

# CONSTITUTIONAL PROTECTION OF CUBAN PROPERTY RIGHTS

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“The [1940] Constitution is understood to be the basic and supreme law of the land—to define the country’s political structure, regulate the functioning of government agencies and determine the boundaries of their activities. It must be *sui generis*, stable, enduring—and to a certain extent inflexible.”—Fidel Castro (October 16, 1953)

On January 1, 1959, following the abdication of power by Fulgencio Batista, Fidel Castro entered Havana as the revolutionary leader of the Republic of Cuba. The new year marked the end of the popular uprising against Batista that had begun on March 10, 1952, when Batista executed a military coup d’etat and suspended constitutional guarantees. The declared purpose of Batista’s opponents was to restore the 1940 Constitution.<sup>1</sup> This objective became the unifying banner under which Cubans fought and ultimately forced out Batista.

The victory over Batista inspired hope that the Republic of Cuba would once again be governed by a constitution that expressed the will of the people. Unfortunately, history bears witness to the fact that Castro and his ministers betrayed the public trust. Within days of seizing power, Castro began the process of illegally amending the Cuban Constitution. The illegal amendments to the Cuban Constitution were part of a scheme orchestrated by the Castro revolutionary government to illegally confiscate and expropriate assets belonging to Cuban nationals and

foreign companies and individuals. These confiscated properties, worth billions of dollars, ranged from sugar mills and petroleum refineries to small businesses and private residences.

Castro’s rule has lasted for more than thirty-five years and one can only speculate as to when his regime will end. Nevertheless, as with the former communist bloc countries of Eastern Europe, Castro’s regime will come to an end. On that day, the Cuban people will have to grapple with important constitutional and legal issues arising from the Castro regime’s illegal confiscation of private property. The purpose of this paper is to highlight the private property rights guaranteed in the 1940 Constitution and highlight the illegality of the Castro regime’s confiscations. The violation of the constitutionally guaranteed private property rights will need to be addressed in a post-Castro Cuba.

## HISTORICAL OVERVIEW

The desire to be governed by a Constitution clearly expressing the will of the Cuban people can be traced to the Spanish colonial era. Since as early as 1812, Cubans sought to be governed by a fundamental or supreme law of the land.<sup>2</sup>

From 1812 to the mid 1890’s several attempts at independence from Spain and self governance were unsuccessful. In the mid 1890’s, José Martí, Máximo Gómez and Antonio Maceo, through the Partido

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1. International Commission of Jurists, *Cuba and the Rule of Law* (Geneva 1962), p.78.

2. Rebeca Sánchez-Roig, “Cuban Constitutionalism and Rights: An Overview of the Constitutions of 1901 and 1940,” in this volume.

Revolucionario Cubano (Cuban Revolutionary Party), began Cuba's ultimate struggle for independence against Spain.<sup>3</sup> In early 1898, the United States entered the conflict between the Cuban revolutionaries and the Spanish government when the U.S. battleship *Maine* exploded in Havana harbor. By the end of 1898, the conflict was over. On December 10, 1898, the Treaty of Paris was signed between the United States and Spain whereby Spain renounced sovereignty over Cuba. Unfortunately, the Cubans who led the struggle for independence were excluded from participating in negotiations and drafting of the Treaty of Paris. As a result, although Cuba obtained its independence from Spain it was left in the hands of the United States.

As a step towards self-governance, in September of 1900, elections were held in Cuba for delegates to a constitutional convention. The thirty-one delegates to the convention drafted a constitution by February of 1901. This constitution established Cuba as an independent, sovereign state. The constitution, however, contained as an annex the Platt Amendment (named after U.S. Senator Orville H. Platt) which gave the United States the power to intervene in Cuban affairs to preserve Cuba's independence and maintain its government and any other obligation placed on the U. S. under the Treaty of Paris. The constitutional convention agreed to annex the Platt Amendment to the new constitution. The vote, however, was decided by a bare majority of one vote.<sup>4</sup>

Pursuant to the new constitution, the constitutional convention adopted an electoral law for the election of the first president and, thereupon, the convention was dissolved. On December 31, 1901, Tomás Estrada Palma was elected president of the Republic of Cuba. On May 20, 1902, the Republic of Cuba was officially born and governed under a constitution enacted pursuant to the will of the people.

Between 1902 and 1940, political instability fueled by resentment created by the Platt Amendment re-

sulted in uncertain and inconsistent application of the 1901 Constitution. In 1933 Dr. Ramón Grau San Martín, then President of Cuba and an opponent of the Platt Amendment, abrogated the 1901 Constitution and promulgated provisional statutes to govern Cuba while calling for a constitutional convention to be held on April 1, 1934.<sup>5</sup> Political unrest, however, continued and the constitutional convention was not convened until 1939.

In 1939, elections were held for delegates to a constitutional convention that was to put an end to the political unrest and uncertainty with regard to self-governance. The convention was charged with the task of reconciling all of the disparate interests which had led to the instability of the 1920s and 1930s. Toward that end, the constitutional convention was made up of 76 delegates representing 9 political parties (including the Communist party). The convention met and debated for approximately 4 months and on July 8, 1940, the new Constitution was published in the *Gaceta Oficial*.

The period following the enactment of the 1940 Constitution resulted in twelve years of relative stability. During that time, three presidents, Fulgencio Batista (1940-1944), Dr. Ramón Grau San Martín (1944-1948) and Carlos Prío Socarrás (1948-1952) succeeded each other through democratically held elections.

## PROPERTY RIGHTS UNDER THE 1940 CONSTITUTION

The right to own and use property, is one of the fundamental or natural rights of free men. It is a right recognized in the Universal Declaration of Human Rights and other international conventions. For example, the American Convention on Human Rights of 1969 states: "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

3. Jaime Suchlicki, *Cuba: From Columbus to Castro*, 3d Ed. Rev. (London: Brassey's 1990), p. 86.

4. Suchlicki, *Cuba: From Columbus to Castro*, p. 82.

5. Suchlicki, *Cuba: From Columbus to Castro*, p. 111.

To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origins to constitutions. It existed before then. It is part of a citizen's natural liberty, an expression of his freedom ...

The ancient and established maxims of law ... which protect these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history -- the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that it benefits free men.<sup>6</sup>

The 1940 Cuban Constitution sought to protect and guarantee the natural right of its citizens to own and use property freely.

The two seminal provisions pertaining to property rights in the 1940 constitution are found in Article 24 and Article 87. Article 24 is found in the section titled "Individual Rights." Within these individuals rights, it states:

Art 24.—Confiscation of property is prohibited. 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, judicially fixed. Non-compliance with these requisites shall determine the right of the person whose property has been expropriated, to be protected by the courts, and if the case calls for it, to have his property restored to him.

The reality of the cause of public utility or social interest, and the need for the expropriation, shall be decided by the courts in case of impugnation.

Significantly, Article 24 establishes an individual's property rights as a fundamental right to be protected under the Constitution. Article 24 prohibits the taking of property without judicial proceedings that establish a justified cause of public utility or social interest. Additionally, adequate payment *in cash* must be made to the person who owned the property. Unless these criteria are complied with, the person whose property is confiscated is permitted access to the court in order to obtain restitution of his property.

Article 87 is found in the section of the Constitution titled "Labor and Property." Article 87 reads:

The Cuban Nation recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are established by law.

The remaining articles in the property section of the Constitution, Articles 88 through 96, set forth additional property concepts such as the prohibition of "latifundios" (large landholdings), recognition of intellectual property rights, etc.

The prominence of the property rights guarantee provided by the 1940 Constitution is reflected in the articles governing amendment of the Constitution. Articles 285 and 286 set out the process for amendment of the Constitution.

Article 285 sets out the prerequisites for raising an issue with respect to constitutional amendment or revision. Two methods exist: (1) by initiative of the people whereby the corresponding proposition, signed by not less than one hundred thousand voters, is presented to the Congress [see Article 285(a)]; or (2) by initiative of Congress, by means of a corresponding proposition, signed by not less than one-fourth of the members of the colegislative body to which the proponents belong [see Article 285(b)]. If either of these is met, then Article 286 sets forth the manner for consideration of the amendment.

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6. *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tx. 1921).

Article 286 recognizes that revisions or amendments are of three kinds: 1) specific; 2) partial; or 3) complete. When specific or partial amendment is sought, the approval process for the proposed revision depends upon whether it was brought forward by initiative of the people or whether it was brought on by initiative of the Congress.

In case of initiative by the people, the specific or partial revision must be submitted to a referendum at the next election to be held. If the specific or partial revision is by initiative of Congress, approval may be obtained by a favorable vote of two-thirds of the total members of both the House and Senate, jointly assembled, and the revision cannot become effective until it is ratified in a like manner within the following two regular sessions of the Congress.

In the case of a complete revision of the Constitution, Article 286 calls for an election of delegates to a plebiscitary assembly to address the complete revision of the Constitution. The delegates to the assembly are elected by province (1 delegate for every 50,000 citizens). No sitting congressman is eligible for election as a delegate. Finally, the assembly is required to address the issues at hand within 30 days of the assembly being called to order.

There are four articles of the Constitution which are considered of such magnitude that even if each alone is the subject of revision (which otherwise would classify as a specific or partial amendment) Article 286 of the Constitution calls for the plebiscitary assembly procedure. Two of the four articles of the Constitution which are raised for purposes of amendments to a level as significant as a complete revision of the Constitution are Articles 24 and 87 guaranteeing property rights.<sup>7</sup> Therefore, under the 1940 Constitution amending the property rights sections contained in Articles 24 and 87 required the creation of a quasi-constitutional convention to decide the limited issue of amending those property rights provisions.

## THE CONSTITUTIONAL ACT OF 1952

On March 10, 1952, towards the end of Carlos Prío's term as President, Fulgencio Batista executed a military coup d'état. On April 4, 1952, Batista's government decreed a Constitutional Act which was to govern the country and, in effect, repealed the 1940 Constitution while incorporating most of its terms. At times throughout his tenure, constitutional guarantees were suspended. Batista's coup broke the legal continuity of the political system which was created with the enactment of the 1940 Constitution.<sup>8</sup> As a result, many opposition groups were established, including the 26th of July Movement (named after the Fidel Castro-led assault on the Moncada military barracks in the province of Oriente on July 26, 1953).

Because of the suspension of constitutional guarantees, the restoration of the 1940 Constitution became a unifying factor among the groups which opposed Batista. Although the Constitutional Act of 1952 incorporated verbatim most of the articles of the 1940 Constitution, great dissatisfaction resulted from the fact that under the Constitutional Act of 1952 the Council of Ministers (i.e., the Cabinet), which was appointed by the President, was given the power to amend the Act. Amendment of the Act was possible by merely obtaining a two-thirds quorum vote of the Council of Ministers. This clearly violated Articles 285 and 286 of the Constitution. In his infamous "History Will Absolve Me" recitation, Fidel Castro criticized the Constitutional Act of 1952 by stating:

Batista's statutes contain an article that has not received much attention but which furnishes the key to the situation and is the one from which we shall derive decisive conclusions. I refer specifically to the modifying clause included in Article 257, which reads: "this constitutional law is open to reform by the Council of Ministers by a two-thirds quorum vote." Here, mockery reached its maximum. Not only did they exercise sovereignty in order to impose upon

7. The third article is Article 22, which prescribes the retroactive effect of laws. The fourth article is Article 23, which recognizes the sanctity of private contracts and prohibits their annulment or alteration by the legislature or the executive branch.

8. International Commission of Jurists, *Cuba and the Rule of Law*, p. 78.

the people a Constitution without the people's consent and to install a regime which concentrates all power in its own hands; but also, through Article 257, they assume the most essential attribute of sovereignty -- the power to change the basic and supreme Law of the Land and they have already changed it several times since the tenth of March. Yet, with the greatest gall, they assert in Article II "that sovereignty resides in the will of the people and that the people are the source of all power . . ."

On its face it appears Castro is attacking the usurpation of popular sovereignty. History, however, has shown us that what Castro apparently objected to was the fact that Batista retained this power and not him. Upon seizing power, Castro's regime enacted its own constitutional reforms by also providing its Council of Ministers with the "constituent power."

### CASTRO'S CONSTITUTIONAL ABUSES

Following the abdication of power by Batista, Fidel Castro appointed Judge Manuel Urrutia to be the President of Cuba. In a speech to the Cuban people on January 5, 1959, Urrutia recognized it was necessary to "provide for the exercise of the legislative power properly belonging to the Congress of the Republic, in accordance with the 1940 Constitution."<sup>9</sup> As a result, it appeared the 1940 Constitution was once again restored as the supreme law of the land.

This restoration, if there was one, proved to be short-lived. The Cuban Constitution underwent drastic modifications during the early days of the Castro regime.

The first amendment to the 1940 Constitution was published on January 13, 1959. Notwithstanding Castro's prior denouncement of Batista, the Castro regime's very first amendment established the use of "constituent power" by the Council of Ministers. In effect, the Council of Ministers gave itself the right to amend the Constitution in derogation of the requirements set forth in Articles 285 and 286.

Using the constituent power, the Council of Ministers' first amendment also attacked Article 24. The revised article reads 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 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 court...<sup>10</sup>

Therefore, within 14 days of taking power, the Castro regime ignored and violated constitutional process and began to chisel at fundamental property rights in the 1940 Constitution. We can now refer to Castro's own words in criticizing the Constitutional Act of 1952 and apply his criticism to him by saying:

Here mockery reached its maximum. Not only did [the Castro regime] exercise sovereignty in order to impose upon the people a constitution without the people's consent and to install a regime which concentrates all power in its own hands; but also ... they assume the most essential attribute of sovereignty -- the power to change the basic and supreme Law of the Land.

Fundamental property rights once safeguarded under the Constitution were the first to be illegally modified by the Castro regime to punish political foes and to reward friends of the revolution.

### CASTRO'S "FUNDAMENTAL LAW"

The property confiscation scheme continued on February 7, 1959, when the 1940 Constitution was repealed and replaced by the Fundamental Law. The new law (like Batista's Constitutional Act of 1952) repeated verbatim most of the articles of the 1940 Constitution.<sup>11</sup> Under the Fundamental Law, the

9. International Commission of Jurists, *Cuba and the Rule of Law*, p. 85.

10. International Commission of Jurists, *Cuba and the Rule of Law*, p. 87. In addition, this first amendment authorized the retroactivity of criminal law and introduced the death penalty for political causes.

11. International Commission of Jurists, *Cuba and the Rule of Law*, p. 91.

Council of Ministers (not a popularly elected Congress) officially became the supreme legislative body and under its articles was given authority to amend the Fundamental Law, in whole or in part.<sup>12</sup> The Fundamental Law also carried forward the January 13th amendment to Article 24.

Between February 7, 1959, and August 23, 1961, the Fundamental Law itself was amended sixteen times.<sup>13</sup> Each modification made it increasingly easier for the Castro regime to exercise direct repressive action against broader groups of property owners. The second amendment of the Fundamental Law came through the adoption of the Agrarian Reform Act (ARA) of June 3, 1959.<sup>14</sup>

Under the ARA, large and medium agricultural estates were taken over and converted into state farms. The ARA was challenged before the Court of Constitutional and Social Guarantees on the basis that it violated Articles 24 and 87. The ARA survived “constitutional” scrutiny by the Castro judiciary. The Court of Constitutional and Social Guarantees rejected the argument that Articles 24 and 87 were violated, by finding:

It 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 ARA which is on equal footing with the Constitution.<sup>15</sup>

The court further held that “the delegates of agrarian development areas may not be denied the power to occupy property affected by the [ARA]; they are not required to apply to the organs of ordinary jurisdiction, nor are there provisions [in the ARA] for prior

compensation to the owners.”<sup>16</sup> Thus, with one broad pronouncement the Castro regime executed a widespread confiscation plan affecting thousands of acres of privately owned lands, all under the auspices of “agrarian reform.”

On November 22, 1959, the Council of Ministers again used the constituent power to amend Article 24. As a result of this amendment, confiscation of property from the following class of persons was permitted:

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 abroad against the Revolutionary Government.<sup>17</sup>

The second and third provisions were clearly aimed at the ever increasing exile community.

On July 5, 1960, Article 24 was further amended. This amendment substituted the following paragraph for the second part of the original Article 24 text:

No other natural or juridical person can be deprived of his property except by competent authority and for a 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.<sup>18</sup>

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12. International Commission of Jurists, *Cuba and the Rule of Law*, p. 93.

13. International Commission of Jurists, *Cuba and the Rule of Law*, p. 98.

14. International Commission of Jurists, *Cuba and the Rule of Law*, p. 98. Citing *Gaceta Oficial*, Special Edition (June 3, 1959).

15. International Commission of Jurists, *Cuba and the Rule of Law*, p. 99, quoting Judgment No. 45 of the Court of Constitutional and Social Guarantees.

16. International Commission of Jurists, *Cuba and the Rule of Law*, p. 99, quoting Judgment No. 45 of the Court of Constitutional and Social Guarantees.

17. International Commission of Jurists, *Cuba and the Rule of Law*, p. 100.

18. International Commission of Jurists, *Cuba and the Rule of Law*, p. 104.

This amendment bears witness to the way in which the Castro regime stripped the right of property of all constitutional protection. Where the original text says “no one can be deprived of his property except by competent *judicial* authority,” the amendment merely says “competent authority,” which can mean any authority. Also, where the original text says “and always after payment of appropriate compensation in cash,” the amendment states that “the law shall regulate the procedure for expropriation and shall establish legislation and forms of payment,” which also allows the government to not pay just compensation. Significantly, the amendment adds “national interest” to the causes that may lead to expropriation. Finally, this Amendment deleted the provision of Article 24 that allowed the party whose property was expropriated to appeal to the courts and, if the case justified it, have the property returned.<sup>19</sup>

The Agrarian Reform Act was followed by yet another “reform” labeled the Urban Reform Act. The Urban Reform Act (URA) adversely affected not only the right to property but also the freedom of contract. Article 2 of the URA provides: “Leasing of urban property is prohibited, [and] any contract which implies the use of urban property is also prohibited.”<sup>20</sup> This declaration rendered null and void all leases of urban property that existed at the time the URA was decreed. The URA also ordered the compulsory sale of urban houses and apartments. The sales price for such property was fixed by its rental value over a period of from five to twenty years.<sup>21</sup> The URA restricted the free alienability of houses or apartments. In order to sell or transfer a house or

apartment, the consent of the Council of Urban Reform was required.

On January 4, 1961, Article 24 was once again rewritten. The category of property subject to confiscation was extended to include “those [cases] deemed necessary by the Government in order to prevent acts of sabotage, terrorism or any other counter-revolutionary activities.”<sup>22</sup> This amendment served as the basis for Law No. 989 which caused the confiscation of the real and personal property of Cubans who had left the country for at least one month.

Ultimately, Castro ended the charade by openly proclaiming himself a communist. On February 24, 1976, seventeen years after Castro’s revolutionary government came to power, a socialist constitution was proclaimed without the benefit of a freely elected constitutional convention to represent the Cuban people.<sup>23</sup> The new constitution replaced the provisional Fundamental Law of 1959, under which Castro had ruled since suspending the 1940 Constitution in February of 1959. Chapter I, Article 15 of the Castro Constitution defines state property as follows:<sup>24</sup>

The socialist state property, which is the property of the entire people, becomes irreversibly established over the lands that do not belong to small farmers or to cooperatives formed by the same; over the subsoil, mines, the natural resources and flora and fauna in the marine area over which it has jurisdiction, woods, waters, means of communication; over the sugar mills, factories, chief means of transportation; and over all those enterprises, banks, installations and properties that have been nationalized and expropriated from the imperialists, the landholders and the

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19. International Commission of Jurists, *Cuba and the Rule of Law*, p. 104.

20. International Commission of Jurists, *Cuba and the Rule of Law*, p. 104. Citing *Gaceta Oficial*, Special Edition No. 23 (October 14, 1960).

21. International Commission of Jurists, *Cuba and the Rule of Law*, p. 104. Citing *Gaceta Oficial*, Special Edition No. 23 (October 14, 1960).

22. International Commission of Jurists, *Cuba and the Rule of Law*, p. 110. Citing *Gaceta Oficial*, Special Edition, No. 1 (January 4, 1961).

23. Albert P. Blaustein and Gisbert H. Flanz, *Constitutions of the Countries of the World: Cuba*, Pamela S. Falk, editor and translator. New York: Oceana Publications, 1993.

24. Blaustein and Flanz, *Constitutions of the Countries of the World: Cuba*, p. 9.

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.

This comprehensive declaration of socialist property marked the final blow to the once protected constitutional principle of individual property rights in Cuba. As such, the Castro regime eliminated every legal guarantee for individuals to own property.

### **CONCLUSION**

It is significant that fundamental property rights once safeguarded by the 1940 Constitution were the first to be illegally modified by the Castro regime. Cuba had come full circle. From 1812 to 1901, Cubans had fought to gain independence from Spain. From 1902 to 1933, they fought the Platt Amend-

ment. By enacting the 1940 Constitution, Cubans proclaimed their complete sovereignty and, in doing so, declared fundamental property rights worthy of the greatest degree of protection. The tragic result, however, was that Fidel Castro reestablished a tyranny that immediately subjugated Cubans' rights to own, use and dispose of their property in the manner that befits free men.

Clearly, the issues pertaining to the reprivatization of property will have to be addressed in a democratic Cuba. Resolution of this issue will require a difficult and complex process. Among all of the political and social factors to be considered, it will be important not to lose sight of the constitutional protections afforded fundamental property rights and the subsequent stripping of those fundamental rights.