion

11. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 3, at 98.

12. Gaceta Oficial [Official Gazette], Special Ed. No. 7 (Jun. 3, 1959).

13. See generally JOHN P. RATHBONE, PRIVATE PROPERTY RIGHTS IN CUBA (1992). See also Farmland, Bulletin of La Sociedad Economica de Amigos del Pais, No. 16 (Apr. 8, 1992).

14. One *caballeria* equals 33 acres or 13.4 hectares.

15. Medea Benjamin et al., *Economic Transformation in the 1960's and 1970's*, THE CUBAN READER: THE MAKING OF A REVOLUTIONARY SOCIETY, 89, 96 (1989).

16. Rathbone, *supra* note 13, at 1.

17. *Id.*

of the *cooperativas*, there is little evidence that any significant changes are being implemented.

As significant caveats to the semi-private nature of these small farmers, it should be noted that: (1) their average holding is only about 12.6 hectares (165 acres); (2) they cannot freely sell their land without the authorization of the appropriate state agency; (3) the State dictates what is to be grown on their land; (4) they are completely dependent on the state for agricultural inputs, transportation, credit, marketing, and distribution (through the woefully inefficient *Centros de Acopio*); (5) part of the produce that they harvest must be "sold" to the State at prices established by the State; (6) the obstacles to property transfers include an expansive right of first refusal reserved by the State; and (7) there are burdensome restrictions on the inheritance of these properties.¹⁸

When the constitutionality of the Act was challenged before the Court of Constitutional and Social Guarantees [hereinafter the Court] on the basis that it violated both Articles 24 and 87 of the Constitution, the Castro-controlled judiciary simply held that:

[I]t is also the doctrine of this Court that such standards regulating the right of property cannot be invoked with regard to property falling under the special system of the Agrarian reform, which is subject to special provisions laid down by the Act and is on equal footing with the Constitution.¹⁹

The Court went on to say that the enforcers of the Act may occupy any property affected without applying the "organs of ordinary jurisdiction," and without the requirement for prior compensation to the legitimate owners of these properties.²⁰

18. Benjamin et. al., *supra* note 15, at 96-97.

19. Court of Constitutional and Social Guarantees, Judgment No. 45.

20. *Id.*

V. STRIPPING PROPERTY RIGHTS OF CONSTITUTIONAL PROTECTION

Once again, on November 22, 1959, the Council amended Article 24 of the Constitution to permit the confiscation of property from the following new categories of persons:

(1) Persons found guilty of offenses defined by law as counter-revolutionary; (2) Persons evading the action of the revolutionary courts by leaving the national territory in any manner whatsoever; and (3) Persons who, having left the national territory, perform conspiratorial acts against the revolutionary government.²¹

This proclamation was the revolutionary regime's response to the ever-growing counter-revolutionary insurgency, coupled with the flight of many thousands of Cubans into exile.

On July 5, 1960, the original text of Article 24 of the Constitution was again altered, in relevant part, as follows:

[N]o other natural or juridical person can be deprived of his property except by competent authority and for a justifiable cause of public utility or social or national interest. The law shall regulate the procedure for expropriation and shall establish legislation and forms of payment and shall determine the competent authority to declare the case to be of public utility or social or national interest and that expropriation is necessary.²²

This seemingly unconstitutional amendment is the proverbial linchpin of the Castro regime's strategy to remove individual property rights from their constitutionally-protected sphere and

21. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 3, at 100.

22. *Id.* at 104.

subject them to "revolutionary justice." Following the above-mentioned alteration, Article 24 states that "no other natural or juridical person can be deprived of his property except by competent authority," rather than "competent judicial authority" as it previously read.²³ Furthermore, although the original text included in the expropriation clause the phrase "and always after payment of appropriate compensation in cash," the amended text deleted this condition without a specific commitment to any compensation.²⁴ As a further weakening of the former constitutional private property protection, "national interest" is added as another permissible basis justifying confiscation.²⁵ For good measure, this amendment deleted the clause of Article 24 of the Constitution, which allowed the confiscated party to appeal to the courts for restitution of its property.²⁶ As a further deformity to Article 24 of the Constitution, on January 24, 1961, the category of property subject to confiscation was stretched to nearly *carte blanche* proportions to also encompass the property of "those deemed necessary by the Government in order to prevent acts of sabotage, terrorism or any other counter-revolutionary activities."²⁷

The Castro regime also authorized the confiscation without compensation of the real and personal property of those Cubans who left the country for at least one to three months through Law No. 989²⁸ and the related Resolution No. 454.²⁹ These confiscations were primarily measures taken against the exile opposition to the regime, both to punish the "traitors" who left, as

23. *Id.* See also Gaceta Oficial, Special Edition, No. 21, (Sept. 28, 1960).

24. *Id.*

25. *Id.*

26. Sanchez, *supra* note 2, at 16.

27. Gaceta Oficial, Special Ed., No. 1 (Jan. 4, 1961).

28. Gaceta Oficial, p. 23, 705 (Dec. 6, 1961).

29. Gaceta Oficial, p. 19, 310 (Oct. 9, 1961).

well as to provide disincentives for the economically damaging "brain drain" of Cuban professionals leaving the country.

VI. LAW NUMBER 851 AND LAW NUMBER 890

This last amendment cleared the way for the executory phase of the Castro regime's confiscatory scheme. On August 6, 1960, amidst a flurry of anti-imperialist rhetoric, all of the businesses in Cuba owned by citizens of the United States were individually listed in Law No. 851 in that day's *Gaceta Oficial*. These businesses were forcibly expropriated by the revolutionary regime, with only vague and unrealistic language that the issue of compensation would be determined at a later date.³⁰

Two months later, Law No. 890 forcibly confiscated virtually the entire diversified Cuban-owned industrial sector, including sugar mills, distilleries, alcoholic beverage plants, detergent factories, perfumeries, dairy producers, confectioners, wheat mills, container makers, paint producers, chemical companies, paper companies, metallurgists, lamp makers, textile industries, rice mills, food producers, edible oil producers, wholesale food distribution warehouses, coffee mills, pharmaceutical industries, department stores, railroad companies, printers, cinematographers, construction companies, electric utilities, and maritime industries, as well as all of their related subsidiaries and affiliates.³¹ Law No. 890 merely stated that "the means and forms of payment for the indemnification which corresponds to the natural or juridical persons affected by the expropriation directed by this Law shall be regulated in accordance with a future law."³² Needless to say, just as with the confiscation of the American-owned industries, compensation was never paid to any of the Cuban owners.

30. *Gaceta Oficial*, Special Ed., No. 24 (Oct. 15, 1960).

31. *Gaceta Oficial*, Special Ed., No. 24 (Oct. 15, 1960).

32. *Id.* at 7.

VII. THE URBAN REFORM ACT

That very same month, the Castro regime enacted an urban version of the Act, which also stripped constitutional protection from property and contract rights in yet another important societal area. Article 2A of the Urban Reform Act specifically prohibited all types of leasing and sub-leasing agreements.³³ The Urban Reform Act went beyond proscribing any future leases. The Act rendered all existing leases of urban property null and void.³⁴ Through the Urban Reform Act, the Castro regime ordered the compulsory sale of urban houses and apartments at prices fixed by the state.³⁵ In order for any Cuban citizen to sell or transfer a house or apartment, the consent of the Council of Urban Reform was now required.³⁶

In addition, rents for government-built housing were capped at no more than 10% of household income.³⁷ Between 1959 and 1988, nearly 1.4 million new housing units were built in Cuba. However, about half of this total housing stock is considered to be substandard.³⁸

VIII. THE 1976 CONSTITUTION

On February 24, 1976, long after Fidel Castro seized power in Cuba and imposed the Law outside the framework of the Constitution as a "temporary" measure, he decreed a new and

33. Gaceta Oficial, Special Ed., No. 23 (Oct, 14, 1960).

34. *Id.*

35. *Id.*

36. Sanchez, *supra* note 2, at 147.

37. J. HAMBERG, HOUSING POLICIES IN THE SOCIALIST THIRD WORLD, 35, 38 (Kosta Mathey ed., 1990).

38. *Id.* at 37.

thoroughly communist "constitution."³⁹ The nearly two-decade delay in drafting a new constitution is indicative of the Castro regime's contempt for legal restraints on state authority.⁴⁰ By way of comparison, the U.S. Constitution was drafted to replace the Articles of Confederation only four years after the 1783 Treaty of Paris.⁴¹ The fact that the U. S. Constitution was submitted to the thirteen new states for ratification only four years after the end of the war, despite the relatively limited communications of the late eighteenth century, further emphasizes the comparative disregard of the Castro regime for legal restraints on state authority.

Article 9 of the 1976 Constitution confesses that laws "are to echo only the will of the working people," and that only "socialist legality" is binding on the State, which is to be officially controlled by the Communist Party.⁴² Since there is neither national nor international consensus as to what constitutes "socialist legality," Article 9 has the *de facto* effect of providing "constitutional" cover for the official repression of all opponents of the communist police state.⁴³

On the specific question of property rights, Article 14 prescribes the following: "An economic system based upon the socialist ownership of all the people over the means of production and the elimination of the exploitation of man by man rules in the Republic of Cuba."⁴⁴ Article 15 goes even further in specifying, non-exclusively, which properties become "irreversibly established" as the assets of "the entire people," as represented by the State.

39. PAMELA S. FALK, CONSTITUTIONS OF THE COUNTRIES OF THE THIRD WORLD: CUBA. (Albert P. Blaustein & Gisbert H. Flanz eds., 1979).

40. BRUCE FEIN, CASTRO'S 1976 CUBAN CONSTITUTION: INSTITUTIONALIZING OPPRESSION OF CUBAN CITIZENS AND SCORNING THE 1948 UNIVERSAL DECLARATION OF HUMAN RIGHTS 3.

41. This treaty officially ended the American War of Independence.

42. FEIN, *supra* note 40, at 10.

43. *Id.*

44. 1976 CONST., art. 14 (Cuba).

[T]he land that does not belong to the small producers or the cooperatives formed by the same, the subsoil, the mines, the maritime and natural resources-both living and not living-within the area of the republic, the forests, the waters and the means of communication; the sugar mills, factories, basic means of transportation; and overall the enterprises, banks, installations and goods that have been nationalized and expropriated from the imperialists, large landholders and members of the bourgeoisie; as well as over the people's farms, factories, enterprises and economic, social, cultural and sports facilities built, fostered or purchased by the state and those which will be built, fostered or purchased by the state in the future.⁴⁵

IX. THE 1992 AMENDMENTS

The 1976 Constitution served as a thorough codification of the Castro regime's communist ideology and officially nationalized any private ownership over the means of production that may have arguably survived the earlier revolutionary period. Faced with the collapse of the communist bloc in Eastern Europe and the Union of Soviet Socialist Republics itself (which meant a fairly abrupt end to the \$6-8 billion annual subsidy received from the former U.S.S.R.), the Castro regime has been forced to engage in a curious, neo-mercantilist practice of "state capitalism," in order to attract foreign investment.⁴⁶

Under Law-Decree 50 (enacted on February 15, 1982 and elevated to "constitutional" status by Article 23 of the 1976 Constitution on August 1, 1992), the *empresas mixtas* are determined to be joint commercial ventures with foreign entities, in which the State is typically awarded a controlling interest. These joint ventures currently exist in the areas of tourism, mining,

45. 1976 CONST., art. 15 (Cuba).

46. Franklin Hoet & Jose F. Valdivia, III, *Mining in Cuba*, LATIN AMERICAN REPORTER, Vol. 1, No. 1 (May/June 1994).

textile, communications, real estate, petroleum, construction, manufacturing, cement, sugar and other agricultural sectors.⁴⁷ The foreign companies contract with the relevant Cuban state corporate entities to provide them with local workers. Unrestricted by any minimum wage, right-to-strike, collective bargaining, or other labor protections, not to mention any environmental, antitrust, and capital repatriation restrictions, these companies pay the workers' wages, in the corresponding hard currency, directly to the state corporation. The State, in turn, pays these workers, in nearly worthless Cuban *pesos*, a portion of their wages, discounting from them an additional amount as rent for the use of the confiscated homes in which these workers reside.

The following italicized language was added to Article 15 of the 1976 Constitution, in order to facilitate the creation of the *empresas mixtas*.

These properties and installations cannot be transferred to any persons or corporations, *except in cases in which the property is transferred in order to be used in the economic and social development of the country . . . with the prior approval of the Council of Ministers or its Executive Committee.*⁴⁸

To those who are heartened by the enactment of the 1992 Amendments to the 1976 Constitution as a perceived step towards Cuba's gradual return to capitalism and re-integration into the world economy, the speaker of Cuba's National Assembly had these cautionary words: "Let the enemy not be deceived. They will find nothing in this text that implies retreat, nor return to the past, because we bow to no pressure."⁴⁹

47. Paul B. Carroll, *Mexico Plays Growing Role in Helping Cuba Withstand U.S. Trade Embargo*, WALL ST. J., Aug. 3, 1994, at A7.

48. Matthews, *supra* note 1, at 149.

49. *Cuba's New Constitution: Better or Worse?*, 1 THE CUBA REPORT 1 (1992).

X. CONCLUSION

The Constitution is still internationally regarded as the model for several new Iberian and Latin American democracies. Despite some of its more overtly interventionist and paternalistic provisions, it was certainly a very enlightened and progressive document for its day. Regardless of its faults, it is the last legitimate expression of the constitutional will of the Cuban people. In order to bring Cuba permanently out of its uncontrollable tailspin of disregard for constitutionalism and its concomitant political, economic, and social misery, Cuba must nullify the 1976 Constitution as the starting point for its requisite national reconstruction and development. Needless to say, a constituent assembly will have to be convened expeditiously, in order to amend or even replace the Constitution according to its mechanisms established for this purpose. This process, however, will foster badly needed popular respect for the national institutions of the new republic.

With respect to the specific issue of property rights, prompt and full restitution of all non-materially altered industrial, commercial, and agricultural properties to their legitimate owners will carry out the justice required for social peace. It will also place the means of production in the hands of those entrepreneurs who had elevated Cuba to the top of nearly every single socio-economic index in Latin America, prior to the communist revolution. By creating constitutional and other legal incentives to encourage the unleashing of the creative energies of the Cuban people, both on the island and in exile, Cuba can rapidly earn foreign exchange through exports, produce abundantly for its own domestic consumption, employ workers at real jobs paying in a currency that has value, and restore civil labor, and other societal rights. The economic multiplier effect of this combined economic activity will rapidly return prosperity to the island.