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Cuban Environmental Law: An Analysis from the International Right to Developmental Perspective

Ricardo Garcia  
Todd Howland*

I. INTRODUCTION

Since the 1959 revolution, the study of Cuban law has been extremely limited in the United States, as well as in most western nations. In 1980, the Harvard law library, whose collection of foreign legal materials numbers over five hundred thousand books, contained only books on pre-revolutionary Cuba.

The majority of works written on Cuban studies since the revolution

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Mr. Garcia and Mr. Howland were among the first group of North American law students to study at the University of Havana since the Cuban revolution. The majority of the primary research for this article was done in 1985 while they were studying in Havana.

have come from particular ideological schools which either favor or reject the current regime.² Few have taken specific aspects of Cuban law and analyzed them either on their own merits or against some other national or international criteria.³ For this reason, this paper offers both descriptive information to fill a gap for the western reader, and a critical analysis from an international legal perspective.⁴ It also gives a short sketch of relevant Cuban history, the Cuban legal system, and Cuba's social, political and economic systems.

This paper also describes the relevant international standards for the right to a clean environment and the emerging human right to development. The paper will then analyze Cuba's current implementation of these standards.

The focus is on Cuba's energy policy, specifically its decision to build nuclear power plants. Finally, this paper concludes with brief policy recommendations which the authors believe are most consistent with the human rights discussed, in light of Cuba's historical and ideological roots.

II.

PERSPECTIVE ON THE CUBAN SITUATION IN GENERAL

Less than thirty years old, Socialist Cuba is a new and developing country. Its laws, like the country are in their developmental stages. Before a true appreciation for the current law can be gained, its historical

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The only related article to Cuban environmental law is Levin, "Cuba's Emerging Ecology Movement," 1 Cubatimes 12 (Winter 1981). That article was a short three page summary of the awakening to some environmental issues in Cuba.


⁴ There is a popular misconception that socialist countries operate without the use of laws and legal systems. This article has been designed to displace this misconception with information about the Cuban legal system, focusing on the area of environmental law.
and ideological roots must be understood.\textsuperscript{5}

In 1959, Cuba, like most Latin American countries, was an economically underdeveloped nation. Today, Cuba is still a developing country, but it is now among the most highly developed countries in Latin America.\textsuperscript{6} The fact that Cuba is a developing country explains why the development of legal scholarship has taken a back seat to economic growth. This is not to say that legal publications are non-existent. They simply are not found to the extent, number, and diversity one finds in more developed countries.\textsuperscript{7}

"Environmental law," i.e., protection of the air, water, wilderness, and wildlife, has no direct counterpart in Cuban law. "Derecho del medio ambiente," not literally translatable, is a phrase calling for emphasis on environmental concerns and includes the popular conception of "environmental law." The law and its interpretation in Cuba has a more aesthetic connotation than a health orientation. This does not mean these concerns are mutually exclusive. On the contrary, they are very interrelated. The subtle difference in connotations must be pointed out because the simple translation of the words would not provide the proper foundation to analyze these concepts.

This paper compares and contrasts Cuban developmental and environmental law to the ideal (international law). Currently, no country operates within the ideal. This is not to say that Cuba's environmental law lags behind western countries. Given the possibilities for progressive law in Cuba, however, the authors are critical of Cuba's current system.

\section*{III. INTERNATIONAL ENVIRONMENTAL LAW}

Environmental problems exist to some degree in all nations, regardless of political, economic and social systems. Pollution, and the resulting demand for a cleaner environment are largely a function of the level of economic development, education and the distribution of population

\textsuperscript{5} A point Professor Butler of the University College of London stressed in his lectures on "The Comparative Approach to International Law," at the Hague Academy of International Law, July 8-12, 1985.


\textsuperscript{7} At the time of this research was completed, U.S.-Cuba relations had again deteriorated. This time with the instigation of "Radio Marti" broadcasts aimed at Cuba. This period of deteriorating relations between the U.S. and Cuba did not help the availability and access to the legal materials that did exist. Regretfully, much research was lost battling the automatic and understandable suspicion towards the authors because we were United States citizens. Thus, almost as much time was spent getting clearance as actually researching. Eventually, however, information was obtained. For a more extensive treatment of "Radio Marti" see supra note 1.
within these states. These factors influence the different economic and social priorities accorded environmental law. While some developed countries emphasize the benefits of a stable and healthy environment, considerable debate continues over these priorities in developing countries where environmental protection policies are often viewed as either unaffordable luxuries, or as part of a plot to further hinder third world development. This complaint is considered hollow by many development theorists who believe that environmental protection and development go hand in hand. International law places a duty on these states to provide an adequate environment, both for themselves and the international community.

International environmental law arises out of standards for the protection of individual and group human rights, and has become well established within human right standards. The preamble of the United Nations Charter, for example, sets out "to promote social progress and better standards of life and larger freedom." Further, the Universal Declaration of Human Rights, states that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing . . ." Additionally, the International Covenant of Economic, Social and Cultural Rights recognizes the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

International law is one of the major tools for environmental management. For many years, there has been ad hoc enactment of interna-

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9. Id. at 86.
tional agreements dealing with environmental issues. Before World War II, the only multilateral attempt to control pollution was an aborted attempt by the League of Nations to prevent discharge of pollutants by ships on the high seas.\footnote{Sohn, "The Stockholm Declaration," 14 Harv. Int'l L.J. 423 (1983).} Since then environmental law has developed slowly. The landmark \textit{Trail Smelter} case of 1944 held that:

\begin{quote}
No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or properties or person therein.\footnote{\textit{Trail Smelter} case (United States v. Canada) U.N. Rep., 3 Int'l Arb. Award 1905 (1949).}
\end{quote}

Beginning in 1960, a rapid succession of regional and global conventions covering various areas of the environment were held, culminating in the 1972 U.N. Conference on the Human Environment, in Stockholm.

The outcome of the Conference included the Declaration on the Human Environment, which solidified the relationship between basic human rights and environmental quality. The Declaration held that an adequate environment was a prerequisite to the enjoyment of human rights.\footnote{Declaration of the Human Environment, June 16, 1972, 48/14 U.N. Doc. A/Conf. 21 (1972).} Discussions in Stockholm resulted in the formation of principles for future state conduct with regard to the environment, the most important being Principle 21 which states that:

\begin{quote}
States have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own environmental policies, and responsibility to ensure that activities within their jurisdiction of control do not cause damage to the environment of other states or of areas beyond the limits of nation jurisdiction . . . \footnote{Id.} \footnote{Struthers, "U.N. Environmental Program After a Decade," 12 Den. J. Int'l L. & Pol'y at 270 (1983).}
\end{quote}

The conference also called for the establishment of institutional machinery to implement these principles. The United Nations Environmental Program (UNEP) was thus created, as a “small coordinating body to lead and direct environmental initiatives at the world level, and to coordinate and stimulate action by serving as a catalyst rather than as an executing agency.”\footnote{Struthers, "U.N. Environmental Program After a Decade," 12 Den. J. Int'l L. & Pol'y at 270 (1983).}

Subsequently in 1982, the Nairobi Session on the World Environment created an important and progressive legal concept in its Principle 10. Principle 10 states that:

\begin{quote}
The world community of states solemnly reaffirms its commitment to the Stockholm Declaration and Action Plan . . . [and] urges all governments and peoples of the world to discharge their historical responsibility collectively and individually, to ensure that our small planet is passed over to future generations in a condition which guarantees a life in human
These conventions demonstrate the desire of the world community to develop strict protection of the global environment while allowing nations to develop their own environmental and development policies within the specified bounds. However for third world countries like Cuba, the strong desire to promote economic development often comes into conflict with strict environmental protection.

IV. THE RIGHT TO DEVELOPMENT

Any discussion of environmental concerns in the Third World must address the issues of the level of development achieved by those countries and their accompanying right to development. The right to development as a human right for developing countries is an emerging concept, part of the so-called "third generation" of human rights. The right to development encompasses numerous concerns, and Cuba, as a developing Latin American, socialist country, has its own particular view concerning the theory and the practice of development and environmental concerns.

The right to development has been characterized as a right to "the realization of the potentialities of the human person in harmony with the community." It has also been understood as a process designed to create conditions in which every individual can enjoy and exercise all his or her human rights, including economic, social, cultural, civil, and political rights.

Today's theoretical approach to development reflects a shift from earlier development strategies which stressed economic development. Earlier strategies assumed that the sacrifice of civil liberties, equity and distributive justice was a necessary evil for developing countries, at least during a transitional stage of development. In contrast modern development theory comprehends the interrelated aspects of society. It strives to promote human dignity and a fair distribution of the benefits or development beyond the achievements of economic growth. A basic human needs approach represents an effort to establish practical priorities for the implementation of human rights which will be acceptable across cultures. It looks beyond minimum subsistence needs. This approach encompasses all those needs, both material and non-material, the

22. Id. at 284.
25. Id.
fulfillment of which is essential for self-realization.27

While many developing countries place greater emphasis on basic needs than on civil and political rights, the western world reverses these priorities. These two sets of rights are inextricably linked, requiring concurrent observance in the development scheme. Economic, social-cultural, and civil-political rights are all valued by individuals, even at very low levels of economic development.28 Civil and political rights are needed in order to implement reasonable development policies, which ensure economic growth, equitable distribution of wealth, and social and cultural rights.29

One of the most fundamental of civil and political rights is the right to meaningful participation.30 Because the individual is the principal beneficiary, the right must not be illusory. The individual should have the opportunity to participate in development decision making, and the implementation of such plans.31

V.

CUBAN PARTICIPATORY GOVERNMENT

Ever since the Cuban government adopted a new Constitution in 1976, the creation and development of laws in Cuba has been characterized by a great amount of citizen participation.32 This participation manifests itself in the legislative and electoral processes in different ways.

A. The Legislative Process

The Cuban legislative process can be generally characterized as highly participatory. Public policy decisions employ collective discussion of the issues involved, with a great amount of referendum style agreement. Through the system of Poder Popular (People's Power), local, municipal, provincial, and national issues are debated and implemented after lengthy discussion. The Cuban legislative process allows the people to affirm or reject the popular decision on any given issue.33

27. Id. at 172.
29. Id.
33. The electoral process in Cuba is not designed to allow the voter to select her preference
B. The Electoral Process

The "People's Power" system also provides for the election of representatives to 169 municipal assemblies of "People's Power." These representatives serve for two and one-half years and elect representatives to the provincial and national assemblies. These assemblies then appoint accompanying executive administrative bodies, and elect professional and lay judges for the court system.34

The system focuses on the importance of allowing people to constantly interchange ideas with their representatives. Article 62 of the Cuban Constitution grants each citizen "the right to file complaints with and send petitions to the authorities and to be given the pertinent response or attention within a reasonable length of time."35 Article 82 states that National Assembly delegates must:

... exercise their duties in benefit of the peoples' interest; stay in contact with their electors; listen to their grievances, suggestions, and criticisms; explain the policy of state to them; and periodically render to them the results of their actions ...36

C. The Judicial System

Following the revolution, Cuba reacted against the elitist legal system of pre-revolutionary Cuba. Popular tribunals were created, which emphasized decisions in accord with revolutionary spirit in an informal setting. Although both formal and informal legal institutions existed, the major emphasis was on the informal tribunal. Eventually, the need for reformalization of the justice system was felt. Consequently the two systems were merged into one, with both professional and lay judges participating in the decision making.37

Today, the Fiscacia (akin to the Office of the Attorney General in this country) is the agency responsible for the enforcement and supervision of a wide range of grievances and infractions outside the realm of elected officials. The Fiscacia's role in the judicial system is twofold: (1) It is the "Guardian of Socialist legality" under Article 130 of the Ley De Organizacion del Systema Judicial (Law of the Organization of the Judicial System), and (2) it exercises control over preliminary procedure under Articles 105 and 109(3) of the Ley de Procedimiento Penal (Law of Criminal Procedure).38

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34. The Constitution of the Republic of Cuba, art. 69. See also Brady, supra note 2, at 190.
35. Id. Art. 62.
36. Id. Art. 82.
37. For an extensive treatment of the changes in Cuba's judicial system, and an analysis of those changes. See Salas, supra note 3.
38. Van der Plus, supra note 3, at 35.
The Fiscacia has the power to monitor state agencies and other bodies. It also has the power to make inquiries, and investigate complaints; and, when impropriety is found, to take appropriate action to restore compliance with the law.\textsuperscript{39} These broad powers allow the Fiscacia to indict and prosecute all criminal actions, or to recommend administrative sanctions against the individual functionaries responsible for the crime.\textsuperscript{40} In civil, and administrative proceedings, the Fiscacia has the power to intervene as representative of the public interest.\textsuperscript{41}

\textbf{D. Mass Organizations}

Mass organizations in Cuba have developed as an additional means for individuals to address their common concerns. These groups play a significant role in Cuban participatory government.

\textit{1. Committees in Defense of the Revolution (CDR's)}

Originally developed to provide surveillance against post-revolutionary sabotage attacks, CDR's have since evolved into local neighborhood groups that provide a forum for individuals to voice either personal or group concerns, aside from legislative matters. The level of participation in the CDR's is high and their structure allows for citizen input into projects and concerns. CDR's also provide a means for implementing coordinated national projects.\textsuperscript{42}

\textit{2. Other Mass Organizations}

The Cuban legislative process also provides opportunities for the participation of mass organizations in the discussion of major proposals. Trade unions, student organizations, the Federation of Cuban Women and similar groups all consider reform proposals at the local level. The outcomes of these discussions are then sent to the original proposal writers, who then make changes and redistribute the proposal for further discussion. The process continues in this manner until a proposal which sufficiently represents the concerns of the people is achieved.\textsuperscript{43}

\textbf{E. The Role of the Communist Party}

Although the role of the Cuban Communist Party in the formation

\textsuperscript{39} D'Zurilla \textit{supra}, note 2, at 1280.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} Domiguez, "Assessing Human Rights Conditions," in \textit{Enhancing Global Human Rights} 64 (1979). \textit{See also Reed, \textit{supra} note 32.}
\textsuperscript{43} These groups had a great amount of input into the adoption of the 1976 Constitution, the development of a new Family Law code, wage policy, retirement policy and the organization of factory and farm production. Lectures, University of Havana Law School, June 16-18, 1985, by Professors Jose Parquea and Juan Vega.
and development of law is difficult to define, its influence remains extremely important. One author states that the "Communist Party is now more separated from administrative roles, and local cadres increasingly serve as 'transmission belts' for the conveyance of ideas, complaints, and policies between the people and the government."  

Another author attributes to Communist Party with perhaps the most important aspect of environmental law enforcement, the "balancing of resources" role, in order to organize and balance all the elements of society to serve the best interests of the country as a whole.

Combining the above elements of the Cuban method of popular participation, it appears that Cuba has achieved some participatory democracy for its people. The following sections discuss the development of Cuban environmental policy within a socialist framework along with the actual conditions presently existent there.

VI.

CUBAN POLLUTION CONTROL GOALS

The actual input of individuals into participatory government and the role that citizens' groups play in the development of environmental policy must be understood in the context of the overall pollution control goals of the individual nation. The methods for meeting these goals varies among countries. Pollution control goals are expressed through legislative standards which state the weight given environmental values relative to other social values. These standards may also be less important than the means chosen to implement those goals.

Most pollution control goals can be described as either conservative or rational. Conservative goals consider any pollution discharge as harmful to the environment. Rational goals are premised on the allocation of resources in a cost/benefit analysis. In general, environmental goals and substantive standards are related to a country's level of industry and its technological development. Regulatory strategies generally reflect the political, economic and social organization functioning in the country. A combination of conservative goals found in the Constitution, augmented by rational goals promulgated in environmental regulations, has become the basic environmental policy for modern day Cuba.

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46. Tarlock and Tark, supra note 8, at 95.
47. Id. at 89.
48. Id. at 95.
This combination is consistent with accepted socialist views towards the environment.

Theoretically, in socialist economics the same motivations to use and abuse the environment would not exist as they do in a capitalist country. Ideally, production in a socialist society would focus on the betterment of society, not simply profit, thereby, making the goals of environmental protection easier to meet. As discussed below, Cuban environmental law deals with this issue in a rational, although at times environmentally unsound fashion.

VII.
CUBAN ENVIRONMENTAL LAW

On the national level, all Cuban environmental law is based on the 1976 Constitution and contains both criminal and civil aspects. The Cuban Constitution is new and innovative in that it includes a provision relating to the environment. Article 27 states:

To ensure the well being of citizens, the state and society are the protectors of nature. It falls within the jurisdiction of the legally qualified agencies and of each and every citizen to watch over the cleanliness of the waters and of the air and to protect the soil, flora and fauna.

A. Civil Law

Practically all of Cuba's environmental law is based on civil law. Law No. 33, passed on February 12, 1981, supports Article 27 of the Constitution. Law No. 33 contains 130 articles dealing specifically with environmental protection. Each of these articles will eventually be supported by regulations that specifically lay out what is and what is not within the law.

The absolutist terms of the 1976 Constitution are not found in Law No. 33. Instead Law No. 33 assumes more of a balancing approach. Article 4 for example states:

The protection of the environment and the use of natural resources is the responsibility of the state, the society, and the individual. They have an obligation to strive for the optimal condition of the environment, in ac-

49. See Levin, supra note 3 at 12.


51. Law No. 33, Gaceta official, Feb. 2 (unofficial translation). See n.81.

52. Id. Currently many of the articles have supporting regulations, but the exact number of articles with supporting regulations was unavailable.
Article 74 of Law No. 33 is an example of an article that has fairly extensive regulations. It prohibits any hydro project which will significantly change the environment. The regulation supporting article 74 was passed in 1984. It grants the Minister of Basic Industry authority to enforce the law. Under the regulation's provisions the following requirements must be met before a hydro project can begin:

1) A geological study must determine if there will be any irreversible effect to the environment.
   a) Irreversible harm is defined not in absolute terms but is limited to the following interests: fishing, tourism, military, security, interior order, and maritime traffic.

If the study finds irreversible harm to any of the enumerated interests, the hydro project is permanently shelved.

Article 74 of Law No. 33 also contains prohibitions on the extraction of sand. Resolution 936 carves out an exception to that law if:

1) the extraction is 400 meters from the coast (water) line.
2) the project receives certificates of approval from the ministries which may be affected.
3) a geological study by the Cuban Academy of Science approves the project after considering various factors;
4) upon granting the exception, a set of inspectors is formed to enforce the regulation; and
5) The provision in the regulation can be overridden by the Council of Ministers.

Basic themes can be drawn from the civil law set out thus far. The Constitution tends towards absolutist protection or conservative goals. In contrast, law No. 33, which was designed to give the environmental law a real foundation, is couched in development language and reflects rational goals. Further the individual resolutions seem to offer a number of exceptions to the stricter constitutional provision and Law No. 33.

53. Id. art. 4, at 255.
54. Id. art. 74, at 260.
55. Resolution No. 936, Gaceta official, Nov. 21, 1984, at 1347 (unofficial translation).
56. Law No. 33, art. 74, supra note 51.
57. The Factors the Cuban Academy of Science considers are:
   a) the entity doing the extraction.
   b) reasons for extraction.
   c) possible alternatives.
   d) length of time required for the project.
   e) specified use.
   f) volume to be taken.
   g) the Lambert system.
58. Resolution No. 936, supra note 58.
This points to a trend in Cuban law away from absolutist protection of the environment if economic growth will be affected.

B. Criminal Law

Cuba's criminal law provisions concerning environmental law are found in its Criminal Code. For example, an individual may face imprisonment from six months to three years for contaminating any body of water that affects the health of game birds or fish.59 Another example is that a person faces a fine of 1,000 to 10,000 cuotas for discharging any substance harmful to the national economy in territorial waters.60 The criminal code also provides criminal sanctions for devastation of forests, illegal exploitation of Cuban resources by a foreigner, and illegal fishing.61

C. Enforcement and Actual Conditions

In Cuba, those entities which are affected by the law are responsible for the development of regulations through the legislative process, beginning with the CDR's or other interested groups; e.g., the Worker's Union or the Federation of Cuban Women.

In Cuba the enforcement mechanism varies depending on who is violating the law, and who it affects.62 For example, those matters concerning two production organizations or firms would be subject to the jurisdiction of the National Arbitration Board.63 Those matters affecting the health of a large number of people, would be under the jurisdiction of the Department of Health.64

Cuban laws are explicitly tied to the socio-economic framework, political structures and realities of the country. This interrelatedness is noted in the following quote which highlights the political and class obligations of the courts in the Cuban legal system:

Marxism-Leninism rejects the theory of 'blind justice' which seeks to hide the class nature of the state... We take as our starting point the principle that in our society there is a single power, the revolutionary power, exercised in the interests of the working classes.65

Enforcement and development of law is left to the people. Mecha-

59. Contamination of water, Ch. 19, Codigo Penal de Cuba, art. 287, 53.
60. Id. art. 288. Cuotas are variable amounts of money which are imposed as fines by Cuban courts upon consideration of applicable aggravating or mitigating circumstances.
61. Id. art. 289.
63. Id. See also Evenson, supra note 3, at 395.
64. Id.
nisms exist to create and enforce environmental standards, but many people do not understand the importance of the environment. Cuba is a developing country, not only in economic terms, but also in terms of participatory democracy, which is itself a function of the educational level. In Cuba the average education level is continually increasing. However, given the current minimum education level of the eighth grade, one can imagine the difficulty for concerned groups to initiate and develop environmental law given its complexity.

There appears to be a current mass education campaign in Cuba to increase awareness with respect to the value of the environment and its various problems. This is seen in the numerous articles and advertisements in magazines and newspapers. Billboards are also used to communicate these values and ideas.

Unfortunately the ad campaign and efforts in environmental awareness education have only been partially successful thus far. Although most Cubans recognize the importance of the environment, they may personally litter and contribute to the air pollution problem. For the most part, the connection has yet to be made between their own individual efforts and an improvement in environmental quality.

Without a strong environmental or holistic educational basis to draw upon, the citizen participant is unlikely to instigate the regulations and laws that are needed to support the absolutist position posited in the Cuban Constitution.

1. Localized Problems Handled by the Neighborhood CDR's

An example of the above problem can be found in the following scenario. On the outskirts of Havana there is a paper mill which dumps its waste into a nearby river. The river then empties into the ocean. Both the paper mill and upstream agriculturalists use the river. Because a substantial amount of river water is removed for agricultural purposes the downstream flow of the water approaches stagnation. As a result when the waste from the mill is dumped into the river, it is not automatically diluted by the river and carried off into the sea for further dilution. Instead the waste stagnates and creates a stench in the vicinity of the mill.

In this case the neighborhood CDR decided there was a problem,

66. Brady, supra note 65, at 17.
68. See, vol. 77. No. 23 Bohemia (Junio 7 de 1985).
69. Billboards are commonly used in Cuba to express a message of political and social importance.
70. Interview with High School level teacher at the prestigious Lenin School, outskirts of Havana, Cuba, June 21, 1985.
and approached the municipal People's Power with a resolution. Two alternatives were presented. Either 1) close the mill, or 2) decrease water usage by upstream agriculture in order to increase the river's downstream flow. Ultimately both alternatives were rejected, the rationale being that either alternative would hurt the entire economy in order to help only the affected neighborhood.71

This rationale raises some serious questions, since it only considers the production side of economic growth. In evaluating the situation as a cost of production borne only by those residing in the neighborhood, while the production process benefits the whole society, the intrinsic unfairness of the situation becomes clear. In order to be consistent with socialist ideology, both the costs and the benefits of production should be shared equally by all in society.72 The fact that the People's Power organization decided that the burden of the paper mill's waste was to be borne by the neighboring residents hopefully is attributable to a lack of understanding of a complex environmental question, rather than a value judgment which is incongruent with Cuba's ideological foundations.

Without an increased grassroots level awareness, the scenario will most likely be repeated because the people of Cuba control what laws are created and how they are implemented. In other words, a classical case of the ill-formed majority making decisions that negatively affect society could be repeated. The idea that it is "their problem and not ours" is uncharacteristic of socialist ideology, but without the environmental education and sophistication to make the connection Cuban citizens and their environment will suffer.

2. Environmental Problems Handled by the National Arbitration Board

A major portion of Cuban environmental law lies within the realm of the National Arbitration Board. The Board applies Cuban environmental law to large business entities. A Cuban environmental resolution mandates that business entities or individuals that have damaged the environment must pay the costs to restore, or clean up the damage to the environment.73 In this example, the interaction of the five year plan for economic growth and environmental law is apparent.

71. Interview with an affected neighbor and CDR member, June 13, 1985, Havana, Cuba. In some cases the Council of Ministers may override and ask for rediscussion of certain issues resolved in the CDR's and the Peoples Powers Assembly. Unfortunately, among the Council of Ministers there is no Ministry of the Environment, or a Ministry willing to argue in favor of the environment. Thus, this method of overturning an ill-informed CDR or People's Power decision is left without much chance of success.


73. Resolución No. 6318, Gaceta Official, Nov. 29, 1983 at 766 (unofficial translation).
Approximately fifteen years ago a mining firm devastated a tract of land while extracting minerals. Recently a forestry company was to begin to use the land to provide a timber source for Cuba. 74 According to the National Arbitration Board, and in accordance with Resolution No. 6318, the mining company was to pay to revitalize the land and restore it to a productive state. Toward this end the mining company was also made to budget accordingly within its five year plan for the restoration. Thus, within its budget the mining company was to request (K) amount for restoration and (Z) amount to meet its production quota. According to the law when the cost of the cleanup grows more expensive than anticipated, resources earmarked for production can be used for the clean-up, even at the cost of the firm falling below its production quota. 75

Of course the balancing process does not always favor the environment. Numerous factors are necessarily considered and the decision of whether to apply the excess cost provision provided by law is determined on a case by case basis. 76

VIII.
IS CUBAN ENVIRONMENTAL LAW WITHIN INTERNATIONAL LEGAL PRINCIPLES?

A. Origins and Content of Cuban Environmental Law

It is interesting to note that Cuban environmental law, while still in its development stages has the potential to become one of the most advanced and progressive bodies of environmental law to date. Article 27 of the Cuban Constitution was modeled after the 1972 Stockholm Declaration on the Human Environment. 77 The Stockholm Conference and its principles had great impact on the formation of environmental law in Cuba. 78 Article 27 states:

to ensure the well being of citizens, the state and society are the protectors of nature. It falls within the jurisdiction of the legally qualified agencies and of each and every citizen to watch over the cleanliness of the waters, and of the air and to protect the soil, flora, and fauna. 79

One could interpret this article to be within the most progressive doctrine in international environmental law today. Principle 20 of the Nairobi Session on the Environment which states:

the world community of states solemnly reaffirms its commitment to the

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74. See supra note 62.
75. Resolución 6318, supra note 73.
76. See supra note 62.
77. The Constitution of the Republic of Cuba, art. 27.
78. Lecture on International Law by Professor Miguel A. DiStefano-Pisani, University of Havana, Cuba, June 29, 1985.
Stockholm Declaration and Action Plan . . . and urges all governments and people of the world to discharge their historical responsibility collectively and individually to ensure that our small planet is passed over to future generations in a condition which guarantees a life in human dignity for all.\textsuperscript{80}

Law No. 33 and some of the regulations that have been adopted seem to couch the absolute perfectionist language of Article 27 of the Constitution in language following certain sacrifices of the environment for the sake of economic growth:

[T]hey have an obligation to strive for the optimal condition of the environment, in accordance with the developmental activities of the country . . . \textsuperscript{81}

Even though Law No. 33 and its regulations allow for certain sacrifices of the environment, these occasions when economic growth outweighs absolute protection of the environment are explicitly enumerated. For example, Resolution 6318 lays out an entire process which must be completed before an exception to the absolute protectionism is made.\textsuperscript{82}

Considering the whole body of Cuban environmental law (the Constitution, the laws, and their regulations), it seems to be well within the international environmental law framework. This framework is set out in Principle 21 of the Stockholm Declaration:

States have in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.\textsuperscript{83}

\textbf{B. Influences Upon the Implementation of Cuban Environmental Law}

While the body of Cuban environmental law is well within international legal standards, the reality may not be.\textsuperscript{84} Simple observation indicates that there may be a gap between the rigid and progressive environmental laws in Cuba and reality. Cuba's plan to build nuclear power plants is one disturbing factor.\textsuperscript{85} The operation of nuclear power plants and nuclear waste storage facilities creates a risk that may violate customary international environmental law and principles of the Stockholm and Nairobi Declarations.\textsuperscript{86}

\textsuperscript{80.} Struther, \textit{supra} note 21.
\textsuperscript{81.} Law No. 33, \textit{supra} note 51.
\textsuperscript{82.} Resolución 6318, \textit{supra} note 73.
\textsuperscript{83.} 14 Harv. Int'l L.J. 423, at 485.
\textsuperscript{84.} Interview with Cuban high school teacher, \textit{supra} note 70.
The crux of the problem is the lack of an environmental-consciousness among the people. This controls what laws are written and how they are enforced.

1. **Role of the Communist Party**

If in fact the Communist Party makes the resource balancing decision for society, the environment could be negatively affected. People gain membership into the party by being the hardest or best working employees, not necessarily those with the purist revolutionary zeal (for the most part, however, the two are usually equated). If in fact the party members are the hardest working, considering the current system of personal economic incentives, the Communist Party will tend to be composed of the highest paid workers. It would seem to follow that Communist Party members have the most personally to gain by increasing economic growth without regard for the environment. According to Che Guevara, the party’s main function is to educate the people. Education would provide a basis for the people to make their own value judgments and balances. If Che’s view is the reality, there is no inconsistency between environmental protection and the role of the Communist Party.

2. **Monetary Incentives**

It would seem to be an easy step to integrate respect for the environment into one of the nation’s goals and thus into everyone’s consciousness. Yet under the current system of incentives, the task of making the protection of the environment a part of each individual’s value is much more difficult. Each individual who understands the direct connection between increasing productivity and reward, may find the connection between their actions and some intangible goal, like the protection of the environment, a difficult one to make.

The difficulty lies in the fact that individual economic motivations lead to a consumptionist orientation. It is this consumptionist attitude, which is present in all western countries, that makes the individual internalization of the value of environmental protection difficult. It focuses on economic growth, rather than individual and group development. For example, each time an individual firm acts in accordance with strict environmental standards some resources must be protected. These resources could have been used to better the individual or firm’s financial situation. Thus, a tradeoff exists between immediate economic self-bet-

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87. Cannon, "Democracy in Cuba."

ternalment of the individual and the societal short and long-term benefits of a clean environment. The result of using individual economic incentives to build a great economic base for communism has made the task of internalizing the value of environmental protection and individual development seem as difficult in Cuba as in western societies. The increased demand for consumer goods brought about by the monetary incentive system replaces the goal of improving the quality of life for all, with that of increasing the material standard of living for a few.

Some authors argue that without some kind of personal individual economic incentives there will be no economic growth. There is a total trade off between the societal goal of equal economic distribution and economic growth. Other scholars argue that the trade off is not absolute and that economic growth can occur, given the proper socio-economic framework, without individual economic incentives which lead to an unequal distribution of income. Analogously, economic growth can occur in a country with strict protection of the environment, but certain educational and economic factors must be present; e.g., adequate living standards and appreciation of long-term protection of the environment and true development.

Thus economic incentives seem contradictory, but somehow necessary to the building of communism within the “Great Debate.” The use of individual economic incentives has created a dilemma between individual gain vs. societal gain. Education, to a certain extent, has emphasized the connection between economic growth of society and increased personal well-being. However it has failed to make the connection between a clean and healthy environment, growth of society and personal well-being. This dilemma, combined with the lack of individual awareness of environmental concerns, creates more and more environmental problems as the responsibility for the environment is passed increasingly to the populous.

3. **International Economic Pressures**

From the international trade perspective there is another possible rationale for Cuba’s emphasis on economic growth. While Cuba does have some foreign debt, it is not strapped like most Latin American

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countries with tremendous debt. The International Monetary Fund (IMF) and other similar organizations have not imposed austerity measures on Cuba, which would tie Cuba to a certain crop export. Even so Cuba has placed itself on an austere course of development to facilitate payment of the Cuban debt. This self imposed austerity could help provide an answer to why sheer economic growth as opposed to development is so important to Cuba, and other Latin American countries.

Cuba's focus on economic growth also has to do with the fact that Cuba is part of the competitive, international economic community. Cuba, as a less developed country, is automatically at a disadvantage in world trade, and like many underdeveloped nations, searches for routes to equalize their economic position with developed countries. One such route is the sacrifice of the environment.

If this is in fact a rationale, the solution lies in international law. The solution most congruent with the New International Economic Order, is that of making the industrialized states bear the costs of improving environmental standards in developing countries. Another possible solution is the adoption of realistic and complete international environmental legal principles to put states on the same economically competitive plane.

Most authors and Cuban citizens believe the road to communism is slow, and there will be mistakes along the way. The problem is that with the environment there is no room for mistakes. With the development of nuclear power, one accident and the community, the region, the country, and even the world could be negatively affected for thousands of years.

C. Case Study—The New Cuban Energy Plan—Is It Within Environmental Legal Standards?

Unfortunately Cuba is currently making one of these mistakes, by developing nuclear power. In this case Bertrano Silverman's criticism of revolutionary societies is appropriate: "Self serving ideology has too frequently been substituted for critical study."

If the plan is a product of the democratic process it lends support to

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92. Interview with Fidel Castro, President of the Republic of Cuba (from "El Día," June 8, 1985), 43 Guild Prac. 33.
93. Id.
94. Id.
the theory that individual decisionmakers in Cuba, who do not possess an environmental consciousness, have a tendency toward opting for the alternative that will result in a perceived short-term economic gain, but may eventually negatively impact the society, both in terms of economics and true development.

The plan calls for three nuclear power plants to be built in Cuba.\textsuperscript{99} It cites the lack of natural resources and the slow technological improvements of alternatives as the major rationale for opting for nuclear power.\textsuperscript{100} The plan which is ninety-one pages in length, deals mainly with the need for a new energy source, and the capabilities of nuclear power. The plan mentions the word environment twice.\textsuperscript{101} It never raises the issue of whether adoption of nuclear power was within Cuban or international environmental law.\textsuperscript{102} The plan pushes aside the incredibly complex and controversial issue of the production and disposal of nuclear wastes with one not so reassuring sentence; which basically states that Cuba is a socialist country, and therefore, it is somehow better equipped to handle nuclear wastes safely.\textsuperscript{103}

Unfortunately for Cuba nuclear wastes do not understand ideological differences, nor boundaries of states. Nuclear wastes will present health risks for thousands of years.\textsuperscript{104}

Under current technology Cuba cannot guarantee that the radioactive wastes it creates will not at some time migrate to another country, exposing those citizens to the health risks of radioactivity. The accident at Chernobyl is an example of radioactive migratory capacity and effect, and how blind faith in technology and future discoveries can have deadly consequences.\textsuperscript{105} Cuba cannot guarantee that negative transboundary effects will not occur, thus, the customary international legal principle of sic utere tue ut alienum non luedas,\textsuperscript{106} and article 21 of the Stockholm Declaration may be violated.\textsuperscript{107} One can even construe the production of

\textsuperscript{99} F. Castro, \textit{supra} note 85.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} It should be noted that Cuba's treatment of nuclear power is no different than that of the international community. For the most part nuclear regulation has been the function of a body other than the national or international environmental organizations. See Hasselman, "Do We Need New IAEA Safeguards?," 27 German Y.B. Int'l L. 259 (1984).
\textsuperscript{103} \textit{Id.} This is the same argument used by the Soviets before Chernobyl. With the repercussions of Chernobyl, such a statement no longer retains any validity. See Diamond, "Chernobyl Causing Big Revisions in Global Nuclear Power Policies," New York Times, Oct. 27, 1986, at 1, Col. 1.
\textsuperscript{106} \textit{Trial Smelter case, supra} note 18.
\textsuperscript{107} Soh, \textit{supra} note 17.
nuclear wastes as a violation of Article 27 of the Cuban constitution, which mandates that the state and society are the protectors of nature in order to ensure the well being of its citizens. The production of nuclear wastes threatens the well being of citizens, and creates a situation where the natural system runs the risk of disruption for hundreds of thousands of years. As one scholar warns:

although it may well be the safest place on earth . . . surely something will go wrong, sometime, somewhere while the radioactive waste is shipborne or during its burial—and the consequences will be apocalyptic.  

D. Impact of Overlooking the Interconnectedness of Development on Society as a Whole

Using energy sources such as tidal, solar, and wind is consistent with the ideological basis of communism. Those resources are not physically scarce nor does some state mechanism control them, resulting in the domination of one individual over another. At least in the area of energy production, short term economic growth has blinded Cubans from seeing the ecological and economic folly of nuclear power. The decision to use nuclear power supports a Latin diplomat's comment about Cuba, that in Cuba today "ideology is taking a back seat to economics," but unfortunately for Cuba their economics is short-sighted.

In analyzing the Cuban energy plan to discover whether it falls within Cuban environmental law and Article 27 of the Cuban Constitution, the discrepancy between the plan and the law is vast and obvious. This result is antithetical to the hypothesis of some authors who posited that "the most important thing about the provisions of the Cuban Constitution is that they are real and enforceable. They are not hollow promises." The people of Cuba must look at the energy plan and reveal the fact that it does turn Cuban environmental law and its constitution into hollow promises.

The future of Cuban environmental law is full of possibilities. First and foremost there must be a grassroots awakening of the people of Cuba to the importance and complexities of the natural environment. Once the people understand the interrelationship of the environment and their actions, positive steps can be taken toward true development. For example, in the local chapters of the CDR's or the work place, Cubans could

108. The Constitution of the Republic of Cuba, art. 27.
111. Cannon, supra note 45.
initiate environmentally sound programs, and facilitate the creation and enforcement of environmental law.

A novel but feasible approach to improvement of the environment in Cuba would be to allow Greenpeace or some Cuban counterpart of such an organization to operate. The creation and operation of such an environmental organization would be a positive development according to Fidel Castro.

The mass organizations are the great school that develops the consciousness of millions upon millions of workers, men and women, the aged, the youth and children...they make it possible for the party to keep in touch with the feelings, problems, and opinions of every sector of the population whose specific interests they defend and represent.112

A mass environmental organization would allow Cuban citizens through a specialized environmental arm to more effectively uphold the constitutional mandates to watch over the environment, and more importantly it would provide the needed consciousness raising for the Cuban people.113

Such organizations could use the court system to protect the environment under current Cuban law.114 A mass environmental organization could join with the office of the Fiscacia to bring suit when certain actions appear to have negative effects on the environment, because the Fiscacia has a duty "to represent the public interest in any cases in which it must participate in accord with the law."115

Another suggestion would be for Cuba to form a ministry of the Environment which could actively coordinate urban planning, energy plans, and environmental concerns. They could do this by elevating the status and authority of COMARNA. The environment, like economic planning, is interrelated to almost everything in society. An agency could better deal with this complex interaction by giving it their full rather than their partial attention.

VIII.

CONCLUSION

Cuban developmental and environmental laws are not perfect, but they are well within international standards. Unfortunately, enforce-
ment and application lags behind the positive strides made in the written form of the law.

One must be cognizant of the fact that Cuban law and traditions are based on the western philosophical school. To what extent environmentalism is philosophically compatible with western philosophy is an area of debate. One philosopher has said:

We are in a period of perpetual turmoil, in which we have to challenge the limits of the analytical and empiricist comprehension of the world as we must work out a new conceptual and philosophical framework in which the multitude of new social, ethical, and ecological, epistemological, and ontological problems can be accommodated and fruitfully tackled.116

Current day Marxists are split as to the role of environmentalism within Marxism. One school rejects environmentalism as a ploy to keep underdeveloped countries underdeveloped.117 The other school believes that individuals are an integral part of the world ecosystem, and all actions must be cognizant of that basic relationship.118

Even the most educated in Cuba, like any other country with a western philosophical base, have only a cursory knowledge of eastern philosophy of an appreciation for a society where development means having few material goods, yet there is affluence.119 Some of Cuba's leaders have an understanding of a philosophy that could lead to an environmentally sound state. Fidel Castro said:

What we have done in the twenty-six (years) may be nothing compared to what we can do, especially if we measure what we do not in quantitative but qualitative terms, in terms of good sense and good efforts.120

The quantitative and qualitative distinction is very important in the area of development and of environmental soundness. The production of cars may contribute to the Gross National Product, but also has negative effects on a city, e.g. air and pollution. Constructing a city utilizing urban planners cognizant of environmental concerns may reduce the demand for cars resulting in a decrease in car production & GNP. So the result could be a clean environment in the quality of life, while GNP (the usual indicator for the standard of living) has declined. The right to development, including the right to a clean environment, is a reaction to the previous overemphasis on quantitative measurement. In some areas Cuba has already placed a greater emphasis on quality of life than on economic growth. Cubans made the political decision that health care

117. Tarlock & Tarak, supra note 8.
119. M. Sahlins, Stone Age Economics (1972) see, e.g., Ch. 1, "The Original Affluent Society."
120. F. Castro, This Must be an Economic War of All the People (Dec. 28, 1984).
and education were more important than short-term economic growth. The result has been that Cubans enjoy among the highest levels of health care and education in the Americas (in some areas rivaling their more economically developed neighbors). Those decisions will continue the long-run quantitative and qualitative aspects of Cuban life.

Whether such precedents will eventually dominate Cuban society is a difficult question, and has long been a subject of debate. Che Guevara, more than any other Cuban leader or theorist advocated putting ideological pureness before all other concerns. For example, Che Guevara was willing to risk the problems of short-run economic inefficiency in order to create institutions more consistent with socialist consciousness. Guevara also realized that economic growth and production in some instances is meaningless.

It is not a question of how many kilograms of meat, or how many imported things can be bought, but whether the individual feels greater fulfillment, inner wealth.

The ideas of Che Guevara, and Fidel Castro provide a philosophical and ideological basis for environmentalism in Cuba. Cuba's current environmental law is among the most progressive in the world. It is theoretically possible for Cuba to be an example of true development to the world community.

In the aftermath of Chernobyl, Cuba should take the opportunity to critically analyze its plans for "development," including its energy plan. For true development, including the right to a clean environment, Cuba must evaluate its policies in ideological terms congruent with the will of the informed citizenry, as opposed to short-term band-aid type "solutions."

121. B. Silverman, supra note 98.
122. Id. at 350.