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The Crisis of Land Law and Policy
in Nicaragua

By

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Summary:

The Sandinista government confiscated and expropriated property during the 1980's under legislation that, when enacted, was highly popular and attempted to redress perceived inequities that had occurred under the Somoza dictatorship. Prior legislation probably could have been used instead of new "revolutionary" decrees. But, the Sandinistas had a different perspective on the function of law and therefore did not feel obligated to use existing law. And they did not foresee a problem as they never expected to be electorally removed from office.

The UNO government and former property owners have challenged the Sandinista laws using constitutional theory and the Civil Code. The debate is now taking place in the legislature and the press.

In brief, the "campesinos," more needy now than ever after a bloody civil war, need to live and work somewhere. The old property owners want compensation, or their land back if compensation is not forthcoming. And the government is too broke to pay for it. Emotions run hot. A political solution must be worked out. Yet, Nicaragua's lack of a democratic tradition is complicating matters.

Text:

Land law and policy have become the focal points of the current land-based crisis in Nicaragua. Ever since the 1979 revolution, the Nicaraguan society has tried to cope with land distribution issues. Since the electoral defeat of the Sandinistas, the issue has again come to the forefront of the political debate, making land the most salient political thorn in the side of this new democracy. Unfortunately, the lack of democratic tradition and a biased media have made it difficult to sort out exactly what the issues are.

This report analyzes this crisis. It is organized as follows: (1) The Civil Code and Sandinista Legislation; (2) Agrarian, Confiscation and Expropriation Legislation; (3) Politics and the Law in Action.

1. The Civil Code and Sandinista Legislation

The main thrust of Sandinista legislation beginning in July of 1979 was support for organized labor and "campesinos," especially in the area of agrarian law and reform. The Civil Code, taken over by Latin America from the French, had been in use in Nicaragua at the time of the revolution. Yet the Sandinistas felt that the Code was incapable of resolving the problems the new government wished to address.¹ In short, the Sandinista government viewed the Civil Code law as static, while decrees could be used more freely. This approach is consistent with the revolutionary nature

1. Mireya Molina Torres, *Marco Juridico de la Reforma Agraria* (1989) p. 12.

of the Sandinista movement. It is not consistent, however, with the manner of legal change in other jurisdictions.

Three observations emerge from the "revolutionary" Sandinista approach to legal reform:²

- (1) The Sandinistas used special legislation for social reform and to speed up the process of change.
- (2) The Sandinista legislation was allowed to be separated from the rest of the law contained in the Civil Code.
- (3) The constant and stable concept of property law contained in the Civil Code was superseded by an evolving notion of property law.

The Sandinistas never expected to be removed so swiftly from power. Thus, many of their laws are inconsistent with the Civil Code, and they were not in a rush to modify the Civil Code to bring it up to date. In other words, the Sandinistas probably thought that they would not be limited by the Civil Code and did not view it as a constraint.

Despite neglect during the rule of the Sandinista government, the Civil Code remains formal law in Nicaragua, *at least* to the extent it is consistent with subsequent legislation. It therefore fills in the gaps where the UNO and Sandinista governments have not legislated and holds a very important position in the legal structure of the nation.

2. *Agrarian Reform, Confiscation and Expropriation Legislation*

(a) *The Somoza properties confiscation.*

Sandinista reform of property law began July 19, 1979 with the "confiscation" of property belonging to Somoza. 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 was acquired illegally and is simply being returned to its rightful owners. Decree 3, signed by Daniel Ortega S. 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, military officials and other functionaries that were abandoned in the country after December, 1977.

Decree 38, dated July 20, 1979, extended the Attorneys General's confiscation powers to goods belonging to the followers ("personas allegadas") of Somoza. This decree was also signed by Daniel Ortega, Violeta B. de Chamorro, and others. Decree 38 was later suspended as of August

2. Mireya Molina Torres, *Marco Jurídico de la Reforma Agraria* (1989) pp. 13-14, discusses these concepts.

8, 1979.³ The vague wording of this decree, allowing for confiscation of property from any "follower" of Somoza, may have led to much abuse.

The Sandinista government had at its disposal the provisions of the Penal Code that would have been adequate for trying the cases of Somoza property. Had the Sandinista government used the Penal Code and ordinary courts, it would have been within the traditional legal framework. Instead, however, it established this scheme of "confiscation," a punishment not foreseen in the Penal Code, and established "revolutionary courts" to judge the cases.

Consequently, the Sandinistas had great difficulty in executing their judgments overseas, where other courts were suspect of the "due process" of revolutionary justice. And, the Sandinistas now have to contend with the allegation that they acted illegally in establishing penalties not contemplated in the Penal Code. Further, it is now too late to try the "Somocistas" under the traditional code, as the period of "prescription" has run. In short, by executing "revolutionary" justice, the Sandinistas sacrificed legal consistency for immediate political expediency, which at the time was immensely popular but now is provoking political difficulty.

Interestingly, Venezuela employed under a similar type of special tribunal for claims relating to Pérez Jiménez, the dictator who ruled that nation until 1959. Thus, special tribunals for the confiscation of property of dictators do have a Latin American precedent.

(b) Confiscation of abandoned property and property of persons engaging in anti-social behavior.

Under the civil code, when a person "disappears," a guardian can be appointed by the courts to oversee the administration of the property of the "desaparecido." After four years,⁴ the individual's heirs (or legatees, as appropriate), may request that the court hand over possession of the property of the disappeared person in exchange for a bond. After sixteen (16) years, or seventy (70) years after the birth of the absentee, the bond is released and possession of the property becomes final.⁵ This "presumption of death" system is similar to other Latin American jurisdictions.

The Sandinistas issued Decree No. 760, appropriating for the state "abandoned" property. This decree, signed on July 19, 1981, declared property abandoned if its owner was absent for six (6) months.⁶ Article 2 of that decree provided that persons would not be considered absent if they had "justifiable reasons" for their absence and had made sworn statements that they had not abandoned their property. Appropriated property was published in the Official Gazette and fifteen (15) days were

3. Decreto No. 172 (1979).

4. This is extended to six (6) years if the "desaparecido" left an attorney in fact. It can be shortened to three (3) years if the absent persons disappeared in a calamity, such as a war, shipwreck, earthquake, etc.

5. Commercial Code 48-75.

6. Decreto No. 760, Artículo 1.

allowed for the true owner to respond, after which time the property reverted to state control.⁷

A similar decree, Decree No. 895, of December 5, 1981, referred specifically to un-utilized urban properties. That legislation also contemplated giving state bonds as compensation for the taking of the property. Other decrees provided for the confiscation of companies in which management was considered to be "de-capitalizing" the enterprise.

Conservatives have criticized these provisions for several reasons. They allege that actual notice was not given in some cases.⁸ The legislation was aimed primarily at members of the resistance movement, as a punishment for their participation in counter-revolutionary activity that required them to leave home and remain in safer areas.⁹ Persons who were in the hospital or simply travelling also had their homes and property confiscated, conservatives allege, claiming that in practice no opportunity was provided to "justify" the absence.

The provision can be criticized as well for being inconsistent with the Civil Code. As mentioned above, the Civil Code provides for a presumption of death if a person has disappeared, in which case the property passes to the heirs. Under the Sandinista legislation, property passed to the state after a period of only six months. Since the Sandinistas failed to repeal the Civil Code provision, the Sandinista decree appears to be in conflict with the Civil Code.

Decree No. 763, also dated July 19, 1981, allowed for the confiscation of property for crimes against the maintenance of public order and security. This decree applied whenever a criminal sentence was handed down by the courts calling for a jail of five (5) or more years.

Interestingly, as stated above, the Penal Code of Nicaragua does not contemplate the confiscation of property as a punishment. Like Legislation in other Latin American countries, it does provide for the confiscation of the instruments used to commit a crime. This provision was not used, however. Instead, the special decrees were enacted to carry out the confiscations.

Dra. Mireya Molina, who headed the titling of INRA, the Agrarian Reform Institute during Sandinista rule, has stated "confiscations" were

7. Art. 3, Decree No. 760.

8. Roberto J. Argüello, founding President of the Nicaraguan-American Bankers and Businessmen Association, has claimed in the Editorial pages of the Wall Street Journal (April 1, 1991) that "Nicaragua is the only country in this hemisphere other than Cuba where the transfer of title to properties can occur without the knowledge, consent or compensation of its rightful owners." Mr. Argüello does not state, however, that U.S. legislation often allows for "constructive" notice through the use of publication in newspapers. And the American Fifth Amendment certainly provides for the taking of property in the interests of the public without the consent of the owner and if necessary without actual knowledge of the owner or compensation when as long as the owner is absent. In this regard, the Nicaraguan legislation can be viewed as consistent to a certain extent with U.S. legal practice.

9. Richard Boudreaux, "Sandinistas Seize All Properties of 3 Dissenting Coffee Growers," *Los Angeles Times* (June 22, 1989) p. 11, Part 1, Col. 5., reports that the Sandinista government nationalized all real estate owned by three prominent coffee growers because they had adopted attitudes of "confrontation" to discourage production of coffee—Nicaragua's most valuable export crop. One of the men subject to the decree, Nicolas Bolaños, reportedly stated "The only way this government knows how to react to criticism is to destroy its critics."

used much less often than the Agrarian Reform legislation.¹⁰ The Sandinistas had access to both systems, but apparently preferred use of the Agrarian Reform Law, given its broad scope.

Confiscations of property are not unique to Nicaragua, especially in emotionally-charged political issues. In the U.S. the Justice Department recently "confiscated" property belonging to a fraternity at the University of Virginia because some of its members were involved in the sale of marijuana. The case of Ferdinand Marcos of the Philippines also comes to mind as a well-known situation in which property was "confiscated" by the U.S. government. Still, in these cases, confiscation was carried out under traditional legal theory using ordinary courts. In Nicaragua, it was carried out in execution of "revolutionary" justice, a system in which capitalistic notions of property ownership were secondary to the needs of the "campesinos."

In the U.S. it is possible that this type of legislation might be construed as a "bill of attainder," a law directed at a single individual and therefore unenforceable as a criminal statute.

(b) The Agrarian Reform Law

Next, the Sandinista government enacted Agrarian Reform legislation that permitted the taking of certain "affected" properties.¹¹ Curiously, the Sandinistas did not use existing "expropriation" legislation that allowed for expropriations under certain conditions.¹² Instead, old legislation was bypassed by a new special decree that created a new class of land, "affected land." In this manner, agrarian reform could avoid existing law relating to "confiscations" or "expropriations." "Affected property" included land that was abandoned, and land that was under-utilized.

Agrarian reform legislation differed from existing laws in other respects as well. Agrarian reform titles could not be sold legally. Yet they could be used for inheritance or as commercial collateral. The law itself defined the title as a "use of rights." Still, as defined in the Civil Code, the titles given did not conform to the requisites of a "use right" in the strict sense. Thus, implicitly, the legislation changes the existing definition of "use rights" and we witness the evolution of a Civil Code notion.

Like earlier legislation regarding expropriation, the Agrarian Reform Law called for indemnization to the original owner. However, payment

10. Meeting with Dra. Mireya Molina Torres, former Chief Counsel of the Titling Office of the Agrarian Reform Institute (INRA), Managua, (June 18, 1991).

11. La Ley de Reforma Agraria del 19 de Julio de 1981, Decreto 782, and its reforms in Law No. 14, Jan. 11, 1986. It should be noted that Agrarian Reform legislation was on the books under the Somoza regime. This legislation, however, was under-utilized and was eventually replaced by the more aggressive, Sandinista Agrarian Reform Law in 1981.

12. The Expropriation Law, still in effect, calls for an opportunity to be heard in court, payment of an agreed price and, in the case of disagreement, the establishment of "peritos" or expert witnesses to establish a fair market value. An expropriation could only take place to carry out a social or public benefit. This law was enacted on March 3, 1976. Technically, expropriated individuals would also be entitled to their lost profits and earnings, as specified in the Civil Code, since the compensation has been delayed.

was to be made in the form of "agrarian reform bonds."¹³ Yet, land that was previously abandoned would not be compensated for. Abandoned land simply passed directly to the state. The value used for compensation was based on the average value declared for tax purposes over the past three years.¹⁴

Agrarian reform legislation prohibits the sale of land received under the agrarian reform.¹⁵ This limitation on alienation is common in Latin American jurisdictions that have undergone agrarian reform. One way ingenious Nicaraguan lawyers have gone around this limitation is by drawing up "Promises to Sell" rather than "Sales" contracts, in effect delivering the property to the buyer in exchange for payment.

Data from other countries suggest that restrictions on alienation in the region have not been very successful in practice.¹⁶ And, at least in theory, inability to alienate would appear to undercut the value of giving a title in the first place.

Conservatives allege that the Sandinistas took many properties under agrarian reform legislation without following even the formalities of that legislation, let alone the expropriation law. They also argue that the expropriation law should be applied instead of the agrarian reform legislation, since the expropriation law was not repealed or amended and thus would appear to govern in these cases. As a result, say conservatives, the Sandinistas are guilty of "arbitrary confiscation of property."

(d) Agrarian Businesses

Generally, the Commercial Code establishes the various types of possible organizations for business in Civil Code jurisdictions, as is true in Nicaragua. Yet Decree 580, dated December 2, 1989, allowed the Minister of Agricultural Development and Agrarian Reform to create agrarian reform companies. The purpose of these companies was profit as well as social progress, unlike the Commercial Code that assumes the business is organized simply for profit.

Workers in these businesses are involved with management and the Corporate Director, all of which must work with the Ministry. In this regard, the notion of Agrarian Reform companies was foreign to the Commercial Code, and is thus atypical of Latin America, which treats the Commercial Code in a more conservative fashion.

Beginning in 1988, many reorganizations took place. These reorganizations transferred direct control of the agrarian reform businesses from

13. Decree 782, Article 17.

14. Decree 782, Article 19.

15. Decree 782, Article 31 and 32.

16. John Strasma of the Land Tenure Center has noted that in El Salvador, beneficiaries of the FINATA programs can only sell their property to FINATA for 30 years. However, "FINATA staff admit readily that many parcels have already been transferred without FINATA's approval. While asserting its right to evaluate and decide, FINATA has no effective mechanism to do so that, and the beneficiaries quite wisely do not even ask." John Strasma, *Land Market Profile Study: El Salvador* (Madison, 1989), p. 34.

the Ministry to the corporations themselves. However, the Ministry retained the power to appoint corporate officers and other powers. Management was vested in a board of directors that included at least one representative of the union to guarantee worker participation in decision-making.

(e) Agrarian Cooperatives

Decree No. 826, dated September 17, 1981, created the agrarian cooperatives. This law regulates self-managed businesses, controlling the entity's organizational purpose, internal structure, and so on. These organizations took the legal structure of an "agrarian associative contract." The cooperative's structure and capital were in theory viewed not as a means to qualify as a certain formal legal structure, but as a source from which a legal work relationship flowed.

Article 127 of the Regulations to the Agrarian Cooperative Law discusses the role of workers as partners. Temporary workers receive much the same benefits as long-term partners under this framework. All workers are submitted to a single labor program for each cooperative.

The centralized control structure of the cooperatives allows the central government to dictate: (1) who holds title to the land; (2) who should manage the cooperative; (3) what should be planted; and (4) what price should be set for the produce, among other things. Whether this power has been used in fact is beyond the scope of this investigation.

Cooperatives were organized by the Sandinistas in two forms: (1) cooperatives for the purchase of inputs (ex. seed), and for the selling of produce; and (2) cooperatives in which members worked land together, sharing profits equally.

Critics of the Sandinista government assert that the cooperatives were created as a vehicle to organize the "campesinato" against the armed resistance (the "contras"). To be certain, the number of cooperatives rose after 1986. In at least some instances, "campesinos" were organized into self-protecting militia units, equipped with arms and ammunition.

In effect, the "coops" became military installations in some cases—making them a target of the "contra" insurrection. This led to the Sandinista charge that the "contras" were attacking agrarian cooperatives, which they were. In spite of the politics, however, the "revolutionary" purpose of the creation of the cooperatives (to bring workers into management of their work places) remained the same as the original intent of the legislation in 1981.

Dr. Silvio de Franco, the present Minister of the Economy in Nicaragua foresees a strong future role for cooperatives, albeit in a changed format.¹⁷ Dr. de Franco states that the UNO government would like to give individual titles to cooperative members and eliminate government

17. Meeting with Dr. Silvio de Franco, Minister of the Economy, Industry and Commerce, Managua (June 20, 1991).

control over decision-making within the cooperative. This goal, however, is contingent upon legislative action to override current law.

(f) Law 85 and Law 86

As previously mentioned, the Sandinista government never thought it would be removed from power by the electorate. Therefore, not sensing any urgency, it was slow in proceeding with the legal formalization of confiscations and expropriations. Often, the government confiscated or expropriated property, but failed to register the transaction. In the legal debate, these informal takings are **confiscations or expropriations "in fact,"** not in "law." In other cases, "campesinos" took the "law" into their own hands and invaded property of large landowners.

After the election, the Sandinistas passed legislation that "legalized" informal confiscations and expropriations that took place before February 25, 1990. Law No. 85 applied mainly to housing and sometimes required the beneficiary to pay for the housing unit received over a twenty year period, at 3% interest. The government retained a mortgage on the properties as a guarantee of payment. Decree No. 86 applied mainly to vacant lots where possessors wished to build housing.

At this point, as the Sandinistas were leaving office, some abuse of power occurred. The press refers to this as the "**piñata**," drawing an analogy to the Mexican children's game in which an object is destroyed to obtain candy. Here, some corrupt officials used their power and influence to obtain land. The press has used the issue to de-legitimize decrees 85 and 86.¹⁸

In viewing this situation, one must remember that corruption is not unique to Nicaragua or the Sandinistas, but is a problem throughout the region. Further, the degree of abuse is unknown due to the hyperbole of the press, which presents "horror stories" of abuse, some of which may be true.¹⁹ Presumably, abusers could be tried by courts using established Penal Code provisions.

Other property not strictly under Decrees 85 and 86 was also subject to perceived abuse. For example, there are reports in the press of Sandinista officials "donating" public property for private gain²⁰ and the inalienability of government-owned property.

Another area of abuse, unrelated to property, was the increase in salaries declared by the Sandinistas before the elections, immediately after

18. In one famous incident, Presidente de Chamorro requested on television news that Daniel Ortega return a mansion he received during his term in office. She requested that he do so for "moral" reasons. The press asserted that the home was worth "millions." Later that week, Ms. de Chamorro was attending a wedding at the Hotel Intercontinental in Managua. During the reception, a vehicle passed the hotel and its occupant shot at the building. This was interpreted by many to be a warning to Ms. de Chamorro not to press too hard for the return of properties to the confiscados.

19. Political bias and the use of sensationalism to sell newspapers may also account for some of the stories.

20. See, for example, Hilario Vargas Miranda, "Alcalde reclama bienes 'piñateados,'" *La Prensa*, June 18, 1991, p. 5, col's. 3-4.

the elections, and immediately prior to their departure from office. This was done, say conservatives, to present the UNO government with a political and financial difficulty upon taking office, while making the Sandinistas more popular with the people. In this fashion, the salary increases are considered part of the "piñata" as well, although, formally speaking, unrelated to Decrees 85 and 86.

One view of the Sandinista abuse, that of persons favorable to the Sandinistas, is that it is simply exaggerated to take land away from the poor. Another view, that of the conservative camp, is that the poor are being used as a "buffer" or "shield" to deflect criticism of the Sandinistas, who are trying to get away with theft on a grand scale. The truth will prove difficult to tell in the short term.

Because of this perception of abuse, some conservatives feel that the Sandinistas already have received what they should have, and should be willing to provide compensation for land taken. Any further compromise on their part, say a few conservatives, would be a "windfall" for the "corrupt Sandinistas."

(g) *Decree-Law 11-90*

After the UNO government took office, Decree-Law Number 11-90 was passed.²¹ That law sought to review the "arbitrary" violations of rights to property.²² That law further created a National Review Commission, comprised of four persons named by the President, to review all confiscations made under the former government.²³

The commission was given the duty of settling disputes, keeping in mind the "rights" of the "confiscados" on the one hand, and the "rights" of the "campesinos" and cooperatives on the other. The attorney general was given the power to preside over the commission.²⁴ And, Decree-Law 11-90 required claims to contain a number of formalities.²⁵ In claims where a "confiscado" is awarded judgment, but the property is not returned by the government, the law mandates compensation.²⁶ Finally the law required that claims be submitted within 180 days of the publication of the law in May, 1990.

Two particular provisions of Decree-Law 11-90 deserve special note: (1) Article 7 states that the Commission shall decide matters by a simple majority vote, (2) Article 11 states that the commission's decision to return property will serve as sufficient title to take possession of property and register it.

21. As published in the Official Gazette, May 11, 1990.

22. In legal terms, the word "arbitrary" is not self-defining. A confiscation or expropriation is arbitrary if the judge concludes that it is. Logically, it is a conclusion, not a reason. Thus, it is impossible to say whether a confiscation or expropriation was arbitrary without a formal legal proceeding.

23. Article 1, Decreto-Ley de Revisión de Confiscaciones.

24. Art. 2.

25. Art. 4.

26. Art. 12.