

THE PRESENT STATUS QUO OF PROPERTY RIGHTS IN CUBA

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The current Cuban situation shows just how difficult it will be for a future democratic government to commit to property restitution. Official statistics in Cuba reflect a significant shortage of family housing, an increasingly unsafe and deteriorating housing infrastructure, and a high density of families living under the same roof. Furthermore, Cuban exiles (mostly middle and upper class) were estimated to be over 10% of the total population by the end of 1961.¹ These, and other factors, have to be considered by any future democratic government aiming to establish an orderly public policy when considering restitution or compensation of property to former owners.²

The present status quo of property rights in Cuba is governed almost entirely by Cuban domestic Law. Whether Cuban nationals should be compensated for property expropriated by the Castro Regime, is also an issue to be resolved pursuant to domestic Law.³ Nevertheless, as opposed to international law, which may play a role with respect to the compensa-

tion for property expropriated to non-Cubans, a study of Cuban domestic law is presently the sole source available in order to understand the status of property rights for Cuban nationals.

In addition, and after 36 years of government control, Fidel Castro undergoes an economic crisis caused by the disappearance of his communist allies. New types of economic reforms have been created to save the Cuban economy. Basically, these reforms authorize the creation of joint ventures between the government and foreign entities. The Cuban joint venture experiments guarantee that the foreigner will inject the hard currency needed to save the Cuban economy and, thus, ensure the government's survival.

Currently, the Cuban government, pursuant article 24 of the Constitution of 1976 (amended in 1992),⁴ has made public its interest in creating a new type of property while selling it to foreigners.⁵ Accordingly, this type of government action rises a numerous of interesting questions regarding how the purchase of

1. Hemilce Esteve, *El Exilio Cubano en Puerto Rico* 13-14 (1984).

2. Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law* 46.2 Rutgers Law Review 873, 875 (1994).

3. *Id.* at 887; *Banco Nacional de Cuba v. Sabbatino*, 307 F2d 845 (1962) at 861.

4. See, Consuegra-Barquín, *supra* note 2, at p.897. (note 105).

"The collapse of communism in the Soviet Union and Eastern and Central Europe brought Cuba's economy to bankruptcy. Seeking new forms of incentives to attract venture capital was one of the objectives of the 1992 amendments to the Socialist Constitution of 1976. New forms of property ownership were created as an incentive to attract joint ventures with foreign investors.

"Those amendments authorized the transfer of property title only in those cases where the transfer benefitted the economic development of the Cuban economy; and when the social, economic and political principles of the socialist State were not affected. Furthermore, a title transfers only with the approval of the Cuban Minister Council and Cuban Executive Committee." *Id.*

5. See Ariel Remos, *Institucionaliza Fidel Castro la Venta de Cuba*, El Diario las Américas, enero 24, 1995 at 1.

private property by a foreign entity affects the rights of present and former owners. Perhaps, among them, how does this action fit with the well recognized principle of international law which states that a successor government is bound to recognize all obligations incurred by the predecessor government?⁶

Today, it is still unclear whether a former owner could claim his property back. Since the issue is not solved, arguments to either position are well accepted. Nevertheless, it is the duty of every responsible legal scholar to avoid speculating on this issue, specially to guarantee and assure that properties confiscated will be returned or compensated. One thing is clear, however, the decision is a political question⁷ that might be left for the politicians to decide and not for the Courts. Thus, and until the time comes, we will keep updating, studying, analyzing and comparing different or newly emerged theories of law, in order to help and assist the next transitional government during its imminent transformation to a free market economy and to a democratic system of government. Likewise, we also assist in answering the political

question of whether the properties confiscated must be returned to their former owners.

A considerable portion of this paper is a brief and an update of the law review article *Cuba's Residential Property Ownership Dilemma: A Human Right Issue Under International Law*, published at the Rutgers Law Review and written by this author. Such article analyzes, inter alia, the current domestic law regarding property rights and the possible related controversies that will arise in the transitional process.

THE REVOLUTION AS A SOURCE OF LAW OR "FUENTE DE DERECHO"

When analyzing the current property rights in Cuba, the first question to answer is whether the triumph of the 1959 Revolution was powerful enough to overrule the Constitution of 1940. In other words, whether the Revolution was a legit Source of Law or "Fuente de Derecho." This question has been hotly debated by multiple law scholars in the exile.⁸

The general rule regarding revolutions is that a successful revolution has the power to annul the existing

6. The controversial Cuban Liberty Act, S. 381 H.R. 927, will not only have to deal with this principle, but will have to address the following issues: whether the act of the state doctrine forbids a State to adjudicate the acts of another sovereign State performed within its territory; whether the United States has the authority to espouse the claims of United States citizens who were Cuban nationals at the time of the takings; whether the United States has territorial or personal jurisdiction to govern the transactions executed outside the United States between the sovereign government of Cuba and a private entity of another foreign State; whether the United States has the power under international law to adjudicate and enforce this Act; what alternatives the United States has in order to harmonize this Act with other bilateral or multilateral treatise as the North America Free trade Agreement (NAFTA) or the General Agreement of Tariffs and Trade (GATT); whether the method of compensation in the FCSC shall be similar to the traditional international standard of compensation, "prompt, adequate and effective", or merely "appropriate" compensation, according to articles 24 of the 1940 Cuban Constitution and the Cuban Fundamental Law of 1959; whether this Act deteriorates the ability of the United States to espouse legitimate claims of persons who were United states citizens prior to the property takings; and others.

7. Emilio Cueto, one of the scholars who has study the issue thoroughly, has classified the property issue as a political question "with no real solution." Emilio Cueto, *Property Claims of Cuban Nationals*, in Papers and Proceedings of the Cuban Transition Workshop, organized by the Law Firm of Shaw, Pittman, Potts & Trowbridge, Washington DC, January 26, 1995 at 4. [hereinafter RESOLUTION OF PROPERTY CLAIM WORKSHOP].

"[t]he Cuban property claims will not, I believe, be fully resolved in a Court of Law which will carefully weigh the legal arguments on both sides of the issue. The problem is of such complexity that Law alone cannot be expected to solve it. Thus the 'resolutions' of these claims will be 'political,' in the broadest sense of the term, and will take place in a particular context which, I suspect, will emphasize National Reconciliation and Social Peace while recognizing existing reality, the scarcity of resources, and the search for viable, sustainable options." Id.

8. See: Consuegra-Barquín, supra note 2; Matías Travieso, *Some Legal and Practical Issues in the Resolution of Cuban Nationals Expropriation Claims Against Cuba*, in Resolution of Property Claim Workshop, supra note 7; Cueto, supra note 7; Nicolás Gutiérrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba*, in Resolution of Property Claim Workshop, supra note 7; Nestor Cruz, *Legal Issues Raised by the Transition: Cuba from Marxism to Democracy, 199_-200_?*, in Cuba in Transition, Papers and Proceedings of the Association for the Studies of the Cuban Economy (ASCE) (1992)[hereinafter CUBA IN TRANSITION]; José D. Acosta, *El Marco Juridico Institucional de un Gobierno Provisional de Unidad Nacional en Cuba*, in Cuba in Transition, supra; and others.

constitution with a new set of legal norms.⁹ Matías Travieso, citing a case from the High Court of the State of Lesotho, states the appropriate test to determine whether a revolutionary government is lawful.¹⁰ The test inquires, *inter alia*, if the government is firmly established, if the government administration is effective, and whether the majority of the people behaves according to the new government.¹¹

Whether we like it or not, it seems that in 1959 the Cuban Supreme Court did its own research and concluded that the Cuban Revolution was legit. The Cuban historical context show that on January 1, 1959, after Fulgencio Batista, then president-dictator of Cuba, fled the country and consequently surrendered control of the Cuban government, a Resolution by the Cuban Supreme Court held that the Revolution was a legit source of law.¹² The facts indicate that

“according to the 1940 Constitution, whenever the presidential position is vacant and there is no legitimate substitute available, the most senior justice of the Supreme Court should be appointed as the next President of the Republic.¹³ As a result of the demise of the Batista government, the Cuban Supreme Court confronted the specific question of the Revolution’s legitimacy. Justice Carlos M. Piedra, the Supreme Court’s most senior incumbent Justice, brought forth a petition to assume the presidency, based on the constitutional presidential vacancy clause.¹⁴

“The Cuban Supreme Court in a January 1, 1959 resolution, decided instead that the Revolution was the legitimate ‘government’ under the law. *It also indicat-*

ed that the actual situation was not the one contemplated under the 1940 Constitution, being the revolutionary movement the original cause of the Batista regime collapse, and therefore a legitimate Revolution. As a direct result of this ruling, Manuel Urrutia Lleó, the Revolution’s candidate, was recognized as the legitimate new president of Cuba.”¹⁵

However, questions of recognition by other governments arise whenever a new government assumes power through a revolution or a military coup d’etat. Such recognition involves a combination of international law and international politics.¹⁶ In recent years, two major approaches were developed in order to recognize a foreign government: the traditional approach and the Estrada Doctrine.¹⁷

Basically, the traditional approach seeks to determine: “(1) whether the government is in *de facto* control of the territory and in possession of the machinery of the state; (2) whether the government has the consent of the people, without substantial resistance to its administration, that is, whether there is public acquiescence in the authority of the government; and (3) whether the new government has indicated its willingness to comply with its obligations under international law...”¹⁸ The second requisite of this traditional approach, the consent of the people, is very controversial.¹⁹ Even though most of the states interpret such requisite to mean the people’s acquies-

9. Matías Travieso, *supra* note 8, at 26. (Citing a number of legal authorities stating, *inter alia*, that “when revolutions are successful and their actions meet with the habitual submission from their citizens, they acquire the power to overturn prior constitutions.”)

10. *Id.* at 27 (note 63).

11. *Id.*

12. Ramón M. Barquín, *El Día que Fidel Castro se Apoderó de Cuba*, Annex 23-A (1978).

13. Constitution of 1940 at art. 141-149.

14. Barquín, *supra* note 12.

15. Consuegra-Barquín, *supra* note 2, at 898. (Our emphasis).

16. L.T. Galloway, *Recognizing Foreign Governments* (1978), reprinted in Barry E. Carter & Phillip R. Trimble, *International Law* at 421 (1991).

17. *Id.*

18. *Id.*

19. *Id.* at 422.

cence to the new government, policy makers state that the concept of actual consent is meaningless.²⁰

The second approach developed is the Estrada Doctrine. This doctrine was created by the Mexican Foreign Minister Don Genaro Estrada in 1930.²¹ Basically, the doctrine postulates that states only recognize new states and not new governments since “when a new government comes to power either through constitutional means or otherwise, its relation with outside states remains unchanged.”²² The Estrada Doctrine makes no distinction between a government of bullets and a government of ballots. It “embraces to the principle of unfettered national sovereignty and rejects interferences with the domestic affairs of one state by another through the granting or withholding of recognition.”²³

An unsuccessful third approach to recognizing foreign governments, known as the Tobar or Betancourt Approach, emerged in Ecuador pursuant to a multilateral treaty signed by five Central American states.²⁴ The approach attempted to “encourage democratic and constitutional government by refusing to recognize any government that comes to power by extra-constitutional means until a free election is held and new leaders elected...”²⁵

Castro’s Revolution was immediately recognized by the majority of the states, including the United States. Thus, to analyze the Revolution’s recognition would be practically unnecessary. However, in the event the Cuban Revolution’s recognition needs to be analyzed, I have no doubt that the Revolution would satisfactorily comply with either of the two

prevailing and international recognized approaches (the traditional or the Estrada approach). It is hard to support the theory, however, that the present Cuban regime is not legit under international law with a status of crisis and disorder.²⁶ Castro’s government has been in power over 36 years, and throughout this period it has proven to be politically stable and consistent in maintaining power.²⁷

Since Fidel Castro’s revolution came into power, three constitutions have ruled over Cuba. The first constitution, the one Castro found when he came into power, was the Constitution of 1940, the second constitution was known as the Fundamental Law (Ley Fundamental) of 1959, and the third, and current constitution, is the Socialist Constitution of 1976²⁸.

To support the theory that the Cuban Revolution’s source of law did not possess enough power to repeal the Constitution of 1940 would not seem very helpful in practice. It might cause chaos and lead to collective disorderly conduct, not to mention legal confusion to follow within the judiciary.²⁹

WAS THE PROPERTY EXPROPRIATED OR ABANDONED³⁰

Is the act of departing a country for political reasons, and thus, leaving property behind, an act of abandonment? Why should property be reverted to its former owner from someone who possesses a legit title, recognized by a sovereign state, for a period of over 36 years? Such questions represent one of the most complex issues to be resolved by the next Cuban transitional government. Perhaps, in order to

20. Id.

21. Id.

22. Id.

23. Id.

24. Id.

25. Id.

26. See Consuegra-Barquín, *supra* note 2, at 906.

27. Id.

28. Amended by the Constitutional Reform Law of July 13, 1992.

29. Consuegra-Barquín, *supra* note 2, at 899.

30. See Id. at 904-907, for a detailed explanation of this topic.

understand the issue, the following paragraph briefly explains the historical situation during the first years of the Revolution.

“During the first years of the Revolution, political persecution was intense and political assassinations rampant. There were many well documented political trials with total disregard for due process in which sentences of anywhere from 30 years to life were handed down to the more fortunate. For the not so lucky, military style executions were organized for public entertainment and consumption in a manner not unlike an early Roman circus.”³¹

Abandonment is “the act whose consequences and effects are to forsake property.”³² In order for an act to become an abandonment it must have been a voluntary act.³³ The owner has to forsake its property voluntarily, or in a noncontentious manner.³⁴ Once the requisites are established, the abandonment has been consummated.³⁵

Can there truly have been a “voluntary” abandonment of property in those cases where an owner fled Cuba for political reasons?³⁶ It would be difficult and unjust to believe that those political emigres voluntarily abandoned their belongings.³⁷

The Cuban migratory group which owned property in Cuba was pressured, at least emotionally, to leave

the country.³⁸ They had well founded reasons to fear a political system which was hostile to them.³⁹ In many cases they suffered actual political persecution from the repressive forces of the system.⁴⁰ The required test would be to ask whether it was reasonable for a normal person, confronting an imminent danger of this nature, to emigrate and voluntarily enter political exile from his or her country with the hope of returning once the crisis ends and normality is re-established.⁴¹

THE EXPROPRIATION LAWS RELEVANT TO THE PROPERTY RIGHTS ISSUE

As stated before, three constitutions have ruled over Cuba, since the Revolution took control:⁴² The Constitution of 1940, the Fundamental Law (Ley Fundamental) of 1959, and the third and current constitution, the Socialist Constitution of 1976, amended in 1992.

The Fundamental Law⁴³ empowered the creation of the Law for the Recovery of Misappropriated Properties to recover all economic goods embezzled by the former regime⁴⁴ or its collaborators.⁴⁵ The government extended the power of confiscation to those properties owned by persons who in order to avoid the jurisdiction of the Revolutionary Courts, abandoned the country.⁴⁶ Furthermore, this Law permit-

31. Id. at 904.

32. I. Rivera García, *Diccionario de Términos Jurídicos* 1 (1985) (our translation).

33. See: M. Albaladejo, *Derecho Civil III* 223 (1st Vol., 5th Ed. 1983); A. M. Morales Moreno, *Posesión y Usucapión* 321 (1972).

34. Consuegra-Barquín, supra note 2, at 905.

35. Albaladejo, supra note 33, (our translation).

36. Consuegra-Barquín, supra note 2, at 905.

37. Id.

38. Id.

39. Id.

40. Id.

41. Id.

42. The issue of whether the expropriation laws were constitutional or null and void, will not be addressed in this paper. For a discussion of this issue, see Consuegra-Barquín, supra note 2, at 895-907.

43. Fundamental Law, art. 24.

44. Law 112 of February 27, 1959. Amended by the Law 151 of March 17, 1959.

45. Law 438 of July 7, 1959. Amended by Law 746 of February 19 of 1959.

46. Law 664 of December 23, 1992.

ted the confiscation of property owned by any person considered to be a conspirator against the Revolutionary Government.⁴⁷

The Agrarian Reform⁴⁸ expropriated privately owned property, giving it free of charge to the persons who lived on the land and worked it.⁴⁹ Likewise, the Urban Reform Law⁵⁰ gave property title to every tenant, sub-tenant or any person who possessed property. The legislative intent expressed a number of reasons for its creation including the housing crisis that characterized every underdeveloped country, the incredibly high demand for housing that existed during Batista's rule, the increase in the number of unemployed persons, and the exodus from the countryside to the cities in search of better economic opportunities.⁵¹ The revolutionary program's stated objective was to guarantee housing to every Cuban family.⁵²

The 989 Law,⁵³ better known as the Confiscation of Abandoned Property Law, was enacted in order to confiscate properties owned by those persons who left the island because of their disagreement with the Castro regime.⁵⁴ Through this law, the Cuban government accomplished three goals: punish the "traitors" who left, provide disincentives for other Cuban professionals who might be thinking of leaving the country, and avoid an even deeper economic crisis.⁵⁵

THE "USUCAPION" IN THE CIVIL LAW⁵⁶

Cuba inherited its civil legal system from Spain since its days as a Spanish colony. Even though a communist government has controlled Cuba for more than 36 years, the civil code (in modified form) still operates as the basis of Cuba's legal system. However, during this period the communist government amended all of Cuba's civil codes so they could respond to the interest of a socialist order.

The civil law's adverse possession concept is known in the Civil Law as the "usucapion" [known in latin as "usucapio"]. Even though the Cuban Civil Law System has gone through a vast number of changes, the institution of the usucapion is still in existence under the communist government.

In essence, usucapion gives title to any person who possesses a property, or a right over a certain period of years and complies with certain requisites provided by the code.⁵⁷ Also, it is defined as the possessor's acquisition of an unowned property title, without the need for the real property owner to participate in the legal proceeding of title purchasing.⁵⁸

In civil law, properties that can be adverse possessed under usucapion are those that are legally susceptible to appropriation.⁵⁹ However, in the Cuban socialist regime, socialist personal properties are the only type of property legally subject to appropriation.⁶⁰

47. Consuegra-Barquín, *supra* note 2, at 900.

48. The Agrarian Reform, Law of May 17, 1959. This Law will not be discussed in this article since this land is not classified as residential property.

49. Consuegra-Barquín, *supra* note 2, at 901

50. The Urban Reform, Law of October 14, 1960.

51. Consuegra-Barquín, *supra* note 2, at 901

52. *Id.*

53. Law 989 of Dec. 6, 1961.

54. Consuegra-Barquín, *supra* note 2, at 903.

55. *Id.*

56. See *Id.* at 912-923.

57. *Id.* at 913.

58. *Id.*

59. *Id.* at 914. Also, see *id.* at 907-912 (explaining the types of property recognized under the socialist constitution of 1976).

60. *Id.* at 914.

The 1976 Constitution established that all land belongs to the state with the exception of the holdings of small farmers and/or their cooperatives.⁶¹ The inclusion of housing as socialist personal property needs further clarification, however, since it is somewhat unclear whether the land under the house is personal or State property.⁶² Because of the constitutional definition of State property, all land is irreversibly State property except that belonging to small farmers or their cooperatives, it is logical to conclude that the land under a house must be considered state property.⁶³ Therefore, it must first be resolved what is considered personal property or State property under the domestic law in order to determine whether anything could be transferred by usucapion.⁶⁴

Ancient and modern scholars⁶⁵ have explained that the purpose of the usucapion was that “ownership of property should not remain uncertain for too long a time.”⁶⁶ “In this way a title could be proved by giving its history for a limited time, instead of for an indefinitely long time.”⁶⁷ Moreover, society and its legal order benefit from the usucapion’s objectives,⁶⁸ since the State and public interest is to maintain the certainty of property rights⁶⁹ and to secure the confi-

dence in the trade of property and its related commerce.⁷⁰

Under Civil Law, usucapion can be achieved in two ways: through the possessor’s good faith⁷¹ or through the possessor’s bad faith.⁷² A good faith, or bona fide possessor, is a holder who is unaware of a flaw in his property title.⁷³ On the other hand, a bad faith possessor is one who 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.⁷⁴

The stated requisites for usucapion are the following: (1) there must be continuous possession without interruption, (2) under “quiet or peaceful enjoyment” possession, (3) acting in an ownership capacity, and (4) with public and open possession.⁷⁵ Good faith usucapion, however, adds two more requirements for the possessor: (1) the possession has to be in good faith—bona fide, and (2) it must be with a just title (“justo título”).⁷⁶ Following, we will first define the terms of the four requirements that apply to both types of possessions, bad and good faith, and then the two additional requirements for good faith usucapion.

61. *Id.* at art. 15.

62. *Id.* at 911.

63. *Id.*

64. *Id.*

65. William C. Morey, *Outlines of Roman Law* 309 (1890); H. F. Jolowicz, *Historical Introduction to Roman Law* 253 (1953); W. Burdick, *The Principles of Roman Law and Their Relation to Modern Law* 342-343 (1938); W. Hunter, *A Systematic and Historical Exposition of Roman Law in Order of a Code* 265 (4th ed., 1903); Puig-Brutau, *Fundamentos de Derecho Civil* 360 (1978); Albaladejo, *supra* note 33, at 165.

66. Gaius, II.44.

67. M. Radin, *Handbook of Roman Law* 362 (1927).

68. Consuegra-Barquín, *supra* note 2, at 913.

69. *See: Id.*; Spain Supreme Court Judgments made on Apr. 27, 1925; Sept. 26, 1927; Jun. 29, 1935; April 21, 1958; June 11, 1960; May 5, 1961; Dec. 14, 1967. (cited by Albaladejo, *supra* note 33, at 165).

70. Puig-Brutau, *supra* note 65, at 360.

71. 1889 Civil Code, art. 1940.

72. *Id.* at art. 1959.

73. Consuegra-Barquín, *supra* note 2, at 914.

74. *Id.*

75. *Id.*

76. *Id.*

1. *Continuous Possession.* The possession needs to be continuous, with no interruption. However, the owner has the right to interrupt the statute of limitation of such possession. Interruption of possession is defined as the “proprietor’s act which stops the usucapion’s statute of limitation.”⁷⁷ The 1889 Civil Code recognizes three types of interruption⁷⁸, civil interruption, natural interruption, and the voluntary recognition by the possessor. When the possessor voluntarily stops possessing the property for a year or more, the interruption will be natural.⁷⁹ Voluntary interruption occurs when the possessor voluntarily recognizes that the possession has been interrupted.⁸⁰ Lastly, civil interruption takes place through a legal or personal summon.⁸¹
2. *“Quiet or Peaceful Enjoyment”.* The possessor shall control the property under a quiet enjoyment capacity or under a peaceful degree,⁸² and cannot engage in any violent action whose purpose is to possess the property or to control it.⁸³
3. *Ownership Capacity.* The possessor must possess in an ownership capacity. Ownership Capacity has a different definition for good faith possessions and bad faith possessions.⁸⁴ In the good faith possession, ownership capacity is when the possessor has reasonable cause, or good faith, to believe that the property he is possessing was legitimately and legally transferred to him.⁸⁵ How-

ever, in the bad faith possession, ownership capacity is determined by community belief that the possessor is the legitimate owner, even when the bad faith possessor knows that the property he is possessing is not his.⁸⁶ Of course, in both types of usucapion the possessor must possess with the intent of making the property part of his proprietorship.⁸⁷

4. *Public and Open Possession.* Another usucapion requisite is that it has to be public and open. The possessor cannot hide or live clandestinely, and neighbors must see him actually possessing the property.⁸⁸

The good faith usucapion has two more requisites which obviously do not apply to the bad faith usucapion. As mentioned before, the two requisites are the possessors obligation to have a just title and to be a bona fide possessor.

1. *Good Faith or Bona Fide Possessor.* The 1889 Civil Code defines a good faith possessor as one who ignores that he holds a flawed title, or any defect that makes his title invalid.⁸⁹ The possessor must believe that the person he obtained the title from was the legitimate proprietor.⁹⁰
2. *Just Title.* The 1889 Civil Code defines “just title” as anything required by law to transfer a property right, or a property domain, from one

77. J. R. Vélez Torres, *Los Bienes, Los Derechos Reales* 25 (2nd vol., 1983).

78. See the 1889 Civil Code at art. 1943-1948.

79. Id. at art. 1944

80. Id. at art. 1948.

81. Id. at art. 1945-1947.

82. Id. at art. 1941.

83. Puig Brutau, supra note 65, at 370-371.

84. Consuegra-Barquín, supra note 2, at 915.

85. 1889 Civil Code, art. 1950.

86. Consuegra-Barquín, supra note 2, at 915.

87. Id.

88. Id.

89. 1889 Civil Code, art. 433.

90. Puig Brutau, supra note 65, at 363.

person to another.⁹¹ At the moment of the transaction the purchaser must have believed that the proprietor had real title and domain over the property.⁹² The purchaser will not be a bona fide possessor if at the moment of the transaction he had doubts about the proprietor's ownership title.⁹³

CHANGES TO THE "USUCAPION" INSTITUTION BY THE NEW SOCIALIST CIVIL CODE OF 1988 AND ITS IMPLICATIONS.

The Civil Code of 1889 (inherited from Spain) and the Socialist Civil Code of 1988 are the two civil codes used by the Revolutionary Government. The 1889 Civil Code was active until the year of 1988 when the new Socialist Civil Code expressly repealed it.⁹⁴ In order to protect the socialist order, the Revolutionary Government needed a code that could respond to the interests of the proletariat and not to a capitalistic society.⁹⁵

The Civil Code of 1889 recognized the good faith usucapion. The code provided good faith usucapion, however, with two different statutes of limitation: First, a 10 year term to adverse possess a property against a proprietor living in the Cuban jurisdiction (a "present proprietor"); and, second, a 20 year term against a proprietor not living in the Cuban jurisdiction (an "absent proprietor").⁹⁶

However, the Socialist Civil Code of 1988 prohibited any person to adverse possess against State property or farm land. Moreover, the new Code changed

the good faith statute of limitations to a 5 year term against either type of proprietor, present or absent.⁹⁷

On the other hand, the old civil code stated that in order to adverse possess through the bad faith usucapion, the possessor needed to possess the property for a period of 30 years.⁹⁸ The possessor did not need to be a bona fide possessor nor hold a just title.⁹⁹ Furthermore, the 30 year statute of limitation for bad faith usucapion did not distinguish between absent or present proprietor.¹⁰⁰

Currently, bad faith usucapion is not recognized under the new Cuban Socialist Civil Code. Framers of the 1988 Socialist Civil Code simply did not include this type of adverse possession in order to tacitly repeal it from existence.¹⁰¹

It seems that these changes have generated a rather curious situation, which can be explained as follows:

"The Socialist Civil Code became the law of the land effective October 12, 1988. That is, exactly 29 years, 8 months and 12 days after the Castro Revolution came into power--January 1, 1959. Was there a relation between the 30 year statute of limitation for bad faith usucapio and the timing of the code's repeal? If not, why did it take so long for communist Cuba to enact a Civil Code that could respond to the country's socialist postulates?"¹⁰²

By eliminating the institution of bad faith usucapion, the Cuban Regime only protects the former owners, who in their majority are now living in exile. The implication is of such magnitude that the former owner

91. 1889 Civil Code at art. 1952.

92. Consuegra-Barquin, *supra* note 2, at 916.

93. Vélez Torres, *supra* note 77, at 229.

94. Consuegra-Barquín, *supra* note 2, at 916.

95. See 1988 Civil Code at 3.

96. See *Id.* at art. 1957.

97. See 1988 Civil Code at art. 185.1.

98. See 1889 Civil Code at art. 1959.

99. Consuegra-Barquín, *supra* note 2, at 917.

100. *Id.*

101. *Id.*

102. *Id.* at 917-918.

might have a new chance to reacquire their property back. In the event that the confiscatory laws are declared unconstitutional or null and void, and held that the present possessors are not possessing in a bona fide capacity, then the present possessor not only will lose title of the property, but will not be able to acquire title under the argument of usucapion.

This author cannot understand the reasons why the Cuban Regime eliminated the bad faith usucapion institution from the Cuban Legal system three months and eighteen days prior to the 30th anniversary of the Revolution without analyzing its implications. However, it seems that the act might be another one of Castro's blind copying of the former Soviet Law,¹⁰³ which does not recognize such institution.

REQUIRED CONDITIONS IN ORDER TO COMPUTE THE USUCAPION TERMS

In the event the laws that expropriated the property in question are declared unconstitutional or null and void, the occupant or possessor will have to prove that he owns the house through usucapion.¹⁰⁴ Arguments can be made in favor of both, the former owner or the present possessor, however, the stronger case lies in favor of a good faith usucapion against the former owner.¹⁰⁵

As previously discussed, good faith usucapion requires the possession to be continuous and without interruption, in an ownership capacity, public and notorious, by a bona fide possessor, and with a just title ("justo título"). It seems, however, that the most probable controversial of these requirements to the Cuban property issue are the continuous possession

without interruption, the just title, and the good faith or bona fide possessor classification.¹⁰⁶

Nevertheless, under the premise that the State's acts were unconstitutional or null and void, the present possessor cannot be blamed for such state actions since the acts of states are presumed to be executed in good faith.¹⁰⁷ Moreover, a well recognized principle in international law is that the State which executes a confiscation owing to its own law cannot be said to possess in bad faith under its own laws.¹⁰⁸

The possessor was given property title by the State, which was absolutely legitimated through a resolution of the Cuban Supreme Court¹⁰⁹ and through the Revolution's source of law faculties. Under these circumstances, these possessors had no knowledge, or reason to suspect, of any flaw or defect in the title given by the government that made the title invalid.

"It is the view of this author, that the possessor will be a bona fide possessor until the law that gave him the title is declared unconstitutional [or is declared null and void]. To date, none of these laws have been declared unconstitutional. Therefore, the possessor should have no reason to believe that he holds a flawed property title."¹¹⁰

Thus, in the event the confiscatory laws are declared unconstitutional or null and invalid, the actual possessor is a good faith possessor. In other words, a possessor who receives a confiscated property from the State, will never get to be a bad faith possessor.¹¹¹

In order to determine which of the usucapion terms apply, the first step is to establish whether property owner is an absentee or a present proprietor. Since a

103. Id. at 917. (In Soviet Law "[t]he proprietor is given a term to regain the property illegally possessed. If the statute of limitations expires before, the proprietors' legal action will be dismissed and the property automatically will pass to the hands of the State." Id.)

104. Id. at 919.

105. Id.

106. Id. at 919-920.

107. Id. at 920.

108. M. Bogdan, *Expropriation in Private International Law* 43 (1975).

109. See Barquín, *supra* note 12.

110. Consuegra-Barquín, *supra* note 2, at 921.

111. Id. (for a detailed explanation of this issue, see Id. at 920.)

former proprietor living in exile is an absentee proprietor, the statute of limitation for a good faith possessor is 20 years. However, in those cases with a similar scenario but with the former proprietor still living in the Island (present proprietor), the statute of limitation is 10 years.

Did the former property owner have an opportunity to interrupt such statute of limitation? Were the political obstacles confronted by the Cuban exile community relevant to determine whether any former owner could interrupt the usucapion's statute of limitation? Even though these questions will be hotly debated, once again, arguments from both sides are equally valid and welcome.

In fact, even where an interruption was never sought by a former owner, and thus not achieved, the political circumstances provide a very reasonable cause to

justify that former owner's inaction.¹¹² However, scholars have argued that in order to interrupt the statute of limitation period, a simple advertisement¹¹³ is enough to "warn in advance all potential buyers of the expropriated goods in order to make it impossible for them to invoke later their good faith."¹¹⁴

This approach was recently adopted by a number of organizations representative of the Cuban exile community when the Castro Regime, in order to survive, began the economic experiment of creating joint ventures with foreign entities in connection with the properties confiscated.¹¹⁵ The validity of such advertisements may be questioned because: (1) the organization must have a standing to claim such proper-

112. Id. at 921.

113. Id. at 921 (quoting from Bogdan, *supra* note 108, at note 35.)

114. Id.

115. On May 1992, eleven widely disparate Cuban exile groups (Comisión Nacional Cubana, Coordinadora Social Demócrata de Cuba, Cuba Independiente y Democrática, Cuban American National Foundation, Cuban Committee for Human Rights, Directorio Revolucionario Democrático Cubano, Ejército Rebelde en el Exilio, Ex Club Asociación de Prisioneros y Combatientes Cubanos, Libertad y Vida, Partido Pro Derechos Humanos de Cuba y Union Liberal Cubana) signed an open letter directed to all foreigners investing in Cuba. The letter was published in the most recognized newspapers worldwide. Part of the letter states, in relevant:

"The undersigned have every intention of encouraging and providing appropriate protection for private investments in a democratic Cuba, and intend to deal with its legitimate international debt obligations in a responsible manner. However, *it is our position that investments made in Cuba under the present circumstances should not benefit from any laws passed by a future Cuban government for the protection of private property.* We feel that these investments should be considered as state property and disposed accordingly..." Id. (Our emphasis).

Likewise, see the approach adopted on January 14-15, 1994 by the National Association of Cuban Sugar Mill Owners, Sugar Cane Growers, Sugar Industry Workers, Cattlemen, Mineral and Petroleum Right Holders, Bankers, Tobacco Growers, Attorneys, Architects and Journalists, who published a notice of warning in the Wall Street Journal to any foreign investors purchasing assets which were the product of confiscation, without compensation and through the use of force, by the Revolutionary Regime.

However, another well recognized principle in international law is that the acts executed by a sovereign and legit state must be internationally recognized by its successor government.

"It is an established principle of international law that changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or the republic into a monarchy; absolute principles may be substituted for constitutional or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired." (Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396, 401 (2d Cir. 1927) (quoting Moore, Digest of International Law, vol. 1, p. 249).)" *Jackson v. People's Republic of China*, 550 F.Supp. 869, 972 (N.D. Ala. 1982), rev'd on other grounds, 596 F.Supp. 386 (1984), aff'd, 794 F.2d 1490 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987).

If the government of Cuba sells private property to a foreign entity, would the successor government be bound to recognize this type of state action under international law? If a successor government is obliged to recognize the acts of its predecessor, then why bother paying for a worldwide advertisement? Should there be compensation or restitution of the properties at issue? What would be the standard of compensation? Prompt, adequate and effective compensation or appropriate compensation? Fascinating question may be raised when discussing this issue.

ty;¹¹⁶ and (2) the advertisement must describe the location of the property in issue. In this way, the former owner guarantees due process and avoids a general fishing expedition.

To not declare an adverse possession in favor of the present possessors would be a ruling contrary to the purpose for which the legal concept was established under Roman Law, which was to maintain continuity and certainty in property ownership and hence to accomplish the good administration of land and property rights, especially for the confidence of society's property trade and commerce.¹¹⁷ As Cueto points out,

“[t]he spirit behind ‘adverse possession’ is not so much the weighing of the circumstances which may have prompted the original owner to leave the property but, instead, the notion that uncertainty as to title cannot be tolerated for an indefinite period of time. (Like the proverbial show, ‘Life must go on.’)”¹¹⁸

The good faith usucapion's statute of limitation will be a term of 20 years, because of the proprietor's absence from the country, and 10 years if the former proprietor lives within the island. These terms apply only until 1988, when the statute of limitation term changed to 5 years, a much easier period in which to adverse possess through usucapion.¹¹⁹

The bad faith usucapion statute of limitation will never be reached unless the possessor started to adverse possess before October 12, 1958.¹²⁰ Currently, no one could legally adverse possess through usucapio with bad faith because of its non-recognition in

the 1988 Socialist Civil Code.¹²¹ Therefore, if an expropriation law is declared unconstitutional, or null and void, and the possessor is possessing in bad faith, the legitimate proprietor would still be the former owner.¹²² Nevertheless, this does not imply that a bad faith possessor could not accumulate more years in his possession when the institution of bad faith usucapion is reestablished in connection with the private property right.¹²³

CONCLUSION

Under the current Cuban law, the present possessors are owners of the property they possess. This analysis should not be a cause for concern to current possessors, or occupants, since presently the confiscation and expropriation laws have not been declared unconstitutional nor null and void.¹²⁴ However, even though the property rights issue regarding nationals is governed entirely by Cuban law, the Cuban Government still has the legal duty and moral obligation to compensate those nationals for property expropriated or confiscated.

Finally, the purpose of the usucapion, according to the Romans, is to maintain continuity and certainty in property ownership and to accomplish the good administration of land and property rights, especially for the confidence of society's property trade and commerce. Even though the usucapion applies to the issue of whether property confiscated should be returned to former owners, it may not be used to solve the dispute because of its political implications and interests. Therefore, we will leave such political questions for the successor Cuban government to decide.

116. In this case, an association standing may satisfy the standing qualification question since the Cuban organizations represent a legit party in interest.

117. Consuegra-Barquín, *supra* note 2, at 921.

118. Cueto, *supra* note 7, at 19 (note 44).

119. Consuegra-Barquín, *supra* note 2, at 922.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*