

The “New” Property rights in Cuba: a disclaimer.

By José Manuel Palli, Esq.*

Many moons ago, I was invited to participate in a venture to promote the use of title insurance –a financial product or service almost no other country in the world had ever found any use for –internationally, in Mexico and beyond. I made a good living off that venture for a long time, but one of the most frustrating things I had to endure was my inability to explain to my mostly American title insurance clients who bought real estate in Mexico, their American lawyers, and even American pundits, the nuances that made acquiring property rights in Mexico so different from, but still so similar to what we were used to hereabout (and even safer, from a legal certainty standpoint). And that frustration arose, mainly, from my audience’s insistence in assimilating Mexican legal concepts (grounded in Civil Law) to our own Common Law rooted ones –which led them, for example, to call the rights a foreign purchaser acquires as a trust beneficiary in a Mexican bank trust (a *Fideicomiso*) leasehold rights. This fable persists to this day, together with the one that tells about Mexico lacking a proper recording system –when what they have is, conceptually at least, far better than ours.

So it came as no surprise that so many of us, Americans and Cuban-Americans alike, seem to be baffled by what the new Cuban law in effect since November 10 (*Decreto Ley 288*) means. Despite the well established fact that the Cuban Revolution was, in great measure, a revolution conceived and made by lawyers, we in Miami long ago decided there is no Law in Cuba (*en Cuba no hay Derecho*), a prejudice that is likely to make the generalized confusion worst than that affecting our perception of Mexican real property law. And it is a prejudice that, together with its corollary –there are no “real” lawyers in Cuba- dilutes even further our ability to properly understand these recent changes to Cuban law, which are the result of internal pressures subtly channeled through my colleagues in the legal profession in Cuba.

* Jose M Palli is a Cuban born member of the Florida Bar, originally trained as a lawyer in Argentina. He is President of World Wide Title.

The first caveat when it comes to assessing the significance of the recent adjustments to Cuban Housing laws –and that is all that *Decreto Ley 288* does- is that they are far from heralding the advent of our kind of private property rights for Cubans in the island.

Cuban property rights remain socialist to the core, whether we are discussing housing units or other assets. Cuban law has for years strictly defined its citizens' constitutionally guaranteed rights to housing as *propiedad personal* over one “permanently occupied” place of abode, a definition that remains intact under the new rules and which falls short from granting Cubans in the island what we call private property rights.

Cuban substantive property law remains unaltered. *Decreto Ley 288* modifies a few articles in Chapter Five of the Cuban Housing Law (*Ley General de la Vivienda*) -which sets the rules whereby the rights Cubans have over their housing units are governed- but neither Cuba's Constitution's treatment of property rights nor its Civil Code's provisions on that subject have been even air-brushed.

Nor is a wider opening to foreign real estate investment in Cuba foretold by these recent changes. Some “cubanologists” think such an opening could happen soon. But when it does happen, it is likely to be on Cuba's terms, as was the case in China, where foreign purchasers of real estate seem to be trampling over each other to take advantage of the investing opportunities despite the fact that Chinese property rights law and most other institutions do not rate up to what we may consider “investment grade”. The conversion of some recreational or vacation homes – apparently exempted from the “permanently occupied” requirement that characterizes the socialist *propiedad personal* over housing- into bed and breakfast operations may now be facilitated. But the right to own one vacation home is a right Cubans in the island already had, and such conversions were already viable under the cautious process of opening to private entrepreneurship Cuba has been engaged in for years, in many cases financed by relatives abroad.

Mortgaging your real property to milk your equity and spend it on consumer goods remains an unmitigated sin for Cubans, who are still subject to an old maxim laid down by one of the authors of Cuba's first

housing law, “Housing is to live in, not to live from” (*La vivienda es para vivir en ella, no para vivir de ella*).

Consequently, it is kind of early to predict the development of any meaningful real estate market in Cuba as a result of these adjustments to the Cuban Housing Law. Which is not to say that the changes made are inconsequential for Cubans in the island.

Over the past few days, more than one journalist has asked me when exactly did Cuba ban the sale and purchase of real property. It turns out Cuba never did so as specifically as my friends in the media would like to report. Castro did curtail Cubans’ rights to sell or convey their housing unit by limiting them to a single possible buyer under the law, which gave the Cuban State a right of first refusal (at prices presumably set by the oh so quaint “Ministry of Pricing”, the façade of which, close to Santo Domingo square in Havana, is one of my favorite picture spots), and you needed an administrative authorization from your neighborhood’s Municipal Housing Bureau for all exchanges or *permutas*- but the Cuban Constitution -in article 21- and the Housing Law both allowed Cubans to dispose of (*disponer*) or sell (*vender*) their housing units, even if under the aforementioned constraints.

Now, Cubans will be able to sell their housing units to another natural person (which rules out corporations, the “most favored persons” under “our” rule of law) or exchange them for profit, without the need to seek permission from the authorities. The only administrative requirements under the new rules are: you need to document the conveyance before a Civil Law Notary, and the notary must have proof that the title to the housing rights you are conveying has been recorded at the *Registro de la Propiedad* before he / she authorizes the conveyance document. These two requirements make a lot of sense, since Cuba has been trying to rebuild the excellent recording system it had back in 1959 – which was far better than anything we have ever had in the US, where we are still looking for lost mortgage notes, or even the ones Mexico has- and Civil Law notaries (the real notaries, not our fifty robo-signatures a minute variety) are far more useful –for fraud prevention, among other things- than the overrated annual World Bank Doing Business Reports would ever acknowledge.

Cubans will now have to pay transfer and inheritance taxes, previously exempted, when a housing unit changes hands.

The payments made in these newly authorized transactions have to go through one of three banks (*Banco Metropolitano S.A., Banco Popular de Ahorro y Banco de Crédito y Comercio*) authorized to date by Cuba's Central Bank (*Banco Central de Cuba*) and this has raised the alarm of some, Yoani Sanchez' -the bright and insightful blogger, one of the keenest observers of Cuban daily life- included. Before the Central Bank issues the certified check (*cheque de gerencia*) the procedure calls for, the payor -the buyer of the housing unit or the party to the exchange or *permuta* who has to add money to his part of the bargain- must first open a bank account, vouching for the legality of the funds so deposited (*licitud*, is the word used in Central Bank Resolution 85/2011, which seems to point to the origin of the funds) and to be used in the purchase or exchange, mirroring our Patriot Act. Cuba's legislators often play tit for tat with ours.

There are still some vital things Cubans will not be able to accomplish under the new rules. For instance, you still cannot inherit housing rights from your relatives in Cuba if you have left the island for good. The new rules apply to Cuban residents only, whether national or foreign. On the other hand, a foreigner residing in the island can now openly purchase a house (if he intends to "permanently occupy it" while in Cuba) from a Cuban individual, which may prove a bonanza for those Cubans who plan to join us in Miami any time soon: they are now able, because of the recent changes, to sell the house they own -or the object of their housing rights, to be more precise- before they leave.

Overall, these are significant changes that should improve the average Cuban's life standard, and they should be encouraged, not down played by those this side of the Florida strait who sadly see every little conquest by the Cuban people under its present rulers as a setback to their dreams of a "free Cuba".

But the socialist model is still pretty much the rule of law in Cuba.

We may even benefit from looking at these changes as part of an ongoing evolution of property rights now playing on screens worldwide,

including our own multiplexes. Maybe we should go back to our own business and keep watching over our own vaunted property rights, imperiled, as ever, by the often greedy and overreaching institutions we have. The latest bright idea from our financial brain trusts –now apparently discarded- of charging us for the use of our own money through a bank issued debit card should confirm our need to be watchful. I am certain after this last round of playing “Simple Dimon Says”, and after shelling out the money awarded to plaintiffs in the class action suits over “debit re-sequencing” (yet another fancy name for “stealing from their customers”) the true leaders of the “free World” will reward themselves for their business acumen by adding a million or two to their year end bonuses. Because these guys do know how to take care of their property rights... Maybe we should send them all packing to Cuba if what we want to see there is “change we can believe in”.

José Manuel Palli
jpalli@wwti.net