

LAND TITLE REGISTRATION IN CUBA: AN UPDATE

José Manuel Pallí

This essay has a dual purpose: (1) updating a paper on the same topic presented at the 2005 ASCE Conference;¹ and (2) exploring some of the issues and queries raised by said paper. The author has tried to reflect in it dissimilar backgrounds and points of view, as befits the reality we are bound to face when the time comes to begin resolving—in practical and no longer theoretical terms—many of the issues covered herein. We have also tried to bring into our writing the perspective of our brothers and sisters in Cuba, to the extent that their assessment of those very same issues and queries are discernible to us—always a difficult task due to our self imposed isolation, which piles on the long history of restrictions placed by the Cuban government upon the free flow of discourse between us and its citizens.

THE CUBAN REGISTRAL SYSTEM

In the Fall of 1999, the First Ibero-American Conference on Registral Law was held in Mexico City, hosted by the then head of the *Registro Público de la Propiedad del Distrito Federal*, Lic. Raúl Castellano. It was, to my knowledge, the first time the Cuban Registry System was discussed in a regional forum dealing with that particular branch of the Civil law.

Our Cuban heritage led many of our friends and colleagues, specialized in Registral and Notarial Law in

Latin America and attending the Conference, to joke with us about what common ground could possibly be found with a system where property rights, as we understand them, were non-existent (“what is it that they record in Cuba, anyway?”), was one of the questions heard more than once during the inaugural session of the conference, always in a somewhat mocking vein, from many of the participants who wanted us to engage in a discussion with the Cuban delegate). Those very same questions, as well as a sense of foreboding with regard to what course such a discussion could take, were also in my mind.

But after a very long private conversation with the Cuban delegate—born in 1959, making her first trip abroad, whose allegiance to the Cuban Revolution (and to Fidel) was all but unassailable—we came to realize that: (1) the lawyer with whom we were meeting had, at the very least, as solid and comprehensive an understanding of the nuances of Registral Law as other participants in the conference; and (2) despite her dogmatism vis-a-vis the “achievements of the Cuban Revolution,” she was willing to discuss anything and everything we placed on the table.²

So we discussed the apparent absurdity of having a Mortgage Law (the law that regulates the Cuban Registry System is called *Ley Hipotecaria*) in a legal envi-

1. José Manuel Pallí, “Land Title Registration in Cuba: Past, Present, and Future,” *Cuba in Transition—Volume 15* (Washington: Association for the Study of the Cuban Economy, 2005), pp. 147–156.

2. Besides, in these days of anti-globalization and anti-liberalism backlash, some on our side are prone to resort to a similar degree of dogmatism when debating the other side (calling those who point to the shortcomings in our policies “perfect idiots,” or dismissing them outright as robotic interpreters of totally discredited views, notwithstanding some uncomfortable voting patterns). The obvious strengths of our so called “traditional” or “western” ideas are ill served by such dogmatism, which confuses conviction with exaggeration, undermining the credibility of what should be a very good and persuasive argument from our side.

ronment that bans mortgages; we learned that a debate was then going on in Cuba regarding the implementation of a law enabling foreigners to mortgage their real estate investments in the island; we discussed the state of disrepair in which the Cuban Registry system stood after so many years of paralysis (we were told that it was been revamped, which led us to investigate this topic and write the essay we are hereby updating); we discussed the role of the lawyer in Cuban society (she was totally impervious to our hints about how much money a very well trained lawyer like her could be making in another place; in fact, she took pride of her being in equal terms with her next door neighbor, a hair-dresser by trade, when it came to their respective wardrobes, their eating habits, and the amenities their families could enjoy).

During that conversation — my first ever with a Cuban official — it became clear that her skills and knowledge were such that they deserved to be shared with a larger audience. We suggested she should take the podium next morning and give the whole conference a summary of what she was then describing to us: a registry system in the early stages of re-development, run by very well trained professionals and staff (we were impressed also by the caring way in which she referred to her staff, and how she seemed to rate them above those she had observed working in registry chores over the previous days in Mexico). She smiled, and gave us the impression she was pondering over our suggestion, before telling us that she

was not concerned with what the delegates from other countries might think or say: she was concerned with “what you guys in Miami think” — she made a point to let us know that she tended to discard what our Miami side “said,” just as she expected our side to discard what her side “said.” But “thoughts” — grounded on true knowledge of each other side’s reality — were another matter, she said.

A year later, the Second Ibero-American Conference on Registral Law was held in Havana, but due to the restrictions that U.S. law impose on traveling to Cuba, we were not able to attend.³

In January 2003, we were allowed to visit the Registry offices (*Oficinas del Registro de la Propiedad*) at La Lisa, one the five offices functioning in the City of Havana. We had insisted, at a Registral Law Seminar we participated in, that Registral Law has a practical side that cannot be grasped from books and theoretical principles, and that the quality and effectiveness of a recording system can only be measured through practical experiences. Our colleagues and friends in the Cuban legal profession obtained authorization for our visit, and all other participants in the Seminar were also invited.⁴

We felt as one would feel visiting a *Registro de la Propiedad* in any small town in Spain. The setting, the way the books were kept — the books were identical to those used in Spain, their pages irregularly cut at the end in order to prevent (or make evident) any tear or tampering —, the indexes, all had a distinct

3. Those in attendance were stricken by two surprising circumstances surrounding that second conference: Cuba was holding a Registral Law Conference, but it was impossible for any of the participants to obtain a copy of Cuba’s Registral Law (it was re-printed soon thereafter). Nor could anybody find a trace of the Cuban delegate to the First Mexico City conference. Questions about her went unanswered or were evaded, without any explanation. She could not be reached through the contact information she had given us in Mexico City. It was — from what we were told by the Spaniards, the Argentines, the Mexicans, and everyone else we spoke to — as if she no longer existed, or worst, had never existed. Many thought that our discussions with her, and the fact that, in response to the Cuban Ministry of Justice’s invitation to the Second Conference, we had praised her and expressed our wish to continue and expand our conversation at some other occasion, had gotten her in trouble, a thought that, from our Miami perspective, fitted perfectly into our folklore. Only in 2003 did we learn that she was not in any cane-cutting assignment, nor in a “pajama plan,” but had been elevated to a position she craved at one of the international law firms the Cuban system runs. Only in Cuba (we hope) can a government’s penchant for secrecy — and for cloak and dagger exercises — play such a role, giving others a reason to confirm their very negative perceptions towards it in such a gratuitous way.

4. There were a couple of notaries in the seminar, who were also professors of Notarial Law at the University of Havana Law School. We told them they need not feel obliged to come — assuming, as we would in any other Civil Law jurisdiction, that Cuba’s *Registro Público de la Propiedad* would be the natural habitat for notaries and their employees, as it is everywhere else. They insisted they wanted to come with us, since they had never been at a Cuban recording office.

Spanish flavor. The entries (or *inscripciones*) were made in the same way as they are made in Spain, applying a *Folio Real* technique that presents, for purposes of a quick search and examination, all the information affecting the rights over a specific parcel or unit. We could see a number of entries recording the property rights of foreigners over housing units (which responded to our query as to how would an Italian or Spanish investor be able to show, to a lender or purchaser in his or her home country, the availability of these assets). During our visit there was a power outage—a frequent occurrence in Havana during those early days of 2003—and so it was impossible to make any copies of the books and documents we viewed. But the overall experience confirmed other indications we then had that the Cuban land title recording system was slowly but surely returning to its roots in Spanish Registrational Law, a perception reflected in our 2005 ASCE paper.

DEVELOPMENTS SINCE 2005

In late 2005, shortly after we presented our paper at the August 2005 ASCE conference, Cuba's *Ministerio de Justicia* (Minjus) passed a resolution⁵ seeking to improve the way the *Registro de la Propiedad* functioned and a more agile and effective control of Cuba's real estate assets base.⁶ The new stage started by the Resolution seems to be centered on the registration (*inmatriculación*) of full city blocks (*manzanas ordenadas*)—it is not clear to us whether this technique supersedes the *Folio Real* technique that characterizes Spanish registrational Law—and the use of loose leaf binder books (*libros carpeta de hojas móviles*) sequentially numbered from the day of their first use,

beginning in the year 2003 (these binder books were apparently meant to replace the large, guillotined books we had seen at the La Lisa recording office in January 2003).⁷

- Resolution 249/05 of the Minjus superseded and derogated resolution 247 of September 15, 2003, which is discussed in our 2005 paper,⁸ and consolidated in a single statute all the existing norms that regulate the organization and functioning of the *Registro de la Propiedad* in Cuba. Among its most salient points, it appears to introduce a reservation of priority mechanism (or *reserva de prioridad*),⁹ another step away from the Spanish Registrational system, which perceives this Argentine inspired (and, in our opinion, useful) institution as anathema.
- Resolution 249/05 includes in its list of titles and documents to be recorded at the *Registro de la Propiedad*, the certifications issued by the Land Tenancy Registry (*Registro de la Tenencia de la Tierra*) as evidence of the existing property rights over rural land (*fincas rústicas*).¹⁰ In the same list we find the *actas de notoriedad*, a document used in Spanish Registrational Law when it becomes necessary to reconstruct (or fill the gaps in) the title chain to a given piece of property.¹¹
- Its Article 5 complements the recordable documents list in article 4 by stating that real property rights (*derechos reales*) are “also”—“*además*”—recordable at the *Registro de la Propiedad*, an apparent give-away on the true goals pursued by the Minjus, which seems to be more concerned about controlling who “owns” what than in pro-

5. Resolución No 249/05.

6. Fifth Whereas (Quinto Por Cuanto) in the resolutions' preamble, and last paragraph in article 79 of Resolution 249/05, which emphasizes the differences in this “nueva etapa del funcionamiento del Registro de la Propiedad.”

7. Articles 76 to 83 of Resolution 249/05

8. Second paragraph, third transitory provision (*resoluciones transitorias*) of Resolution 249/05.

9. Last paragraph, article 6, and second paragraph, article 9, of Resolution 249/05.

10. Item (*inciso*) 9, under article 4 of Resolution 249/05. This appears to foretell an eventual consolidation of all property rights over Cuban land in a single registry, the *Registro de la Propiedad*, as is usual everywhere else in the Civil Law world, where urban and rural property rights coexist and are publicized in the same recording office. But this would require the elimination of the Land Tenancy Registry, created by Resolution 597 of 1987, issued by Cuba's Department of Agriculture

11. Item 15 under article 4 of Resolution 249/05.

protecting any Cuban's individual property rights. The priorities (*prelación*) as to the rights— or documents— recorded is anchored by a Diary or Reception Book (*Diario de Radicación*), where a sequential number is assigned to each incoming document at the time it is presented for recordation, that is, before it is formally recorded,¹² since the formal recordation can only occur after the Registrar reviews it (*lo califica*).

- It goes into painstaking detail in describing how the chain of title to a given parcel or unit is to be restored or reconstructed in cases where there is little or no information in the records. The starting point for a procedure aimed at restoring a chain of title (what in our Anglo-American legal parlance is called the root of title) is to be found in the governmental act whereby the real property in question was nationalized or confiscated (*la disposición de nacionalización o confiscación del inmueble*), or else in the first title or grant issued by the State after said nationalization or confiscation.¹³ This apparent attempt to turn their backs to the pre-revolutionary past may be mellowed by other provisions in this same statute.¹⁴ If it is not possible to completely restore a given chain of title, Article 27 of Resolution 249/05 allows for the validation of the title presented for recordation magnifying the importance of its two immediately antecedent titles or conveyances (*actos de transmisión*) and/or any evidence that the Cuban State acquired, improved or tendered (“... *adquirió, construyó o fomentó...*”) the property in ques-

tion more than five years beforehand (a rather short prescription term that covers a lot of ground for the sake of finality in the restorative process).

- The access to the data stored at the *Registro de la Propiedad* is limited to those who can show they have a legitimate interest in learning about the contents of a specific recording entry.¹⁵ The publicity of the recorded information is rendered by means of simple memoranda issued by the pertinent recording office (*notas simples informativas*), by certifications issued by the Registrar, and thru the direct examination of the recording books (a very common practice for our colleagues in the Civil Law world, but that, in Cuba, requires prior and specific approval from the Minjus).¹⁶ The scope of the publicity available seems to be expanded by item (*inciso*) (f) of Article 64, which seems to authorize the Registrar to give out information about the recordings made before 1965 (“...*antes del año 1965...*”, which could be read as encompassing pre-revolutionary titles).
- The language in Article 74 distills a slightly paranoid concern with regard to the need to “protect” the data contained in the *Registro de la Propiedad* that, read together with the immediately preceding articles, reinforces our impression that it is the “control” of the information and not the protection of rights-holders (and/or of third parties) that is driving Cuba's efforts to revitalize its land title recording system.¹⁷

12. Article 8 of Resolution 249/05.

13. Article 26, item (inciso) 1 of Resolution 249/05

14. For instance, it is our impression that Article 29, item (d), leaves the door open to the use of an “*acta de notoriedad*” where the “parties” to it might go beyond the prescribed root of title and delve into the past history of the property title in question. Article 29, item (c) takes into account the information found in a document presented for recordation about pre-existing but missing titles (“*títulos ... que faltan,*” known to exist but not available for presentation) in order to fill the gaps in the title chain. This seems to be supported by the policies behind Cuba's foreign investment laws and regulations, which have played a significant role behind this ongoing process of revamping the *Registro de la Propiedad* and on increasing, even if modestly, the levels of legal certainty in regard to land titles in Cuba.

15. Article 63 of Resolution 249/05.

16. Article 64 of Resolution 249/05.

17. And yet, Article 71, in describing the scope of the “*nota simple informativa,*” states that this type of document has no evidentiary value vis-a-vis the rights of third parties (“...no acredita derechos frente a terceros...”), an overt acknowledgement of one of the key roles of most recording systems in the world.

- The *Registro de la Propiedad* is decentralized, and there should be as many offices — one per municipality (*municipio*) at a minimum — as needed to facilitate the orderly management of the real estate asset base in each area (*territorio*).¹⁸
- After the last article in this rather long statutory Resolution from the Cuban Ministry of Justice, we find a number of Special (*Disposiciones Especiales*) and Transitory Provisions (*Disposiciones Transitorias*) that shed some light into other aspects of this emerging recording system and its potential impact upon real estate transactions (present and future) in Cuba.
- The Notarial offices (*las unidades notariales* or *Notarías*, as they are called else-where, in less “burocratized” versions of the Spanish language) and the Notarial Archives in each Province (*los Archivos Provinciales de Protocolos Notariales*), are called upon to assist — free of charge — the Registrar in his/her review of titles presented for recordation (*la calificación registral*), by issuing fresh copies of those titles and documents (*escrituras matrices*) contained in their respective notarial books (or *protocolos*).¹⁹
- In the same vein (as an incentive for recordings), every first recording of personal property rights over real estate (“*La primera inscripción relativa a los inmuebles de propiedad personal que se practique...*”) made after October 1st, 2003 will be free of charge.²⁰
- There is even an apparent concession to the role of the market when it comes to establishing property values. The Fifth Special Provision stipulates that the legal value (*el precio legal*) of urban properties is the one reflected in the corresponding title (“*el que consta en el título correspondiente...*”).²¹

This new stage of Cuba’s recording system or *Registro de la Propiedad* has been in place since December of 2005, and it is our understanding that significant strides have been made to bring into the system the information pursued, even while prioritizing the State’s interest in knowing and controlling, over the protection of individual property rights.

PRE-REVOLUTIONARY TITLES

Among the many questions raised by our 2005 essay on land title registration in Cuba, none have been more persistent than those related to the pre-revolutionary recording entries and the documents entitling those whose properties were expropriated, confiscated, or “abandoned” (a term couched by revolutionary laws to justify the taking over by the State of all property left behind by those who left the country permanently after 1959, thereby “giving up” the property in question, as per the Cuban government’s interpretation).²² All indications we have point to the preservation of the old recording books — where the pre-revolutionary titles to real property are entered — and of the old documents of title (*escrituras públicas*).

The First Housing Law (*Ley 48 de 1984*) tried to put behind the old Spanish Regstral System, following a course initiated 20 years before with Law 1180 of 1965. But the old Spanish system, supported by a Regstral Law which was never derogated by the revolutionary authorities, kept fighting back, and its resilience and relevance (in historical terms, at least) was acknowledged by the Second Housing Law passed in 1988, which identifies the old *Registro* as an accessory to the new Registry (the short-lived *Registro de la Propiedad de la Vivienda y Solares Yermos*). And the sanction of Cuba’s 1995 Foreign Investment Law, which authorized foreign direct investment in Cuban real

18. Article 84, Resolution 249/05.

19. Special Provision # 1 (*Disposición Especial Primera*). This provision seems to apply only to titles (*títulos de dominio*) issued by the notaries after (“*a partir de*”) 1996, but still, it hints at a more relevant role for the notarial function in Cuba.

20. Special Provision # 2.

21. We read this as a reference to the transactional value, as agreed upon by the parties, despite the difficulties posed by the somewhat inconsistent use of the term “*título*” throughout this and other Cuban statutes. The usage here seems to go beyond the titles issued by the Cuban authorities.

22. This “abandonment” concept is “enshrined” in article 81 of the 1988 Housing Law (*Ley General de le Vivienda*).

property, appears to have also contributed to the preservation of data related to pre-revolutionary property rights (as it did to the re-assessment of the importance of having an effective registral system), since the scope of the foreign investor's due diligence effort when investigating title is bound to go way back, beyond the revolutionary era. The Cuban authorities may only assign a historical value to pre-revolutionary titles, but history can still be checked.

In most cases, these questions about the old records are posed to us by people who seek our help and advice in pursuit of establishing the foundation for a future claim seeking the restitution of (or reparation for) expropriated or confiscated real property rights. The key word in these pursuits is "future," and although we can help anyone in such a predicament by sorting out and organizing the evidence of title they may have, and pointing out the strengths and shortcomings of what we are shown, we can only guess what the rules under which such claims will be assessed and adjudicated will look like, since under the present laws of Cuba those claims would not prosper, and betting on a full restoration of the pre-revolutionary legal system (which could support those claims) is far from a safe bet.

However, these claims are (and are likely to remain) an important factor in any objective and reasonable vision of Cuba's future. And all Cubans — from both sides of the Florida Straits — should face this reality (as well as many others) with objectivity and common sense. There is nothing wrong in the restorative

or compensatory aspirations of those who feel that they (or their ancestors) were unjustly deprived of their property rights. Those hopes and aspirations are deeply imbedded in human nature, to the extent that property rights are widely recognized as human rights.²³ The notion that there was an element of justice in the expropriations and confiscations undertaken by the Cuban revolution is preposterous, except for perhaps a handful of cases. And the arguments built around the idea that the wealthiest among us are less deserving of protection when it comes to Human Rights can only fit in the minds of the most feverish Marxist ideologues. But many of those who were born in Cuba after the Revolution have had this "fairness of the revolutionary taking of property from its enemies" argument engraved in their hearts and minds.²⁴

So it is important to try to see things from the perspective of both, the more than eleven million Cubans in the island, who would be called upon to answer — even if indirectly — for these past injustices, and from that of those of us whose families left everything behind. And the Human Rights angle is a good starting point in such an endeavor, if we are searching for common ground.²⁵

LEGAL CONTINUITY

Another question frequently faced by our 2005 essay was whether it was justified to assume, as we do, some degree of continuity between the presently existing legal system (or *ordenamiento jurídico*) and the one that will follow the end of "Castroism" in Cuba.

23. In our Inter-American system, the right to own private property is recognized among the Rights and Duties of Man (article 23 of the *Declaración de Bogotá*, and article 21 of the *Pacto de San José de Costa Rica*), although the national laws of each country in the Hemisphere are allowed (even expected by their respective Constitutions, in some cases) to subordinate the use and enjoyment of private property rights to the interest of society. The latest addition to this set of Inter-American Human Rights treaties is the *Protocolo de San Salvador*, which speaks to a series of economic, social and cultural Human Rights, calling them essential, and emphasizing the need for a framework of democratic principles, social justice and individual freedom for them to be realized. Cuba, which has been excluded from the Inter-American system for many years, is not a party to either the *Pacto* or the *Protocolo*, nor is the United States, which has yet to ratify them.

24. And many of those direct beneficiaries of the takings still alive, those who went from tenants to "owners" thru the magic of the Urban Reform, for example, feel they have as strong a claim as anybody else to their housing assets, since they will tell you they paid the State for them, at no little sacrifice.

25. For years now, Brazil has been regularizing property rights (*regularização fundiária*) on the premise that by assuring every Brazilian's access to dignified housing you come closer to realizing the constitutionally mandated goals of eradicating poverty and exclusion, and reducing social and regional inequality (Article 3, III, Federal Constitution of Brazil).

After all, many amongst us seem convinced that there is no legal system whatsoever in Cuba: *en Cuba no hay Derecho* is frequently the argument of those who fail to see any value or purpose in studying Cuba's present laws.

But this is an incongruous emotional argument, which flies in the face of some difficult-to-ignore facts. There are several very bright and knowledgeable young Cuba trained lawyers practicing in the United States after revalidating their Cuban Law degrees. They seem to have faced no greater difficulty in obtaining admission to Florida's and other states' Bar Associations than other foreign lawyers face. Jesús Faisel Iglesias, one of the founders of the *Corriente Agramontista*, the Cuban dissident lawyers group, got his accreditation to practice Law in Puerto Rico in a fairly short time. We have never heard him, or his better known *Agramontista* co-founder, René Gómez Manzano, claim that there is no legal system in Cuba.

Cuba's legal system is essentially the same Spanish Civil Law system that was in place before the Revolution. There are over 22,000 lawyers in Cuba, and many more in the making.²⁶ Many Cuban lawyers take pride in the services they render to the Cuban people, and their practice, though often difficult and frustrating (because of the heavy ideological content that sometimes permeates it) is also the source of personal and professional satisfaction. A Cuban lawyer's first duty is towards his/her client (the same as everywhere else), but he/she is also sworn to uphold the interests and principles of the Revolution.²⁷

According to some of the Cuban lawyers we have met and interviewed, the court system works fairly well when it comes to resolving the kind of issues and disputes that result from human interaction in any society. In many instances, a Cuban citizen is required by the law to seek legal representation, but this is quite inexpensive. People see lawyers as a valuable tool or resource,²⁸ there is no resentment against them, no "lawyer jokes."

We may not want to discard a possible transit from this legal system underlying the Cuban society of today, into the one that will frame the rights and lives of tomorrow's Cuban citizens. It makes very little sense to simply ignore Cuba's legal system. Rather, we should be doing everything in our power to know it better, to engage it through interaction and debate between American and Cuban lawyers (between our two societies, in every other aspect as well), and to influence it with our arguments and experiences, pointing to its deficiencies (occasional arbitrariness and ideological biases among them). We can do that by changing a weak argument—"there is no law in Cuba" (*en Cuba no hay Derecho*)—into a very strong one—"there is no right for things like this to happen in Cuba" (*no hay derecho a que sucedan estas cosas en Cuba*), singling out egregious cases of violations of Cuba's own laws, as dissident Cuban lawyers do.

RULE OF LAW IN CUBA

The "there is no Law in Cuba" argument is sometimes refined into a "there is no Rule of Law (or *Estado de Derecho*) in Cuba" version. But this is an argument only in name, since no one who truly understands the traditional western concept of The

26. In 1959, there were only two Law Schools in Cuba, the University of Havana Law School and the one at the private *Santo Tomás de Villanueva* University. Now there is a Law School in each Provincial capital.

27. This means that he or she is barred from going against those interests, a somewhat subjective test that each individual lawyer must face, and not many of them take the courageous positions that a Gómez Manzano may take, but that is also human nature. In many aspects of everyday life, the role of the lawyer in the private law sphere is unhindered by this ideological angle. Even in the realm of public law, where a Cuban lawyer is barred from questioning or criticizing (in the oral stage of the trial) the work of the prosecution and the forensic crew (the police, the magistrates), he or she can do so in writing, and their pleadings will be answered by the Court, and sometimes by state security, which makes such zeal in the defense of a client's interest occasionally a costly one.

28. The most valuable asset every Cuban has is his or her home, and people place their trust in Cuba's legal system, and on Cuban lawyers, when it comes to protecting their rights over housing.

Rule of Law can argue that there is even a vestige of it in today's Cuba.²⁹

But the Rule of Law is barely a staple in today's world. Our country deals daily, and fluidly, with a number of countries that resemble Cuba when it comes to neglecting the Rule of Law. Some of our closest allies, and even countries in the top of the list of aid recipients from the United States, get very poor marks when it comes to observing the basic tenets and principles that define the Rule of Law.³⁰ And we trade with, invest heavily in, and enthusiastically collaborate with countries like China, Vietnam, even Libya now, which fall way short of meeting our expectations (conditions, in the case of Cuba) regarding the respect due to property rights, political freedoms, and even human rights.³¹

Some of the countries mentioned above have been undergoing a (slower or faster) process of growth, a transition of sorts, which, to varying degrees, extends to economic, civil and political freedoms. They are doing so at their own pace, a pace we are often in a position to influence by way of our interaction with them. And we decide to engage in such interaction

with barely any absolute pre-conditions to be met by them before we do. Obviously, any such pre-conditions, if rejected, would prevent us from exerting the influence we — and in some cases, the more enlightened segments in those opening societies — wish we had.³²

THE CUBAN TRANSITION

At the same time we take a fresh look at the value engagement and interaction with Cuba may potentially have for all Cubans and for America's national interests, we also need to look into the likelihood that the transition we are all waiting and hoping for may be played out at a pace slower than the one we would all like to see. In such a scenario, a sense of continuity in the legal system might well be very helpful for all Cubans, in and outside the Island.

We frequently look at the transition examples set in Eastern and Central Europe, as a guiding light for what will one day happen in Cuba. They are, indeed, valuable and interesting lessons on how to deal with deep changes in a given society. We also frequently touch on other experiences which are culturally closer to ours, like the transitions in Spain and in Nicara-

29. The Rule of Law, a “complex, multilayered and opaque concept,” as described by Aharon Barak, the President of the Supreme Court of Israel, in a recent and excellent book (*The Judge in a Democracy*, Princeton University Press, 2006) was embedded in Cuba's 1940 Constitution, which conceived a society where human rights, social justice, and civil and political freedoms were not subordinated to public order. That is why many believe the restoration of the constitutional order underpinned by the 1940 Constitution is the best way to strike a balance between society's needs and the needs of the individuals in the Cuba of the future. But that cherished 1940 Constitution was the result of a broad and extended consensus, without exclusions or conditions of any kind, a consensus that embraced every opinion to be found in the Cuba of those days. These days are different days, but the guidelines are there for us to follow in order to forge a similarly broad consensus.

30. Saudi Arabia is about to behead a foreign teen-ager working in Riyadh whose negligence — or simple ignorance — may have caused the death of a newborn Saudi child. Democracy in Egypt is as fluid a concept as it is in Cuba, where many pro-Castro Cubans will tell you that theirs is the one truly democratic society. Even in Israel, there was a policy in place (now discontinued) that justified the destruction of the housing where the relatives of a suicide bomber lived, without any need to tie them to any crime, just arbitrarily imputing to them the behavior of the relative and making them pay for it. Few would claim there is no legal system in Egypt, in Israel, or in Saudi Arabia.

31. Curiously, Vietnamese-Americans, many of whom fled their home country in the aftermath of the Vietnam War, and have lived amongst us while reaping the benefits available under the Rule of Law in our society, have actively participated in and endorsed the ongoing process wherein Vietnam is turning into the New Century's Asian Tiger. Surely Vietnamese-Americans would welcome a future where the Rule of Law fully governs and protects their businesses and investments in Vietnam, but they are not waiting for that to happen (and there are few indications that their brothers and sisters in Vietnam hold their eagerness against them).

32. The U.S. House of Representatives agreed recently to extend the existence of the Overseas Private Insurance Corporation (OPIC) through 2011. This Federal Agency was created to provide American businesses political risk insurance and financing so they could invest in foreign less developed countries where there is economic and/or political instability, and private insurance may not be available. The legislation now going to the U.S. Senate would allow federal help thru OPIC to corporations that underwrite loans or make investments in the energy sector of nations sponsoring terrorism, as long as those loans or investments do not exceed US\$20 million.

gua. But we seldom go deep enough into the core of those transition processes, which is usually imbedded in an underlying legal system that changes, but without a cataclysmic break.

Spain serves as a case in point. The transition, in the mid seventies, from Franco to present day Spain, was anchored by a series of laws passed by the Spanish Parliament (*Las Cortes*) in a long session known as the Reform Plenary (*El Pleno de la Reforma*). Presiding over this plenary session (and over the Spanish Parliament) at that time was don Torcuato Fernández Miranda y Hevia. Many regard him as the unsung hero of the Spanish transition, since he was the architect behind the Political Reform Law (*Ley para la Reforma Política*) approved by the Plenary on November 18, 1976, and ratified by 94.2% of the Spanish voters on December 15th, barely a year after Franco's death. The idea behind the Reform Plenary was to forge a very broad consensus—seeking common ground without excluding any political party—around the key elements that would sustain the legality of the transition and give strength to the foundations of post-Franco Spain, regardless of the results of future electoral processes. Those elements formed a core that every side in the political spectrum consented to and would abide by: a bridge between the past and the future, a consensual core that would remain in place, no matter how many times the foes from the past took turns governing Spain.³³

And that bridge spanning Spain's painful past and its joyous present has been stoutly in place for over thir-

ty years now, despite foreseeable tensions and occasional bouts with the ghosts from the past.³⁴ If there is any model, and there may not be any for Cubans to follow, the cultural affinity with the Spanish people and the extraordinary success of Spain's experiment (its ability to forge an enduring national consensus in an environment where the scars ran as deep as they did in Spain) makes it the most sensible choice.

Nicaragua's experience is apparently less successful, although it may be too soon to pass judgment, since the national consensus around the core elements there seems still to be in the making.³⁵

REGISTRAL LAW AND THE TRANSITION

Once we weigh the importance of don Torcuato's maxim (*de la Ley a la Ley, a través de la Ley*) for a smooth transitional process, we can begin to reflect on the importance of having a legal tradition like Cuba's specifically in terms of Registral Law.

The countries of South East Europe (those in the Balkans) have gone through a transition of their own. As we all know, this transition has been less orderly and peaceful than that of other countries that we frequently call upon as examples (Hungary, the Czech Republic, Poland, the Baltic countries), but it does have its own type of lesson. The norm in the Balkans was not continuity thru consensus and common ground, but fracture—even at a geopolitical level, resulting in fragmented nations—and bloodshed along ethnic and religious lines. Coincidentally per-

33. And this bridge was grounded on the premise that it should be a legality bridge: *del Derecho al Derecho, a través del Derecho* (from The Law, to the Law, through the Law) was the maxim used by don Torcuato, and described by the then Minister of Justice, don Laudelino Lavilla, before the Political Reform Law was voted in Parliament (*“Es importante insertar el nuevo momento en la legalidad, sin fractura entre lo que ha sido y lo que va a ser”*). Another master of parliamentary politics, Sir Winston Churchill, once made the same point by observing, at another critical juncture (June 1940) for his country, that “If we open a quarrel between the past and the present, we shall find that we have lost the future.”

34. And this robust and wide-span bridge is only Five Articles, Three Transitory Provisions, and One Final Provision long, fitting comfortably in two letter size pages (*Ley 1/1977 de 4 de enero, para la reforma política, publicada el 5 de enero de 1977*), confirming the old adage *“lo bueno, si breve, dos veces bueno”* (what's good, if brief, is twice as good).

35. It is also conditioned by forces that were fortunately absent in Spain. For instance, in the same field of property rights we have been focusing on in prior sections of this essay, the uncertainty as to who owns what is still prevalent in Nicaragua, and outside pressures—a former Senator from South Carolina comes to mind—play a role in keeping Nicaraguans from forging the type of consensus that might bring closure to this issue (one that still lives in a kind of purgatory and may be further complicated by the recent “second coming” of Daniel Ortega). The soundness of the Registral System in Nicaragua was never close to what it is in Spain (and was in Cuba, before Castro), and this is also a key element to ponder.

haps, or maybe not, the land registration system in some of these nations (Kosovo, Macedonia, Albania) was rudimentary and, in some cases, not even properly anchored in a Civil Code.

In Cuba, the legal institutions supporting one of the most efficient registry systems the world knows (the Spanish) are still there, even if underneath a layer of revolutionary debris. The evolution of property rights in Cuba, from the socialist concept of *propiedad personal* of today, to the full protection of private property rights that our conception of a truly democratic society based on the “rule of law” requires, will be made easier by that underlying Registral Law framework.³⁶

And in arguing on behalf of this conception of society, anchored by the “rule of law” and solid unassailable property rights, we must keep in mind that exaggeration is credibility’s worst enemy. We can assert the great value, in strength and certainty, implicit in our concept of property rights, without calling it essential, and without ignoring or dismissing other points of view and experiences.³⁷

CONCLUDING REMARKS

The institutional design of Cuba’s property rights system, and of the registral system through which the

future Cuban society will consent to and recognize the rights that affect all of Cuba’s citizens, should be based on Cuba’s long legal tradition. The issue of property rights is, eminently, a legal issue,³⁸ but also a political one.³⁹ It requires a keen knowledge of the real conditions prevailing in a given society. It should be the product of a broad consensus, supported by all the diverse interests that coexist within Cuban society,⁴⁰ in the Island and abroad: registrars, jurists, notaries, financial institutions, academics, cadastre officials, governmental authorities at all levels, developers, etc.

And the time to seek that common ground, to begin forging that consensus, is here and now.⁴¹ We need to change our attitude, and pursue a fearless engagement and interaction with the over eleven million Cubans in the island. The question about whether history will absolve Castro should not be a factor in our attitude and behavior; it is irrelevant, because we simply have no control over it. The question is whether it will absolve us, in view of our obdurate dogmatism, inaction, and self-imposed isolation from the real Cuba.

36. The enforcement and protection of private property rights is perhaps the best and most solid foundation for the architects of Cuba’s society of the future — the builders of the necessary consensus — to work from, but its immediate implementation may not be possible.

37. China’s economy (the world’s fourth largest) is today six times as large as it was in 1993, when its national legislature first discussed a property rights law. The average income of urban Chinese has increased five-fold since then. For many years, plenty of real-estate buyers, including sophisticated foreign ones like Morgan Stanley and Goldman Sachs, have invested heavily in the Chinese real estate market. Only in March 2007 did the National People’s Congress pass a property law (which falls way short from meeting liberal “rule of law” standards, although it is certainly a law). A similar story, in a smaller scale, can be told about Vietnam.

38. The cadastral or physical (now geodetic) aspects of property rights are often over-valued by non-lawyers (and by some lawyers as well). This emphasis in the cadastre is also visible in authoritarian countries, especially because they bank on physical detail to better exert their administrative control over people. But no matter how many maps you have, and how good they are, it is the legal framework that determines who owns each portion of a given map, and sets priorities between competing and over-lapping rights. Besides, it is very questionable that exactitude and detail in cadastral maps is required by the market.

39. This essay does not speculate over the many possible and specific ways the property claims from U.S. and Cuban nationals could be addressed — or even redressed — since a key element in that political equation is the freely expressed will of over eleven million Cubans about whom we know very little.

40. Property rights are only as strong as the level of recognition that society grants them, which is the reason why many concepts exported into countries in transition from countries that are at a much higher level of economic development, if done without paying heed to cultural and idiosyncratic differences, fail, sooner or later.

41. A year ago, the ASCE conference was held in an atmosphere of great anticipation. A year went by and we are still waiting for when the time comes (*cuando llegue el momento*). If we want to see the “rule of law” in place in Cuba — after almost fifty years of the “rule of one” — there is plenty of hard work ahead, and not a single reason to delay it.