

## RIGHTS AND REMEDIES CONCERNING CUBAN RESIDENTIAL PROPERTY

Stephen J. Kimmerling

On my first visit to Cuba, a government taxi drove me to Havana's Miramar district and dropped me off at the elegant Belgian embassy where I was to interview an official for a law school research project. The receptionist told me to wait outside the door on what looked like a porch or circular veranda.

As I waited, I gazed unthinkingly at the lawn behind the embassy. Noticing a patch of blue in the grass, I realized I was looking at an empty swimming pool. A wave of dread swept through me as I realized out loud, "This was someone's home. I'm standing in someone's house." I later learned that many of the homes vacated by Havana's citizens had been converted to business use for embassies, corporate offices, and Cuban law firms. Others now housed families unrelated to the original occupants.

My experience in Miramar opened my eyes to the poignant metaphorical power that a lost home represents to a Cuban exile or to anyone shut out of the land of his or her birth. That one lone house-turned-office represented for me the enormity of loss and separation that so many Cubans have suffered for over 40 years.

A recent news article on CubaNet reminds us that the legal issues surrounding Cuban residential property are very much alive, even all these years later. A CubaNet report from Camagüey, for example, tells us that "[c]onfiscated real estate [is] to be registered . . . to determine who the owners of . . . property were before 1959 and the transformations that have taken place since. After the government started confiscating properties in 1959, the Registry of Deeds was neglected, and now the government wants to redress the situation."<sup>1</sup>

Indicating that the Cuban government is aware of the possibility that Cubans living abroad might hold hopes of reclaiming their confiscated homes and other properties, the article continues: "It was all a little irregular from the jurisdictional standpoint, and no one knows for sure what the policy of confiscation was based on. Everything seems to indicate that the Cuban government is preparing a legal framework to forestall future claims by the former owners or their families. At least some of the properties are still registered to their former owners," said one source.<sup>2</sup>

An official working at the Registry of Deeds in Camagüey said that 90 percent of the properties in the city used to belong to people who left the country.<sup>3</sup>

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1. Julio García Quesada, *Confiscated Real Estate to Be Registered in Camagüey*, <http://www.cubanet.org/-CNews/y01/apr01/11e1.htm> (Apr. 6, 2001) (posted Apr. 11, 2001).

2. *Id.*

3. *Id.*

### RESIDENTIAL PROPERTY AND THE REVOLUTION

Cuba's Communist revolution is as much about property as it is about centralization of power and the bestowal of rights in exchange for allegiance to political orthodoxy. As with commercial property, many Cubans left behind and subsequently lost their homes upon exiting the country. As one legal scholar put it:

Property lies at the heart of the story of the Cuban Revolution. [The poorest Cubans realized immediate economic benefits] . . . as a result of the redistributive measures undertaken by the new government. On the other hand, hundreds of thousands of middle-class Cubans fled to the United States and elsewhere, leaving behind virtually all of their property: family homes, businesses, farms, clothes, cars, and photographs. Unable to carry their belongings with them, most of the Cuban refugees left with, as the Cuban saying goes, "one hand in front and one hand behind."<sup>4</sup>

In his speeches, Fidel Castro was less than sympathetic to these uprooted Cuban citizens. "In the fine houses where a few used to have the privilege of living, many today can stay and study,"<sup>5</sup> boasted Cuba's new leader. Asserting that "terrorists [were] hid[ing] in homes of the rich,"<sup>6</sup> Castro claimed that he would "liquidate"<sup>7</sup> them. Striking a Robin Hood-like moral posture, he continued, "[I]f we must occupy one by one the homes of the privileged that aid the terrorists, we will occupy the houses of the privileged and place the poor of the capital there to live."<sup>8</sup> And in a

speech revealing plans for converting homes to other uses, Castro announced:

We will prepare 100 houses for guests invited by the institute of friendship with peoples, which has been established. We will keep up the gardens. Youth brigades for revolutionary work will supply 100 young people who want to study languages and serve as tourist guides. We will establish a school for those who want to study for a diplomatic career. But meanwhile, they can take our visitors around. Later, they can even become ambassadors. That is what we are going to do with the houses at Cubanacán—a former country club—abandoned by distinguished families who have gone to the hospitable shores of Uncle Sam, and thanks for the houses.<sup>9</sup>

### CUBAN PROPERTY LAW BEFORE RESIDENTIAL PROPERTY CONFISCATIONS

Cuba's Constitution of 1940, in effect when Castro came to power, provided very clear private property protections that the new government would soon abridge as part of its property redistribution program.

As a foundation for its enumerated rights, the 1940 constitution stated that "[a]ll Cubans are equal before the law"<sup>10</sup> and that "[a]ny discrimination by reason of sex, race, color, or class, and any other kind of discrimination destructive of human dignity, is declared illegal and punishable."<sup>11</sup> These provisos would become important considerations when assessing the validity of residential property takings.

To further protect property rights, the 1940 constitution recognized that those rights are inextricably

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4. Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 Fla. L. Rev. 107, 108 (January 2000) [hereinafter Peñalver].

5. *Castro Addresses Mothers*, Havana Domestic Service in Spanish 0330 GMT (May 15, 1961) (Fidel Castro speech to rural mothers in Havana).

6. *Second Anniversary of the Cuban Revolution (Castro Says U.S. Undermines Revolution)*, FIEL Network (Jan. 3, 1961) (speech by Fidel Castro at Civic Plaza in Havana on the second anniversary of the Cuban revolution).

7. *Id.*

8. *Id.*

9. *Anniversary of the Student Martyrs of 1871 (Castro Cites Counterrevolutionary Perils)*, Radio Rebelde (Nov. 28, 1960) (speech by Prime Minister Fidel Castro commemorating the anniversary of the student martyrs of 1871).

10. Cuban Constitution of 1940, art. 20.

11. *Id.*

tied to contract law. The constitution therefore held that “[c]ivil obligations arising from contracts . . . may not be annulled or altered by the Legislature or by the Executive, and consequently laws shall have no retroactive effect in respect to the aforesaid obligations.”<sup>12</sup> Only “grave national crisis”<sup>13</sup> could justify suspension of these protections.

In explicit terms, the constitution shielded private property from government takings and laid out specific conditions under which property deprivation could occur:

ART. 24. Confiscation of goods is forbidden. No one may be deprived of his property except by competent judicial authority and for a cause justified by public utility or social interest, and with mandatory prior payment of the proper indemnification in cash, in . . . [an] . . . amount judicially determined. In case of failure in compliance with these requirements, the person whose property has been expropriated shall have the right of protection by the tribunals of justice, and as the case may warrant, that of the restoration of his property.<sup>14</sup>

The constitution contained equally explicit property protections later in the document:

ART. 87. The Cuban State recognizes the existence and legitimacy of private property in the fullest concept of its social function, and with no further limitations than those that may be established by law for reasons of public necessity or social interest.<sup>15</sup>

In articles that would become relevant to Cubans leaving their homeland after Castro’s ascendancy, the 1940 constitution held that “[a]ny person may enter and remain in the national territory, leave it, move from one place to another, and change residence”<sup>16</sup> and that “[n]o person shall be obliged to change his domicile or residence, except by order of a judicial authority and in the cases and subject to the requirements stipulated by law.”<sup>17</sup> And in a provision that unwittingly presaged the Castro government’s markedly different policies and practices, the constitution stated that “[n]o Cuban may be expatriated or be prohibited entrance into the territory of the Republic.”<sup>18</sup>

The 1940 constitution protected the rights enumerated within it by invalidating their abridgment through article 40: “Provisions of a legal, governmental, or any other nature that regulate the exercise of the rights guaranteed by this Constitution, shall be null if they abridge, restrict, or corrupt said rights.”<sup>19</sup> Finally, to ensure the constitution’s viability, the drafters established clear procedural requirements for amending the document.<sup>20</sup>

## FIDEL: CHANGING PROPERTY LAW

Early in his tenure, Castro began altering private property rights, including those pertaining to residential property. For example, he amended the 1940 constitution to give the new Council of Ministers authority to amend the constitution despite the 1940 document’s clearly specified amendment procedures

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12. *Id.* at art. 25.

13. *Id.*

14. *Id.* at art. 24.

15. *Id.* at art. 87.

16. *Id.* at art. 30.

17. *Id.*

18. *Id.*

19. *Id.* at art. 40.

20. *See Id.* at art 285 (“The Constitution may be amended only: 1st. Upon the initiative of the people, by means of the presentation of an appropriate proposition to the Congress, with the signatures of not less than 100,000 voters who are able to read and write, given before the electoral bodies, and in accordance with what the law may establish. When this has been done, the Congress shall be assembled into a single body, and within the thirty days following shall, without discussion, approve the law proposing to call an election of delegates or for a referendum. 2nd. By the initiative of the Congress by means of an appropriate proposition, bearing the signatures of not less than one-fourth of the members of the colegislative body to which the proponents belong.”)

and requirements.<sup>21</sup> The government also enacted the Fundamental Law of 1959 which, without explicitly repealing the 1940 constitution, effectively replaced the latter document.<sup>22</sup> Among its other provisions, the Fundamental Law declared the Council of Ministers to be Cuba's ultimate legislative body and expanded the government's confiscatory powers to permit property confiscations from a greater number of categories of citizens.<sup>23</sup>

During the Revolution's early years, the government made it increasingly easier to take private property and to do so from larger numbers of Cubans. For example, in late 1959, the new regime's confiscatory powers were applied against those allied with the Batista regime, those leaving to escape Cuba's judicial jurisdiction, and those conspiring against the Cuban state.<sup>24</sup> In making these changes, the government did not specify what constitutionally required legitimate public purpose or plans for compensation lay behind these now-authorized takings.<sup>25</sup> Further barriers to private property seizure fell when the government dispensed with the requirement that only a

court could authorize confiscations and when it removed requirements that the property owner be compensated in cash, in an amount determined by a court, and *before* the taking occurred.<sup>26</sup>

In late 1960, Cuba enacted the Urban Reform Law, a drastic measure that conveyed property title to tenants, subtenants, and other possessors of property.<sup>27</sup> The law "rendered all existing leases of urban property null and void"<sup>28</sup> and, through a kind of rent-to-buy program, the law "expropriated rental properties and offered them for sale to their inhabitants through monthly payments over a period of time at prices fixed by the state."<sup>29</sup> In addition, the law nullified urban mortgages, and the state became the main landlord for purposes of residential property.<sup>30</sup> Those whose residential properties were confiscated received state-determined compensation.<sup>31</sup> These provisions, unlike earlier Castro property laws, went significantly further in eroding residential property rights.

Of all the laws affecting residential property during the Revolution's early years, perhaps the most controversial was Law 989—the Confiscation of Aban-

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21. Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 Rutgers L. Rev. 873, 897-898 (Winter 1994) [hereinafter Consuegra-Barquín]; *but see* José A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 Loy. L.A. Int'l & Comp. L. Rev. 321, 329 (June 2000) ("Castro's initial confiscation plan continued until February 7, 1959, when he officially repealed the Constitution of 1940 and enacted the Fundamental Law of 1959.") [hereinafter Ortiz].

22. Ortiz, *supra* note 21.

23. *Id.*

24. Consuegra-Barquín, *supra* note 21, 900.

25. Ortiz, *supra* note 21, at 329, 331; Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation – A New Form of Property*, 27 U. Miami Inter-Am. L. Rev. 453, 482, 478, n. 152 (Spring 1996) [hereinafter Grider]; Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. Pa. J. Int'l Bus. L. 217, \_\_\_\_ (§ 4.4.2.1) (Summer 1995); Steven E. Hendrix, *Tensions in Cuban Property Law*, 20 Hastings Int'l & Comp. L. Rev. 1, 17 (Fall 1996) [hereinafter Hendrix]; Nicolás J. Gutiérrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba*, 5 U. Miami Y.B. Int'l L. 51, 54 (1996-97) [hereinafter Gutiérrez].

26. Matías F. Travieso-Díaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. Pa. J. Int'l Econ. L. 659, 667 (Summer 1996).

27. Ley de Reforma Urbana (Oct. 14, 1960); Eduardo Moisés Peñalver, *supra* note 4, at 126; *see also* Gutiérrez, *supra* note 25, at 60.

28. Gutiérrez, *supra* note 25, at 60.

29. Peñalver, *supra* note 4, at 126.

30. *Id.*; *see also* Consuegra-Barquín, *supra* note 21, at 901-903 (Winter 1994); *see also* Gutiérrez, *supra* note 25, at 60.

31. Peñalver, *supra* note 4, at 126; *see also* Consuegra-Barquín, *supra* note 21, at 901-903 (Winter 1994); Gutiérrez, *supra* note 25, at 60.

done Property Law.<sup>32</sup> To stem the brain drain caused by massive emigration of Cuba's professional classes and to punish los gusanos for leaving,<sup>33</sup> the government declared in Law 989 that Cubans who left the island and failed to return within specific time periods (depending on their destination) would have their homes declared legally abandoned. The government deemed as a permanent departure a citizen's failure to return within the statutory time limits. Affected homes were considered abandoned and became state property subject to redistribution.<sup>34</sup> Of course, this law raises considerable legal problems, including the fact that no compensation was deemed to be owed; the law contravened traditional notions of abandonment as being voluntary and a matter of intent; and the law punished and discriminated against Cubans based on their political beliefs and/or the political dissent implicit in the act of leaving the country.<sup>35</sup>

### THE CONSTITUTION OF 1976

The Fundamental Law of 1959, though intended to be temporary, became the de facto Cuban constitution until the government drafted and enacted the Constitution of 1976. This latter document expressed and codified the government's socialist approach to property and represented a radical departure from Cuba's pre-Castro tradition of protection for private property rights.

The 1976 constitution redefines Cuban property relations in accordance with Communist ideology. Article 14, for example, affirms the country's socialist economy by speaking of it in terms of the "people's socialist ownership of the means of production and

... the abolition of the exploitation of man by man."<sup>36</sup> Article 15 then lays out the various types of property ownership—state property, small-scale farms and farming cooperatives, and personal property (indentifiable by implication as this last property category is not explicitly named):

The socialist state property, which is the property of the entire people, becomes irreversibly established over the lands that do not belong to small farmers or to cooperatives formed by the same; over the subsoil, mines, the natural resources and flora and fauna in the marine area over which it has jurisdiction, woods, waters, means of communication; over the sugar mills, factories, chief means of transportation; and over all those enterprises, banks, installations and properties that have been nationalized and expropriated from the imperialists, the landholders and the bourgeoisie; as well as over the people's farms, factories, enterprises and economic and social, cultural and sport facilities built, fostered or purchased by the state and those that will be built, fostered or purchased by the state in the future.<sup>37</sup>

According to this system, whether property is personal (e.g., homes, personal items) or state-owned is a question of its economic function.<sup>38</sup> Property used solely for consumption is personal; property used for production is typically state-owned.<sup>39</sup> Personal property would therefore include housing, savings resulting from labor, material goods for personal needs, and property necessary for one's own or one's family's labor.<sup>40</sup> While housing is therefore personal property, there is some question as to whether the state owns the land underneath that housing. Under this

32. Ley 989, published in Gaceta Oficial, at 23, 705 (Dec. 6, 1961) [hereinafter Ley 989].

33. Consuegra-Barquín, *supra* note 21, at 903.

34. Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, *supra* note 25, at \_\_\_\_; see also Gutiérrez, *supra* note 25, at 58-59; see also Consuegra-Barquín, *supra* note 21, at 903.

35. Consuegra-Barquín, *supra* note 21, at 904-906; see also Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, *supra* note 25, at \_\_\_\_, n.84 (citing Consuegra-Barquín, *infra*, at 903-906).

36. Cuban Constitution of 1976, art. 14.

37. *Id.* at art. 15.

38. Consuegra-Barquín, *supra* note 21, at 908-909.

39. *Id.* at 909.

40. *Id.* at 911.

scenario, the state would grant residents the right to use the land for residential purposes.<sup>41</sup>

### THE 1980s HOUSING LAW CHANGES

In the 1980s, Cuba passed laws changing residential property rights and obligations. The 1984 General Housing Law, for example, fostered private home ownership by stating that all citizens had an ownership right to the homes in which they lived.<sup>42</sup> Cubans in state-owned housing were offered an opportunity to buy their homes from the state for a statutorily fixed price.<sup>43</sup> The law also provided a rent-to-buy program: renters could apply retroactive and future rent payments toward the state's purchase price and thus obtain title.<sup>44</sup>

The 1988 General Housing Law, by contrast, restricted residential property rights by curtailing home sales. On the other hand, the 1988 law created more detailed inheritance norms for residential property. For example, the law granted the right to inherit primary and vacation homes from family members. Yet, its provisions also reflected an interest in balancing Cubans' freedom to bequeath housing to whomever they wished against the need for protecting the interests of those currently residing in the properties in question.<sup>45</sup>

### THE CONSTITUTION OF 1992

In 1992, Cuba revised its 1976 constitution to, among other things, place religious believers on equal legal footing with other citizens and lay the groundwork for foreign investment in Cuba. But the constitution is equally interesting for its declarations concerning personal and residential property.

In article 9, the constitution states that the government aspires to ensure that every family has an adequate place to live.<sup>46</sup> In articles 11 and 14, the government asserts its sovereignty over the whole of the national territory<sup>47</sup> and claims authority over an economy that is based on a socialist property model.<sup>48</sup> Article 15 then restates the 1976 constitution's distinctions between state and non-state commercial property by providing that all property belongs to the state except for small-scale farmers and farming cooperatives.<sup>49</sup> The 1992 document also specifies that citizens have a right to personal property such as income, savings, and housing to which they hold title.<sup>50</sup>

In articles addressing expropriation and confiscation, the 1992 constitution authorizes property expropriation, with due indemnification, in cases of public utility or social interest.<sup>51</sup> In disturbingly vague language, the documents states that "the law" ("la ley") will establish the expropriation procedure to be fol-

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41. *Id.* at 911-912.

42. Peñalver, *supra* note 4, at 127.

43. *Id.*

44. Hendrix, *supra* note 25, at 64 (citing John P. Rathbone, *Private Property Rights in Cuba* (1992): Housing, La Sociedad Económica de Amigos del País Bulletin (La Sociedad Económica, London, England), Mar. 17, 1991, at 2.

45. Peñalver, *supra* note 4, at 128.

46. Cuban Constitution of 1992, art. 9 ("El Estado: . . . c) trabaja por lograr que no haya familia que no tenga una vivienda confortable.")

47. *Id.* at art. 11 ("El Estado ejerce su soberanía: a) sobre todo el territorio nacional . . .")

48. *Id.* at art. 14 ("En la República de Cuba rige el sistema de economía basado en la propiedad socialista de todo el pueblo . . .")

49. *Id.* at art 15 ("Son de propiedad estatal socialista de todo el pueblo: a) las tierras que no pertenecen a los agricultores pequeños o a cooperativas integradas por éstos . . .")

50. *Id.* at art. 21 ("Se garantiza la propiedad personal sobre los ingresos y ahorros procedentes del trabajo propio, sobre la vivienda que se posea con justo título de dominio y los demás bienes y objetos que sirven para la satisfacción de las necesidades materiales y culturales de la persona. Asimismo se garantiza la propiedad sobre los medios e instrumentos de trabajo personal o familiar, los que no pueden ser utilizados para la obtención de ingresos provenientes de la explotación del trabajo ajeno.")

51. *Id.* at art. 25 ("Se autoriza la expropiación de bienes, por razones de utilidad pública o interés social y con la debida indemnización.")

lowed and the bases for determining the expropriation's utility and necessity.<sup>52</sup> In addition, "the law" is to determine the form (and presumably the amount) of indemnification (i.e., cash or other remuneration) within the context of the property owner's interests and economic and social needs.<sup>53</sup> Confiscation, on the other hand, is designed to be an uncompensated taking applied as a government sanction against the property owner.<sup>54</sup> Finally, though people's homes are deemed inviolable, nonresidents may enter without permission as provided by law.<sup>55</sup>

### POSSIBLE APPROACHES TO RESOLVING RESIDENTIAL PROPERTY RIGHTS DISPUTES

The fact that today's Cuban citizens occupy and, in many cases, hold title<sup>56</sup> to the homes of those who left Cuba over the last four decades raises challenging legal questions. These questions will become more pressing should Cuba move toward democratic rule, transition toward a free market system, or at least commit itself to resolving these property issues.

While the most difficult question concerns who holds legitimate legal title to Cuban exiles' residential properties, it is worthwhile exploring practical options to resolving and avoiding residential property disputes between current occupants and Cuban exiles with viable claims to their former homes.

Avoiding bitter litigation and civil unrest are paramount goals for any country concerned with righting past wrongs while protecting citizens' immediate needs. Cuba is no exception. The prospect of protracted residential property disputes involving exiled Cubans, current occupants of those exiles' homes, and the Cuban government would likely dampen

governmental enthusiasm for resolving these matters in the first place. It could also discourage much-needed foreign investment and lead to violence or civil disquiet.

What options might Cuba have to balance competing interests while ensuring a just result? One approach would be to establish a commission, agency, or tribunal composed of Cubans living in Cuba, Cubans and Cuban exiles, or Cubans (both in Cuba and elsewhere) and highly qualified, relevant professionals such as international jurists, academics, and government officials from countries that have experience with such fact-finding bodies. This commission would be judicial in nature in that it would be the primary finder of fact; it would be truly independent of other government sectors; its decisions would have binding, precedential authority; and its decisions would be subject to appeal. The Cuban government might also wish to set up separate bodies or procedures according to the types of claimants (e.g., families versus corporations) and/or the types of property (e.g., houses versus apartments, commercial versus residential property, equipment versus land).

After determining who resolves the complex legal questions, Cuba must decide what form justice will take. Will aggrieved residential property claimants receive physical restitution of their property, or will they receive compensation? Literal restitution, of course, would mean evicting current occupants, convincing them to leave on their own, or relying on them to believe that the original owners have the right to move back in. None of this seems highly likely. On the other hand, claimants could feasibly receive substitute restitution, whereby they would be

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52. *Id.* ("La ley establece el procedimiento para la expropiación y las bases para determinar su utilidad y necesidad, así como la forma de la indemnización, considerando los intereses y las necesidades económicas y sociales del expropiado.")

53. *Id.* ("La ley establece el procedimiento para la expropiación y las bases para determinar su utilidad y necesidad, así como la forma de la indemnización, considerando los intereses y las necesidades económicas y sociales del expropiado.")

54. *Id.* at art. 60 ("La confiscación de bienes se aplica sólo como sanción por las autoridades, en los casos y por los procedimientos que determina la ley.")

55. *Id.* at art. 56 ("El domicilio es inviolable. Nadie puede penetrar en el ajeno contra la voluntad del morador, salvo en los casos previstos por la ley.")

56. These occupants hold title under current Cuban law, but whether such title is valid is one of the many difficult questions yet to be addressed.

granted another property of equal value. Such a compromise deal would make them whole financially, vindicate their claims, and avoid throwing current occupants out into the street.

Compensation, on the other hand, could take the form of cash payments to individual claimants for their property's fair market value. Alternatively, the government could make a lump sum payment to the entire class of claimants or set up a fund (much like the historic Manville Trust) from which qualified claimants would receive monies. Compensation could also take the form of vouchers redeemable for substitute property, future cash payments, or shares in newly privatized corporations. The government could also simply compensate claimants with shares in those new companies. Finally, claimants could receive bonds or other debt instruments that would yield a guaranteed return in cash or corporate shares.

### **DETERMINING WHO HOLDS LEGAL TITLE TO EXPROPRIATED RESIDENTIAL PROPERTIES**

Sorting out who holds valid title to Cuba's residential properties is as important to Cuba's economic growth and social stability as it is to notions of justice under law. As one legal scholar noted, "[A] lack of clear property rights impedes economic development by discouraging investment and demoralizing the populace."<sup>57</sup> This would be as true for Cuba as for any other country in transition. But however the issues sort out, there seems to be agreement that Cuban nationals "must be the primary beneficiaries of . . . [any] . . . privatization effort."<sup>58</sup>

Whether the dispossessed original owners or the current occupants hold superior title depends on the validity of the Castro-era laws affecting property rights, including the Fundamental Law of 1959, Castro's amendments to the 1940 constitution, and laws stripping owners of their properties (Law 989) and granting occupants title (the Urban Reform Law and the 1980s housing laws).

According to one school of thought, the laws noted above are invalid as violations of Cuban law as it existed at the time the first legal changes were made. The argument is that since the initial constitutional amendments were enacted in violation of the 1940 constitution's own requirements and provisions, the changes were null and void. Consequently, the progeny of those and other amendments and the supplanting of the 1940 constitution by the Fundamental Law were and remain illegitimate. If this is so, current occupants' title to residential property would be questionable at best since such title was borne of these invalid laws.

For example, when Castro amended and attenuated the 1940 constitution's bans on expropriation, he did so in violation of that document's obligatory amendment procedures. That in itself, the argument goes, made the amendments invalid. In addition, the government's expropriation of residential property by forcing exiles to forfeit their homes and by nullifying outstanding rental and mortgage agreements violated the constitutional requirements of a legitimate public purpose and proper, prior indemnification.

This school of thought also argues that Law 989 (deeming exile homes to have been abandoned) was illegal and invalid as it penalized citizens for leaving the country, an action ostensibly expressing political disagreement with government orthodoxy. Such punishment would have violated article 33 of the 1940 constitution by discriminating against a class of persons on the basis of political beliefs.<sup>59</sup>

Law 989 is also said to be invalid for contravening traditional civil and common law notions of abandonment. Abandonment under both rubrics requires the property owner to relinquish his or her property voluntarily, peaceably, intentionally, permanently, and with knowledge of the consequences of his or her action. If for no other reason, the abandonment theory fails since Cubans fleeing the island and leaving behind their homes hardly did so voluntarily, as that

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57. Grider, *supra* note 25, at 458.

58. *Id.* at 468 (quoting Cuban American National Foundation, *Transition Program for a Post-Castro Cuba: Outline 5* (May 1993)).

59. Consuegra-Barquín, *supra* note 21, at 903-904.

term is used for determining legal abandonment. Rather, their relinquishment was imposed and coerced. Many, for example, faced persecution and death for being aligned with the prior regime. Others faced similar fates for openly disagreeing with the new government or simply for the fact that their social and business status bespoke an association and alignment with the ancien regime. Still others had no choice but to leave once they faced the prospect of penalties for failing to conform to, or at least remain silent in the face of, Communist orthodoxy. Those penalties included legal sanctions, harassment, and social ostracization for disagreeing with the new order, for being suspected of or perceived as being in dissent, or simply for being related to or otherwise associated with someone who dissented with the Castro government. In all cases, these exiles fled for their lives—some literally, others to preserve the human dignity and freedom that make life worth living.<sup>60</sup>

A contrary school of thought argues that for reasons of practicality and peaceful transition, we should not deem invalid all Cuban law enacted over the last 40 years. While the notion that the 1940 constitution is still alive and Castro-era laws are invalid may have emotional appeal, such an approach would mean that all Cuban law since 1959 was unconstitutional. That result would likely be counterproductive. As one legal scholar put it, “To declare that the Fundamental Law of 1959 and the Socialist Constitution of 1976 were null and void from their inception might cause chaos and lead to collective disorderly conduct, not to mention legal confusion within the judiciary.”<sup>61</sup> This pragmatic view urges that we acknowledge and accept (for practical purposes only) Cuban law and the state of residential property title as they are. It prompts us to work with what we have rather than with what we might prefer.

The question, then, as to who holds title to the homes left behind by Cuban exiles depends on whether the Fundamental Law of 1959 and other laws were valid or not. One legal writer provides an interesting and helpful test for conducting the necessary analysis and arriving at competing conclusions. As this legal scholar posits, whether or not the Fundamental Law was valid, we must first apply an abandonment test to determine if, in fact, Cuban exiles did indeed abandon their homes.<sup>62</sup>

The writer distinguishes three types of abandonment:

1. property abandonment: the voluntary forsaking of property by its owner and, therefore, its automatic transfer to the state’s patrimony;
2. imposed abandonment, where expropriation took place against an absentee owner; and
3. property expropriated (not abandoned), where expropriation took place under one of the expropriation laws (i.e., Urban Reform Law) against a present owner who never left the island.<sup>63</sup>

If the Fundamental Law was valid and one or more of these types of abandonment applies, then the state would have had a right to use the properties as it saw fit. In that case, current occupants would hold valid title under Cuban laws granting them such title.<sup>64</sup>

If, however, our premise is that the Fundamental Law was invalid, we would first apply the abandonment test and then examine whether the expropriation laws were constitutional. If those latter laws were in sync with the constitution, then the properties would belong to the title holders. If the expropriation laws were not constitutional, alleged title holders would have to substantiate a claim for *usucapio*, a Civil Law form of acquired title similar to the U.S.

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60. *Id.* at 904-905; Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, *supra* note 25, at \_\_\_\_\_, n. 84 (citing Consuegra-Barquín, *infra*, at 903-906).

61. Consuegra-Barquín, *supra* note 21, at 899; *see also* Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, *supra* note 25, at \_\_\_\_\_ (§4.4.2.1).

62. Consuegra-Barquín, *supra* note 21, at 918.

63. *Id.* at 918-919.

64. *Id.* at 919.

phenomenon of adverse possession.<sup>65</sup> Such a claim would require the possessor to show that he or she acquired good title without the prior title holder's permission simply by meeting certain criteria. As summarized by one legal writer:

The stated requisites for usucapio are the following: (1) there must be continuous possession without interruption, (2) there must be a quiet enjoyment possession, (3) the possessor must be acting in an ownership capacity, and (4) possession must be public and open.<sup>66</sup>

Under Civil Law *usucapio*, there are two types of possessors: those with title under ordinary acquisitive prescription and those holding title under extraordinary acquisitive possession.<sup>67</sup> For the *usucapio possessor* to hold title through ordinary acquisitive prescription, "the possession has to be in good faith – bona fide, and it must be with a just title (justo título)."<sup>68</sup> In cases of extraordinary acquisitive possession, however, the holder "has full knowledge of the flaw on the property title or knows that by his action he is

possessing a property which does not belong to him."<sup>69</sup>

### LEGAL CLAIMS

Cuban exiles considering litigation as a means of recovering lost residential property or vindicating property rights would need to carefully determine what claims to raise and which laws and legal principles should form the bases of their arguments.

Potential claimants eager to bring suit under U.S. law would find that the Helms-Burton Act does not grant standing in most cases for suits to recover confiscated residential properties.<sup>70</sup> Apart from Helms-Burton, Cuban exiles who are now U.S. citizens would likely (though not definitively) lack standing to sue in U.S. courts given the legal tradition that "a state [here, the United States] can only act to protect the interests of those who were nationals of that state at the time of the expropriations."<sup>71</sup> Furthermore, there is case law supporting the notion that "an expropriation by a state of property of its own nationals does not violate international law."<sup>72</sup>

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65. *Id.*

66. *Id.* at 914.

67. *Id.*

68. *Id.*

69. *Id.*

70. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. 104-11422, § 4 (12)(B)(i)-(ii) ("For purposes of title III of this Act, the term 'property' does not include real property used for residential purposes unless, as of the date of the enactment of this Act – (i) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949; or (ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.") [hereinafter LIBERTAD Act].

71. Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, *supra* note 25, at \_\_\_\_, n. 23 (citing D. W. Greig, *International Law* 53-56 (2d ed. 1970)).

72. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702, n. 9 (1986) (citing *Jafari v. Islamic Republic of Iran*, 539 F.Supp. 209, 214-215 (N.D.Ill. 1982)) [hereinafter RESTATEMENT (THIRD)].

In addition, U.S. courts traditionally avoid sitting in judgment of the acts of foreign states that take place within those states.<sup>73</sup> Known as the act of state doctrine, this general rule is not absolute, however. In fact, Helms-Burton itself states that “[n]o court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action”<sup>74</sup> by those (including Cuban-Americans) suing foreign companies for trafficking in confiscated properties located in Cuba. As importantly, international human rights cases (particularly those outside the United States), U.S. cases involving foreign officials, and even the U.S. Supreme Court’s own language<sup>75</sup> suggest that the act of state doctrine is not a hard-and-fast rule and that U.S. jurisdiction may apply in cases involving overseas actions and leaders.

Though Cuban-American claimants would likely not have recourse to U.S. laws that are not also international laws to which the U.S. is bound, they may have colorable claims under international law covering property expropriation. Property is, after all, a subject of international law in general and international human rights law in particular.

It is important to understand what international law is and what qualifies certain norms as international law. The Restatement (Third) of the Foreign Relations Law of the United States states the following:

International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.<sup>76</sup>

Furthermore, a “rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law;<sup>77</sup> (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.”<sup>78</sup>

The notion that private property cannot be taken by a government without prior, adequate compensation (i.e., fair market value) is an international law principle that meets all three of the criteria for determining whether a given standard qualifies as international law. Protection of private property could be said to be customary law since it is a practice of many na-

73. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804, \_\_\_\_ (1964) (Justice White dissenting) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”); *see also Id.* at 428 (“[W]e decide only that the [Judicial Branch] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.”); *see also Id.* at 416 (“The classic American statement of the act of state doctrine. . . is found in *Underhill v. Hernandez*, . . . where Chief Justice Fuller said for a unanimous Court: ‘Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.’”) (citations omitted) [hereinafter *Sabbatino*].

74. LIBERTAD Act, *supra* note 70, at title III, § 302 (a)(6).

75. *Sabbatino*, *supra* note 73 at 421-422 (“We do not believe that this [act of state] doctrine is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law. . . . That international law does not require application of the doctrine is evidenced by the practice of nations. . . . No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments . . .”) (citations omitted); *see also Id.* at 423 (“The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.”); *but see Id.* (“The act of state doctrine does, however, have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.”)

76. RESTATEMENT (THIRD), *supra* note 72, at § 101.

77. *Id.* at § 102 (2) (stating that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”)

78. *Id.* at § 102 (1) (a)-(c).

tions undertaken out of a “sense of legal obligation.”<sup>79</sup> In addition, numerous treaties, including bilateral investment treaties and multilateral agreements, recognize the need to protect property. Finally, today’s “major legal systems”<sup>80</sup> protect the sanctity of property in their constitutions and national laws.

Property is more than just a matter of international law, however. It is also an international human right. Though recognition of property as a human right is still evolving and far from being adequately addressed, “[a] new consensus is emerging recognizing property as an individual right, with the protection of human rights law from state expropriations.”<sup>81</sup> That property is an international human right finds support in the fact that it is recognized as such in most multilateral human rights agreements (thus satisfying Restatement § 102(1)(b)) and “in the vast majority of . . . national constitutions”<sup>82</sup> (satisfying Restatement § 102(1)(c)). It may not be a product of customary international law, however, since it is almost impossible to accurately monitor worldwide state practice for consistency or to determine whether respect for property rights is observed out of the requisite sense of legal obligation. Nevertheless, if property does qualify as an international human right, states are bound to respect that right as it pertains to those subject to their jurisdiction.<sup>83</sup>

While private property, and residential property above all, is an international human right, it does not likely fall within the category of peremptory norms

that trigger universal jurisdiction. According to the customary international law of human rights, state practices such as genocide,<sup>84</sup> slavery,<sup>85</sup> torture,<sup>86</sup> and “consistent pattern[s] of gross violations of internationally recognized human rights”<sup>87</sup> permit “[a]ny state . . . [to] pursue international remedies against any other state” that engages in such activities.<sup>88</sup>

Prohibitions on activities such as torture and genocide are peremptory norms (also known as *jus cogens*): “permitting no derogation[,] [t]hese rules prevail over and invalidate international agreements and other rules of international law in conflict with them.”<sup>89</sup> It is unclear whether a right to property falls within this class of nonderogable norms such that it would justifiably trigger international outcry and jurisdiction. The Restatement (Third) addresses this uncertainty:

The Universal Declaration of Human Rights includes the right to own and not to be arbitrarily deprived of property. . . . There is, however, wide disagreement among states as to the scope and content of that right, which weighs against the conclusion that a human right to property generally has become a principle of customary law. All states have accepted a limited core of rights to private property, and violation of such rights, as state policy, may already be a violation of customary law. Invasions of rights in private property that have not achieved the status of customary law may nonetheless violate a particular international agreement or . . . the principles of customary law governing state responsibility to foreign nationals.<sup>90</sup>

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79. *Id.* at § 102 (2).

80. *Id.* at § 102 (1) (c).

81. Consuegra-Barquín, *supra* note 21, at 887.

82. *Id.* at 892.

83. RESTATEMENT (THIRD), *supra* note 72, at § 701 (a)-(c).

84. *Id.* at § 702 (a).

85. *Id.* at § 701 (b).

86. *Id.* at § 701 (d).

87. *Id.* at § 701 (g).

88. *Id.* at § 703 (2).

89. *Id.* at § 102, comment k.

90. *Id.* at § 702, comment k (citations omitted).

In most cases, expropriation of residential property does not likely fit alongside such “gross violations”<sup>91</sup> as torture, genocide, and slavery. It also probably falls outside the § 702 category of a “consistent pattern of gross violations of internationally recognized human rights,”<sup>92</sup> as those actions have to be “particularly shocking because of the importance of the right or the gravity of the violation”<sup>93</sup> and because the term “consistent pattern of gross violations” “generally refers to violations of . . . rights that are universally accepted and that no government would admit to violating as state policy.”<sup>94</sup> In addition, private property rights might not be *jus cogens* since they are often “subject to derogation in time of public emergency.”<sup>95</sup>

However, even though “[n]ot all human rights norms are peremptory norms,”<sup>96</sup> one could argue that residential property belongs in the *jus cogens* category since that category includes “rights [that] are fundamental and intrinsic to human dignity.”<sup>97</sup> Unlike commercial property, private homes are expressions of, intimately related to, and necessary for peoples’ desire and ability to live with dignity, raise families, and preserve personal privacy.<sup>98</sup> In this re-

spect, residential property might be said to be a non-derogable international human right under precepts of natural law, and in fact recent legal scholarship supports this notion.<sup>99</sup>

## CONCLUSION

Once Cuba is able and willing to untangle the legal and moral issues surrounding resolution of residential property, the undoubtedly lengthy process will require not only great care, but great minds and hearts as well. Wrestling with Cuban residential property claims will open old wounds and force all involved to confront great injustices. As importantly, however, it will require a recognition that residential property, unlike commercial or other forms of property, is intimately tied to people’s lives, to their sense of home, security, and privacy. Resolving these claims will require a balance between justice and mercy, theory and practice, idealism and pragmatism. This process will demand that people draw upon the better side of their nature, whether those people are Cubans on the island, Cubans in exile, or those of other nationalities. That is a challenge no one can afford to underestimate.

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91. *Id.* at § 702 (g).

92. *Id.*

93. *Id.* at § 702, n. 10.

94. *Id.*

95. *Id.* at § 702, n. 11.

96. *Id.* at § 702, comment n.

97. *Id.* at § 702, comment m.

98. See generally Peñalver, *supra* note 4.

99. *Id.*