A Covenant with Uncertainty: Considering Contemporary Constitutional Land Reform in Bolivia

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ABSTRACT

Land distribution remains a critical element of contemporary constitutional reform in Bolivia. Many poor Bolivians view the land reforms of 1952 as unfinished. Today, approximately 100 families own 12.5 million acres of land, compared against the 2 million Bolivians who crowd onto 2.5 million acres. Economic and social change in Bolivia will likely come at the expense of the one-fifth of one percent of the population who own the largest estates. Bolivia’s constitution—approved in January 2009—declares that land reform will be a main priority of the government. However, constitutional land reform will only be the first of many obstacles that must be overcome for Bolivia to reverse its legacy of inequality and underdevelopment. The charter does not currently recognize the tension between equity and economic growth in determining the extent to which the state will enshrine property rights or responsibilities. The government of President Evo Morales must resist the temptation to abuse the new powers bestowed upon the state to expropriate land. The social function doctrine that guided the composition of Bolivia’s new constitution must be carefully circumscribed to guard against abuse. The Morales government should immediately begin to reform its bureaucracy to be more transparent and accountable. In addition, the government must abstain from interfering with the independence of the constitutional tribunal. Bolivia’s new constitution is an ethical and farsighted document, but its legitimacy will be tested by the state’s ability and willingness to uphold the rule of law.

In October 2008, nearly 100,000 Bolivians packed into La Paz’s Plaza Murillo to witness the Bolivian Congress’ ratification of a new draft constitution. Along with the election of Bolivia’s first indigenous president, Evo Morales, in December 2005, this moment was the culmination of five hundred years of foreign domination and five decades of stalled reforms. Speaking at the ceremony, Morales wept openly, overcome by the emotion of the occasion.

President Morales’s main promise during his election campaign was to hold a constituent assembly that would rewrite the constitution and “refound” the Bolivian state. Morales’s impassioned demand for a new constitution resonated with Bolivia’s dispossessed, and his address to the gathered multitude signaled the beginning of the end of a protracted battle between his Movement Toward Socialism (MAS) party and a coalition of opposition lawmakers and eastern governors over the text of Bolivia’s new constitution. Morales announced that a historic compromise had been struck between the seemingly intractable foes, and it was no surprise that one of the key elements of that compromise was land reform.

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The distribution of land is an issue that has inspired conflicting emotions in Bolivia’s citizenry since the 1952 revolution that generated the landlocked nation’s first major land reform. Although the 1952 revolution addressed a number of the grievances of Bolivia’s peasantry, many poor Bolivians view those reforms as unfinished. Today, approximately 100 families own 12.5 million acres of land, compared against the 2 million Bolivians who crowd onto 2.5 million acres. Eighty-six percent of the farms constitute only two percent of the land. The World Bank estimates that the vast majority of land is divided into only 686 farms, averaging out at 16,000 hectares per farm. Much of this land is concentrated in Santa Cruz, a province with local leadership especially hostile to Morales and the land reforms.

The extreme concentration of land in the hands of a few powerful families is a root cause of endemic rural poverty in Bolivia. The country has become synonymous with political instability; there have been more than 190 coups since independence in 1825. The conflict over land—its seizure, ownership, exploitation, and reallocation—has been a key element in many of these dramatic shifts of power. Status in Bolivia is often synonymous with land ownership. Entrenched elites were able to acquire land with relative ease and newly arrived settlers quickly learned that land acquisition—rapacious or gradual, legal or illegal—was the key to prestige, influence, and power. Scholar of Bolivian history James Malloy explains, “In Bolivia the possession of land was fundamental, almost mystical. It was through land ownership that one anchored himself in the world. It was through land ownership that one’s name gained solidity. By passing land down through the generations, the family name would gain historical permanence.” Land ownership was a relatively foreign concept to Bolivia’s indigenous community, made more foreign by the structural impediments to land ownership created by the Bolivian state’s institutional racism. Indigenous persons tended to conceptualize land ownership as a collective rather than an individual enterprise.

As a result, many indigenous persons have difficulties recognizing the legitimacy of much of the land ownership in contemporary Bolivia. While a relatively prosperous Mestizo Bolivian might perceive the title to his or her land as the only requisite proof and justification of ownership, the indigenous person does not see land solely in the context of a title granted in 1970 or 1980. His or her scope of vision encompasses the initial Spanish conquest, the centuries of expropriation and divestment, and the manipulation of conscripts who fought in successive wars throughout the nineteenth and twentieth centuries in exchange for promises of

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23 James Malloy, The Uncompleted Revolution (1970) 189
land that were broken immediately upon victory. Additionally, much of the land in the most agriculturally fertile areas of Bolivia was acquired through suspect means during the period of dictatorship from 1964 to 1978. Mistrust pervades Bolivian political life, and the country’s most recent constituent assembly was colored by these conflicting narratives of land, legitimacy, and history.

Bolivian law is not sacrosanct. A weak tradition of liberal democracy has been undermined by frequent constitutional revisions and the staggering frequency of extra-legal power grabs. The law has been only one of many pawns in this game of power. Before the 1952 revolution, the de facto law was that of the hacienda. A hacienda’s resident Indians were completely at the mercy of their landowner who demanded labor and passivity. During the revolution, centrist factions favored giving the indigenous population title to their own small plots of land, while keeping the hacienda system intact. They argued that state expropriation should be legalistic and accompanied by compensation to the landowners. Leftist elements demanded the destruction of the feudal hacienda system and the expropriation of large land holdings without compensation.

Since the Bolivian power structure in 1952 appeared unwilling to accommodate the necessary sacrifices for the economic development of the country’s poorest citizens, revolution and development became synonymous to those fighting against the status quo. The ruling Movimiento Nacional Revolucionario’s (MNR) land redistribution was extra-legal, and was justified by arguments that Bolivian society must be completely reorganized in order to reverse the trajectory of economic and socialbackwardness. This inherent tension between the accommodation and compromise of the democratic process and the radical demands of land reform is replaying itself today.

The 1996 Agrarian Reform Law (Law 1715) took an important step forward by enabling indigenous communities to gain legal title to their communal lands. The law defined both the rights and obligations of land ownership and established an agrarian superintendent to oversee the reform process. However, this and previous efforts at land reform have been complicated by a number of factors, such as the insufficient definition of property boundaries by authorities and a lack of access to credit, technology, and technical assistance. Soon after Morales’s election, his government produced a new agrarian reform law (Law 3545, October 2006) that attempted to address many of the deficiencies of the 1996 law. The government’s plan would obtain the land for redistribution from two sources: One-third would be state-owned, and two-thirds would be reclaimed from individuals or companies that lack legal titles or have titles that were obtained illegally. According to Miguel Urioste, the director of Fundación TIERRA, the majority of large landowners in the wealthy Santa Cruz province do not have legal documentation for their property.

Law 3545 expanded the scope of the 1996 law and, most important, empowered the state to expropriate property that was deemed...

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26 James Malloy, “Revolution and Development in Bolivia,” in *Constructive Change in Latin America*, ed. Blasier Cole (1968) 177
27 Clare Ribando Seelke, *Bolivia: Political and Economic Developments and Relations with the United States*, CRS Report for Congress (July 2008) 14
“unproductive.” Analyst Douglas Hertzler estimated that the plan would result in about 13 percent of Bolivia’s land being given to approximately 28 percent of its people, while opponents to the reforms claimed that it would lead to arbitrary expropriations of private land. The International Crisis Group reports that more than 3.7 million hectares have been transferred to indigenous communities since January 2007, but notes that government officials have expressed skepticism that a majority of the 60,000 people who have requested land will actually farm it. The draft constitution as composed by the constituent assembly aimed to preserve and advance these reforms by incorporating them into Bolivian law.

Morales’s reform plan was bolstered when he secured the support of 67 percent of the population in an August 10, 2008, referendum. Skeptics were encouraged by the October 2008 compromise between the Morales government and the opposition, in which the opposition agreed to submit the draft constitution to referendum in exchange for concessions on land expropriation.

The constitution was approved by referendum in January 2009. In addition to approving the constitution, Bolivia’s citizens were asked to choose whether future land ownership should be confined to 5,000 or 10,000 hectares; an overwhelming 70 percent chose the former. Morales was reelected in January 2010 and immediately set about dismembering some of the country’s largest properties. According to Juan de Dios Fernández, the secretary general of the National Agrarian Reform Institute, the Bolivian government has verified and legalized the land ownership of more than 30 million hectares.

LAND, TITLE, AND POWER
Legitimacy in much of the developing world rests on a leader’s ability to pull his or her citizens out of the trap of poverty. Many of these leaders have pursued land reform in a variety of manifestations, guided by the belief that land ownership is among the most effective ladders out of poverty. In a study for the Rural Development Institute, Roy L. Prosterman and Tim Hanstad identify a number of benefits to legal land reform that have special relevance to contemporary Bolivia: reduced social unrest and instability, increased crop production, creation of wealth, and a “foundation for sustained and inclusive economic growth.” Since land reform involves a transfer of power from the elite to a marginalized population, it often faces great resistance. Ultimately, land reform is about who wields power within rural society. Change in Bolivia will likely come at the expense of the one-fifth of one percent of the population who own the majority of farms greater than 5,000 hectares.

30 Douglas Hertzler, "Bolivia’s Agrarian Revolution: Trying to Keep the Promises of Past Governments,” Andean Information Network (August 2007)
31 Clare Ribando Seelke, Bolivia: Political and Economic Developments and Relations with the United States, CRS Report for Congress (July 2008) 15
33 Mary Vaca, “Jornada Historica en Bolivia,” BBCMundo.com (October 21, 2008)
In his seminal book *The Mystery of Capital*, Hernando De Soto identifies the lack of a formal property system in much of the developing world as the prime cause of under-capitalization and seemingly inescapable poverty. The climate of uncertainty surrounding property in the developing world requires excessive effort to make the most basic transaction, let alone sell a valuable piece of agricultural real estate. Advocates of De Soto’s line of thinking argue that increasing legal certainty through issuing land titles increases investment in improving the land and even higher agricultural production. Skeptics argue that the importance of titling is overstated or epiphenomenal, and increased production is dependent on other legal, cultural, and historical factors. In Latin America, many agrarian reform beneficiaries may have gained title to land, but institutional deficiencies prevented them from benefiting from that title through the sale, mortgage, lease, or transfer of that land. In such systems, gaining title to land is just the first step of what is generally a much longer and often fruitless journey. Obstacles to the utilization of newly acquired land include high registration costs, excessive bureaucracy, lack of access to credit, lack of access to insurance, a dysfunctional land registry, or the absence of a modern cadastral land information system specifying zoning, taxation, and land use.

**SOCIAL FUNCTION:**

**A CONTROVERSIAL DOCTRINE**

Bolivia’s contemporary political landscape resembles 1952 in many ways, but it is not a mirror image. Despite a prodigity for revolutionary rhetoric and a tendency to make public threats against his country’s economic and political elites, Morales and his government have largely pursued their agrarian reform project through a negotiated process within the aegis of Bolivian law. The Bolivian draft constitution provides protections for private property, as have most of the key legal charters in Bolivian history. However, there is a major difference between the conceptualization of property in Bolivia and many “developed” nations, such as the United States. Property *rights* are supreme in U.S. law, while Bolivian law emphasizes the importance of a property owner’s *duties*. The paramount duty of land ownership in Bolivia is ensuring that the land has a social function. Article 7, Section J of the 2002 constitution (written and ratified prior to Morales’s election) states that every Bolivian citizen has a fundamental right “To private property, individually or collectively, provided it fulfills a social purpose.” The notion of the social function of property opens the door to legalistic land reform. This is not an entirely new phenomenon. The Irish Constitution of 1937, Japanese Constitution of 1946, Italian Constitution of 1947, and numerous Latin American agrarian reform laws all outline property rights and responsibilities with the intent of ensuring that property contributes somehow to the common good.

The social function doctrine clearly guided the composition of Bolivia’s new constitution. The constitution’s ninth chapter concerns land rights and responsibilities. Articles 393 and 397 stipulate that property must provide a social or social-economic function and define the social function as the sustainable use of the land similar to what takes place in small properties, where the land is the “source of livelihood, well-being, and socio-cultural development of their holders.” Articles 398 and 399 outline the

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42 Constitution of Bolivia as amended by Law No. 2410 of August 8, 2002
44 Constitution of Bolivia. Edmund A. Walsh School of Foreign Service, Center for Latin American Studies, Political Database of the Americas. (May 5 2009)
criterion by which land will be expropriated: land
that is unproductive; land that does not serve a
social economic function; land that applies a
system of servitude or slavery; and land that
exceeds the maximum area established in the
law. Article 395 states that land will be provided
to those communities that do not possess or
possess insufficient land, but it does not specify
what constitutes “insufficient” land. This
omission could create future legal uncertainty.

CONSTITUTIONALISM IN A VACUUM
Bolivia’s contemporary framers faced the same
challenges as the framers of the United States in
codifying their particular national vision.
American legal scholar Cass Sunstein points out
that constitutionalism is often in tension with
democracy, and James Madison often expressed
fears that a process of continual revision would
instigate factionalism, especially in the face of
divisions along religious, ethnic, cultural, and
social lines. While the U.S. framers wrote a
constitution with a vision that both enshrines the
democratic process and warns against the
dangers of majoritarianism, Bolivian democracy
is more direct and unfettered. However, Bolivia
is afflicted with the fault lines that Madison felt
prudent to identify as harmful to the democratic
process. The weak constitutionalism of the past
has made the law in Bolivia vulnerable to the
whims of these factions. The quantity of Bolivian
constitutions is dispositive of past failures.

Land that is redistributed as a result of the
constitutional reforms is best protected by a
consensual and legitimized process. Illegitimate
land reforms can always be undone by
successive governments; therefore, if the
intention of the government is to preserve and
protect the newly acquired land rights of the
rural poor, it is vital that the process be
legitimized. It does not bode well that the
constituent assembly itself has been fraught with
irregularities and ideological clashes. Exploiting
procedural loopholes, MAS delegates were able
to force a vote approving the new constitution on
December 8, 2007 (finalized in February 2008).
The vote occurred without the presence of
dozens of opposition delegates, despite a
previous agreement that a two-thirds majority of
the entire constituent assembly would be
necessary to approve the draft constitution.
Some of the absentee delegates were boycotting
the session; others were unaware that the
assembly had been moved from the city of Sucre
to the city of Oruro; while still others were
forcibly prevented from entering the session. The
Constitutional Tribunal, which traditionally
arbitrates among the various organs of state, was
unable to step in during the crisis, as five
magistrates had resigned following the initiation
of MAS-led impeachment proceedings against
them. The inability of the Tribunal to oversee
the process of the constituent assembly and the
charter’s subsequent adoption increases the
potential for abuses of power and contributes to
a sense of legal uncertainty.

In addition, Morales’s government has impaired
the Constitutional Tribunal’s ability to perform
its basic functions. The International Bar
Association’s Human Rights Institute has
expressed concerns that Morales’s public
criticism of Bolivia’s judges—including calling
for members of the Constitutional Tribunal to be
tried by Congress—is undermining the rule of
law and independence of the nation’s judiciary.

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44 http://pdba.georgetown.edu/Constitutions/Bolivia/bolivi a09.html
45 V. Jackson and M. Kushnet, eds., Comparative
Constitutional Law (1999) 190

46 International Crisis Group Policy Briefing, “Bolivia:
Rescuing the New Constitution and Democratic Stability,”
Latin America Briefing #18 (June 2008) 2-3
47 International Crisis Group Policy Briefing, “Bolivia:
Rescuing the New Constitution and Democratic Stability,”
Latin America Briefing #18 (June 2008) 3
48 Fabrice Lehoucq, “Bolivia’s Constitutional Breakdown,”
Journal of Democracy Vol. 19, No. 4 (October 2008) 119
49 International Bar Association, “Bolivia: IBA Calls on
President Morales to Desist from Undermining the Rule of

The new constitution creates a Plurinational Constitutional Tribunal to which judges will be democratically elected. Alaramingly, possession of a law degree is not a precondition for consideration.\footnote{Julio Ríos-Figueroa, “Will the Bolivian Constitutional Tribunal Rise From the Ashes?” \textit{Comparative Constitutions Blog} (July 14, 2009) \url{http://www.comparativeconstitutions.org/2009/07/will-bolivian-constitutional-tribunal.html}} This paves the way for authorities within the customary indigenous justice system to serve on the Tribunal. While Bolivia’s indigenous justice system is sophisticated and built upon centuries of tradition, the knowledge set that distinguishes an authority on the customary system differs dramatically from that required to interpret constitutional law. No precedents for this hybridization exist in Bolivian constitutional law, and the consequences of such a radical restructuring are unknown.

President Morales’s obstruction of the Constitutional Tribunal and the Bolivian Supreme Court cast a long shadow over his intentions for legalistic, constitutional land reform. In February 2010, the government planned to take advantage of their parliamentary majority to pass a law that would temporarily empower Morales to unilaterally nominate judges for both courts in advance of the judicial elections planned for December 2010.\footnote{Mabel Azcu, “Morales elabora una legislación para controlar el poder judicial de Bolivia,” \textit{El País} (February 6, 2010) \url{http://www.elpais.com/articulo/internacional/Morales/elabora/legislacion/controlar/poder/judicial/Bolivia/elpepuintlat/20100206elpepuint_3/Tes} \footnote{International Crisis Group Policy Briefing, “‘Bolivia: Rescuing the New Constitution and Democratic Stability,” \textit{Latin America Briefing} #18 (June 2008) 13.} \footnote{U.S. Department of State 2007 Investment Climate Statement on Bolivia \url{http://www.state.gov/e/eeb/ifd/2007/80681.htm}}} The opposition has accused Morales of an extra-constitutional power grab that will create the conditions for totalitarianism in Bolivia.

Future conflict remains a possibility in Bolivia, and land reform disputes have the potential to destabilize the country.\footnote{International Crisis Group Policy Briefing, “‘Bolivia: Rescuing the New Constitution and Democratic Stability,” \textit{Latin America Briefing} #18 (June 2008) 13.} According to the U.S. Department of State’s 2007 Investment Climate Statement on Bolivia, expropriations for land reform risk further hurting foreign direct investment: “Bolivia remains a difficult place to do business...political and economic uncertainty has presented challenges for potential investors.”\footnote{U.S. Department of State 2007 Investment Climate Statement on Bolivia \url{http://www.state.gov/e/eeb/ifd/2007/80681.htm}} Foreign direct investment by U.S. firms into Bolivia amounted to USD $1.4 billion between 2001–2005. High political risks generally translate into a decline in foreign investment. The Bolivian government must decide if land reform is worth the price paid by a decline in foreign direct investment. This choice ultimately touches on the very nature of the
reform project: Is its paramount goal to stimulate economic growth or address historic inequality? If both goals cannot be achieved, which is supreme?

**ABUSE OF POWER OR MEDDLING MENNONITES?**

But even if land reform is desirable, is it possible? The answer is unclear. The Bolivian government will need to overcome serious hurdles—some would argue insurmountable hurdles—in order to reap the benefits that land reform has produced in other developing countries. Political will and grassroots support for land reform is strong, but the government will need to recognize and address many of the structural problems that have impeded previous reform efforts. Agrarian reform too often comprises a short period of extravagant promises followed by long periods of stagnation and setbacks. The institutions that scholars maintain as necessary for successful agrarian reform are in disarray in Bolivia. Political scientist Fabrice Lehoucq identifies “cronyism, corruption, and the general disregard for the rule of law...” as well as the inability of officials to convince their citizens to pay taxes or stop smuggling contraband goods as the causes of political and economic stagnation. Bolivia ranks 102nd out of 180 nations in Transparency International’s Corruption Perceptions Index. Weak rule of law, an impotent judiciary, arbitrary regulatory decisions, endemic corruption, a porous bureaucracy, and social unrest will impede the implementation of equitable land reform.

Morales has yet to explain how Bolivia’s fragile and easily corrupted bureaucracy will be reformed in order to carry out his ambitious land reform program. Without precautions to guard against abuse of power by corrupt officials, Morales’s entire reform platform will be undone. The social function doctrine, if too broadly interpreted, could be used to justify many questionable land seizures. The 1996 Agrarian Reform Law failed because the process for acquiring and redistributing land was not clearly defined and regulated. Officials have been unable to untangle the elaborate web of conflicting land titles and establish a functional land registry. Only 18 percent of the land targeted for new titling was certified. No agricultural census has been conducted since 1984, and misinformation abounds. As they currently stand, Articles 397, 398, and 399, which attempt to define the social function in the Bolivian context, are dangerously broad. It is unclear what checks would constrain the government’s actions in managing the land reform. In a troubling development, land reform officials targeted one of Morales’s key political rivals, seizing a 12,500-hectare ranch from Branko Marinkovic. Other large landowners in the southeastern Chaco region are fighting the expropriation of their own ranches in court.

In the absence of a clear, narrow definition of the social function, the state could in essence redefine the limits of its own power. The plight of Bolivia’s landless might be improved, but at the cost of the rule of law. Worse still, the abuse of these powers could make legitimate expropriation vulnerable to future “corrective” land reform if the political winds blow rightward. Subsistence farmers lacking the funds to fight a protracted court battle would find themselves once again victims—but victims of policies that were built on the shifting sands of politics, not the sturdier foundation of law.

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60 Mark Weisbrot and Luis Sandoval, “The Distribution of Bolivia’s Most Important Natural Resources and the Autonomy Conflicts,” The Center for Economic and Policy Research (July 2008) 2
Abusing such powers now would eviscerate the very safeguards that will protect the right to a dignified existence for future generations of Bolivians.

The example of eastern Bolivia’s Mennonite communities illustrates this point. In the past 40 years, numerous Mennonite communities immigrated to Bolivia, cut down jungle in eastern provinces, built settlements, and farmed soybean. While wealthy by Bolivian standards, these communities are a far cry from the “oligarchs” that MAS functionaries regularly proclaim to be the target of their redistribution. Currently, Mennonite communities are subject to inspection by the National Agrarian Reform Institute and must be able to demonstrate the social economic function of their land.62 But communities that have been able to demonstrate their land’s social function are evicted if their land purchases are deemed to have been illegal, even over the objection of local indigenous communities who claim to be profiting from their presence. Gerardo Martens, a Mennonite farmer interviewed by the New York Times, sums up the frustrations of living in this atmosphere of legal uncertainty: “We simply want to know what will happen to us and our land.”63

The failure of many previous land reform efforts in Bolivia and abroad was due in part to a lack of available technical assistance. Article 407 of the draft constitution outlines how the state will protect agricultural production, including the creation of insurance for rural farmers and a seed bank, technical education and assistance, infrastructure development, and the provision of basic services. But when Associated Press reporters visited the indigenous collective Pueblos Unidos in October 2007, donated tractors and generators had run out of fuel and were not being used by the community.64 It is unclear whether Pueblos Unidos is the exception or the rule in rural Bolivia.

Joaquín Saravia of the Universidad Mayor de San Andrés has pointed out that redistribution in the 1950s was thwarted when families who were awarded plots of redistributed land subdivided their property until the individual plots were no longer economically viable.65 Enrique Ormachea, an agricultural analyst with the Centre for Research on Labour and Agrarian Development, has identified an even more daunting challenge. Most of Bolivia’s poverty is concentrated in the western highlands, but much of the large estates that will qualify for redistribution are in the eastern lowlands (the land distribution of the 1950s targeted the large estates in the highlands, and there is little land remaining in the region that would qualify for redistribution).66 The government has not thus far articulated a plan to relocate and resettle families, which would be a massive undertaking fraught with possibilities for abuse or mismanagement.

In the previously cited Rural Development Institute study, Prosterman and Hanstad emphasize that expropriation and adequate compensation paid for expropriated land be justified by the state’s claim to eminent domain. They counsel against stigmatizing large landowners as enemies of the people. As a result of recent negotiations, Article 399, Section I stipulates that the ownership limits on land will relate to land acquired after the constitution goes into force and are non-retroactive. In deference to international custom, Article 401, Section II states that payment of just

62 “Alcalde de San Javier y ex funcionarios del INRA lotearon 85.000 hectáreas en Beni Trinidad,” ABI News Agency November 5, 2008
64 “Humble Beginnings for Evo Morales’s Sweeping Land Reform in Bolivia,” The Associated Press, January 13, 2007
compensation will be provided for any expropriated land.

Juan de Dios Fernández, secretary general of the National Agrarian Reform Institute, argues, “This government’s policies respect individual, community-owned, and collective property, while generating a sense of certainty and security. A central pillar of a country’s institutionality is guaranteeing legal security. If you have a property that was acquired either rightfully or wrongly, and which is larger than 5,000 hectares, I can’t take it from you retroactively. That would be an attack on the owner and we would be breaking the property rules of this society.”

Dios Fernández insists that his organization is cleaning up the land register, regularizing and legalizing property ownership, and identifying public land; however, he also sees the expropriation and redistribution of land owned by ranchers and large landowners that serves no economic or social function as one of his central responsibilities.

Yet Morales set the tone for political polarization in his inaugural speech, in which he promised Bolivia’s indigenous majority, “we will take power for 500 years.” The executive seldom takes responsibility for policy failures, choosing to blame forces beyond the control of the state—in Morales’s case, he often alludes to conspiracies involving the U.S. Paradoxically, the two most important provisions that legitimize the draft constitution’s land reform—those securing just compensation and ensuring the non-retroactivity of land seizures—are threatened by the revolutionary vision that is at the heart of Morales’s reform project. MAS is a complex amalgamation of various groups, but among their key constituents are Bolivia’s radical left. In the wake of MAS’s constitutional compromise with the opposition, these groups have rebuked the elements of the land reform intended to uphold the reform’s legality as well as minimize conflict, targeting the redistribution’s non-retroactivity. These groups see the constitution’s compromises, including the preservation of private property, as traitorous. Successful land reform will be contingent upon Morales’s ability to rein in the more radical elements of his coalition.

CONCLUSION: THE ILLUSIONARY CONSTITUTIONAL MIRACLE

Bolivia’s constitution was formally approved in January 2009. For the first time, Bolivia’s indigenous majority played a major role in the composition of their most sacrosanct laws. Ideally, this local ownership will give the document more permanence than previous discredited constitutions. Such an act of self-determination, long deferred, should be celebrated. However, the revelers should also guard against the intoxications of dreamy political promises. The Bolivia that has been created by the new constitution is a more inclusive nation. But inclusiveness alone does not confer legitimacy upon a legal charter; it must be informed by process, and by a state that is willing to be constrained by its rules and restrictions. In an interview with the magazine Nueva Cronica, Bolivian judge Gonzalo Mendieta warned against the temptation to trust in a “constitutional miracle” or great leader to institute progressive change in the country.


“La vision de la actual Constitucion es la base que pervive en el proyecto constitucional,” Nueva Cronica (November 7-20, 2008)
The Bolivian citizenry must be vigilant in ensuring that the rule of law is upheld and that the new powers bestowed upon the state to expropriate land will not be abused. Given Morales’s popularity, his growing cult of personality, and his masterful employ of the politics of mass mobilization, it seems unlikely that these checks on power will succeed.

Land reform has been demonstrated to promote economic development, and enshrining land reform in the Bolivian constitution will establish basic principles that mitigate future conflict between political factions. In relation to economic development, the government will need to recognize the tension between equity and economic growth in determining the extent to which the state will enshrine property rights or responsibilities. But the extent to which Morales clearly recognizes the limitations of principles—even constitutional principles—that lack capacity will be the real test of future land redistribution. At present, the National Agrarian Reform Service does not appear to be up to the monumental task that the constitution has laid out for it. The Morales government should immediately begin to create a reform program that will provide the Agrarian Reform Service with incentives for good governance, transparency, and accountability. The battle for equity will not be won with the adoption of the constitution; it will be won with the effective implementation of its vision by ethical public servants. Detailed records of each expropriation should be made available to the public, including the legal reasoning that justified the seizure.

Constitutionalism is a legal limitation on government. President Evo Morales has spoken much more forcefully and in much more detail about the new powers that the state will gain through land reform than the limitations to those new powers. If the Morales government is truly dedicated to constitutionalism, it should reactivate the Constitutional Tribunal as soon as possible, nominate judges that are approved by consensus in the legislature (thus ensuring that the opposition can reject any candidates that are not sufficiently independent), and pledge itself to abstain from political interference in the judiciary’s interpretation of the law.

The success of Bolivia’s land reform rests on the shoulders of Bolivia’s elites as well as the state. However, elites are rarely willing to give up land or property, and Latin American history has seen dozens of land reform programs that were outmaneuvered by the wealthy. Perhaps the current moment in Bolivia’s history is only a precursor to more radical change. Now, land reform wears the clothing of both constitutionalism and democracy; future crises may necessitate the exchange of these outward appearances for the unconstrained advocacy of radical revolution. As scholar Edward McWhinney reminds us, “No constitutional charter could have...saved Louis XVI or Marie Antoinette.” Regardless, the draft constitution is the product of compromise between formerly irreconcilable visions of Bolivia. In approving the constitution through popular referendum, Bolivia’s people—rich and poor, landowning and landless, Mestizo and indigenous—have committed themselves to a new understanding of national unity. Bolivia’s new constitution is an ethical and farsighted document. Its legitimacy will depend on the future conduct of the Bolivian state.

The day that Bolivia’s voters approved their country’s new constitution, President Evo Morales declared that the charter would “‘decolonize’ Bolivia by championing indigenous values lost since the Spanish conquest.” In his pursuit of equitable land reform—as well as his pursuit of justice writ large—one hopes that Morales will not forsake constitutionalism as a vestige of that era of conquest.

73 V. Jackson and M. Kushnet, eds., Comparative Constitutional Law (1999) 212
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