

COMMENTS ON

“On the Continued Good Standing of Pre-1959 Cuban Legal Entities ‘Ubi Lex non Distinguit, Nec Nos Distinguere Debemus’” by Goytisolo

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Through this paper, Dr. Goytisolo has discovered one more legal controversy caused by the unreasonable and non-planned legislation of the Castro regime. He prepared a well documented and informed study which evaluates the question of whether the revolutionary legislation affected the continued good standing of legal entities organized or doing business in Cuba during the first years of the revolution (“the Entities”).

The paper groups all possible causes of dissolution of legal entities found in the Civil Code, the Commercial Code, the General Corporation Law and the “Reforma Tributaria,” in order to explain how the laws maintained some of these entities in good standing.

Dr. Goytisolo brings to our attention a list of what I would identify as the “10 Most Wanted List of the Confiscation and Nationalization Laws in the Republic of Cuba.” The laws are as follows:

1. The Fundamental Law (Constitution of 1959).
2. The law that confiscated property from those individuals related directly or indirectly to Fulgenio Batista.
3. The law that confiscated property from those persons who illicitly enriched while exercising a public authority.

4. The law that confiscated property from those persons who were sanctioned for counterrevolutionary felonies.
5. The law that confiscated property from those persons who were sanctioned and passed away.
6. The law that nationalized property from U.S. citizens.
7. The law that nationalized property from all U.S. citizens.
8. The law that nationalized the sugar mills, the distilleries and other manufactures.
9. The law that nationalized property from those persons who left Cuba without government authorization.
10. The law that allowed the Minister of Labor to nationalize work places and other related enterprises.

Not only does he analyze each of the laws, but he also searches for every possible scenario where the Entities were to be dissolved.

After analyzing each of the 10 Most Wanted Laws, the paper concludes that a great number of these Entities not only are in good standing but capable of engaging in any business activity authorized by its certificate of incorporation and bylaws.

When interpreting any law in the Civil Legal System (which prevails in Cuba), and such law does not dis-

tinguishes, then the General Law shall be observed (the General Law shall be the Civil Code). General law always follows the special law. Article 16 of the Old Cuban Civil Code of 1889 (“the Old Civil Code”), derogated in 1988 by the new Socialist Civil Code (“the New Civil Code”), states:

“En las materias que se rijan por leyes especiales, la deficiencia de éstas se suplirá con las disposiciones de este Código.”¹

Meanwhile, article 8 of the new Socialist Code states:

“Las disposiciones de este Código son supletorias respecto a materias civiles u otras reguladas en leyes especiales.”²

Furthermore, in the event the general law (Civil Code) does not distinguish either, then the Civil Code provides certain guidelines or general principles to interpret the special law. Article 6 of the Old Civil Code states:

“El Tribunal que rehuse fallar a pretexto de silencio, obscuridad o insuficiencia de las leyes, incurrirá en responsabilidad.

“Cuando no haya ley exactamente aplicable al punto controvertido, se aplicará la costumbre del lugar, y, en su defecto, los principios generales de derecho.”³

According to article 6, in order to interpret these special laws (the 10 Most Wanted), customary Cuban principles in its legal system are to be observed on the first instance and, in their absence, the general principles of the Civil Law System are to be adopted.

An in depth analysis of the principles in the Cuban legal system must be performed first before concluding on how they shall be interpreted. However, we found that the *Ubi Lex Non Distinguit, Nec Nos Distinguere Debemus* principle is no stranger for the Cu-

ban Supreme Court. This interpretation was used to decide a case in 1903.⁴

On the other hand, I believe one of the general principles of the Civil Law System which deserves to be observed for purposes of this paper is the principle of *In Pari Materia*,⁵ which may be found in many Latin American civil codes. For example, Article 18 of the Puerto Rican Civil Code states:

“Las leyes que se refieran a la misma materia o cuyo objeto sea el mismo deben ser interpretadas refiriendo las unas a las otras por cuanto a lo que es claro en uno de sus preceptos pueda ser usado para explicar lo que resulte dudoso en otro.”

The *In Pari Materia* principle explains that the laws related in topic and in object must be interpreted between one another. For example, if a term is clearly interpreted in Law number 1, contrary to Law number 2 where the term is not clearly defined, then Law number 2 may adopt Law number 1’s definition, complementing one another. Likewise, Law number 1 may adopt a term’s definition well defined in Law number 2.

Applying this principle to our analysis, since the 10 Most Wanted Laws are related in topic (confiscation and nationalization) and in object (properties, government, private owners), perhaps, a well defined term in one of these laws may help to complement the other laws. For example, if one of these laws, when referring to “property confiscated” uses and defines the term “property” to include “corporate shares,” then the other laws where the term “property” is not defined, or if defined, not well or ambiguously defined, may adopt the term property’s definition under the principle of *In Pari Materia*.

1. The Old Civil Code at article 16.

2. The New Civil Code at article 8.

3. The Old Civil Code at article 6.

4. Decision Number 20 of April 18, 1903. It should be noted that in 1903, the Cuban Supreme Court may have been influenced by the Common Law System since on such period the U.S. had total political and sovereign control over Cuba after the Spanish-American War of 1898.

5. A similar principle to the *In Pari Materia* principle was previously used by the Cuban Supreme Court in a few of its decisions. See Decision Number 16 of July 15, 1907; Decision Number 24 of April 14, 1913; Decision Number 34 of June 1, 1915; and Decision Number 138 of November 29, 1924. The principle reads: “Donde existe la misma razón, debe aplicarse la misma disposición.”

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The second observation is whether the good standing of the Entities and the Cuban Constitution of 1976 (the Socialist Constitution) are in harmony or in conflict. This Constitution, later amended in 1992, provided for the creation of new types of property ownership. Personal property,⁶ state property⁷ and small farmer property⁸ were the three types of property recognized under the socialist constitution of 1976 before its amendments in 1992.⁹

Cuban scholars, commenting on the 1976 socialist constitution, have said that economic function is the main test to determine whether a good should be considered personal property or State property.¹⁰

“In a socialist society, goods must be classified according to their economic function. Goods are either means of production or they are for use and consumption. Only the latter can be considered as personal property, while the former must be social property given its key social function.”¹¹

Socialist personal goods may only serve to satisfy an individual's basic needs, and according to some jurists, their only limitation is that they cannot be used for the exploitation of another person's work or to make profit through individual private enterprise. Such a transaction would be contrary to the fundamental principles of socialist law, and therefore invalid.

The Socialist Constitution states that personal property includes: (1) savings and income which are the product of personal labor; (2) housing; (3) every good, object or instrument serving to satisfy their

cultural or material necessities; and (4) every good, object or instrument needed to carry out personal or family labor.¹²

Therefore, the only type of individual private ownership authorized by Cuban Law, with the exception of the property of small farmers, was personal property. No other type of ownership not included in the definition of personal property was either authorized or legal.

Under the presumption that these Entities are presently in good standing, how could we harmonize their legal existence under the narrow possibilities of ownership provided by the Constitution of 1976? In other words, an argument must be created in order to support the theory that these Entities were in existence during the time period of the Constitution of 1976, when none of the ownership rights recognized under Cuban Law would authorize a person to be a shareholder of a Cuban Corporation or a member of an Entity.

Therefore, in order to conclude that these Entities are presently in good standing and that they may qualify as claimants under the Helms-Burton Law, Dr. Goytisolo must: (1) interpret the 10 Most Wanted Laws according to the Cuban Legal System; and (2) must create a solid argument that prevails over the theory that these Entities were incompatible with the ownership rights recognized under the Constitution of 1976 since it was impossible for a person to own a corporate share of a Cuban corporation under Cuban Law.

6. The 1976 Cuban Constitution at article 21.

7. *Id.* at article 15.

8. *Id.* at articles 15, 20-21.

9. In order to understand the ideological debate regarding the non-socialist concepts of property and these three new types of socialist property, see, J. Consuegra-Barquín, “Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law,” *Rutgers Law Review* 46:2 (1994).

10. F. Alvarez Tabío, *Comentarios a la Constitución Socialista* (1985), p. 109.

11. Alvarez Tabío, *Comentarios a la Constitución Socialista*, p. 109.

12. 1976 Constitution at article 21.