

A Role in Reform: The Supreme Popular
Tribunal of Cuba's *Bouly-Andux* Decision and
What It Means for a Changing Cuba

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Beginning in 1959, the Cuban Revolution launched a program of socialization and nationalization that upended Cuba's longstanding system of property rights. This process continued unabated for more than fifty years and involved not only expropriation without compensation, but also a series of onerous regulations that fundamentally altered and restricted the ability of individuals to freely alienate real property. There is a broad body of work that has analyzed these confiscations under existing Cuban, U.S., and international norms, and offered potential remedies ranging from acceptance and reconciliation to challenge and compensation. This Note focuses on ongoing reforms commencing under Raúl Castro in 2011 that appear aimed at re-establishing a market for private property transfers and examines a recent decision by Cuba's supreme judicial body that may advance new, creative solutions to accomplish such a transition.

INTRODUCTION	205
I. A BRIEF HISTORY OF CUBAN PROPERTY LAW	207
A. The 1940 Constitution.....	207
B. Expropriations in Castro’s Cuba	208
C. Private Housing Stock under a Public Housing Regime	213
D. A Brief Aside: Note on Adverse Possession in Cuba	215
E. The Lineamientos and Decree-Law 288	216
1. The Adoption of the <i>Lineamientos</i>	216
2. Decree-Law 288 of 2011	218
F. Title Registry in Cuba.....	219
II. THE <i>BOULY WILSON-ANDUX BARRUETA</i> DECISION AND REASONING.....	220
A. Background	220
B. Reasoning.....	221
C. Circular 265.....	225
III. THE FUTURE OF CUBAN PROPERTY LAW	226
A. The Importance of Titling to Development	226
B. Property Law in 2018.....	230
1. The Future for Current Residents	230
2. Effects on Potential Claimants.....	232
CONCLUSION	232

INTRODUCTION

Beginning in 1959, the Cuban Revolution launched a program of socialization and nationalization that upended Cuba’s system of property rights—one deeply rooted in its colonial past. This process continued unabated for more than fifty years and involved not only expropriation without compensation, but also a series of onerous regulations that fundamentally altered and restricted Cubans’ ability to freely alienate their real property.

In response to this reality, Cubans devised new methods of conveying property.¹ Prior to the enactment of reforms launched by

1. One need only read the statistics on the status of legal ownership to fully appreciate the landscape of property rights in Cuba. According to one source, there are approximately 60,000 Cuban families who do not know whether their homes are privately- or state-owned.

Raúl Castro's government, *permutas*, or property swaps, and extralegal sales had produced an outdated property registry, clouded title, and legal disputes.² In fact, until recently, many Cubans believed title registry was merely an inconvenient process that ultimately yielded few benefits.³ The enactment of Decree-Law 288⁴ in 2011, which made private, residential residences the most freely alienable during the Castro brothers' 56-year regime, almost entirely eliminated the need for black market home transfers. This groundbreaking law, however, remained silent on the issue of earlier illegal exchanges, creating legal ambiguity for those whose titles had been obtained via unsanctioned means.

A vast body of analysis pertaining to the Cuban government's confiscation of real, private property following 1959 has produced remedies ranging from acquiescence to demands for compensation and restoration of rights. This Note focuses on ongoing reforms commencing under Raúl Castro in 2011 that appear aimed at re-establishing a market for private property transfers. This paper will attempt to clarify the current state of property law in Cuba, as well as the major changes and enhanced stability that the recent Supreme Tribunal decision in *Bouly-Andux* may offer. It will also raise questions about the current relationship of the judicial branch to the apparent reform taking place in Cuba and to the Castro regime.

Part I of this Note discusses the history of Cuban property law with an emphasis on the constitutionality of the Cuban government's expropriations in the years immediately following the 1959 Revolution. This section will address the Cuban government's current efforts at reform, as well as the state of Cuba's title registry prior to the *Bouly-Andux* decision. Examination of the trajectory of Cuba's property market before *Bouly-Andux* illuminates the likely motive behind the Tribunal's decision: If expropriations of the 1960s are eventually invalidated, Cuba's adverse possession laws may provide a way for current inhabitants to acquire good title. The Tribunal's decision in *Bouly-Andux* has created an avenue for pre-2011 extralegal transactions to make use of those laws.

Adriel Reyes, *More Cubans Want the Deed to Their Homes*, MARTINEWS.COM (Dec. 20, 2013), <http://www.martinews.com/content/cubans-deed-homes/30258.html>.

2. *Id.*; see Mirella Betancourt, *Al César lo que es del César*, CUBA ENCuentRO (Oct. 9, 2013, 10:44 AM), <http://www.cubaencuentro.com/cuba/articulos/al-cesar-lo-que-es-del-cesar-302033>.

3. Reyes, *supra* note 1.

4. Decreto-Ley No. 288, GACETA OFICIAL NO. 035 EXTRAORDINARIA, 359, Nov. 2, 2011 (Cuba); Betancourt, *supra* note 2.

Part II lays out the facts of the *Bouly-Andux* case and includes analysis of the Tribunal's reasoning. Part III explains the importance of titling programs with respect to economic growth, and how the Tribunal's decision may enhance opportunities for development.

I. A BRIEF HISTORY OF CUBAN PROPERTY LAW

A. *The 1940 Constitution*

The 1940 Cuban Constitution is commonly believed to be the first successful, truly sovereign Constitution on the island.⁵ Articles 24⁶ and 87⁷ are examples of the deep respect for private property held by the drafters. They are considered by most scholars to be the “the two most important provisions protecting property.”⁸ These articles provided for the unrestricted use of one's private property and contained remedies for individuals deprived of their property by the State. At the time of its enactment, Articles 24 and 87—and by extension the principle of private property—were accorded such importance that their amendment would require a special process, distinct from that established in Articles 285 and 286⁹ for ordinary

5. The Constitution of 1901 was enacted following the Cuban-Spanish-American War, but the powerful Platt Amendment tainted the document's purportedly independent essence and is largely responsible for its ineffectiveness. 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, 325 (2000), available at <http://digitalcommons.lmu.edu/ilr/vol22/iss3/1>.

6. Article 24 reads:

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 a judicially determined amount. In case of non-compliance with these requirements, the person whose property has been expropriated shall have the right of protection by the Tribunals of Justice and, if warranted, that of the restoration of his property. In the event of a challenge, the Tribunals of Justice shall have the power to decide upon the necessity of expropriation for reasons of public utility or social interest.

CONST. OF THE REPUBLIC OF CUBA art. 24 (1940) (translated by the author).

7. Article 87 reads “The Cuban Nation recognizes the existence and legitimacy of private property in its broadest conception as a social function and with no limitations other than those which, for reasons of public need or social interest, are established by Law.” CONST. OF THE REPUBLIC OF CUBA art. 87 (1940) (translated by the author).

8. Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 LAW & POL'Y INT'L BUS. 137, 146 (1995).

9. CONST. OF THE REPUBLIC OF CUBA arts. 285–86 (1940).

provisions.¹⁰ This Constitution was suspended following Fulgencio Batista's *coup d'état* and rise to power in 1952 and eventually reenacted by Fidel Castro's revolutionary government.¹¹

B. Expropriations in Castro's Cuba

The revival of the 1940 Constitution contained nearly all of its original provisions, but it underwent significant revisions during the early days of the Revolution.¹² The Council of Ministers, now empowered by Castro to unilaterally amend the Constitution,¹³ modified Article 24 to read:

Confiscation of property is prohibited. However, confiscation is authorized in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public treasury committed during the tyranny which ended on December 31, 1958, as well as in the case of property of the tyrant and his collaborators. No one can be deprived of property except by competent judicial authority and for a justified cause of public utility or social interest, and always after payment of the corresponding indemnity in cash, as fixed by a Court.¹⁴

Though not abolishing private property law, the new regime was unmistakably wielding its newfound power and control to punish, through confiscations,¹⁵ those who had been allied with the Batista

10. Ignacio E. Sánchez, *Cuban Property Rights and the 1940 Constitution*, 3 J. TRANSNAT'L LAW & POL'Y 135, 141–42 (1994). Only two other articles required a special plebiscitary assembly in order to be amended: Article 22, which prohibits the retroactive application of new laws, and Article 23 which “recognizes the sanctity of private contracts and prohibits their annulment or alteration by the legislature or the executive branch.” *Id.* at 142 n.20; see Alexander & Mills, *supra* note 8, at 147.

11. The Constitution of 1952 was effectively established following Fulgencio Batista's *coup d'état*, and the nullification of the Constitution of 1940 was one of the primary motivations for the 1959 Revolution led by Fidel Castro. Sánchez, *supra* note 10, at 142.

12. Ortiz, *supra* note 5, at 328.

13. The 1940 Constitution required the proposal of an amendment by means of (a) a petition signed by no less than one hundred thousand citizens and a Congressional vote, or (b) a petition submitted and signed by at least one fourth of the members of Congress. Amendments had to be adopted by popular referendum. CONST. OF THE REPUBLIC OF CUBA arts. 285–86 (1940).

14. Ortiz, *supra* note 5, at 328.

15. This law expressly authorized confiscations, which are distinct from

regime.¹⁶

On February 7, 1959, the new government repealed the Constitution of 1940 and replaced it with the Fundamental Law of 1959.¹⁷ This law also decreed that the Council of Ministers would be the supreme lawmaking body of Cuba, empowering it to independently amend the temporary constitutional instrument.¹⁸ Though under a different name, this document closely mirrored the Constitution of 1940 and included the recently revised Article 24.

The next amendment to Article 24 came on November 22, 1960. Confiscations of property from those found guilty of counterrevolutionary acts and persons who performed conspiratorial acts against the government from abroad were sanctioned.¹⁹ Soon after, the grounds for expropriation were expanded. Law 989, enacted in 1961, authorized the confiscation of properties owned by Cubans who left the island based on ideological or political disagreement, thereby “abandoning” their properties.²⁰

Once again, on July 5 of the same year, the Council of Ministers replaced the second paragraph of Article 24 with new language:

No other natural or juridical person can be deprived of his property except by competent authority and for a cause of public utility or social or national interest. The law shall regulate the procedure for expropriation and shall establish legislation and forms of payment and shall determine the competent authority to declare the case to be of public utility or social or national interest and that expropriation is necessary.²¹

Whereas the original Article 24 gave power to make decisions re-

expropriations. For a discussion of the difference, see P. ADRIAANSE, *CONFISCATION IN PRIVATE INTERNATIONAL LAW* 5–8 (1956), explaining that “by confiscation is understood any governmental action by which private property is seized without compensation, no matter in what form or under what name. The term expropriation, although a general one, from now on will be used, in accordance with common parlance, to indicate expropriation for public utility against just compensation.”

16. Sánchez, *supra* note 10, at 144.

17. *Id.*

18. Ortiz, *supra* note 5, at 329.

19. Sánchez, *supra* note 10, at 145 (many of these reforms were targeted at the increasing numbers of émigrés leaving Cuba).

20. Juan C. Consuegra-Barquín, *Cuba’s Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873, 903–04 (1994).

21. Sánchez, *supra* note 10, at 145–46.

garding expropriations to the Courts, the new Article 24 effectively stripped the Courts of this jurisdiction by substituting a “competent judicial authority” for “competent authority.”²² Furthermore, where the original text made monetary compensation obligatory, the new language created ambiguity with respect to the requirement of just compensation.²³ The amendment also abolished the process for judicial restoration of rights and appeal.²⁴ Private property was now vulnerable to expropriation for any number of reasons, with very few legal safeguards.

Numerous scholars impugn the legality of these expropriations.²⁵ Under the original Articles 24 and 87 of the Constitution of 1940, the confiscation of property by the state without compensation or just cause is undoubtedly illegal. Some go further and argue that the 1959 Fundamental Law’s revisions themselves are unconstitutional, given that they were enacted under the Constitution of 1940 by a Council of Ministers that could not have been authorized to amend the constitution in the first place.²⁶ Even assuming *arguendo* that the laws authorizing the takings are constitutionally valid because the body implementing the amendments was a legitimate one, a strong argument for the involuntariness of property abandonment would surely demonstrate that the *confiscations* under these laws were not legitimate.

That is, in order to validate the confiscations, abandonment must have been definitive. There is a widely held belief that abandonment must take place voluntarily in a “noncontentious manner.”²⁷ According to Antonio Morales Moreno, a “prominent Spanish scholar of Civil Law,” the act must be:

[F]ree and voluntary. No pressure or fear can be a factor in the decision to abandon; otherwise, it would constitute an imposed abandonment. . . . The person provoking these forces may likewise [be in a position] to physically take over or occupy the property or,

22. *Id.* at 146.

23. *Id.*

24. *Id.*

25. See Consuegra-Barquín, *supra* note 20, at 900–06; see also Alexander & Mills, *supra* note 8, at 147–50; see generally Ortiz, *supra* note 5; Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, 16 U. PA. J. INT’L BUS. L. 217, 227–28 (1995).

26. Alexander & Mills, *supra* note 8, at 148.

27. Consuegra-Barquín, *supra* note 20, at 905.

simply, to cause economic harm to the owner.²⁸

Many agree that the act of fleeing Cuba did not involve the requisite “voluntariness” to merit confiscation of these properties under the circumstances.²⁹ There is strong evidence for the assertion that “the tumultuous events in Cuba after the 1959 Revolution induced an imminent fear of political and economic persecution among many Cubans and foreigners.”³⁰ The final blow to any abandonment defense of these expropriations is that the government never compensated Cuban nationals for those properties, in violation of its own policies requiring compensation under the Constitution.³¹

The policy of not compensating owners for expropriated property was not constitutionally authorized until the Constitution of 1976 was enacted.³² Accordingly, following these several rounds of expropriations, a number of pre-Revolution owners may have claims against the government for illegal confiscations up until that date.

Yet another line of policies that might be read to conflict with the 1940 Constitution involves urban reforms. In October of 1960, the Urban Reform Act (URA) was passed.³³ Among other things, the URA expropriated numerous urban dwellings and established a program to compensate those owners.³⁴ However, the government failed to reimburse the owners, once again contravening its own policy of nationalization.³⁵ The URA also outlawed the leasing of all urban property and restricted the transferability of homes, requiring the approval of the Council of Urban Reform for the transfer to be considered valid and legal.³⁶ Not surprisingly, following the implementation of these policies, Castro announced in April 1961 that the Cuban Revolution was a Socialist Revolution.³⁷

28. *Id.*

29. *Id.* at 905–06; see Alexander & Mills, *supra* note 8, at 164–66. The authors discuss the findings of the Iran-U.S. Claims Tribunal, which determined that, “as a result of *force majeure* conditions . . . U.S. individuals and businesses were justified in leaving Iran and thereby lost none of their claims for expropriated property.” Alexander & Mills, *supra* note 8, at 165.

30. Alexander & Mills, *supra* note 8, at 165–66.

31. *Id.* at 154.

32. *Id.* at 149.

33. Sánchez, *supra* note 10, at 146.

34. *Id.*

35. Alexander & Mills, *supra* note 8, at 148.

36. Sánchez, *supra* note 10, at 146–47.

37. *Id.* at 147.

Fifteen years later, in 1976, the Castro regime enacted a new constitution to replace the Fundamental Law of 1959. The government made sweeping claims of control over socialist property, stating in Article 15 of Chapter I:

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, social, cultural and sports facilities built, fostered or purchased by the state and those which will be built, fostered or purchased by the state in the future.³⁸

Article 22 of the Constitution guaranteed protections for certain types of private property, including earnings, savings, and housing for which the owner could show just title.³⁹ Although ownership of one's home may have been promised, the limits on transferability made clear that this did not meet the conventional understanding of private property.⁴⁰

38. *Id.*

39. "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." CONST. OF THE REPUBLIC OF CUBA art. 22 (1976). After the 1992 amendments to the Constitution, this language is now under Article 21. It translates to: "[i]ncome and savings earned through one's own work, housing over which one has legal title, and other goods and objects that serve to satisfy the material and cultural needs of the person are guaranteed as personal property."

40. According to A.M. Honoré, there exist "standard incidents" or rights which correspond to exclusive possession and, among those, are exclusive possession, alienation, transmissibility, and the lack of any term on these rights. Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 663, n.187 (1998); see 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, 476 (1996).

C. Private Housing Stock under a Public Housing Regime

Since 1959, the Cuban government has publicly aspired to meet its stated goal of providing families with suitable housing, but has faced a number of serious impediments to its accomplishment.⁴¹ Confronted with far greater demand than supply, the government has instituted construction and distribution programs that have largely proven insufficient.⁴² For example, between 2006 and 2009, the state repeatedly failed to meet its annual target number of 100,000 new homes.⁴³ Along with these efforts, the government has passed several laws aimed at restricting the conveyance of property to private individuals.

Although the government has always purportedly classified housing as “private,” the ability to actually alienate private property was, until recently, severely impeded. Article 70 of the General Housing Law, enacted in 1986,⁴⁴ reads:

Transfer of ownership of property by purchase or donation must be performed before a notary for the price agreed by the parties or for no price and, after approval by the relevant Provincial Department of Housing, which has the right of first refusal to acquire it as property of the State by paying the owner the legal rate established by this Act, minus the amount of the portion of the price outstanding, if any.

The transfer of ownership of a property under the provisions of this Article shall be subject to the tax on transfer of real estate.

The National Housing Institute is empowered to regulate the procedure for the transfer of ownership and establish cases in which the State will grant approval of the assignment or exercise the right of first refusal

41. Teddy Kapur & Alastair Smith, *Housing Policy in Castro's Cuba*, INT'L UNION FOR HOUSING FINANCE 1, 18–19 (2002), available at http://www.housingfinance.org/uploads/Publicationsmanager/Caribbean_Cuba_HousinginCastrosCuba.pdf.

42. *Id.*

43. Fiona Govan, *Raul Castro Lifts Ban on Cubans Building Their Own Homes*, THE TELEGRAPH, Jan. 5, 2009, available at <http://www.telegraph.co.uk/news/worldnews/central-americaandthecaribbean/cuba/4126471/Raul-Castro-lifts-ban-on-Cubans-building-their-own-homes.html>.

44. In 1984, the government implemented laws that “paved the way for a private housing market in which individual owners could freely sell primary and vacation homes.” However, the government quickly amended this law after housing prices skyrocketed. DEBRA EVENSON, *LAW AND SOCIETY IN CONTEMPORARY CUBA* 209–10 (2d ed. 2003).

in its favor.⁴⁵

Thus, although Cubans were theoretically free to sell their property, they were not at liberty to determine the price or recipient due to the requirement that the State be offered the right of first refusal. For practical purposes, property was not freely alienable.

José Manuel Pallí explains the Cuban socialist conception of private property and its value for the average citizen:

Under Cuba's economic and social system, all goods and assets that are not considered as means of production are deemed to be destined for individual consumption, and are thus capable of being the subject of individual or personal property rights. Houses are considered gradual or extended (long-term) consumption assets, and Cubans are allowed to have a personal right to use them to satisfy their housing needs and those of their families. But they hold those rights practically at the State's will, since only with the consent of the State can those rights be negotiated or transferred.⁴⁶

In 2003, Decree-Law 233 amended the General Housing Law of Cuba. Article 11 of the complementary regulation to that law went even further, barring all sales of property among individuals. That provision read:

No home sales between individuals shall be authorized. In all cases, the Municipal Housing Authority

45. The relevant text in Spanish reads:

Cuando se trate de transmitir la propiedad de una vivienda por compraventa o donación, deberá realizarse ante notario por el precio que acuerden las partes o sin precio alguno y previa autorización de la correspondiente Dirección Provincial de la Vivienda, que tendrá derecho de tanteo para adquirirla en propiedad para el Estado, abonando al propietario el precio legal establecido en la presente Ley, menos el importe de la parte del precio que estuviera pendiente de pago, en su caso.

La transmisión de propiedad de una vivienda con arreglo a lo estipulado en este artículo estará gravada con el impuesto sobre transmisión de bienes inmuebles.

Se faculta al Instituto Nacional de la Vivienda para regular el procedimiento para la transmisión de la propiedad de la vivienda y establecer los casos en los cuales el Estado otorgará la aprobación de la cesión o ejercerá el derecho de tanteo a su favor.

Gaceta Oficial de la República de Cuba, Ley General de la Vivienda art. 70 (1986), available at <http://www.gacetaoficial.cu/html/leygeneralvivienda.html> (translated by the author) (website is temporarily out of service).

46. José Manuel Pallí, *Land Title Registration in Cuba: Past, Present, and Future*, 15 CUBA IN TRANSITION 147, 150 (2005), available at <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v15-palli.pdf>.

will exercise the right of first refusal on behalf of the State and acquire ownership by paying a fair price established by the Ministry of Finance and Prices for these purposes, deducting all outstanding debts, if any.⁴⁷

As a result of these decades of restrictions, Cubans resorted to black-market sales and housing swaps, known as *permutas*,⁴⁸ to circumvent the limits on conveyance of property. These transactions were often tainted by illegality and, according to earlier versions of Article 70 of the General Housing Law, if discovered by the authorities, would be grounds for not only nullification of the transaction, but also for the transfer of that property to the State. Finally, in 2011, Decree-Law 288 did away with a number of these restrictions.

D. A Brief Aside: Note on Adverse Possession in Cuba

In Cuba, the idea of *usucapio*, commonly known as adverse possession, was codified even before the country won its independence from Spain.⁴⁹ Under the Civil Code of 1889, both good and bad faith adverse possession was available as methods for acquisition of title.⁵⁰ According to that rule, the adverse possessor was still entitled to acquire ownership of the property after the requisite statute of limitations had run, irrespective of whether she was aware of a flaw

47. In Spanish, the law reads:

No se autorizarán compraventas de viviendas entre particulares. En todos los casos de compraventa, la Dirección Municipal de la Vivienda ejercerá el derecho de tanteo a nombre del Estado y adquirirá la propiedad de la vivienda mediante el pago de su precio legal o el precio que a estos fines fije el Ministerio de Finanzas y Precios, deduciendo de este los adeudos pendientes, en su caso.

Reglamento Complementario al Decreto-Ley No. 233, GACETA OFICIAL NO. 018 EXTRAORDINARIA 171 (Nov. 24, 2003), reprinted in COMPILACIÓN DE DERECHO NOTARIAL 222 (Leonardo B. Pérez Gallardo et al. eds., 2007) (translated by the author).

48. The history of *permutas* involved four different stages, according to Ricardo Núñez Fernández. It began with a basic system of bartering and exchanging homes one for one and became a more complex system of valuation and exchanges accompanied by extralegal compensation in the form of currency or other assets. See generally Ricardo Núñez Fernández, *La Permuta: An effective instrument for housing transactions in Cuba*, INST. FOR HOUSING & URBAN DEV. STUD. (2008), http://www.ihs.nl/fileadmin/ASSETS/ihs/IHS_Publication/IHS_Working_Paper/IHS_WP_019_La_Permuta_2008.pdf.

49. Consuegra-Barquín, *supra* note 20, at 914–16.

50. *Id.* at 915.

in her title.⁵¹

This law remained on the books until 1988, when the Socialist Civil Code of Cuba was enacted.⁵² The new Code made a number of changes to the 1889 Code. Among them, it reduced the statute of limitations for adverse possession from twenty years to a mere five-year period, and it made no mention of the option of bad faith *usucapio*, effectively de-authorizing its use as a defense of one's title.⁵³ The statute read: "The ownership of urban property is acquired by possession during a five year period, with just cause and in good faith. Possession which is merely tolerated by the rightful owner, obtained illegally, without the knowledge of the legitimate property holder, or through violence will not effectuate acquisition."⁵⁴

E. *The Lineamientos and Decree-Law 288*

1. The Adoption of the *Lineamientos*

Shortly after his appointment as President in 2007, Raúl Castro's administration initiated a process of economic and social transformation. Decree-Law 288 was enacted as part of this larger package of reforms, known as the *Lineamientos*, or Guidelines.⁵⁵

Notably, the *Lineamientos* were a product of a process of mass consultation.⁵⁶ According to the *Partido Comunista de Cuba's* own statistics, 163,079 meetings were held, attracting 8,913,838 par-

51. *Id.* at 915–16.

52. *Id.* at 916–17; CÓDIGO CIVIL (1988) (Cuba) [hereinafter Cód. Civ.].

53. Consuegra-Barquín, *supra* note 20, at 916–17. Juan C. Consuegra-Barquín also notes that the repeal of bad faith *usucapio* took place exactly twenty-nine years, eight months, and twelve days after Castro came to power, eliminating the possibility of bad faith possession for those who had acquired physical control over property after the Revolution, which would have vested in thirty years under the 1889 statute.

54. Cód. Civ. art. 186.1 (translated by the author).

55. Philip Peters, *Cuba's New Real Estate: Latin America Initiative Working Paper*, BROOKINGS INSTITUTE (Feb. 2014), <http://www.brookings.edu/~media/research/files/reports/2014/02/21%20cuba%20real%20estate/phil%20peters%20cubas%20new%20real%20estate%20market.pdf>. They were officially referred to as the "Guidelines on Economic and Social Policy of the Party and the Revolution" or "Lineamientos de la Política Económica y Social del Partido y de la Revolución." Steve Ludlam, "Reordenamiento, Lineamientos Arriba": *Legitimacy and Political Culture in Cuba's Reform Strategy*, 4 INT'L J. CUBAN STUD. 242, 243 (2012).

56. *Id.* at 249.

ticipants.⁵⁷ Comparison between the original Draft Guidelines and the resulting Guidelines demonstrates the effect of this participation: only 32% of the guidelines remained unaffected, with thirty-six entirely new Guidelines added by the end of the process of public debate.⁵⁸ The evidence of mass, popular support for reform is overwhelming.

The Resolution adopting the Guidelines included 313 points pertaining to, among other things, goods, cooperatives, home and car sales, liquidation of poorly-performing state-run companies, currency unification, and the scaling back of free benefits and subsidies.⁵⁹ Although positive changes have resulted from these reforms, the system remains flawed.⁶⁰ For example, the recent approval by the government of new and used car sales by Cubans has had largely negative effects on public perception of the government. In a country where the average salary is 20 USD per month, a state-controlled price of 91,000 USD for a Peugeot is viewed as offensive.⁶¹ Thus, many conclude that the decision to allow car and other purchases on the island merely paid lip service to reform and little else.⁶² Even those who take a less cynical approach recognize that legitimate reforms are critical to growth, as the economy faces enormous challenges in, *inter alia*, the areas of foreign direct investment and currency unification.⁶³ Bringing about change in both name and action is essential to the project of economic growth.

57. *Id.*

58. *Id.* at 249–50.

59. SIXTH CONGRESS OF THE COMMUNIST PARTY OF CUBA, RES. ON THE GUIDELINES OF THE ECONOMIC AND SOCIAL POLICY OF THE PARTY AND THE REVOLUTION (Apr. 18, 2011) [hereinafter GUIDELINES], available at <http://www.cuba.cu/gobierno/documentos/2011/ing/1160711i.html>.

60. See generally Ricardo Torres Pérez, *Some Contradictions in Contemporary Cuban Economic Development*, AMERICAS Q. (Summer 2013), available at <http://www.americasquarterly.org/some-contradictions-in-contemporary-cuban-economic-development>.

61. Marc Frank, *Cuban Hopes Dashed as New and Used Cars Go on Sale*, REUTERS Jan. 3, 2014, available at <http://www.reuters.com/article/2014/01/03/us-cuba-reform-cars-idUSBREA020N320140103>.

62. One local with whom the author spoke compared the *lineamientos* to a box full of crabs: “muchu muela, poca carne, y caminando pa’ tras.”

63. See generally Omar Everlenny Pérez Villanueva, *Análisis de la evolución reciente de la economía cubana*, in MIRADAS A LA ECONOMÍA CUBANA: ENTRE LA EFICIENCIA ECONÓMICA Y LA EQUIDAD SOCIAL 17 (Omar Everlenny Pérez Villanueva & Ricardo Torres Pérez eds., 2013).

2. Decree-Law 288 of 2011

Decree-Law 288 was enacted as the codification of Guideline No. 297, which reads:

The sale [of] houses and other forms of homeownership transfer (including but not limited to swaps and donations) shall be authorized and facilitated among natural persons. The formalities required for housing refurbishment, rehabilitation, construction and lease, as well as for ownership transfers, shall be simplified in a manner that helps address the public housing demands.⁶⁴

The relevant portion of Decree-Law 288⁶⁵ once again amended Article 70 of the General Housing Law and effectively repealed Decree-Law 233 by removing numerous restrictions on the transfer of property and streamlining the process for property exchange and registration.⁶⁶

It is important to recognize that, whatever the logical conclusion of these reforms, the government still strongly resists any allusion to a future capitalist Cuba.⁶⁷ For instance, although permitting private property *home* ownership, the Sixth Congress explicitly stated in its 2011 Resolution that Cuba's economic system would "continue to be based on the people's socialist ownership over the fundamental means of production, governed by the socialist principle of distribution: 'from each according to his/her capacity to each according to

64. GUIDELINES, *supra* note 59, art. 297.

65. Decreto-Ley No. 288, Gaceta Oficial No. 035 Extraordinaria, 359 (Nov. 2, 2011) (Cuba).

66. Article 70 now reads:

1. La transmisión de la propiedad de una vivienda por donación, entre personas naturales, se formaliza directamente ante notario del municipio donde se encuentra ubicado el inmueble, previa inscripción en el Registro de la Propiedad correspondiente . . .

3. La transmisión de la propiedad de una vivienda por compraventa, entre personas naturales, se formaliza directamente ante notario con sede en el lugar donde se encuentre enclavado el inmueble, por el precio que libremente acuerden las partes.

El pago total del precio de la compraventa se efectúa en el acto de formalización de esta, mediante los instrumentos de pago emitidos por la institución bancaria, según las regulaciones establecidas por el Banco Central de Cuba.

Id. art. 70.

67. Circles Robinson, *Cuba Is Not Privatizing Its Economy*, HAVANA TIMES (Oct. 15, 2013, 11:30 AM), <http://www.havanatimes.org/?p=99436>.

his/her contribution.”⁶⁸

As further evidence of its refusal to abandon its socialist roots, the government also placed limits on the number of houses an individual may own—one residential, urban home and one vacation home—to avoid the emergence of “property barons.”⁶⁹ The law also imposes restrictions on who may purchase property. Foreigners residing outside of Cuba cannot purchase all of the same properties available to citizens and permanent residents. Instead, they may purchase homes only in designated developments.⁷⁰

F. Title Registry in Cuba

As a predictable result of the earlier restrictions on property conveyance and subsequent machinations to avoid them, title ownership is often unclear. Resolution 249/05 of the Ministry of Justice, regarding the *Registro de la Propiedad*, or Property Registry, sets forth a single, comprehensive code for registering title.⁷¹ The aim of this code is to establish clarity and prevent clouded title, and even though the process itself appears straightforward, it functionally precludes a number of Cuban citizens from ever availing themselves of it.

Under the code, “root of title [] is to be found in the governmental act whereby the real property in question was nationalized or confiscated . . . or else in the first title or grant issued by the State after said nationalization or confiscation.”⁷² When recreation of chain of title is not possible, title may be perfected by presenting the two immediately preceding acts of transmission, or by demonstrating that the State “acquired, improved or tendered the property in question more than five years beforehand.”⁷³ Much of this effort to standard-

68. GUIDELINES, *supra* note 59, preamble.

69. John Arlidge, *Cuba, Home of the World’s Oddest Property Market*, FINANCIAL TIMES (Jun. 21, 2013, 5:02 PM), <http://www.ft.com/cms/s/2/95d3017e-d364-11e2-b3ff-00144feab7de.html#slide0>.

70. Laura Latham, *Cubans Begin to Rebuild Their Residential Real Estate Market*, N.Y. TIMES, July 26, 2012, available at http://www.nytimes.com/2012/07/27/greathomesanddestinations/27iht-recuba27.html?pagewanted=all&_r=0.

71. Res. No. 249, Gaceta Oficial No. 028 Extraordinaria, 179 (Oct. 7, 2005) (Cuba).

72. José Manuel Palli, *Land Title Registration in Cuba: An Update*, 17 CUBA IN TRANSITION 225, 228 (2007), available at <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v17-palli.pdf>.

73. *Id.*

ize property ownership seems to be directed at clearing the way for foreign direct investment,⁷⁴ as well as increasing control over property ownership.⁷⁵ But while the country appears to be paving the way to a stabilized private property market, there remain gaps in its program.

The current state of Cuba's property registry significantly diminishes any hope of a coherent property market in the near future. Even with adverse possession, the existing law would have, on its own, made it virtually impossible for any Cuban citizen with flawed title acquired in a black market transaction to obtain bad faith possession, so many pre-2011 extra-legal transactions remained unsanctioned. That is not to say that all of those transactions have remained illegal; according to *Granma*, Cuba's Communist Party newspaper, nearly 10,660 transactions were recorded to formalize previous exchanges within a year of the enactment of Decree-Law 288.⁷⁶ But this has not done away with the problem entirely, and the Cuban title registry is still "plagued by irregularities."⁷⁷

The Tribunal's decision in *Bouly-Andux*, and the subsequent Circular 265 which mandated the uniform recognition of these transactions, makes huge strides in resolving these issues.

II. THE *BOULY WILSON-ANDUX BARRUETA* DECISION AND REASONING

A. Background

The Supreme Popular Tribunal decision at issue involved Lina Bertha Bouly Wilson and Ricardo Andux Barrueta, two individuals that had contracted for the sale of a home in Havana.⁷⁸ In order to avoid high taxes and prohibitions on property transfers and to circumvent the potential confiscation of the property by the state,⁷⁹ Barrueta, the seller, agreed to marry Bouly, the purchaser, and then convey the property to her in their divorce. Soon after the marriage took

74. *Id.* at 228 n.14.

75. *Id.* at 228.

76. Latham, *supra* note 70.

77. Mirella Betancourt, *Cuban Supreme Court Expands Housing Reform*, CUBA STANDARD (Sept. 24, 2013, 12:12 PM), <http://cubanews.cubaverdad.net/2013/09/analysis-cuban-supreme-court-expands-housing-reform/>.

78. Betancourt, *supra* note 2.

79. The phrase used by the plaintiff, in an interview, was "launder the transaction." *Id.*

place, and before the divorce could be completed, the seller was sent to jail. Upon his release, he refused to transfer title to the purchaser, even though he had already received the agreed upon 5,000 USD payment.⁸⁰ When Ms. Bouly attempted to bring the case to the authorities, they treated it as a family matter. She brought multiple appeals before the provincial courts, but was unsuccessful. Following the 2011 enactment of Decree-Law 288, she decided to appeal under that law; however, Cuban civil laws do not apply retroactively unless explicitly stated in the law,⁸¹ and she again lost. Finally, her case made it to the Supreme Popular Tribunal.⁸²

In its decision, or *Sentencia*, the Tribunal held that the contract between Andux Barrueta and Bouly Wilson was valid and ordered the seller to appear before a notary public to complete the transfer of title. The Tribunal also held that, should he refuse to appear, the district court would be authorized to sign and transfer title on his behalf.⁸³

B. Reasoning

The decision of the Tribunal is notable for several reasons. Importantly, it seems that the Tribunal deliberately avoided citing to Article 2 of Decree-Law 288 itself, which modified Article 66.1 of the General Housing Law⁸⁴ and deals with disposition of property in the event of divorce. The Tribunal appeared more interested in a just and equitable resolution of the matter than with adhering to the black letter law.

The Tribunal's decision to look to the illegal contract in ordering specific performance⁸⁵ may also imply that it believed a decision clarifying title registration law was necessary. Article 2 of Decree-Law 288 would have been available as a basis for deciding the case as it addresses situations wherein married couples with or without express pre- or postnuptial agreements have a dispute over a given dwelling. In those cases, ex-spouses may continue to own the property as co-holders of title. If the pair is in arrears, the Bank may sell the property and divide the remaining funds equally among the

80. *Id.*

81. CONST. OF THE REPUBLIC OF CUBA art. 61 (1992).

82. Betancourt, *Cuban Supreme Court Expands Housing Reform*, *supra* note 77.

83. *Id.*

84. DECRETO-LEY 288 art. 2.

85. *Sentencia* 46, as reproduced in Betancourt's article, *supra* note 2.

ex-spouses.⁸⁶ This resolution, while seemingly fair, was noticeably avoided by the Tribunal deciding this case. The Tribunal cited the receipt of cash payment by the seller, the seller's abandonment of the property fourteen years prior, the seller's renunciation of residence at said property in the address registry, and the purchaser's continued domicile and acts of ownership over the property (i.e. remodeling) in reaching its historic determination in favor of the plaintiff.

Furthermore, in a particularly interesting section of the opinion, the Tribunal noted that the Seventh Special Provision of the General Housing Law,⁸⁷ which explicitly proscribed the transaction between the parties at the time of its execution and would have imposed severe sanctions as a result, had been repealed "at the expressed will of the State."⁸⁸ The Tribunal went on to state that it:

86. DECRETO-LEY 288 art. 2.

87. Disposición Especial 7a, Ley General de la Vivienda, *available at* <http://www.gacetaoficial.cu/html/leygeneralvivienda.html#DE> (website is temporarily out of service).

88. *Id.* The relevant portion of the decision in Spanish reads:

CONSIDERANDO: Que, el motivo único en que se sustenta el recurso, con amparo en el apartado primero del artículo seiscientos treinta de la Ley de Procedimiento Civil, Administrativo, Laboral y Económico debe prosperar, habida cuenta que, del análisis de las actuaciones se constata situación fáctica consistente en la concertación de contrato de compraventa de vivienda realizado entre las partes en 1998, por convenido precio ascendente a 5 mil dólares americanos, cuyos efectos entonces estaban vedados de eficacia de conformidad con prohibición normativa vigente, que a la fecha, por expresa voluntad estatal fue derogada, y en el específico supuesto que se trata, no aplicada por autoridad competente a los sujetos involucrados, la Disposición Especial Séptima de la Ley General de la Vivienda, irrefutable resulta la marcada injusticia que trae consigo no atribuirle a la relación negocial entre los litigantes instituida, los favorables efectos que la novedosa norma inmobiliaria les reconoce de cara a formalizar el contrato realizado con la obtención de pertinente titularidad a favor del comprador, quien erogó suma dineraria que satisfizo al vendedor a la sazón de la venta, y su negación de acudir ante fedatario para revestir de eficacia jurídica el acto de disposición del bien, entraña actuar doloso en el vendedor, que no puede quedar tutelado en el justo momento en que el legislador erige en norma jurídica la voluntad del Estado de proteger los actos de transmisión de la propiedad entre personas naturales sobre bienes de la presente naturaleza; pues sobrevienen relevantes en el presente caso, elementos de juicio que dejan sentado el negocio de que se trata, a saber, el abandono de ocupación del bien por su titular desde hace más de 14 años, con expresa renuncia a continuar domiciliado en el registro de direcciones del lugar, la efectiva entrega del dinero pactado en 2 cuantías de 2500 dólares americanos, cada una, que recibiera conteste como contraprestación, y la ejecución por la inconforme de múltiples acciones de remodelación que se traducen en actos de dominio, así permitidos por aquel al dejar el inmueble a su plena disposición, los que unidos a que el negocio jurídico de compraventa, siempre reconocido en la ley inmobiliaria, primero con la exigencia del pertinente ejercicio del derecho de tanteo que le asiste al Estado de forma preferente, sobre los inmuebles objeto de venta entre particulares, y a posteriori, con la modificación que le introdujo el Decreto - Ley 233 de 2 de julio de 2003, solo a favor del Estado, mediante el correspondiente pago del precio legal a su propietario, requisitos que de no

[W]ould irrefutably result in marked injustice not to attribute to the business relationship between the litigants, the favorable effects that the new real estate rule grants them in order to formalize the executed contract, granting relevant title to the buyer who paid a sum of money to the seller at his satisfaction at the time of sale, and his refusal to go to a notary to grant legal effect to the act of sale of the property, an intentional act involving the seller, cannot be protected at the same moment when the legislature has erected as a legal rule the will of the State to protect the act of transmission of property between individuals of goods of this nature; as there remains relevant evidence regarding the business in question, namely, the discontinuance of the occupation of the property by the title holder over 14 years ago, with the express renunciation of the continued domicile in the address register, the effective delivery of the agree upon amount of money in two payments of U.S. dollars 2,500 each, received as consideration by the defendant, and the completion by the applicant of several acts of remodeling that constitute acts of ownership, made possible by the defendant's leaving the property under the applicant's sole dominion, all of which, coupled with the legal act of sale, consistently recognized in property law, first with the attendant requirement of the relevant exercise of the right of first refusal in favor of the State, and a posteriori, with the modification introduced by Decree - Law 233 of July 2, 2003, which legalized sales only to the State, by the payment of their own legal price, requirements which, at the time, nullified the effectiveness of the contract in question, but repealed as they have been for the potentiality of business, the proper application of the Second and Fourth Final Provisions of Decree - Law 288 of October 28, 2011, must follow for the benefit of the parties.

Whitewashing the past, and in direct contradiction to the presumption against retroactivity of civil laws, the Tribunal determined that laws

cumplirse enervaban entonces la eficacia del contrato, pero suprimidos como han sido para la virtualidad del negocio, procede la debida aplicación de las Disposiciones Finales Segunda y Cuarta del Decreto - Ley 288 de 28 octubre de 2011, en beneficio de los intervinientes en el mismo.

These documents are not generally in the public record. This language was reproduced in Mirella Betancourt's article, *supra* note 2, Anexo No. 2.

in place at the time of the transaction would no longer govern the parties' dispute. Furthermore, it decided that, in the absence of an explicit statute governing these transactions, the only germane law in place, Decree-Law 288, should have effect.

One more central element of this analysis involves the Tribunal's decision to intervene and create new, binding law where the grounding legislation for the decision was demonstrably silent. This presents interesting questions about the politicization of the Cuban judicial system which, though ostensibly independent,⁸⁹ is "subordinate hierarchically to the National Assembly of People's Power and the Council of State," of which Castro is President.⁹⁰

Indeed, the decision is especially surprising when one considers that the Cuban court system is generally controlled by politics.⁹¹ This particular opinion may not have necessarily fallen outside the party line, but it may demonstrate the Tribunal's willingness to detach itself from politics. In fact, this is not the first independent decision made by the Tribunal in recent years. In 2009, the Cuban Juridical Association⁹² filed suit against María Esther Reus González, the Justice Minister, for failure to respond to its request for certification and legal recognition. After twice sending in a request and twice receiving no response from the Ministry, the CJA filed suit, demanding a response. The Association was certain it would lose.⁹³ In an unprecedented move, the Tribunal permitted a case against a ministry or ministry official to proceed in spite of a "procedural error."⁹⁴ In fact, no case against a ministry official had ever been permitted to ad-

89. Article 122 of the Constitution reads "Los jueces, en su función de impartir justicia, son independientes y no deben obediencia más que a la ley." This translates to "Judges, in the administration of justice, are independent and owe obedience only to the law." CONST. OF THE REPUBLIC OF CUBA art. 122 (1992).

90. *Id.* art. 121.

91. Juan O. Tamayo, *Dissident's Case against Justice Dept. Can Continue*, NASHUA TELEGRAPH, Apr. 28, 2011, available at <http://www.nashuatelegraph.com/newsworldnation/917321-227/dissidents-case-against-justice-dept.-can-continue.html#>; Juan O. Tamayo, *Cuban Court to Consider Suit against Ministry of Justice*, MIAMI HERALD, Sept. 1, 2010, available at http://www.cubastudygroup.org/index.cfm/newsroom?ContentRecord_id=398a8e15-0456-4ec7-b2a4-b41239692364&ContentType_id=8c81d17c-7ffe-48d6-81e7-cd93fe3120eb&Group_id=0b3ad3ec-d24e-4d2a-b425-a97ae7617c16.

92. This group is described by Tamayo as "a group of about 30 lawyers founded in 2008 to provide independent legal advice on a nonprofit basis, usually to government critics," and also as "dissidents." Tamayo, *Cuban Court to Consider Suit*, *supra* note 91.

93. Tamayo, *Dissident's Case against Justice Dept.*, *supra* note 91.

94. *Id.*

vance.⁹⁵ Although the ministry has denied his request for registration, the Association is currently appealing the decision⁹⁶—an appeal that would have been impossible had the Supreme Tribunal not obligated the Ministry to defend itself.

Whatever its precise motivation, it appears that the Supreme Tribunal is attempting to carve out a greater role for itself in Cuba's future and has conspicuously done so by handing down landmark decisions in the areas of political dissidents and property law.

C. Circular 265

Even more important for Cubans today is the issuance of Circular 265,⁹⁷ which makes the decision in *Andux-Bouly* binding upon

95. *Id.*

96. Juan O. Tamayo, *Dissident Lawyers File Complaints against Cuban Police*, MIAMI HERALD, Nov. 26, 2012, available at <http://www.cubademocraciayvida.org/web/article.asp?artID=19410>.

97. That document reads:

Adjunto a la presente, para su estudio por los jueces de su provincia, les remito dos copias de sentencias de la Sala de lo Civil y de lo Administrativo de este superior órgano de justicia sobre la novedosa situación, por la cual se autoriza a particulares para concertar contratos de compraventa de viviendas y vehículos automotores, sujeto exclusivamente ese negocio al cumplimiento de específicos requisitos administrativos, conforme a lo previsto en el caso de los inmuebles, en el apartado 3 del artículo 70 de la Ley General de la Vivienda, tal como quedo redactado por el Decreto - Ley 288 del 28 de octubre de 2011, y en el de los vehículos por el Decreto 292 del propio año, impone el actuar de los órganos integrados al sistema de Tribunales, con absoluta sujeción a lo previsto en el primer párrafo del artículo 120 de la Constitución de la Republica, relacionado, entre otros supuestos, con el apartado b) del artículo 4 de la Ley No. 82 de 1997, que en la tramitación y decisión que corresponda a pretensiones de esa naturaleza, la observancia de circunstancias de carácter procesal que jurídicamente han de incidir en la materialización de los de la clase apuntada, y evitar la concurrencia de situaciones que riñan con el debido proceso. A tales efectos y con el objetivo de lograr el incremento de la calidad en la administración de justicia, es necesario adoptar medidas que uniformen el tratamiento judicial de los asuntos que se promuevan, para lo cual debe cumplirse, lo que por la presente se dispone.

PRIMERO: Los jueces deben examinar minuciosamente la demanda como paso previo a su admisión, para constatar los extremos que a continuación se expresan:

a) Además de las exigencias del artículo 225 de la Ley de Procedimiento Civil, Administrativo, Laboral y Económico, si de su formulación se advierte, queda constituida válidamente la relación procesal, de forma que se garantice la participación en el proceso de todas las personas que pudieran tener interés en el mismo.

b) Si la pretensión que se deduce, guarda adecuada relación con los hechos en que se fundamenta la demanda.

c) La existencia del título que ostente la parte demandada, justificativo de la propiedad del cuestionado bien.

all lower Courts. Although this does not automatically “launder” all transactions of this type, it does permit any transaction prior to 2011 that would have been considered null and void under then existing law to now be brought before a tribunal for a resolution of the dispute or, if there is no dispute, before a notary for proper registration of title.

Circular 265 is not a remedy to the country’s property confusion; ignorance of the new laws and abnormalities in registration continue to impede a smooth transition to a more durable property market.⁹⁸ Nevertheless, it represents an important opportunity for Cubans to perfect title and ultimately contribute immensely to overall economic growth and an improved standard of living.

III. THE FUTURE OF CUBAN PROPERTY LAW

A. *The Importance of Titling to Development*

According to the prominent economist Hernando de Soto, “[i]t is formal property that provides the process, the forms, and the rules that fix assets in a condition that allows us to realize them as ac-

SEGUNDO: Los jueces y secretarios actuantes deben velar porque los emplazamientos a las partes, se ejecuten con todas las previsiones de la Ley.

TERCERO: Viabilizar la participación de terceros interesados, e incluso llamarlos de oficio, cuando ello resulte necesario.

CUARTO: Aplicar, en estos casos, lo previsto en la Instrucción No. 217 de 17 de julio de 2012 del Consejo de Gobierno del Tribunal Supremo Popular.

QUINTO: En la valoración de los medios probatorios que se aporten a las actuaciones, el tribunal ha de tener en cuenta la eficacia que a cada uno por disposición de la ley le viene atribuida, y cuidara de no dar por acreditado la validez del contrato, cuando su contenido no esté suficientemente probado.

SEXTO: Cuidar que en estos asuntos, al igual que en los de distinta naturaleza, la argumentación jurídica que sostenga el fallo tenga adecuado respaldo en las normas vigentes, además de que, gramaticalmente sea de fácil comprensión para los justiciables.

SEPTIMO: En el pronunciamiento del fallo, en el supuesto de que la demanda prospere, precisar el precio del bien a que el negocio se contrae, la condena al demandado sería la de compelerlo para el perfeccionamiento del contrato ante notario, y que, de no cumplimentarlo, lo hará el tribunal en su lugar.

OCTAVO: Queda encargado el presidente del Tribunal Provincial Popular respectivo, así como el del Especial Popular de la Isla de la Juventud, de darle a conocer a la sala de ese órgano que en materia civil conoce de los asuntos de esta clase, así como a los presidentes de los tribunales municipales del territorio, el contenido de la presente.

Reproduced in Betancourt, *supra* note 2 (copies of original documents available on website).

98. Reyes, *supra* note 1.

tive capital.”⁹⁹ Formalizing property ownership and title allows people to “fix the economic potential of their assets so that they could be used to produce, secure, or guarantee greater value in the expanded market.”¹⁰⁰ Michael Heller has stated, that “[d]eveloping ‘good law’ on which people may rely—for example, mechanisms to secure credit or protect intellectual property—allows much higher levels of economic performance.”¹⁰¹

As Niall Ferguson points out, however, “it’s not owning property that gives you security; it just gives your creditors security. Real security comes from having a steady income.”¹⁰² Thus, allowing Cuban citizens to secure title to their homes may not be a panacea for all that ails the Cuban economy. Other reforms, in conjunction with property market stabilization, may hold the key to robust economic development in Cuba.

With the recent reforms came the opportunity for the development of a non-state sector, powered by *cuentapropistas* or self-employed citizens. In 2010, Raúl Castro announced that the State would be laying off one million employees within five years,¹⁰³ and this made the need to create a new sector for employment urgent. Its effects have been largely positive: In 2012, the non-state sector grew by 23%. By the end of that year, Cuba had 394,867 non-state employed workers.¹⁰⁴ In order for that number to grow, however, non-state workers must have access to resources with which to fund new ventures.

De Soto’s case studies have shown that those who have unrestricted, formal property rights have the ability to extract capital from these properties. Whether they may be sold or borrowed against, they provide a source of investment for the purposes of starting their own small businesses and supporting themselves—which will be critical in the coming years, as the government has also promised to re-

99. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 46 (2000).

100. *Id.* at 48.

101. Heller, *supra* note 40, at 644 n.115.

102. NIALL FERGUSON, *THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD* 279 (2008). Indeed, de Soto himself admits that “[p]roperty law is not a silver bullet.” DE SOTO, *supra* note 99, at 277.

103. Torres Pérez, *supra* note 60, at 33. These layoffs are largely attributable to the government’s inability to continue paying wages. Charles Shapiro, *Supporting Private Enterprise to Thrive in Cuba*, SAN DIEGO UNION-TRIBUNE, Aug. 7, 2014, available at <http://www.utsandiego.com/news/2014/aug/07/cuba-shapiro/>.

104. Omar Everlenny Pérez Villanueva, *supra* note 63, at 24.

duce state benefits.¹⁰⁵

The effects of this type of exchange are already visible in Cuba. In 2013, approximately 88,000 homes were sold, up from 45,000 in 2012,¹⁰⁶ and many citizens recognize that property is a valuable asset which can be used to obtain capital.¹⁰⁷ It is precisely this realization that has spurred the registration of more than 873,314 private and state-owned properties throughout the country since 2011.¹⁰⁸

De Soto's work has also shown that foreign direct investment increases when there is a stable property market. This is important because, as local economists have noted, foreign direct investment is one of the most crucial elements of any reform project in Cuba.¹⁰⁹ It seems that the Cuban government has also recognized the need to attract foreign investment, and this discussion should provide evidence to support the argument that the Supreme Tribunal's holding in *Andux-Bouly* is directed at facilitating this growth. Although the property affected by that decision is not commercial, this may be a signal to foreign investors that the Cuban government's attitudes toward property are changing.

A key element of any title-formalizing program involves the government's recognition of the existing extralegal market and its nuances.¹¹⁰ According to de Soto, "[t]o obtain legitimacy, they have

105. Torres Pérez, *supra* note 60, at 33–34.

106. All totaled, this number represents only about 2.38% of Cuba's existing housing stock. Emilio Morales, *Crecen las ventas, bajan los precios, pero todavía el mercado inmobiliario está en un bajo perfil*, HAVANA CONSULTING GROUPS (July 3, 2014, 12:46 PM), http://thehavanaconsultinggroups.com/index.php?option=com_content&view=article&id=361%3Acrecen-las-ventas-bajan-los-precios-pero-todavia-el-mercado-inmobiliario-esta-en-un-bajo-perfil&catid=47%3Aeconomy&lang=en. The population of Cuba is roughly the same as that of Ohio, which saw 132,566 home sales in 2013 alone. Michelle Jarboe McFee, *Home Sales End 2013 on Positive Note, but Northeast Ohio Market Still Has Room to Improve*, CLEVELAND.COM (Jan. 23, 2014, 3:17 PM), http://www.cleveland.com/business/index.ssf/2014/01/home_sales_end_2013_on_positiv.html.

107. Reyes, *supra* note 1. Among the five most important motivations for home sales identified in a study by the Havana Consulting Group is the need to generate capital to open a private business. Emilio Morales and Joseph L. Scarpaci, *Real-estate in Cuba: A Half-Hearted Opening*, HAVANA CONSULTING GROUPS, http://thehavanaconsultinggroups.com/index.php?option=com_content&view=article&id=344%3Areal-estate-in-cuba-a-half-hearted-opening&catid=47%3Aeconomy&lang=en.

108. Reyes, *supra* note 1.

109. Torres Pérez, *supra* note 60, at 35–36.

110. DE SOTO, *supra* note 99, at 163. He asserts that, in order "[t]o integrate all forms of property into a unified system, governments must find out how and why the local conventions work and how strong they actually are. [F]ailure to do so explains why past

to connect with the extralegal social contracts that determine existing property rights.”¹¹¹ Based on his empirical research and fieldwork, he has concluded that governments must acknowledge that people have established conceptions and social contracts defining what their property is and how it is to be employed.¹¹² De Soto warns that a system that does not formally recognize these rights as people understand them, or need them, will simply drive potential participants out of the system,¹¹³ much as the earlier restrictions on property sales created a black market for property in Cuba. If those for whom the system was designed do not avail themselves of it, then they are effectively barred from exploiting their property for productive purposes.¹¹⁴

A major success, then, of the *Bouly-Andux* decision is that it essentially codifies the existing system in which many Cubans are participating and affords them the opportunity to protect their socially embedded ownership rights.

An added benefit of this mechanism for the institutionalization of the existing Cuban property market is speed. Very often, economic growth is hindered by bureaucrats in transitional economies; as de Soto puts it:

The difficulty is that few lawyers understand the economic consequences of their work, and their knee-jerk reaction to extralegal behavior and to large-scale change is generally hostile. All the reformers I have met working to make property more accessible to the poor operate with the presumption that the legal profession is their natural enemy.¹¹⁵

Though, as de Soto concedes, lawyers are necessarily a part of any economic reform project, as they guarantee “security of ownership . . . and enforceability of transactions.” That this decision now offers binding law increases the likelihood of acceptance and adherence, as opposed to fruitless interference by bureaucrats.

attempts at legal change in developing and former communist countries have not worked.”

111. *Id.* at 173.

112. *Id.* at 171–72.

113. *Id.* at 168–69.

114. *Id.* at 157.

115. *Id.* at 199. In fact, de Soto goes on to cite a fifty-two country study which demonstrated that “for every percentage point increase in the number of lawyers in the labor force . . . economic growth is reduced by 4.76 to 3.68 percent.”

B. Property Law in 2018

1. The Future for Current Residents

One other very interesting feature of the *Andux-Bouly* decision, however, is its timing. On February 24, 2013, Raúl Castro Ruz formally announced that he would not seek reelection in 2018.¹¹⁶ His stepping down would mean that, for the first time in nearly sixty years, a Castro would not be President of Cuba. This brings with it uncertainty for those both on and off the island. Consequently, it is worth noting that the decision in the case between Ricardo Andux Barrueta and Lina Bertha Bouly Wilson was announced only four days later, on February 28, 2013.

If, as discussed above, an incoming regime or future court should determine that the expropriations completed prior to the enactment of the 1976 Constitution are illegal under the Constitution of 1940, such decree would effectively create a vacuum of ownership, as the State neither owned, nor was empowered to distribute title to those expropriated properties.

Some scholars suggest reenacting the Constitution of 1940 in the future and utilizing its framework to determine the appropriate method of identifying and settling claims.¹¹⁷ Under this instrument, the takings violated both Articles 24 and 87 by failing to serve a legitimate public purpose.¹¹⁸ Under the Fundamental Law of 1959, the revisions to the Constitution were also illegal under Articles 285 and 286, which did not allow for the amendments to the Constitution by a Council of Ministers.¹¹⁹

For a number of homeowners who, under the current regime, have acquired good title to their homes, the fact of illicit expropriation will not necessarily void their rights to their homes. According to some legal theorists, good faith possessors who acquire confiscated title from the state will not become bad faith possessors. This is due to what is known as a “vicious circle problem.”¹²⁰ Quoting Adriaanse, Consuegra-Barquin explains:

116. Marc Frank, *Raúl Castro Announces Retirement in 2018*, NBCNEWS.COM (Feb. 24, 2013, 3:02 PM), http://worldnews.nbcnews.com/_news/2013/02/24/17077928-Raúl-castro-announces-retirement-in-2018?lite.

117. Ortiz, *supra* note 5, at 335.

118. *Id.* at 337.

119. *Id.*

120. Consuegra-Barquín, *supra* note 20, at 920.

[A] person in possession is held to be *mala fide* when he knows that his goods came from confiscation. In general it is a question of bad faith if the person who acquires property knows that he obtains this from an illegal possessor. Here the problem of the vicious circle may arise. The state which executes a confiscation owing to its own law cannot be said to possess in bad faith under that law. According to the same law the state's assignee is not *mala fide*. It is obvious, however, that once the consequences of the foreign confiscatory law are excluded by virtue of public policy, then the law of the *forum* must state whether there is bad faith or not.¹²¹

Morales Moreno further states that, following times of crisis or a disruption in a legal system, "the legal system should support the continuity of an owner's original status" after "normality is restored."¹²² However, once adverse possession has run its course, uninterrupted, then the principle of "maintain[ing] continuity and certainty in property ownership and hence accomplish[ing] the good administration of land and property rights" must outweigh.¹²³ According to Consuegra-Barquín, "[t]o not declare an adverse possession in favor of the present possessors would be ruling contrary to the purpose for which the legal concept was established."¹²⁴

The importance of the *Bouly-Andux* decision applies to those individuals whose flawed titles acquired in extralegal transactions would not have allowed them bad faith adverse possession.¹²⁵ They would not be protected in the event that the laws authorizing confiscation of property were eventually declared unconstitutional.¹²⁶ However, that the Supreme Tribunal has now authorized these parties to register adequate title immediately means those who acted quickly will have acquired title through *good faith* adverse possession by ear-

121. *Id.* (quoting PIETER ADRIAANSE, CONFISCATION IN PRIVATE INTERNATIONAL LAW 142 (1956)).

122. *Id.* at 906; see Alexander & Mills, *supra* note 8, at 151 (acknowledging the "legal tradition that respects the concept of the continuity of law").

123. Consuegra-Barquín, *supra* note 20, at 921–22.

124. *Id.*

125. *Id.* Although, it should be noted, Consuegra-Barquín advocates that bad faith adverse possession should vest title even in the face of the 1988 Civil Code's rejection of it.

126. *Id.* at 922 ("Today, no one could legally adversely possess through *usucapio* with bad faith because of its non-recognition in the 1988 Socialist Civil Code. Therefore, if an expropriation law is declared unconstitutional, and the possessor is possessing in bad faith, the legitimate proprietor will remain the former owner.").

ly 2018—precisely when Castro’s successor will take over.

Although the timing of this decision may have been coincidental, there can be no question that its consequences are potentially vast.

2. Effects on Potential Claimants

At first, this may seem anathema to exiles whose intention is to return to Cuba and reclaim property. There are a number of factors, however, that one might urge those individuals to consider. Foremost is Cuba’s housing shortage. As of 2013, the country’s household deficit “exceed[ed] that of 700 thousand homes.”¹²⁷ Should exiles enter the country and demand restitution of their properties, this would exacerbate the scarcity of residences, increasing pressure on a government that is already incapable of providing adequate housing.¹²⁸

Secondly, these reforms are likely to “free[] up capital” and bring about much more entrepreneurial activity than previously seen on the island.¹²⁹ In that case, overall economic health could lead to greater opportunities for exiles looking to become involved in the Cuban economy.

CONCLUSION

Though not a particularly well-publicized decision, the aptly-timed *Bouly-Andux* case may have rather widespread ramifications. The effects of Cuba’s expropriations laws and their validity in the future are, at the moment, uncertain. What is clear, however, is that in a few short years an unnamed official will be taking over the reins in Cuba. The recent decision from Cuba’s highest Tribunal provides the groundwork for greater stability in the market should future ad-

127. Emilio Morales, *Cuba’s Real Estate Market: Booming Speculation*, HAVANA TIMES (May 10, 2013), <http://www.havanatimes.org/?p=92872>.

128. Govan, *supra* note 43; see Mimi Whitefield, *Home Sales Would Be a Sea Change for Cuba*, THE MIAMI HERALD, Aug. 1, 2011, available at http://www.cubastudygroup.org/index.cfm/newsroom?ContentRecord_id=59906e08-fbae-4aee-bf7b-34928342105b&ContentType_id=8c81d17c-7ffe-48d6-81e7-cd93fe3120eb&Group_id=0b3ad3ec-d24e-4d2a-b425-a97ae7617c16&MonthDisplay=8&YearDisplay=2011 (explaining that part of the reason for the new home sales law was to help with the housing shortage issue).

129. Whitefield, *supra* note 128.

ministrations decree that the takings between 1959 and 1976 were illegal. Through adverse possession, many Cubans have already perfected title to their homes sufficient to withstand a challenge from pre-1959 owners; however, the decision also makes that route available to many individuals whose homes were purchased through extralegal sales.

Apart from contributing, in some way, to the resolution of the housing shortage by encouraging homeowners to invest in their properties and to construct new homes, the new legal landscape also permits Cubans to mine new capital from their homes. By codifying the existing property market in Cuba, the Tribunal's decision does a great deal to reduce the potentially harmful effects of a slowdown in property privatization and increases the potential number of participants in the country's new economic system.

Though many citizens may be unaware of the impact this decision will have on their lives, its very existence indicates that a major transformation in attitude is taking place in Cuba.

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