

Evolution of property in Cuba in a comparative perspective

F. Benatti

For citation: Benatti, Francesca. 2023. Evolution of property in Cuba in a comparative perspective. *Pravovedenie* 67 (3): 284–304. <https://doi.org/10.21638/spbu25.2023.303>

The essay examines the evolution of property in Cuba. It focuses in particular on the reforms that led to the recognition of private property in the 2019 Constitution and the first embryonic openings to the market. The different theories on the emergence of real rights and privatisation are then considered, with a comparison between the rapid and gradual privatisation models. The latter embodied by China and Vietnam, whose experience are analysed, seems to have achieved good results. China since Deng's reforms has opened up to the market and the slow recognition of real rights was enshrined in the 2007 law. The balance achieved is taken up in the 2021 code. The new phase, announced by Xi Jinping, is inspired by the idea of common prosperity. Vietnam with its Doi Moi policy followed a similar path and the difficult balance between the different visions was enshrined in the Constitution. It should be noted that socialist countries are trying, although not without contradictions, to discover their own model capable of guaranteeing individual protections and freedoms together with the development and improvement of quality of life. In this journey, the fundamental and indispensable establishment of property, contract, and enterprise must be balanced with the principles of equality and social justice that are or should be the foundation of their own experience.

Keywords: property rights, socialism, Cuba, constitution, reforms, comparative law.

1. The 1940 and 1976 Constitutions

An analysis of property law in Cuba reveals how the country evolved politically, legally and economically, providing the opportunity to appreciate and reflect on the potential and importance of the socialist model in the current context. While confidence in globalist liberalism appears undermined and the reassuring “world of yesterday” dominated by *Washington's consensus* is pervaded by obvious tensions, one might wonder what future awaits the “other” systems.

The Cuban Constitution of 1940¹, adopted during a period of complexity and turbulence, was meant to foster a return to representative democracy. According to doctrine, its length and casuistic character rendered it closer to a code than to a constitution. With reference to property rights², Article 24 stated that “Confiscation of property is prohibited. No person shall be deprived of his property except by the competent judicial authority and for a justified cause of public utility or social interest, and always after the payment of the corresponding monetary indemnity, judicially fixed. Failure to comply with these requirements entitles the person whose property has been expropriated to be protected by the courts, and, if the case so requires, to have his property returned. The reality of the cause

Francesca Benatti — Associate Professor, Università Cattolica del Sacro Cuore di Milano, 1, Largo Gemelli, Milano, 20123, Italy; francesca.benatti@unicatt.it

¹ The 1901 constitution was the first in the independent country, but it had not provided the hoped-for stability, partly due to the continued U.S. influence.

² See: Garibaldi O. M., Kirby J. D. Property Rights in the Post-Castro Cuban Constitution // University of Miami Yearbook of International Law. 1995. Vol. 3. P. 225–274.

© St. Petersburg State University, 2023

of public utility or social interest and the necessity of the expropriation will be decided by the courts on appeal". Furthermore, Article 87 expressly stated that "the Cuban nation recognizes the existence and legitimacy of private property in its broadest concept as a social function and without any limitations other than those which, for reasons of public necessity or social interest, are established by law".

The particular importance of these provisions in the future legal and political system was illustrated by the difficulty with which they could be amended: it was, in fact, necessary to initiate the same procedure imposed for a general constitutional revision³. As noted by Fidel Castro, this was a Constitution inspired by liberal principles with embryonic socialist influences⁴.

However, it was inserted in a predominantly agricultural economy characterized by the presence of large *latifundos* that did not ensure efficient and adequate use of resources. A 1946 land use study showed that only 22.5 percent of the country's agricultural area was cultivated, of which 14.8 percent was with sugarcane plantations and 7.7 percent with other agricultural crops. 44 percent was natural pasture, 12 percent was covered by forests and 21 percent by weeds. Moreover, by the 1950s, thirteen agribusiness companies owned 1,170,000 hectares, with an average of 90,000 hectares per company. This set-up resulted in severe economic inequality with social repercussions: the rural population was responsible for 35 percent of the GDP receiving only 10 percent in return. Political instability also contributed to the difficult conditions.

Despite Urritia had affirmed the restoration of the 1940 Constitution, after Castro's seizure of power, the tension between Constitutional principles and the need for reform (especially the agrarian reform) was apparent from the outset. The decisive political will was demonstrated by the rapid revision of Article 24 by the Council of Ministers, which had endowed itself with constituent power, exceeding the limits imposed by Article 286. An exception to the prohibition of confiscation was, in fact, provided for "in the case of property of natural persons or legal entities responsible for crimes against the national economy or the public treasury committed during the tyranny that ended December 31, 1958, as well as in the case of property of the tyrant and his collaborators".

It should be noted how the problems surrounding the legal and economic framework of property law are often felt in the aftermath of revolutions or sudden political changes, especially in countries with significant inequalities and social tensions. Indeed, it is necessary to introduce property reforms that respond to the new political balances and ideological visions that have been established. This is even more evident in cases involving the establishment of socialist or communist governments that base their legitimacy on the collectivization of the means of production, the prevalence of public property, and egalitarianism.

The Chinese experience is emblematic. On the influence of the Russian experience, the 1954 Constitution did not completely abolish private property. In fact, Article 5 affirmed the existence of "ownership by all the people, cooperative ownership, i. e., the collective ownership of the working people, ownership by individual workers, and capitalist ownership". However, in reality, the land reform of 1950 had already sparked a redistribution of land in favor of the poorer strata of the population. The process would culminate with the creation of the communes in 1958 and the final demise of private property⁵.

³ Art. 286.

⁴ This is how Fidel Castro described the 1940 Constitution in the seminal speech, "La historia me absolverá": the 1940 Constitution is "influida... ya por las corrientes socialistas del mundo actual que consagraron en ella el principio de la función social de la propiedad y el derecho inalienable del hombre a una existencia decorosa".

⁵ It was allowed only in relation to a few strictly necessary goods.

Mao's policies differed significantly from classical Marxism and its implementation in the Russian Revolution. In fact, as Mao appeared to support the agrarian class more than the working class, he was called the "revolutionary peasant" and criticized even by Khrushchev. In reality, the Maoist position is more complex and cannot be equated with that of figures like Zapata, whose struggle was effectively rooted in the protection and defense of farmers partly due to the characteristics of the Mexican reality. Mao was, at least in his first political phase⁶, a pragmatist. He was aware of the Chinese situation and the impossibility of carrying out his project without the support of the peasants, who were considered the main force in the revolution. However⁷, he was convinced that the working class should lead society⁸, as evidenced by his desire to modernize the country by focusing efforts on industry and his own strategy of decreasing the number of farmers in the party ranks. His economic policies, on the other hand, far from securing the desired results, had resulted in disaster.

Following a trajectory similar to that of other socialist systems, Fidel Castro introduced the first agrarian law in 1959. This law had two basic objectives: a) to facilitate the cultivation of raw materials so as to meet the population's consumption needs, as well as increase their production for trade with other countries; and b) to raise the population's consumption capacity, improving living standards and strengthening the domestic market, especially in rural areas.

According to Art. 1 of the 1959 agrarian reform law, single landowners holding more than 30 *caballerías* (402.6 hectares) of land were to be expropriated. The only exception to this limit, provided under Art. 2, was rice and sugarcane farms which production exceeded the national average by 50 percent. In such cases, it was possible to own up to 100 *caballerías* (1,340 hectares). Art. 6 was more problematic, however, as it established parcels smaller than 30 *caballerías* could be expropriated if they were affected by contracts with sharecroppers, tenants, settlers, or occupied by precarious workers who cultivated less than 5 *caballerías*.

Despite the possible conflict with Article 24, the land reform was upheld by the Constitutional Court, which noted that it was "also the doctrine of this Court that such rules governing property rights cannot be invoked with regard to property that falls under the special system of land reform, which is subject to special provisions established by the ARA that has equal standing with the Constitution"⁹.

It is interesting to note that in India, on the other hand, agrarian reforms were staunchly opposed by the Supreme Court, which invalidated several laws for violating property rights. This had led to a bitter clash with Nehru's government¹⁰. Moreover, different positions and sensitivities on the nature and limits of property rights were discernible already during the drafting of the constitution, despite unanimous agreement on the redistribution of the *zamindars'* land. The majority believed that expropriation should be allowed without compensation and judicial review because private property was not a strictly individual

⁶ Later in life, he was reproached even by Fidel Castro as his personality cult and the abuse of power fostered by his inner circle resulted in the commission of several mistakes. Moreover, the judgment was shared by the Chinese Communist Party itself after Mao's death.

⁷ Knight N. Rethinking Mao: explorations in Mao Zedong's thought, Washington: Lexington Book, 2007.

⁸ "From 1927 to present, the center of gravity of our work has been in the villages, gathering forces in the villages, using the villages to bypass the towns and then taking the towns. The period for this method of work is now over. The period of 'city to village' and of the city leading the village has now begun".

⁹ Decision No. 45 Constitutional and Social Guarantees Court.

¹⁰ This approach, which focuses on the conflict between Nehru and the judiciary, is criticized in: Venkatesan R. The Evolution of the Right to Property in India: From a Law and Development Perspective // Law and Development Review. 2021. Vol. 14. P. 273–308. — It is, in fact, held that it does not serve to explain the particular characteristics of Indian reforms.

right, but a collective one. Others argued in favor of the adoption of a model similar to the U.S. or Australian one¹¹. The final solution consisted in a compromise, described as “a horror” by Ambedkar, the most brilliant of the Constituents. Property was thus included among the fundamental rights under Article 19(1)(f), and it was further established in Article 31 that “(1) No person shall be deprived of his property save by authority of law. (2) No property, movable or immovable, including any interest in, or any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, the manner in which, the compensation is to be determined and given”. Judicial review was also allowed, though it was to be exercised with restraint, at least as Nehru intended. The clash between judicial and political power characterized the subsequent period until the status of property as a fundamental right was lost with the *Kesavananda Bharati v. State of Kerala* decision¹².

In Cuba, by contrast, the implementation of the economic program faced no obstacles, and the second land reform of 1963 led to the nationalization of the remaining land parcels measuring between 67 and 400 hectares. By the end of the nationalization process, the Cuban state owned 95 percent of industry, 98 percent of construction, 95 percent of transportation, and 70 percent of agriculture. The 1960 *Ley de Reforma Urbana* had, moreover, already enshrined the right of every family to decent housing (Art. 1), the leasing of urban real estate had been prohibited (Art. 2), leases and subleases of urban real estate entered into before the enactment of that law had been declared null and void (Art. 5), and mortgages had been abolished. Sale of private property, still theoretically possible, was marked by strong administrative control and state preemptive rights. As noted in doctrine, this resulted in the widespread use of bartering practices¹³. Therefore, in just a few years, Cuba had achieved results very close to those of countries with more than two decades of socialism¹⁴.

The 1976 Cuban Constitution, inspired by the 1936 Constitution of the USSR, consecrated the official Marxism-Leninism ideology, as well as the country’s membership in the socialist bloc. The Cuban republic was defined as a socialist state of workers and peasants and other manual and intellectual laborers. The role of the Communist Party was affirmed as the “organized Marxist-Leninist vanguard of the working class, representing the ruling force of society and the state, organizing and directing the common efforts toward the lofty goals of building socialism and advancing toward communist society”.

Socialist state property was the property of the entire population and “is irreversibly established on the land that does not belong to small farmers or cooperatives formed by them; on the subsoil, mines, natural resources, flora and fauna in the marine area over which it has jurisdiction, forests, waters, means of communication; on sugar mills, factories, main means of transportation and over all those enterprises, banks, installations and properties that have been nationalized and expropriated by the imperialists, landowners and other bourgeoisie; as well as over farms, factories, enterprises and economic, social, cultural and sports facilities of the people built, promoted or acquired by the State and those that will be built, promoted or acquired by the State in the future”.

¹¹ On the debate see: *Sharma N.* The right to property in India. New Delhi: Deep & Deep Publications, 1990.

¹² [1972] S.C.C. 364 (Civil Appeals Nos. 143, 203–242, 274, 309 of 1971).

¹³ See the profound and timely analysis of: *Hung G. F.* Apuntes para un estudio sobre la compraventa de viviendas en Cuba // *Rassegna di diritto civile.* 2021. No. 2. P. 640–661.

¹⁴ *Regimen de propiedad y trabajo por cuenta propia en Cuba: de 1959 a la nueva Constitucion de 2019.*

Socialist property could be:

- a) State-owned;
- b) Held by a cooperative;
- c) Of organizations, social and mass policies.

Ownership of agricultural land and property small farmers (Art. 19) and individual ownership (Art. 21) were also allowed.

Agricultural cooperatives coexisted with large state enterprises, which were characterized by a high degree of centralized management. Empirical data show that in 1990, the private sector managed 14 percent of land, while cooperatives and the state managed 11 and 75 percent of land, respectively¹⁵.

2. The 1992 constitutional reform and early economic openings

The 1976 Constitution was meant to definitively anchor the Castro ideology and facilitate its policies. The situation changed with the collapse of the Berlin Wall and the USSR resulting in a profound ideological (and especially economic) crisis due to the loss of Soviet support. Therefore, the 1992 constitutional reform had both ideological and pragmatic purposes. First, considering the collapse of the USSR, it was necessary to redefine socialism. As emphatically announced, it was now up to Cuba to save it¹⁶. By 1986, Fidel Castro had initiated the phase of *rectificación* in which he broke away from a slavish espousal of the Soviet model and promoted a Cuban autonomy that was as much ideological as institutional. In particular, he stressed how those phenomena of corruption and openness to capitalism that had also involved “good people” should be avoided.

In response to the new course, some policies had been changed. For instance, while the *Ley General de Vivienda* no. 48 of 1984 appeared to allow *inter vivos* transfer of housing by acts other than exchange, in 1988, with the *Nueva Ley General de Vivienda*, it was established that “Personal ownership of housing must be understood in the true sense of this form of ownership within the actual conditions under which socialism was built in our country, meaning it is essentially as the right to enjoy a house by the owner and his family, without making payments after having already purchased it, without the right of personal ownership over the property becoming in any case a mechanism of enrichment or exploitation”¹⁷.

However, there was also an awareness of the severity of the crisis, which suggested that economic changes were appropriate. The 1992 revision was not only apparent, because it changed about 50 percent of the Articles.

While the supremacy of state property was preserved, it lost the characteristic of irreversibility and was limited to the basic means of production. Indeed, Art. 15 established that property under state ownership could not be transferred to legal or natural persons unless, in exceptional cases, it could contribute to the economic development of the country without undermining the political, social and economic foundations of the state upon approval by the Council of Ministers or its executive committee. The provisions on property of small farmers (Art. 19), cooperatives (Art. 20), personal property (Art. 21), po-

¹⁵ *Joseph Recompensa T. W., Joseph Recompensa L. C.* La cuestión agraria cubana aciertos y desaciertos en el período de 1975–2013: la necesidad de una tercera reforma agraria // Polis. Revista Latinoamericana. 2017. Available at: <http://www.journals.openedition.org/polis/12490> (accessed: 11.12.2022).

¹⁶ See, for example, the speech delivered by Fidel Castro at the closing ceremony for the 10th anniversary of the assault on the Moncadas and Carlos Manuel de Cespedes, held at the Teatro Heredia in Santiago de Cuba on July 26, 1993 (Discurso pronunciado por el Comandante en Jefe Fidel Castro Rz por el XL aniversario del asalto a los cuarteles Mocada y Carlos Manuel de Cespedes. Available at: <http://www.cuba.cu/gobierno/discursos/1993/esp/f260793e.html> (accessed: 03.05.2022).

¹⁷ *Hung G. F.* Apuntes para un estudio sobre la compraventa de viviendas en Cuba.

litical, mass and social organizations (Art. 22) were left unchanged. In Art. 23, it was stated that “El Estado reconoce la propiedad de las empresas mixtas, sociedades y asociaciones económicas que se constituyen conforme a la ley. El uso, disfrute y disposición de los bienes pertenecientes al patrimonio de las entidades anteriores se rigen por lo establecido en la ley y los tratados, así como por los estatutos y reglamentos propios por los que se gobiernan”.

Part of the doctrine has argued that this reform was the most significant aspect of the 1992 amendments, resulting in the first embryonic formal recognition of private property. This led to the re-legalization of *cuentapropismo*, which was significantly expanded in 1993 with the eligibility of 117 occupations, increasing to 157 in 1997. However, as noted, the special period was characterized by an ambiguous approach to entrepreneurship: legalization was not accompanied by increased social legitimacy of entrepreneurial activity, which was bureaucratically hampered and restricted through excessive taxation, regulations, inspections, and closures. In a socialist society, it still carried a stigma of immorality.

It should be noted how these reforms were part of the superhuman effort made “to survive the sinking of Soviet-style socialism in the context of a strong worldwide offensive of a neoliberal nature. This period, which Cubans call ‘special’, has been endured without significant change. This ‘Soviet model’ remained even when the domestic situation showed some improvement, which happened when progressive and leftist governments emerged in Latin America. However, given the difficulties faced internally by Cubans, the crisis in the developed capitalist world, the emergence of China and Vietnam as rapidly developing socialist countries, and the transformation of former African and Asian semi-colonies into industrial developing countries, it was evident that the socialist model of construction in Cuba needed profound reforms to meet new domestic and international challenges. The debates on these reforms, which Cubans called ‘updating’, seem to represent a strategic retreat in the context of the impasses of the progressive emergence in Latin America, Africa and Asia, the emergence of China as a socialist market country and major economic power, the international capitalist crisis and the reordering of relations with the United States”¹⁸. In fact, no change in the model was wanted at all. As the Assembly president pointed out in commenting on the 1992 amendments, it was not a retreat or a return to the past since Cuba would not bow to any pressure.

Fidel Castro’s resignation and Raul Castro’s rise to power seemed to launch a new phase. Although he lacked his brother’s dragging and passionate charisma, he was distinguished by a pragmatic, rigorous and efficient approach: he had always “provided the organizational glue. This was because he was the only truly indispensable man in the revolution besides Fidel”¹⁹. He was responsible for consolidating and reorganizing the party and initiating a necessary but controlled transformation. It was in November 2010 that Raul Castro announced the convening of the Sixth Congress of the Communist Party after 14 years, already outlining, albeit still vaguely, the possible changes: “either we reform or we sink”. Above all, he wanted to change the ambivalent attitude toward the private sector. He believed, in fact, that the party and the government should primarily facilitate this form of work and not generate stigmas or prejudices against it, much less demonize it. For this, it was crucial to change the negative views that more than a few of us have toward this form of private labor. It is noticeable how the complex relationship with the business world has also connoted India. If Nehru called entrepreneurs “a bania civilization” and Indhira Gandhi spoke of them as “evil and dark forces”, Singh affirmed their nature as “the source

¹⁸ Pomar V. Cuba: Revolução e Reforma. Sao Paulo: FPA, 2016. P. 19.

¹⁹ Catan T. Who is Raul Castro, Cuba’s New Leader? // The Times. Available at: <http://www.thetimes.co.uk/tto/news/world/americas/article,1997066> (accessed: 19.02.2008).

of India's confidence and our optimism"²⁰. Today, Modi extols startups as the backbone of the country.

The Cuban congressional process was divided into two phases. The first, held in April 2011, focused on economic reforms. The second, held in January 2012, concentrated on the structure of the organization. The population called upon to pronounce themselves in the preparatory discussions convened in 2010 focused their demands mainly on the lack of purchasing power to meet their basic needs (87,150 views), the deterioration of health and educational services (40,391 views), the transportation situation (29,122 views), housing (23,945 views) and domestic fuel (22,599 views). Car sales and the possibility of going abroad as a tourist were also mentioned²¹.

Congress' primary goal was to improve the economic situation through the expansion of the small urban and rural initiative, which was supposed to lead to the generation of 40 percent of jobs in 2016. This also sought to reduce the inefficient and elephantine state bureaucracy. Measures that were considered popular were, then, introduced, such as authorizing the purchase and sale of cars and houses, the rental of barber stores, the sale by agricultural cooperatives of their products directly to markets and tourist companies, and credit to small producers, owners and people making housing transformations. The opening of cooperatives to non-agricultural sectors was also extended. Foreign investment was strongly encouraged. The program of layoffs was, however, reduced following consultations, and the provision for a 40 percent tax on "cuentapropistas" was abandoned.

Reforms include *Decree-ley* 288 of 2011, which significantly amended the *Ley general de Vivienda*. According to Article 70(3) of the reformed law, the purchase and sale of a dwelling is a contract formalized by the parties at a price agreed upon before a notary public at the place where the property is located. Authoritative doctrine notes "that freedom of contract has been chosen, making the administrative authorization and the right of first refusal in favor of the state disappear, and even more so, that the state is the only possible buyer in deeds of sale and purchase of housing"²². Despite subsequent reforms, the results of the new regulations have been ambiguous.

However, an analysis of the economic data following the reforms shows significant differences over the period of Raul Castro's government. The state sector had been growing at 2 percent a year, far from the 5 percent needed to achieve sustainable development. Tourism was the only exception; with an influx of foreign investment, private and state-owned enterprises that came to constitute a model capable of successfully extending to other areas. Above all, it showed the need for the enhancement of FDI, which, in Raul Castro's words, was now "essential" (and no longer merely "complementary").

The private economy, on the other hand, had achieved astonishing results with *cuentapropistas*, increasing from 150,000 in 2008 to 580,000 in 2017. The sector was generating 18 percent of gross domestic product. Above all, it was a significant growth not only quantitatively, but especially qualitatively. The resourcefulness and creativity of the Cuban people was bringing great transformations in the economic reality: small hotels, fine restaurants, varied and modern stores were being established.

In part, the positive results, especially in tourism, had been facilitated by the détente with the U.S. that occurred during the Obama years, which had represented a moment of tranquility and the illusion of general improvement. Trump's election shattered those hopes and the balance that had been painstakingly achieved. The subsequent death of

²⁰ The observation is made by: *Nilekani N. Imagining India. The Idea of a renewed nation.* London: Penguin, 2008. P. 76.

²¹ On reforms see: *Chaguaceda A., González L. J. Participación comunitaria y gobiernos locales en Cuba: La experiencia de los Consejos Populares y el impacto de las reformas de Raúl Castro // Espiral (Guadalajara).* 2015. No. 65. P. 125–152.

²² *Hung G. F. Apuntes para un estudio sobre la compraventa de viviendas en Cuba.*

Fidel Castro in 2017 marked another decisive moment. The Cuban people who poured into the streets crying “Fidel gigante, siempre comandante” grieved the loss of the leader who had guided them from the Revolution and the hopeful uncertainty typical of great changes for a new future. Raul Castro’s resignation in April 2018 heightened these emotions and opened a different phase of the Cuban Communist Party now temporally distant from revolutionary splendor. Its legitimacy can no longer be based solely on the charismatic personality of its leaders or ideology, but also on results. It is a path that appears analogous to that already experienced by China. It is appropriate, however, to clarify how the relationship between the two countries, which is not always easy, cannot and should not be framed in a passive admiration of China by Cuba or a desire to copy it. On the contrary, the Chinese leadership itself has often looked up to the Cuban Communist Party for its ability to withstand difficulties. Hu Jintao in 2007 had acknowledged that he should look to North Korea and Cuba for ideological oversight. Great admiration was also held for the health and education system, perhaps impossible to replicate in a reality like China’s²³.

3. The 2019 Constitution

Against this background, the 2019 Constitution, in addition to reflecting Cuban values and aspirations, has a significant ‘external’ dimension. It is rightly mentioned that new constitutions must cater to different audiences: the establishment, the citizens (whose support is crucial for the stability of governments), foreign investors seeking a favorable legal and economic framework, and other states crucial to securing diplomatic recognition and national security²⁴. Moreover, the ideological aspect cannot be underestimated, which, despite a certain tendency toward uniformity²⁵, continues to be, if not the soul itself, a window into the soul of the Constitution²⁶. These aspects vary in impact depending on the needs²⁷. For example, geography and history may influence the choice of the form of government; the attempt to encourage investment is seen in the affirmation of a particular economic model; ideology emerges in the preamble or enumeration of rights. In new or weak states, the constitution then generally adheres to a universalist archetype to gain foreign approval and support.

²³ Cheng Y. The “socialist other”: Cuba in Chinese ideological debates since the 1990s // *The China Quarterly*. 2012. No. 209. P. 198–216.

²⁴ Law D. S., Versteeg M. The Evolution and Ideology of Global Constitutionalism // *California Law Review*. 2011. No. 19. P. 1163–1258.

²⁵ See: Law D. S. Constitutional Archetypes // *Texas Law Review*. 2016. Vol. 95. P. 153–244. — According to this author, “an effective constitutional narrative must meet a variety of functional and practical criteria that leave little room for creative imagination. Relevant criteria include consistency with the goals of the regime; compatibility with the institutions and structures the regime seeks to justify as legitimate, including both the legal and political systems; and acceptability to a wide range of audiences, both domestic and international. The last of these criteria imposes a considerable constraint on constituents. States today find themselves within an increasingly elaborate network of supranational political and legal regimes that limit their options and favor adherence to established formulas. They also have to contend with a proliferation of norms and expectations about what a constitution should say. These norms are fueled not only by the sheer ubiquity of various constitutional principles and provisions, but also by the deliberate efforts of numerous institutions and organizations to generate and promote the equivalent of international standards of constitutionalism. The overt challenge to these standards undermines the ability of a constitution to perform its justificatory function”.

²⁶ The suggestive expression is from: *Ibid.*

²⁷ It is clear that a major power might be less interested than a small state in delineating geopolitical or international relations aspects in the Constitution.

The 2019 reform is symptomatic of this complex evolution of constitutionalism. It is a document that simultaneously expresses convergence, resistance and commitment²⁸.

The former is present in the references to international law and the principles enshrined in the UN Charter²⁹. Even more evident is Article 16(f), which establishes the intention to combat climate change³⁰ at the center of global political agendas. In this way, Cuba shows that it is converging to the international order.

This approach is reconciled, however, with a resistance to many features of the neo-liberal model. The reaffirmation of anti-imperialism³¹ is accompanied by a renewed exaltation of independence, socialist internationalism and "Latin Americanism". The words of Miguel Diaz Canel in announcing the constitutional referendum are significant: "We Cubans are voting for our Constitution. We are voting for Latin America and the Caribbean... We are also voting for Venezuela, we are defending Venezuela because the dignity of the continent is at stake in Venezuela"³². On a practical level, "Latin Americanism" had produced initiatives such as ALBA and CELAC³³. These principles cannot be reduced to anti-Americanism or defense of socialism, but also represent a pride in one's own history and tradition against foreign interference: a world that refuses to be colonized. It is a vision, moreover, already present in Martí's thinking³⁴.

Finally, commitment consists of an intermediate approach between convergence and resistance and could be configured as a cautious evaluation of other experiences, without

²⁸ See: *Ngoc Son B. You, the People: Cuba's International Constitution // New York University Journal of International Law and Politics*. 2020. Vol. 52. P. 829–874.

²⁹ Art. 16 C.: "Sostiene su voluntad de observar de manera irrestricta los principios y normas que conforman el Derecho Internacional, en particular la igualdad de derechos, la integridad territorial, la independencia de los Estados, el no uso ni amenaza del uso de la fuerza en las relaciones internacionales, la cooperación internacional en beneficio e interés mutuo y equitativo, el arreglo pacífico de controversias sobre la base de la igualdad, el respeto y los demás principios proclamados en la Carta de las Naciones Unidas".

³⁰ Indeed, it states Cuba's commitment that "(f) promueve la protección y conservación del medio ambiente y el enfrentamiento al cambio climático, que amenaza la sobrevivencia de la 74 Gaceta Oficial 10 de abril de 2019 especie humana, sobre la base del reconocimiento de responsabilidades comunes, pero diferenciadas; el establecimiento de un orden económico internacional justo y equitativo y la erradicación de los patrones irracionales de producción y consumo".

³¹ In Lenin's words, imperialism is "(1) the concentration of production and capital has developed to such a high stage as to create monopolies that play a decisive role in economic life; (2) the merger of banking capital with industrial capital and the creation, on the basis of this 'financial capital,' of a financial oligarchy; (3) the export of capital, as distinct from the export of goods, acquires exceptional importance; (4) the formation of international monopoly capitalist associations that divide the world among themselves; and (5) the territorial division of the entire world among the major capitalist powers is completed", as highlighted by: *Dominguez L. E., Yaffe H. The deep, historical roots of Cuban anti-imperialism // Third World Quarterly*. 2017. Vol. 38. P. 2518–2535.

³² On the other hand, it cannot be forgotten that "Washington acted as arbiter and often as director of Cuban policy. Military interventions of varying sizes loomed, with U.S. troops entering Cuban territory in 1906–1909, 1912, 1917, and 1923. These conditions generated political and social protest in Cuba, fostered by social grievances and a growing awareness of the centrality of U.S. imperialism in the country's situation. A series of interconnected processes—the economic and political crises of the 1930s; the Revolution of 1933, a social revolution in Cuba led by a coalition of working class, intellectual and middle class sectors; and the implementation of the Good Neighbor Policy under U.S. President Franklin D. Roosevelt — led to the crisis of the oligarchic-imperial model of domination. This could only be solved through structural adjustment. The Cuban military crushed the 1933 revolution, ushering in a series of military coups in 1934, 1936 and 1952, all led by Fulgencio Batista... This was an early version of what became a trademark of U.S. world hegemony: the neo-colonial model. U.S. hegemony incorporated European powers and Third World elites as junior partners at different levels", as noted by: *Ibid.* P. 2520.

³³ See: *Ngoc Son B. You, the People...*

³⁴ See: *Dominguez L. E., Yaffe H. The deep...*

abandoning its own characteristics or adhering to them completely³⁵. The doctrine identifies commitment in the pre-eminence of the Constitution over international treaties, but especially in the prudent admission of private initiative and property. Their introduction does not equate to an effective change in the economic system.

Pragmatically, the Constitution aims to foster economic improvement and modernization since, at that time, the economy had been affected by the new break with the United States and the deep crisis in Venezuela³⁶.

Article 22, which recognizes multiple forms of property, is fundamental to this development: “a. Socialist ownership of the entire population: in which the state acts as the representative and beneficiary of the people as owners of the property. b. Cooperative ownership: that which is sustained through the collective labor of member owners and through the effective exercise of the principles of cooperativism. c. Ownership of political, social and mass organizations: that which they exercise over their property intended for the fulfillment of their roles. d. Private ownership: that which is exercised over specific means of production by natural or legal persons, Cuban or foreign, with a complementary role in the economy. e. Mixed ownership: that which is formed through the combination of two or more forms of ownership. f. Institutional and associational ownership: that which these groups exercise over their nonprofit property. g. Personal ownership: that which is exercised over their own property that, without constituting means of production, contributes to the satisfaction of the material and spiritual needs of its owner. All forms of ownership over the means of production interact in similar ways; the state regulates and controls how they contribute to economic and social development. The exercise and attainment of these forms of property are regulated by law”.

It should, however, be clarified that the constitutional recognition of private property, while relevant especially in a context such as Cuba, should not be emphasized: it could often be merely symbolic without being accompanied by effective protection. The Czech Republic has had better growth than many Eastern European countries despite not introducing private property into the constitution, while Ukraine was in a situation of extreme poverty with glaring inequalities, despite providing for it. This shows how formal and informal mechanisms³⁷ of protection, including an efficient and honest judicial system and transparent and secure mechanisms of publicity, are equally important.

The changed climate toward individual initiative is further confirmed by Decree Law No. 46 of 2021³⁸, which allows the establishment of MIPYMES, i. e., “aquellas unidades económicas con personalidad jurídica, que poseen dimensiones y características propias, y que tienen como objeto desarrollar la producción de bienes y la prestación de servicios que satisfagan necesidades de la sociedad”³⁹. They can be private, state or mixed, and must take the form of an LLC⁴⁰. They can carry out all activities not expressly prohibited, with the only limitation for private MIPYMES to use state intermediaries for foreign trade. According to a Central Bank resolution issued after the Decree Law, “las instituciones financieras pueden conceder créditos en moneda extranjera a las cooperativas no

³⁵ The definition is from: *Jackson V. C.* Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement // *Federal Law Review*. 2007. Vol. 35. P. 161–186.

³⁶ *Iacometti M.* The right to property in Cuba: from the Castro revolution to the Constitution // *DPCE*. 2020. No. 1. P. 749–767.

³⁷ It is noted that the effectiveness of informal mechanisms is not peaceful.

³⁸ It was noted that such a Decree would have been possible as early as 2011, but for political reasons this step was delayed.

³⁹ These are micro, small and medium-sized enterprises.

⁴⁰ Micro enterprises have from 1–10 employees, small enterprises from 11 to 35, and medium-sized enterprises from 36 to 100.

agropecuarias y a las micro, pequeñas y medianas empresas”⁴¹. Until then, only MIPYMES and non-agro-pecuniary cooperatives could access credit in Cuban pesos (CUP).

At the same time, a new financial institution, *Financiera de Microcreditos SA*, was created to grant microcredits in Cuban pesos and in MLC (*Moneda Libremente Convertible*)⁴² to MIPYMES, self-employed workers, and cooperatives in order to enable them to increase production of goods and services. However, to qualify for credit in MLC, at least one of these three requirements must be met: sell to chain stores in the MLC network, market in the Mariel Special Development Zone, and export goods or services.

Despite the very difficult economic situation (also marked by high inflation), the opening process seems to have achieved fair results. Only 10 days after the law was passed, the first thirty-five MIPYMES were approved, of which thirty-two were private and three state-owned, operating in food, manufacturing, technology, local development, and circular economy projects. As of February 2022, they have already exceeded 2,000 entities.

4. Socialist ownership and economic transition

The doctrine therefore wonders whether the 2019 constitutional reform, and especially the opening to private property, constituted a decisive step toward Cuban “market socialism”, along the lines of China’s or even Vietnam’s. Moreover, given that China and Cuba have socialist economies under the control of the single communist party, it has been argued that, if Cuba followed China’s path, with appropriate adaptations, it would achieve faster progress with the following results: a more viable, efficient and productive economic model; more non-state and cooperative-independent ownership with more incentives; expansion of the non-state sector’s share of GDP, promoting growth; increased agricultural production and reduction of expensive food imports⁴³.

However, the question is complex and cannot be resolved without an assessment of what the essential features of socialism in the 21st century are or should be. In “A World to Build”, Marta Harnecker identifies them as: a) Promoting participatory democracy; b) Creating the political instrument necessary to guide the transition; c) Establishing social ownership of the means of production; d) Organizing the economy toward the satisfaction of human needs; e) Having a decentralized (but aggregating) planned economy; f) Incorporating material and moral incentives; g) Educating for full human development and cultural transformation; h) Building regional (and international) integration; i) Transforming the role of the military⁴⁴.

In constructing an economic order that considers the weaknesses of the Soviet experience, marked by inefficient centralized planning and the distortions of the neoliberal model, further characterized by unequal concentrations of wealth and power, Pat Devine’s theory of “social property” might offer a solution. More specifically, this theory is constructed from the notion that “ownership [should be held] by those interested in the use of the goods in question. Social property is not only, in my view, a fundamental socialist principle, but is also more efficient than private, state or labor ownership. This is because it allows the tacit knowledge of all stakeholders to be drawn upon in the process of negotiating what should be done to promote the social interest in any particular context”⁴⁵.

⁴¹ Resolución 285/2021 de Banco Central de Cuba.

⁴² There is no maximum amount, which is determined based on the project, while the minimum is 100,000 CUP or \$500.

⁴³ This is the opinion expressed by Carmelo Mesa Lago.

⁴⁴ Harnecker M. *A World to Build. New Paths Toward Twenty-first Century Socialism*. New York: Monthly Review Press, 2015.

⁴⁵ Devine P., O’Neill J. *Participatory planning through negotiated coordination // Science & Society*. 2002. Vol. 66. P. 72–93.

If social property appears to be a utopia, it is clear how the issue focuses on identifying the causes that determine the introduction and conformation of property rights in a system. The doctrine⁴⁶ has identified four. According to the first⁴⁷, the need for efficient use of resources leads to their recognition when the benefits of creating a new real right outweigh the costs.

A second thesis⁴⁸ identifies cultural differences as the justification for the variety of economic and social structures. Ideology and values can influence both evaluations of what are the best means of growth and development to ensure the common good of citizens and how political action is taken. The cultural element should also lead to valuing the adoption of efficient rules and institutions.

According to another theory⁴⁹, the characteristics of real rights depend on the historical events that contributed to the formation of the system and their development.

Finally, in a different perspective, the political will appears to be decisive⁵⁰. Acemoglu has shown how economic institutions are endogenous and depend on the decisions of political power⁵¹, which can be *de jure*, i. e., conferred by political institutions, and *de facto*, resulting from the distribution of resources. Two dynamics are identified. Since political institutions are relatively stable, it takes a significant change in political power to alter them. However, when a group has considerable wealth, it pushes to maintain or increase its advantageous position. This could also lead to a preference for uncertain or weakly protected real rights to prevent new concentrations of wealth from forming. Clearly, only shocks such as disruptive technological innovations or shifts in international balances can lead to changes in power that are reflected in new political and economic institutions.

It should be noted⁵² that, following the Fall of the Berlin Wall in the former Soviet Bloc countries, economic and political approaches had initially prevailed, resulting in a recent prevalence of the latter coupled with an emergence of the cultural elements during the last period. This is supposedly a typical response of systems, which in times of crisis focus action on a search for the common good. Additionally, there is an increasingly evident assertion in the determination of economic institutions of the influence of foreign models, often imported passively and without careful evaluation of the characteristics and context in which they must operate.

Opening up to the market (which all socialist systems except North Korea have experienced or are experiencing) has resulted in the clashing of two different trends. According to the first, privatization and liberalization of economic activities must be done as quickly as possible to generate sustained growth. The speed of reform is important despite, as noted by Kornay, there must be an initial recession to create a new market.

⁴⁶ Mijiyawa A. G. Determinants of property rights institutions: survey of literature and new evidence // *Economics of Governance*. 2013. No. 14.2. P. 127–183.

⁴⁷ Demsetz H. Toward a theory of property rights // *Classic papers in natural resource economics*. London: Palgrave Macmillan, 1974. P. 163–177.

⁴⁸ See: Weber M. *The religion of India*. Clencoe: The Free Press, 1958; Putnam R., Leonardi R., Nanetti R. Y. *Making democracy work: Civic traditions in modern Italy*. Princeton: Princeton university press, 1992; Landes D. S. *The Wealth and Poverty of Nations; Why Some Are Some So Rich and Some So Poor*. London: Little, Brown and Company, 1998.

⁴⁹ Engerman S., Sokoloff K. L. Factor endowments: institutions, and differential paths of growth among new world economies: a view from economic historians of the United States / *How Latin America Fell Behind*, ed. by Stephen Haber. Redwood City: Stanford University Press, 1997. P. 260–304.

⁵⁰ An early elaboration can be found in: North D. *Structure and change in economic history*. New York: W. W. Northon & Company, 1981.

⁵¹ See: Acemoglu D., Johnson S., Robinson J. A. Institutions as a fundamental cause of long-run growth // *Handbook of economic growth*. 2005. Vol. 1. P. 385–472.

⁵² See: Hartwell C. A. Property Rights in Transition Countries // *Palgrave Dictionary of Emerging Markets and Transition Economics*. London: Palgrave Macmillan, 2015. P. 170–189.

The privatization shock model was advocated by most economic doctrine in the 1990s and characterized the transition of Eastern European countries from socialism to capitalism. However, the variable and often disappointing results obtained have shown the critical aspects of this approach.

It has been sharply pointed out⁵³ how the effects of privatization depend on the initial conditions, and especially on competition policies, access to credit, and the type of corporate governance implemented. In fact, if market regulation remains inefficient or allows the uneven growth of monopolies, the expected benefits are not realized.

The mode of privatization⁵⁴ is also important, and can take place, first and foremost, through the direct sale of state-owned properties. Empirical data show that this program has been most effective in the case of sales of small assets. In other cases, state-owned companies were transformed into private companies and then sold through either an auction or vouchers, or bought by management or employees.

Another option is the restitution of land and property to those who can prove that they owned it before its expropriation. It should be noted that this is also the method employed in South Africa, following the end of apartheid, to try to heal wounds and achieve a form of social justice. The effects depend on the country's history and characteristics. For example, it works best when there is an organized administrative and governmental system. Often, however, it proves to be a brake on modernization and the creation of a stable and clear securities market.

Finally, in many cases privatization has occurred from below with the creation of new business activities favored by economic, legal and social regulations. This mode is viewed positively because it does not merely consist of a different allocation of assets, but should generate new wealth.

It is evident how these approaches can be combined, and their ability to be adapted to concrete situations is also relevant. Yet, they have not necessarily yielded the same outcomes in all countries. As noted by Stiglitz, it is crucial to consider the role of the state and its institutions: "an economy needs an institutional infrastructure"⁵⁵. From this perspective, growth is not automatically determined by privatization. Since it is a form of redistribution, interest groups that would be disfavored by the process could oppose the improvement of institutions. Moreover, too rapid a transition may cause a fiscal crisis for business, which in turn affects the state and renders it unable to create those institutions necessary to ensure growth.

The most decisive criticism of this model arises, however, from a comparison with the gradualism adopted by China and Vietnam, which seem to have succeeded in successfully introducing major economic reforms within the framework of socialist principles thanks to the shrewd and far-sighted vision of their leadership. Nonetheless, the debate is far from over, both because of the difficulty of clearly identifying the parameters for measuring the results of the privatization processes and the inevitable influence of ideological vision. Additionally, some scholars have highlighted how institutions matter only for sustaining growth, but not for creating it after a recession, and therefore rapid transition is still preferable. In any case, the Chinese and Vietnamese experience cannot be ignored.

⁵³ *Godoy S., Stiglitz J. E.* Growth, initial conditions, law and speed of privatization in transition countries: 11 years later // *Transition and beyond*. London: Palgrave Macmillan, 2007. P. 89–117.

⁵⁴ *Brada J. C.* Privatization is Transition. Or is it? // *Journal of Economic Perspectives*. 1996. Vol. 10, no. 2. P. 67–86.

⁵⁵ *Stiglitz J.* Development based on Participation-A Strategy for Transforming Societies // *Transition*. 1998. Vol. 9. P. 1–3.

5. The Chinese and Vietnamese experience

Indeed, especially since the 1980s, China has experienced a gradual and pragmatic market opening⁵⁶: 摸着石头过河 (*mōzhe shítou guòhé*). The Chinese approach to change is reflected in the famous expression “crossing the river by feeling the stones”.

China’s 1982 constitution established the supremacy of public property, defined as sacred and inviolable⁵⁷, expressly dividing it into state property in urban areas and collective property in rural ones. Along with public property, a private property right of citizens⁵⁸ was also recognized, albeit with restrictions that reveal the influence of socialist ideology. This private property right of citizens extends to:

- a) Legally earned income;
- b) Savings;
- c) Houses;
- d) Other means of life and production.

In this context, it is possible to observe the difficulty of trying to strike a balance between acknowledging the role of private property⁵⁹ in economic improvement and hesitating to break away from or at least relax adherence to socialist doctrines and the current system.

It was on the Southern tour that Deng Xiaoping clarified what would be China’s strategy: “The reason we feel it is difficult to make a breakthrough in economic reform is that many people are too afraid to take the capitalist road. The real question is not whether reform practices are capitalist or socialist. The standard should be whether it is beneficial to the development of socialist productive forces, the increase of state forces, and the improvement of people’s lives”. Above all, he observed how “The proportion between planning and market forces is not the essential difference between socialism and capitalism. A planned economy is not equivalent to socialism because there is planning in capitalism as well. A market economy is not equivalent to capitalism because there is a market even under socialism. Planning and market are both means of controlling economic activity. The essence of socialism is to liberate and develop the productive forces and eradicate exploitation and bipolarity and achieve a goal of common prosperity”.

Under Jiang Zemin, this process continued and there was a gradual strengthening of private property and individual initiative, which had become necessary components of a socialist market system⁶⁰. By 2004, thirteen amendments were adopted, three of which were dedicated to property. It is noteworthy that China joined the WTO in 2001, and although its commitments did not include property law reform, property law was in any case

⁵⁶ Deng’s statement is emblematic: “It doesn’t matter whether the cat is black or white, it is important that it chases mice”. See also, his February 6, 1987 speech: “Why do some people always insist that the market is capitalist and only planning is socialist? Actually they are both means of developing the productive forces. So long as they serve that purpose, we should make use of them. If they serve socialism they are socialist; if they serve capitalism they are capitalist. It is not correct to say that planning is only socialist, because there is a planning department in Japan and there is also planning in the United States. At one time we copied the Soviet model of economic development and had a planned economy: Later we said that in a socialist economy planning was primary. We should not say that any longer”.

⁵⁷ *Dayuan H.* Constitutional Protection of the Right to Private Property in China // *China Legal Science*. 2013. Vol. 1, no. 1. P.6–29. — Notes how in the 1954 constitution it was stated only that “the state shall ensure the priority of the development of the public economy”, while in later constitutions it was defined as only inviolable. Only in 1982 is it also qualified as “sacred”.

⁵⁸ *Ibid.* P. 12.

⁵⁹ Privatist classifications of property law in China are examined by: *Alsen J.* An Introduction to Chinese Property Law // *Maryland Journal of International Law and Trade*. 1996. Vol. 20, no. 1. P. 1–60.

⁶⁰ Moreover, the theory of the Three Representatives developed by Jiang Zemin allows for the overcoming of class struggle and elevates the party to represent the whole society.

affected by China's membership. It was first stated that the state protects "the lawful⁶¹ rights and interests of the non-public sectors of the economy such as individual and private sectors of the economy" and "encourages, supports and guides the development of the non-public sectors of the economy"⁶². Private property was also established as inviolable and not exclusively public. However, a distinction remained: the former was merely "*bu shou qin fan*", while the expression "*shen sheng bu ke qin fan*", meaning sacred and inviolable, continued to be used for the latter.

The 2007 Property Rights Law, preceded by a wide-ranging and lively debate, constituted a symbolic passage of perhaps more political than legal significance. It is connoted by a pragmatic use of comparative law⁶³ that adapts foreign models to its particular context rather than merely imitating what is done in other countries. Indeed, besides the apparent Roman and German law influences, it is possible to detect the typical common law approach and socialist foundation⁶⁴. This is why the 2007 Property Rights Law has been called a 'Law with Chinese characteristics'⁶⁵.

The new Civil Code of 2021 enshrines the balance already achieved with the Property Rights Law. Article 206 provides that "the State upholds and improves the fundamental

⁶¹ The importance of the interpretation of the term "legal" is noteworthy. Indeed, the term is used nine times throughout the Constitution to protect property rights and may thus take on different nuances. On this point, see: *Dayuan H.* Constitutional Protection of the Right to Private Property in China. 22 ff.

⁶² One example is the Several Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy adopted in 2005, whereby the State Council aimed to encourage the development of the private sector through equal treatment and conditions of access.

⁶³ We take up the conclusions of: *Crespi Reghizzi G.* Proprietà e diritti reali in Cina // *Mondo Cinese*. 2006. No. 126. Available at: https://www.tuttocina.it/Mondo_cinese/126/126_cres.html (accessed: 01.02.2023). — Draft Law: the comparatist finds in the "Draft" a great number of suggestions and stimuli and a plurality of models, confirming the intelligent and continuous work of synchronic and diachronic comparison carried out in China by those who make new laws or modify pre-existing ones. To the Italian jurist, i. e., from a country where law and doctrine have long mediated between French and German prototypes, at least formally it is easy to orient oneself among these familiar and predominantly Romanist models, characteristic of the rest of almost all countries with a codified civil law, despite the inevitable peculiarities constituted by the Chinese political and socio-economic reality and its continuous evolution. It is worth mentioning in this regard that even countries that had made different ideological, political and economic choices in the past had never renounced or completely renounced the conceptions, partitions, institutions and language of Roman law, especially in its Romano-Germanic and Pandettist elaboration. The rare attempts to break away from it — I am thinking of the Civil Code (*Zivilgesetzbuch*) of the German Democratic Republic of 1975 — foundered after only a few years. There is no need to recall here the various and numerous historical occasions of China's contact with legal categories of Roman or post-Roman law, including through looking at the most unthinkable foreign models (Japanese, French, German, Swiss, Soviet, etc.) and, of course, through the important precedent of nationalist civil codification. Even the Bill of Rights in rem shows that those contacts have become a permanent presence and that it is very difficult to escape the flows of this dominant model; while in this very matter the Common Law seems to manifest its influence only in the notion of ownership (or rather use) of land at "fixed time", re-proposing the ancient leasehold-freehold binomial but reserving the second type of ownership solely for the state and collective bodies.

⁶⁴ See: *Qiao S.* The Structure and Spirit of Chinese Property Law / *Handbook of Property, Law and Society*. New York: Routledge, 2023. P.8 ("...it is a puzzle that China has both maintained its socialist commitment to public land ownership and created individual land rights which eliminated famine in rural China and ushered in the biggest urban real estate market in the world. To make it even more puzzling, all these changes were achieved without legal authorization in the beginning and were driven by farmers, entrepreneurs and local officials on the ground. Chinese law eventually catches up with and sanctions practices that have proven effective, but has never been able to regulate or ossify these dynamic and ever-changing practices. That is why we see the co-existence of the socialist public land ownership, the civil law principle of *numerus clausus*, and the common law practices of bottom-up, continuous reconfiguration of the bundle of sticks. They are not always in harmony with each other. Instead they are in constant conflict with each by nature, creating frictions and bumps on China's road to economic and social development").

⁶⁵ *Chen Y.* Ownership in China's Transitional Economy. New York: The Edwin Meller Press, 2007.

socialist economic systems, such as the ownership system under which diverse forms of ownership co-develop with public ownership as the mainstay, the distribution system under which multiple forms of distribution coexist with distribution according to work as the mainstay, as well as the system of socialist market economy. The State consolidates and develops the public sector of the economy, and encourages, supports and guides the development of the non-public sector of the economy. The State implements a socialist market economy and protects the equal legal status and development of rights of all market participants”. Also in the new code, as already noted by a diligent scholar of the Chinese model, the formal equality of different types of property fades into the provision of greater protection for state property⁶⁶. It is then specified how the real rights of the State, the community, private individuals, and other owners are equally protected by law and no individual or organization can violate them (Art. 207).

Regulated real rights of use and enjoyment include: usufruct, right of habitation, easement, right to management of land, right to use buildable land, and construction rights on residential buildings. The latter three are typical of the Chinese system and have always been characterized by uncertain legal qualification and insufficient regulation, which the code seeks to remedy. The contractual right to manage land can be exchanged and transferred as set out by law. Article 341 states that “the right to management of land which is transferred for a term of five years or longer is created when the contract for the transfer enters into force. The parties may apply to the registration authority for registration of the right to manage the land; without registration, such right cannot be asserted against a bona fide third person”.

However, there has been no effective clarification as to the content and limits of property rights. Another critical issue concerns the poor enforcement to date of the rules on registration and even compensation in expropriation cases, frequently resulting in the protection of rights only on paper. Significantly, a law on agrarian contracts has also been enacted, but social, political and cultural factors hinder the perfect functioning of the legal framework.

The reforms to ownership status have been accompanied by continuous and effective reforms of state-owned enterprises (SOEs), which through restructuring, privatization and “corporatization” plans have declined in number while remaining key players in the economic system. It should also be mentioned that China’s four major banks are SOEs⁶⁷.

Therefore, it is yet to be assessed whether there will be a complete convergence to majority Western models in this area, a typically Chinese approach maintained, or (more likely) if mainstream Western and Chinese approaches will be instead combined with new and pragmatic solutions suited to the context in which they fit⁶⁸. It is in this perspective that the 2020–2022 plan should be read, which aims to conclude the process of transforming SOEs into mixed-ownership companies, incentivize technological development and promote digital transformation⁶⁹. By 2021, it was 70 percent complete, and the results were encouraging with net profits of central SOEs reaching \$275.8 billion.

⁶⁶ *Crespi Reghizzi G.* Proprietà e diritti reali in Cina.

⁶⁷ They are the *Industrial and Commercial Bank of China* (ICBC), the *China Construction Bank Corporation* (CCB), the *Agricultural Bank of China* (ABC) and the *Bank of China* (BOC). In addition to the *Big Four*, the banking system consists of *Joint-Stock Banks*, *foreign banks*, and *Policy Banks* such as the *Agricultural Development Bank of China*, the *China Development Bank* for infrastructure financing, and the *Export-Import Bank of China*. According to some estimates, only 12 percent of the banking industry’s capital is private: attempts to boost it seem to be held back in the state by the new policies. See: *Khatri P.* *Insight of China’s Banking Sector and the Capital Market // International Journal of Business and Management Invention.* 2019. Vol. 8, no. 6. P.50–56.

⁶⁸ *Chen Y.* *Ownership in China’s Transitional Economy.*

⁶⁹ See for a comparison: *Diritto commerciale russo* / ed. by G. Crespi Reghizzi, V.F. Popondopulo. Padova: Cedam, 2020.

It is interesting to highlight how, starting in the 1980s, Vietnam also underwent an economic reform that led to a market opening similar to that in China (Doi Moi). Party Resolution No. 10 of 1988 recognized households as the basic unit of agricultural production and began a process of land allocation that culminated in Law 1993. Indeed, certificates were issued for the use of land formally still owned by the state; these land use certificates could be transferred, leased, mortgaged, and inherited, lasting 20 to 50 years. While affirming the dominance of state ownership, the 1992 Constitution recognized the existence of a private economy and allowed foreign investment. These early embryonic steps were confirmed and reinforced by the Enterprise Law, the enactment of which was accompanied by slogans such as “the state can do only what is strictly limited by law, while an individual is free to do anything that is not explicitly prohibited by law”. This opened a period of great impetus for the economy and individual initiative.

In 2001, constitutional revision introduced the Chinese formula of “market socialism”, and in 2008 Vietnam entered the WTO. However, the subsequent economic crisis and reduced growth led the party to question again what economic model to adopt. Indeed, there was a heated debate between those advocating a return to socialism and public intervention in the economy and those championing liberal reforms. The compromise between these lines of thought is encapsulated in the 2013 Constitution⁷⁰. Alongside the reaffirmation of the socialist orientation, however, a progressively more market-friendly approach was felt in practice, leading to the 2016 Party Resolution: “Vietnam’s socialism-oriented market economy includes many forms of ownership, many economic sectors, with the private sector as an important driving force of the economy; the market plays the main role in effectively mobilizing and allocating resources for development, the state plays the role of guiding, building and perfecting economic institutions for fair, transparent and healthy competition”. It is observed that even in Vietnam, SOEs, while maintaining a central role, have undergone continuous and gradual reforms along the lines of those in China. However, outcomes have been mixed and high hopes are pinned on the 2021–2025 restructuring plan.

It should be noted, however, that from a socialist perspective, a check on the market must be maintained to prevent the emergence of new inequalities capable of undermining both the ideological legitimacy of the system and the social order. As early as a 2014 speech, Xi Jinping stressed the importance for Chinese leaders to learn to use the “invisible hand” and the “visible hand”, balancing the role of the government with that of the market⁷¹. The rollout of the new economic phase (featuring the pursuit of “common prosperity”) that was announced in August 2021⁷² should be interpreted from this perspective. Recently, Xi specified how “bringing prosperity to all is an essential requirement of socialism as well as an important feature of Chinese-style modernization. The common prosperity we are working toward is for everyone and covers the enrichment of people’s lives in both material and non-material senses. It is not prosperity for a minority, nor is it rigid egalitarianism. We should undertake thorough research on the goals in stages and advance common prosperity in stages. By the end of the 14th Five-Year Plan period (2021–2025), we will have made solid progress in bringing prosperity to all as the gaps between individual incomes and real levels of consumption gradually narrow. By 2035, we will have made more remarkable and substantial progress toward shared prosperity, and equitable access to basic public services will be ensured. By the middle of this century, common

⁷⁰ On this point, see: *Pham D. N. From Marx to Market: The Debates on the Economic System in Vietnam’s Revised Constitution // Asian Journal of Comparative Law. 2016. Vol. 11, no. 2. P. 263–286.*

⁷¹ *Xi J. The ‘Invisible Hand’ and the ‘Visible Hand’ / The Governance of China. Beijing: Foreign Languages Press, 2014. P. 129.*

⁷² Interventions on Internet companies and large concentrations of wealth should also be read from this perspective.

prosperity will be fundamentally achieved, while the gaps between individual incomes and actual levels of consumption will narrow to an appropriate range. To achieve these goals, we must promptly formulate an action plan to promote common prosperity, and devise rational and practicable systems of targets and evaluation methods that are adapted to China's national conditions"⁷³. In fact, it seems appropriate to recall how the creation and preservation of a middle class is a challenge faced by all countries, whether because, like China, they have never had one or because, like in the West, it is weakening and shrinking.

6. Concluding remarks

The regulation of property rights is complex in every system: "every society must confront certain recurring points of tension inherent in private property. These include the balance between individual freedom, collective responsibility, and limitations on harm, as well as incentives for productive activity, recognition of personal connection to property, and others. Society confronts these tensions through the resolution of individual disputes, with legal institutions that inherently draw on the values and imperatives of a given historical context. As a result, there is no singular social function—there cannot be—and no possibility of a transcendent, unified theory of what that function should be. Rather, every legal system must perpetually balance the plural values represented in property"⁷⁴. In socialist systems, this challenge is compounded by the determining role the regulation of membership status (with the prevalence of public property, at least formally) has on the legitimacy and resilience of the system.

However, this need not necessarily entail adherence to or mere imitation of the current liberal model connoted by technocratic and globalist profiles. Indeed, within the very legal systems that adhere to this economic system, deep reflection is taking place on its efficiency and justice⁷⁵. The shrewdest doctrine⁷⁶ had already pointed out the limits of an uncritical acceptance of the property/freedom binomial, which also cannot and should not be neglected.

A vision that does not consider different histories, traditions, visions and cultures should also be eschewed. The desire to impose a single paradigm is not only short-sighted but risky, especially when this has already shown its fragilities. On the other hand, such an approach seems distant from the one that characterizes Beijing's policy to which the socialist countries refer. Kissinger's musings are enlightening as he recalled China, like the United States but without adhering to the American notion of universalism, has always felt it had a special role in spreading its values to the world. China merely controlled the barbarians immediately at its doorstep and sought to persuade tributary states (such as Korea) to recognize its special status, in exchange for which it conferred benefits such as trade rights. Toward barbarians as distant as Europeans about whom they knew little, the Chinese maintained a friendly, albeit condescending, aloofness. They had little interest in converting them to Chinese ways⁷⁷.

Socialist countries are trying, although not without contradictions, to discover their own model capable of guaranteeing individual protections and freedoms together with the development and improvement of quality of life. In this journey, the fundamental and

⁷³ Xi J. Making Solid Progress Toward Common Prosperity. Available at: http://en.qstheory.cn/2022-01/18/c_699025.htm (accessed: 02.05.2022).

⁷⁴ See: Davidson N. M. Sketches for a Hamilton Vernacular as a Social Function of Property // *Fordham Law Review*. 2011. Vol. 80, no. 3. P. 1053–1070.

⁷⁵ See, for example, the studies on *progressive property*.

⁷⁶ *Metodo e teoria giuridica*. Scritti / ed. by Carlo Castronovo, Antonio Albanese, Andrea Nicolussi, Milan: Giuffrè, 2011. P. 73–92.

⁷⁷ Thus: Kissinger H. *Cina*. Milan: Mondadori, 2018.

indispensable establishment of property, contract, and enterprise must be balanced with the principles of equality and social justice that are or should be the foundation of their own experience. Perhaps a meeting point between the various liberal and socialist trends and drifts can be found today in the Church's social doctrine: a return to the person as the subject of economics and ideology and no longer subordinate to them.

References

- Acemoglu, Daron, Johnson, Simon, Robinson, James. 2005. A. Institutions as a fundamental cause of long-run growth. *Handbook of economic growth*. London, North Holland: 385–472.
- Alsen, Jonas. 1996. An Introduction to Chinese Property Law. *Maryland Journal of International Law and Trad* 20: 1–60.
- Brada, Josef C. 1996. Privatization is Transition. Or is it? *Journal of Economic Perspectives* 10: 67–86.
- Catan, Thomas. 2008. Who is Raul Castro, Cuba's New Leader? *The Times*. Available at: <http://www.thetimes.co.uk/tto/news/world/americas/Article> (accessed: 01.02.2023).
- Chaguaceda, Armando, González, Lazaro de Jesus. 2015. Participación comunitaria y gobiernos locales en Cuba: La experiencia de los Consejos Populares y el impacto de las reformas de Raúl Castro. *Espiral (Guadalajara)* 63: 125–152.
- Chen, Yang. 2007. *Ownership in China's Transitional Economy*. New York; The Edwin Meller Press.
- Cheng, Yinhong. 2012. The "socialist other": Cuba in Chinese ideological debates since the 1990s. *The China Quarterly* 209: 198–216.
- Crespi Reghizzi, Gabriele. 2006. Proprietà e diritti reali in Cina. *Mondo cinese* 126. Available at: https://www.tuttocina.it/Mondo_cinese/126/126_cres.htmva (accessed: 01.02.2023).
- Crespi Reghizzi, Gabriele, Popondopulo, Vladimir F. (eds). 2020. *Diritto commerciale russo*. Padova, Cedam.
- Davidson, Nestor M. 2013. Sketches for a Hamilton Vernacular as a Social Function of Property. *Fordham Law Review* 80: 1053–1070.
- Demsetz, Harold. 1974. *Toward a theory of property rights*. London: Palgrave Macmillan: 163–177.
- Devine, Pat, O'Neill, John. 2002. Participatory planning through negotiated coordination. *Science & Society* 66: 72–93.
- Dominguez Lopez, Ernesto, Yaffe, Helen. 2017. The deep, historical roots of Cuban anti-imperialism. *Third World Quarterly* 38: 2518–2535.
- Engerman, Stanley, Sokoloff, Kenneth L. 1997. Factor endowments: institutions, and differential paths of growth among new world economies: a view from economic historians of the United States. *How Latin America Fell Behind*. S. Haber (ed.). Redwood City: Stanford University Press: 260–304.
- Garibaldi, Oscar M., Kirby, John D. 1995. Property Rights in the Post-Castro Cuban Constitution. *University of Miami Yearbook of International Law* 3: 225–274.
- Harnecker, Marta. 2015. *A World to Build. New Paths Toward Twenty-first Century Socialism*. New York, Monthly Review Press.
- Hartwell, Christopher A. 2015. Property Rights in Transition Countries. *Palgrave Dictionary of Emerging Markets and Transition Economics*. London, Palgrave Macmillan: 170–189.
- Hung, Gil F. 2021. Apuntes para un estudio sobre la compraventa de viviendas en Cuba. *Rassegna di diritto civile* 2: 640–661.
- Iacometti, Miryam. 2020. The right to property in Cuba: from the Castro revolution to the Constitution. *DPCE* 42: 749–767.
- Jackson, Vicki C. 2007. Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement. *Federal Law Review* 35: 161–186.
- Joseph Recompensa, Tatiana W., Joseph Recompensa, Lazaro C. 2017. La cuestión agraria cubana aciertos y desaciertos en el periodo de 1975–2013: la necesidad de una tercera reforma agraria. *Polis. Revista Latinoamericana*. Available at: <http://journals.openedition.org/polis/12490> (accessed: 01.02.2023).
- Khatri, Pooja. 2019. Insight of China's Banking Sector and the Capital Market. *International Journal of Business and Management Invention* 8: 50–56.
- Kissinger, Henry. 2018. *Cina*. Milan, Mondadori.

- Knight, Nick. 2007. *Rethinking Mao: explorations in Mao Zedong's thought*. Washington, Lexington Book.
- Landes, David S. 1998. *The Wealth and Poverty of Nations; Why Some Are Some So Rich and Some So Poor*. London, Little, Brown and Company.
- La Porta, Rafael Lopez-de-Silanes, Florencio, Shleifer, Andrei, Vishny, Robert W. 2000. Investor protection and corporate governance. *Journal of financial economics* 58: 3–27.
- Law, David S. 2016. Constitutional Archetypes, *Texas Law Review* 95: 153–244.
- Law, David S., Versteeg, Mila. 2011. The Evolution and Ideology of Global Constitutionalism. *California Law Review* 99: 1163–1258.
- Mengoni, Luigi. 2011. Proprietà e Libertà. *Metodo e teoria giuridica. Scritti I*. Eds. C. Castronovo, A. Albanese. A. Nicolussi. Milan, Giuffrè: 73–92.
- Mijiyawa, Abdoul Ganiou. 2013. Determinants of property rights institutions: survey of literature and new evidence. *Economics of Governance* 14.2: 127–183.
- Ngoc Son, Bui. 2020. You, the People: Cuba's International Constitution. *New York University Journal of International Law and Politics* 52: 829–874.
- Nilekani, Nandan. 2008. *Imagining India. The Idea of a renewed nation*, London, Penguin.
- North, Douglass. 1981. *Structure and change in economic history*, New York, W.W. Northon & Company.
- Pham Duy, Nghia. 2016. From Marx to Market: The Debates on the Economic System in Vietnam's Revised Constitution. *Asian Journal of Comparative Law* 11: 263–286.
- Pomar, Vladimir. 2016. *Cuba: Revolução e Reforma*. Sao Paulo, FPA.
- Putnam, Robert, Leonardi, Robert, Nanetti, Raffaella Y. 1992. *Making democracy work: Civic traditions in modern Italy*. Princeton, Princeton University Press.
- Qiao, Shtiong. 2023. *The Structure and Spirit of Chinese Property Law*. New York, Routledge.
- Sharma, Naveen. 1990. *The right to property in India*, New Delhi, Deep & Deep Publications.
- Stiglitz, Joseph. 1998. Development based on Participation. A Strategy for Transforming Societies. *Transition* 9: 1–3.
- Venkatesan, Rashmi. 2021. The Evolution of the Right to Property in India: From a Law and Development Perspective. *Law and Development Review* 14: 273–308.
- Weber, Max. 1958. *The religion of India*. Clencoe, The Free Press.
- Xi, Jinping. 2014. The 'Invisible Hand' and the 'Visible Hand'. *The Governance of China*, Beijing, Foreign Languages Press.
- Xi, Jinping. 2022. *Making Solid Progress Toward Common Prosperity*. Available at: http://en.qsttheory.cn/2022-01/18/c_699025.htm (accessed: 01.02.2023).

Received: March 12, 2023

Accepted: May 25, 2023

Эволюция собственности на Кубе в сравнительной перспективе

Ф. Бенатти

Для цитирования: Benatti F. Evolution of property in Cuba in a comparative perspective // Правоведение. 2023. Т. 67, № 3. С. 284–304. <https://doi.org/10.21638/spbu25.2023.303>

В статье рассматривается эволюция собственности на Кубе. Особое внимание уделяется реформам, которые привели к признанию частной собственности в Конституции 2019 г. и первым зачаточным открытиям рынка. Затем рассматриваются различные теории возникновения вещных прав и приватизации со сравнением моделей быстрой и постепенной приватизации. Последние в лице Китая и Вьетнама, опыт которых анализируется, похоже, добились неплохих результатов. Китай после реформ Дэн Сяопина открылся для рынка, и медленное признание реальных прав было закреплено в законе 2007 г. Достигнутый баланс отражен в Кодексе 2021 г. Новый этап, объявленный Си Цзиньпином, вдохновлен идеей всеобщего процветания. Вьетнам с его политикой Doi Moi пошел по тому же пути, и сложный баланс между различными взглядами был закреплен в Конституции. Следует отметить, что социалистические страны пытаются, хотя и не без противоречий, найти свою собственную модель, способную гарантировать защиту и свободу личности

наряду с развитием и улучшением качества жизни. В этом путешествии фундаментальное и необходимое установление собственности, контракта и предпринимательства должно быть сбалансировано с принципами равенства и социальной справедливости, которые являются или должны быть основой их собственного опыта.

Ключевые слова: право собственности, социализм, Куба, Конституция, реформы, сравнительное правоведение.

Статья поступила в редакцию 12 марта 2023 г.
Рекомендована к печати 25 мая 2023 г.

Бенатти Франческа — адъюнкт-профессор, Католический университет Святого Сердца, Италия, 20123, Милан, Ларго Гемелли, 1; francesca.benatti@unicatt.it