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Cuban Expropriation Legislation in the Latin American Context

Steven E. Hendrix*

Did Cuba illegally expropriate US property? Did the Cuban agrarian reform represent theft on a massive scale? Such questions are understandable, given the partisan research in recent years and Cuba's tense relationships with other countries, most notable in the recent Helms-Burton legislation in the United States. However, on closer examination, the Cuban case reveals a more nuanced set of facts. Cuba's legislative framework for agrarian reform was in large part consistent with other countries' laws which had sought to reverse fraudulent seizure of land from the poor by the rich, to restore a more equitable distribution of property and to promote productivity, in accordance with a 'social function' for land. This article shows Cuba's agrarian reform legislation to be typical of that in the Latin American region.

Cuban legislation in the regional context of the agrarian reforms

In much of Latin America, opposition to large estates (*latifundios*), on both equity and productivity grounds, is of such national importance that it is often included in the constitution. In Bolivia, for example, Article 165 of the Constitution (2 February 1967) states that all land is of original state ownership ('*dominio originario de la Nación*'), and Article 166 goes on to declare that it is only through work that one obtains ownership of property. In Chile, paragraph 2 of Article 24 of the Constitution (21 October 1980) states that the social function of property covers all requirements of the nation's general interests, security, public use, health, and the conservation of the environmental patrimony. Colombia's Constitution states that the social function of land also includes an ecological mission. In Uruguay, Article 32 of the Constitution (1970) recognises property as an inviolable right, but subject to laws advancing the general interest. Venezuela's Constitution has a similar provision (Art. 105). Furthermore, 'social' policy dictates that whoever works the land should also

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own it as a means of promoting equality of ownership and the elimination of peasant exploitation.

'Social function', as used in Latin American agrarian law, is a shorthand, catch-all term meaning that land should be used to promote social and economic development, and not viewed or used simply as a market commodity. For example, legislation in the Dominican Republic discusses which lands ought to be and can be seized under laws related to quotas, untilled land, large rural estates, and recovery of state lands (Decree 2960 of 11 May 1985 in *Gaceta Oficial*, 15 May 1985). Spain also recognises the concept of the 'función social'. An equivalent concept ('*Bonner Grundgesetz*') is found in Germany (Art. 14-2 of the Constitution), and in Italy (Art. 832 of the Civil Code) (Romero, 1991: 83-7). In Guatemala, where the 1952 Arbenz land reform was quickly reversed, the constitutional provision on property does not mention the words 'función social'. However, it does state that property owners can use and enjoy their property in a way that promotes 'individual progress and national development to the benefit of all Guatemalans' (Art. 39 of the Constitution).

In Cuba, Article 87 of the 1940 Constitution recognised the existence of private property within the broader framework of a 'social function' of land. Defining land as having a 'social function' would mean that the person who personally and directly works the land owns it. This is quite apart from the documentary owner, who ceases to own the land if his use of it does not conform to the social function. This concept of 'land to the tiller' fits well with other Latin American jurisdictions.

With Castro's seizure of power in 1959, a new constitutional framework, the 'Fundamental Law', came into effect, reinstating provisions of the 1940 Constitution regarding property ownership (Navarrete-Acevedo, 1984: 84). One of the goals of Castro's revolution was the restoration of the 1940 Constitution, which Batista had suspended. Some Castro supporters contend that the 1959 Fundamental Law updated or modified the 1940 Constitution rather than replacing it. According to this theory, Cuba was supposedly governed by the 1940 Constitution until 1976, when the new socialist Constitution came into effect. Castro supporters distinguish between Batista (whose coup was unconstitutional) and Castro by asserting that Batista seized power in order to loot the country, while Castro assumed power to carry out the mandate of the people for a revolutionary programme (D'Zurilla, 1981: 1239-40).

Article 87 under the Fundamental Law, like Article 87 of the 1940 document, reaffirmed the 'social function' of land (D'Zurilla, 1981: 1223). In Cuba, as in most other Latin American agrarian reforms, land grants (*dotaciones*) are provided subject to certain conditions, basically as ways of guaranteeing that the 'social function' works. The idea of granting property subject to conditions is common throughout agrarian reforms, not only in Cuba and Latin America but in Africa as well. In Africa, a leasehold system is commonly thought to be more consistent with indigenous tenure models which recognise tribal or other

community interests in land. The state is viewed as the successor to the tribe, exercising its land allocation prerogatives. Where the state consists of a single tribe or ethnic group and the chief or king of the group is the head of state, the lease may simply be a new legal instrument for exercising traditional powers to allocate land (Bruce, 1989: 9). In the former Zaire, Article 80 of the General Property Law (1973) states that land is owned by the government, which in turn can grant concessions, even perpetual concessions (the right to enjoy the land indefinitely), as long as certain legal conditions are satisfied (Riddell et al., 1987: 13). The Latin American '*dotación*' may also be compared to the English common law concept of a 'determinable life estate with a restraint on alienation', in which a beneficiary owns the property for life (and thus cannot pass it on through a will or through intestacy), so long as s/he farms or uses the land, but may not sell or transfer it.

Admittedly, a '*dotación*' is clearly not a fee-simple interest in land. Agrarian reform legislation in Ecuador, Honduras, Peru and elsewhere specified that the beneficiary had the right to use the property while s/he worked the land. If the land was abandoned (or not used, thus violating the 'social function'), it could revert to state control and ownership. In Peru and Venezuela, for instance, the beneficiary usually could not mortgage the land, since s/he was not the fee owner. Sometimes the land could also be passed to heirs through wills or intestacy, assuming that the subsequent holders continued to use the land in conformity with the government's social objectives, as is the case in Venezuela. For example, prior law in Peru required governmental authorisation before the mortgage, transfer, or sale of agrarian reform property (Art. 86 of the Peruvian Agrarian Reform Law). In this sense, the Cuban property legislative framework can be seen to be consistent with that of a wide group of nations.

In Cuban agrarian law, as elsewhere, *dotaciones* are distinct from other forms of landholdings contemplated in the civil codes. First, *dotaciones* are not to be confused with usufructs. A usufruct is a civil code equivalent to a right to use and enjoy the property of another, referred to in Spanish as a *usufructo*. While a usufruct can be bought, sold, inherited, or transferred, a *dotación* cannot. Furthermore, the *dotación* has only one owner and no one else can use the land, whereas with a usufruct, one person owns the land while another has the right to use it. Secondly, the *dotación* should be distinguished from the emphyteusis, which is basically a long-term lease with a requirement to improve the land, allowing the right to use and enjoy the land as if it were owned outright. Thirdly, the *dotación* is different from an antichresis, or a loan in which the creditor is given access and permission to use the good held as collateral, usually a house. Finally, the *dotación* should also be distinguished from a rental agreement and from sharecropping (Casanova, 1990: 254-5).

While expropriation for agrarian reform was an important way of gaining land for redistribution, it was not the only mechanism: confiscation of property was also an option. Historically, Cuban property law has been fairly

conventional. Article 24 of the 1940 Constitution prohibited confiscations of property:

Confiscation of property is prohibited. No one can be deprived of his property except by competent judicial authority and for the justified cause of public or social utility, and always after payment of the corresponding indemnification in cash, as judicially determined. Non-compliance with these requirements will not change the right of the individual whose property has been expropriated to be protected by the courts, and, if the the case is so determined, to have restitution of the property.

The reality of the cause of public utility or social interest, and the necessity for expropriation, will be decided by the courts in case of contest.

It is this last provision that allows for expropriation of property for public use, a main tenet of Latin American agrarian reform legislation.

The first amendment to the 1940 Constitution was published on 13 January 1959, introducing the use of constituent power by the Council of Ministers, which gave it the right to amend the Constitution in derogation of the requirements set out in Articles 285 and 286. They in turn modified Article 24. The revised article read as follows:

Confiscation of property is prohibited. However, confiscation is authorised in the case of property of natural persons or corporate bodies liable for offences against the national economy or the public treasury committed during the tyranny which ended on 31 December 1958, as well as in the case of property of the tyrant and his collaborators. No one can be deprived of his property except by competent judicial authority and for a justified cause of public utility or social interest, and always after payment of the corresponding indemnity in cash, as fixed by a court... (Sanchez, 1994: 135)

This new provision was then carried over into the new Fundamental Law (Travieso-Dias, 1995: 231). This was followed several months later by the first agrarian reform law, which authorised immediate confiscations by the Castro government according to the revised Article 24.

As in US legislation, confiscations must be distinguished from expropriations. Expropriation implies the taking of property for a public purpose with compensation. This would be the case of taking property to widen a road, for example. It might also apply to the land reforms undertaken by Hawaii and Puerto Rico since World War II, which were attempts to redistribute land. However, property can be confiscated without any indemnity if it is the result of criminal activity or if it has been abandoned. Notorious examples of this might be the confiscation of property from Ferdinand Marcos of the Philippines or Manuel Norriega of Panama, both accused of corrupt practices.

Cuba has often been compared to Nicaragua in terms of confiscated assets. Sandinista reform of property law in Nicaragua began on 19 July 1979 with the 'confiscation' of property belonging to Somoza. As stated above, the use of the word 'confiscation' is important because, unlike 'expropriation', it carries with it the notion that the former owner will not be compensated. Presumably, the property had been acquired illegally and was simply being returned to its rightful owners. For example, Decree No. 3 of 1979, signed by Daniel Ortega and Violeta B. de Chamorro among others, authorized the Attorney General ('*Procurador General de Justicia*') to confiscate (seize) all goods belonging to Somoza's family, and to military officials and other functionaries, that were abandoned in the country after December 1977. Decree No. 38, dated 20 July 1979 and also signed by Ortega, de Chamorro and others, extended the Attorney General's confiscation powers to goods belonging to the followers ('*personas allegadas*') of Somoza. The vague wording of this decree, allowing for confiscation of property from any 'follower' of Somoza, may have led to considerable abuse — the removal of property without compensation from people only tangentially connected with Somoza. Similar *de facto* confiscations may possibly have occurred in Cuba, although such a determination will obviously depend on the merits of a case-by-case analysis.

Many agrarian reform laws provide for a size limitation, though limits may also be set by administrative rules. The former Yugoslavia imposed a maximum size limit of 10 hectares. Cuba sets the limit at 5 caballerias (Casanova, 1990: 47). (A caballeria = 45.2 hectares, or 64 manzanas.) Thus, the laws try to prevent large estates from being held by a single owner. El Salvador, for example, set a limit on agricultural land of 245 hectares (Art. 105 of the Constitution). Venezuela did not provide for size limitations in its agrarian reform legislation: lots could be of any size, provided these parcels met the social policy criteria, as specified in Article 19 of the Venezuelan Agrarian Reform Law (*Gaceta Oficial* No. 611 (Special Supplement), 19 March 1960). Legislation may also try to prevent parcelisation of property (*minifundios*).

We see these size restrictions enacted in Cuban law. Article 90 of the 1940 Constitution allowed for size restrictions against large farms and against foreign ownership:

Large estates are illegal, and to effect their elimination the Law will set out the maximum extension of property that each person or entity can possess (for each type of use the land is used for, taking into account respective peculiarities).

The Law will restrictively limit the acquisition and possession of land by persons and foreign companies and adopt measures so that the land reverts to Cubans.

Article 91 of the 1940 Constitution allowed the paternal family head, who occupies, cultivates and directly exploits a farm worth 2,000 pesos or less, to declare the land 'irrevocable family property'. Other provisions in the 1940 document require the nation to 'employ the resources within its reach to furnish employment to everyone who lacks it', and to guarantee workers 'the economic conditions necessary to a fulfilling existence' (Art. 60). Consequently, these 1940 provisions lay the groundwork for concluding that large estates were already unlawful, and that the government advocated a policy in favour of smallholders. Furthermore, based on later constitutional changes, the government was enabled lawfully to take parcels not in conformity with the requirements of the Constitution, consistent with the dominant legal doctrine of the region.

Rule of law before Castro and conclusions about Cuban expropriations

Many of Castro's critics would like to turn the clock back to a 'golden era' prior to his coming to power. Such dreams are either misinformed or disingenuous. In 1951, Fulgenio Batista led a coup taking over the government in Cuba. Then a Cuban attorney, Fidel Castro brought a suit in the Court of Constitutional Guarantees, alleging that Batista had acted unconstitutionally and that the coup was illegal. The court dismissed Castro's complaint, ruling instead that revolution is the 'font of law' (Adams, 1991: 236-7). Using this case as a precedent, it is almost impossible to find any of Castro's later actions unlawful. Later, in 1954, Batista suspended parts of the Constitution. It would thus be hard to argue that the rule of law in a true sense existed prior to Castro's coming to power.

Nor is Castro's agrarian reform necessarily far-fetched in such a legal context. Batista himself ordered a modest agrarian reform in 1952. This legislation is comparable in many respects with that approved later by Castro. The differences between the two are more in the degree to which they were enforced or implemented, than in the texts themselves.

Did Cuba illegally expropriate US property? Based on the description of the regional framework for property law, Cuban property law can hardly be said to be inconsistent with the dominant legal doctrine and practice in the hemisphere and elsewhere. On the contrary, Cuba's framework is in many ways consistent with hemispheric legal practice. Critics of Castro are fond of saying that he stole property, that his actions were unlawful or inconsistent with the rule of law. This article puts those criticisms in context, demonstrating that Cuba was not outside the regional norm. There was no 'golden era' of a rule of law prior to Castro, and US policy should not seek to restore that era of government or even its original property structure.

Where critics of Castro and his agrarian reform might have a case is if the Cuban government failed to follow its own legislative framework. The agrarian

reform law lays down considerations with regard to expropriation. Furthermore, the Fundamental Law provides for due process under the law. In specific cases, it may be that the Cuban government unlawfully expropriated property without just or proper compensation. However, these are cases that must be examined on the merits of the individual facts. No blanket statement can be made that the general legal framework was inconsistent with the regional context.

Cuba has often been compared with Nicaragua in terms of agricultural and property law. In Nicaragua, the main thrust of Sandinista legislation beginning in July 1979 lay in support for organised labour and the '*campesinos*' (peasants), especially in the area of agrarian reform. The Civil Code, taken over by Latin America from the French, had been in use in Nicaragua at the time of the revolution. But the Sandinistas considered the Code incapable of resolving the problems the new government wished to address (Molina-Torres, 1989: 12). In short, the Sandinista government viewed the Civil Code as static, whereas decrees could be used more freely. This approach is consistent with the revolutionary nature of the Sandinista movement and its antecedent, the Cuban Revolution. With this new perspective on the function of law and the role of the Civil Code, the Sandinistas created great problems in Nicaragua by not following even their own legislative framework. While the Cuban legislative framework seems to compare well with its regional counterparts, it remains to be tested whether, like Nicaragua, Cuba was 'casual' in its approach to following that framework. It may be that if there has been abuse, this would be the most likely area.

Those arguing that Cuba has stolen US property will also have a difficult time proving individual cases. Cuba and El Salvador are the only two countries in Latin America that still use the '*folio personal*' system of property registration. Under this system, descriptions of properties do not use coordinates or geodetic referencing. Instead, properties are referenced by adjoining properties, making exact boundary determination very difficult, and hence making it difficult to determine appropriate compensation.

Assuming the property was lawfully held at the time of its taking (in accordance with the social policy for land), those who still argue that it was 'stolen' will also confront the fact that Castro offered indemnification to the ex-owners, but at the value they had previously declared for property tax purposes. There is less sympathy for claimants who now claim their property was worth millions, when they themselves had previously used much lower values to evade taxes.

Whether or not the property was 'stolen', there is also a real question as to the level of compensation claimants deserve. Many, if not all, US claimants have deducted the loss from their income taxes. In this sense, it could be argued that US taxpayers have already indemnified the former owners.

To conclude, the Cuban framework for agrarian reform is largely consistent with that of neighbouring Latin American countries. However, individual cases

of abuse may have occurred. These will be difficult to sort out and will depend on case-specific information. There is no clear black and white answer.

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