

THE PRESUMPTIONS AND BURDENS OF LAND RESTITUTION IN COLOMBIA

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I. INTRODUCTION

In 2011, Colombia enacted legislation for the restitution of land to internally displaced persons. It was responding to an urgent crisis. By then, over 5 million people had been forced to leave their homes—the world’s largest internally displaced population. The cause is the country’s 50-year plus guerilla war. Leftist insurgents have been tenaciously fighting for social justice, originally for peasant farmers. They have also been heavily involved in drug trafficking, kidnapping, and organized crime. The national armed forces and criminal paramilitary groups have long been trying to stop them. In the process, they have committed countless human rights abuses, and the latter are responsible for much of the population displacement. After a wrenching half-century, the end of the conflict finally appeared in sight by the end of 2016. The government and the major guerrilla group, the Fuerzas Armadas Revolucionarias de Colombia (FARC) concluded a peace agreement. However, negotiations with the country’s other significant insurgency, the Ejército de

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Liberación Nacional (ELN), never materialized. And most recently, continued violence—political and otherwise—has threatened to undermine the historic peace accord.

Still, land restitution has not awaited the end of all hostilities. The *Ley de Víctimas y Restitución de Tierras*, Law 1448, was enacted in 2011 under a direct mandate from Colombia's Constitutional Court. In 2004, the Court determined that an "unconstitutional state of affairs" existed as to the situation of displaced persons. It directed the government to take action, and it established a monitoring commission. The result was the 2011 law to alleviate the plight of the displaced. It includes provisions for the return of displaced people to their original dwellings. To this end, the law adopts a quite creative approach to property law. It creates an exceptional regime that heavily favors restitution claimants. The law was established for an initial ten-year transitional period and was recently extended for another ten years until 2031.

Like in many countries, property law in Colombia assigns superior rights to registered owners and recognizes certain rights of those in material possession. In areas of population displacement, there are often new occupants on the land and in dwellings. These current residents may have formal ownership, possessory rights, or other claims to the land. These would, as a general matter, conflict with the restitution claims of former occupants now displaced. It is true that there are some avenues available to the displaced within ordinary property law. For example, the displaced might have been registered owners. They could then try to challenge the current landholders' rights based on some defect in the transfer of title or other contractual defense. If restitution claimants are still the registered owners, they could potentially prevail over mere possessors if the adverse possession period has not yet run.

However, defects in title transfers or contractual defenses may be unavailing in many cases. The displaced have lost their lands in a myriad of scenarios, not all of them formally recognizable as legally invalid. Additionally, ordinary property law does not offer a remedy for those asserting restitution claims for mere past possession after more than one year, which is the situation of about half of restitution claimants. Finally, the ordinary legal process requires claimants to carry the full burden of proof and pursue their case with their own means in the regular courts. As such, dispossessed lands cannot be easily reclaimed under the ordinary legal regime, except where effectuated through a voluntary transfer from the current occupants or executed by state expropriation of these properties.

Rather than limiting itself to traditional property law or state expropriation, the 2011 law enables an exceptional regime. Under the framework of transitional justice, it sets up an independent procedure and substantive provisions to reclaim dispossessed land. This regime runs for an initial period of 10 years, which was recently extended another ten years by the legislature. Most notably, the law establishes several legal presumptions in favor of displaced persons. These apply when the enumerated factual preconditions obtain. For example, property transfers to transferees connected

with the armed conflict are conclusively presumed invalid. In addition, property transfers in areas of combat; to extradited drug traffickers; at prices below 50 percent of market value; that change land use from subsistence farming to concentrations of land, single-crop agriculture, or industrial mining; or, transform the membership in communities holding collective lands, are all presumptively invalid, but their invalidity may be rebutted. Indeed, it is the restitution claimant who enjoys the *presumption* of superior rights in all of these cases. The burden is then on the current occupants to rebut. The latter must show “good faith exempt of fault,” not to retain the land but simply to receive state compensation upon their eviction. Once claimants establish their condition as victims of the internal conflict and their past relation to the land, the law contemplates they are entitled to get their property back.

As such, the 2011 law turns the traditional rules of property law on their head. It reverses the ordinary presumptions in favor of the formal property owner or the party in material possession. Instead, it favors a past owner or possessor. In this regard, it delineates the defined fact patterns in which these reversed presumptions are to apply. These provisions track the most common circumstances constituting “dispossession,” as defined in the statute. These include transfers effectuated at gunpoint in areas of armed conflict, coerced sales for the benefit of powerful economic interests, transactions yielding illegitimate windfalls to purchasers or lands going into the hands of armed combatants and drug-traffickers. The law attaches presumptions of invalidity to all of these standard fact patterns. And, it places the burden on the current landholders to rebut them with a heightened standard of proof. Thus, it legislates the advantage to those previously in possession, who now only have an “informal” claim—if that—under ordinary property law. In many cases, these claimants may no longer have title registered in their name, and about half of them never did.

Notably, the law does not differentiate between past registered owners, on the one hand, and past possessors or occupants, on the other. It provides an avenue for restitution to all, regardless of previous formal rights. Additionally, it provides a mechanism for the conversion of past possession or occupation into full ownership rights. In cases where claimants meet the requisite elements, the land judges are directed to grant full title. Title may be awarded under a theory of adverse possession, counting the time claimants were away. Or, it may be awarded when claimants meet the requirements of the government agrarian reform program or other titling laws. Newly granted titles come with a restriction on alienation for a period of two years.

This Article examines the creative legal arrangements employed by the Colombian legislature to facilitate restitution to displaced persons. It also places the 2011 restitution law within the broader context of the contemporary movement for wide-scale property formalization, especially in the developing world. The law itself is a property rights formalization mechanism. Land is not only to be returned but also formalized.

With respect to restitution, the discussion here highlights the significant changes to the traditional property law regime. The Colombian legislature

modified the ordinary rules of property law for the special purpose of a one-time restitution of land. In this respect, they introduced a special legal procedure; a new government agency to bring cases and provide assistance to the displaced; legal presumptions in favor of claimants; and a shifted burden of proof onto defendants.

These legal techniques could potentially serve different policy objectives, as well. Indeed, they could be extended more permanently to create a *new property regime*. Legal presumptions and burdens on property transfers could be tailored to particular sectors and for specific social objectives. They need not entail absolute presumptions against alienation and mortgage-ability—as they do not in Law 1448. They may be *rebuttable* presumptions. Additionally, the shifted burden of proof could also be tailored to serve public policy objectives. For example, urban low-income housing may be subjected to a similar regime of presumptions and burdens to ensure that a stock of such accessible housing remains in the hands of low-income residents. Further, a sector of small-scale farming may be sustained within the economy by employing certain limiting presumptions on their alienation. Greater or lesser restraints on alienation—at certain times, in certain areas, or to certain parties—may be regulated through the rebuttal burden imposed on transferees. The discussion below considers the operation of Law 1448's techniques and their potential transposition to other contexts.

Relative to formalization, the discussion here questions the sustainability of a redistribution program based near exclusively on grants of full-title property. Market forces and illegitimate coercion are quite likely to undo the redistributive gains obtained by judicially-mandated land restitution. Indeed, even if the 2011 law were fully effective, the re-allocation of lands may be short-lived. Powerful economic interests, and even violent actors, may ultimately secure the more desirable plots, employing greater or lesser degrees of coercion. The unrestricted marketability of full title further exacerbates these pressures, notwithstanding the statutory two-year restraint on alienation imposed by the law. The subsequent transfers would likely work to deprive the law's intended beneficiaries of the country's most productive lands.

Overall, this Article advocates for a more sustainable means of keeping restituted lands in the hands of their intended beneficiaries. Specifically, the transitional regime in Colombia, meant only to be temporary, serves as inspiration. That regime establishes a set of presumptions and shifted burdens of proof. But, it also offers a roadmap for a more permanent arrangement. The exceptional rules that allow for one-time restitution of land may also serve to secure ongoing social policy objectives. The discussion below is divided into two main sections. Section II immediately below examines the transitional property scheme erected in Colombia with the passage of the 2011 law. It analyzes the restitution provisions in the law, including the twin mechanisms of legal presumptions and shifting burdens of proof. Section III critiques the property formalization aspects of the law. It questions the relative benefits of full title formalization prioritized in the legislation. Throughout, the Article argues in favor of adapting the restitution-related legal mechanisms to other

public policy contexts, such as preserving the gains of land restitution itself, maintaining a consistent stock of low-income housing, and sustaining a viable small farming sector.

II. LAND RESTITUTION FOR INTERNALLY DISPLACED PERSONS

Displacement of people from the countryside has been at the heart of the Colombian conflict.¹ Some commentators describe it as a reverse agrarian reform.² Violence has driven away rural residents, farmers, and *campesinos* from approximately 6 million hectares of land.³ Cleared of population, property is more easily concentrated in the hands of a few.⁴ It has in some cases ended up under the control of large corporations for industrial agriculture and mining projects.⁵ Yet, this is not always the case. Some lands have simply been taken by other displaced persons.⁶ They may themselves be victims, fleeing other conflict areas and equally vulnerable subjects. Either way, large-scale restitution to previous residents faces a number of hurdles and conflicting interests.

A. Background on Law 1448

An initial step forward was the controversial 2005 Law of Justice and Peace.⁷ It provided for reparations to victims but not private law remedies. That legislation was superseded by Law 1448 of 2011, which is the focus of this

¹ Juan Camilo Portela García, *Francisco Gutiérrez Sanín ¿Una Historia Simple?*, 72 DEBATES 46, 47 (2015), <https://perma.cc/DG2G-S8MM>.

² See generally Ricardo Rocha García, *Antecedentes y Perspectivas del Narcotráfico en Colombia: Una Mirada a las Políticas*, 32 PROBLEMAS DEL DESARROLLO: REVISTA LATINOAMERICANA DE ECONOMÍA 59 (2001).

³ LUIS JORGE GARAY SALAMANCA ET AL., CUANTIFICACIÓN Y VALORACIÓN DE LAS TIERRAS Y LOS BIENES ABANDONADOS O DESPOJADOS A LA POBLACIÓN DESPLAZADA EN COLOMBIA 8 (2011) (indicating that 6.6 million hectares have been dispossessed since 1980).

⁴ COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO, VI INFORME A LA CORTE CONSTITUCIONAL: LA RESTITUCIÓN COMO PARTE DE LA REPARACIÓN INTEGRAL DE LAS VÍCTIMAS DEL DESPLAZAMIENTO EN COLOMBIA. DIAGNÓSTICO Y PROPUESTA DE LÍNEAS DE ACCIÓN 22 (2008) [hereinafter COMISIÓN DE SEGUIMIENTO, VI INFORME] (showing that the official figures in 2007 were that 1.4 percent of proprietors owned 65.4 percent of the land).

⁵ See discussion and citations *infra* notes 41–45. According to Fundación Forjando Futuros, the list of companies “taking advantage” of the conflict can be found here: <https://perma.cc/U4SN-68QJ> (author’s translation).

⁶ Corte Constitucional [C.C.] [Constitutional Court], junio 23, 2016, Sentencia C-330/16, Gaceta de la Corte Constitucional [G.C.C.] (para. 118) (Colom.).

⁷ L. 975/05, arts. 46, 52, julio 25, 2005, DIARIO OFICIAL [D.O.] (Colom.) (contemplating restitution, but at a regional commission level; the law is generally criticized for allowing impunity of paramilitaries). For a detailed history of reparation efforts to displaced persons, see ANA JIMENA BAUTISTA REVELO, *LA RESTITUCIÓN DE TIERRAS EN COLOMBIA: ¿REALIDAD O FICCIÓN?* (2015); David L. Attanasio & Nelson Camilo Sánchez, *Return Within the Bounds of the Pinheiro Principles: The Colombian Land Restitution Experience*, 11 WASH. U. GLOB. STUD. L. REV. 1 (2012); Rodrigo Uprimny-Yepes & Nelson Camilo Sánchez, *Los dilemas de la restitución de tierras en Colombia*, 12 REVISTA ESTUDIOS SOCIO-JURÍDICOS 305 (2010).

Article's discussion.⁸ The latter combines transitional justice measures with land restitution provisions. Law 1448 is the product of a joint bill by the Minister of the Interior and Justice, the Minister of Agriculture and Rural Development, two separate agency heads, and several legislators.⁹ The administration was effectively ordered by Colombia's constitutional court to develop public policy on the restitution of land to displaced persons.¹⁰

Indeed, this entire area of legislation stemmed from of an initial Colombian Constitutional Court decision in 2004.¹¹ The case was decided by a single magistrate in a *tutela* decision: a private right of action asserting a constitutional violation.¹² The Court declared that public policy with respect to displaced persons was in an "unconstitutional state of affairs," and it ordered the government to take action.¹³ The Court continued monitoring the situation through a *Comisión de Seguimiento* (Follow-Up Commission). By 2009, the Court issued another decision in which it found that the unconstitutional state of affairs persisted.¹⁴ By 2010 the newly elected government of Juan Manuel Santos and his broad National Unity coalition in congress widely supported land restitution. In 2011, Law 1448 was enacted.¹⁵

Land restitution faces both material and legal obstacles.¹⁶ Certainly, the return of displaced persons has been impeded by the ongoing conflict itself. Individuals fled because of combat occurring on or near their property, defined as situations of "forced abandonment" under the law.¹⁷ They were also driven out due to intimidation or coercive uses of legal instruments to transfer the land to someone else, defined as "dispossession."¹⁸ The fact that the law became effective prior to the termination of hostilities means that not all displaced persons have been able to take advantage of its provisions. Some areas remain unsafe.

⁸ For a general description of the law, see Nicole Summers, *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?*, 25 HARV. HUM. RTS. J. 219 (2012).

⁹ For general analysis, see BAUTISTA REVELO, *supra* note 7.

¹⁰ Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, Gaceta de la Corte Constitucional [G.C.C.] (vol. 1, p. 353) (Colom.).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (author's translation).

¹⁴ Corte Constitucional [C.C.] [Constitutional Court], enero 26, 2009, Auto No. 008 de 2009, Autos y Sentencias [A.S.] (Colom.).

¹⁵ L. 1448/11, junio 10, 2011, DIARIO OFICIAL [D.O.] art. 74 (Colom.); L. 2078/21, enero 8, 2021, DIARIO OFICIAL [D.O.] (Colom.) (extending Law 1448's effectiveness from 2021 to 2031); *see also* BAUTISTA REVELO, *supra* note 7, at n.76 (explaining the previous 2021 cut-off date as justified as the period in which adverse possession claims of current occupants had not yet vested).

¹⁶ *See* Attanasio & Sánchez, *supra* note 7 (arguing for more centralized control of the land restitution process).

¹⁷ L. 1448/11, *supra* note 15, art. 74 (author's translation).

¹⁸ *Id.* (author's translation).

Interestingly, nearly 75 percent of displaced persons claim to have had ownership rights to their land.¹⁹ The rest report being irregular landholders of one kind or another.²⁰ However, this is not borne out by the numbers in land restitution courts, where the figure of formal ownership claims is only slightly above 50 percent.²¹ A common perspective in and outside of Colombia is that land informality is the main cause of the country's violence. As this thinking goes, because informal landholders have no official records, it is easier to force them off their lands. Yet, formal owners have been equally dispossessed of their lands through coerced transactions and document fraud. Official paper records were clearly no fail-proof protection against forced abandonment and dispossession.

In fact, the legal system has, in some cases, abetted dishonest transfers.²² In some cases, displaced persons were intimidated into selling their land, despite a formally regular transaction. They were either physically threatened or pressured into selling. Transfers were made, in some cases, directly to armed combatants or their proxies and to drug traffickers. Additionally, in territories with active combat, sales were often effectuated at exceedingly low prices. Yet, from a purely formal perspective, these transfers were also legally concluded and validly registered, unless some recognizable contractual defense could later be proven in court. Absent such judicially determined defenses, however, under ordinary property rules preceding the 2011 law, landholders enjoyed all the benefits and presumptions of either full ownership or rights as material possessors or occupants, depending on their individual situation.

Some special legal protections for displaced persons did exist prior to the 2011 law.²³ For example, the 2007 *Estatuto de Desarrollo Rural* (Statute on Rural Development) set up a legal presumption against voluntary consent in the case of property transfers from displaced persons; it prohibited adverse possession cases from running against displaced persons; and, it made reference to procedures for asserting displaced persons' rights.²⁴ However, that law was declared unconstitutional in 2009, for reasons unrelated to these provisions.²⁵ Additionally, the even earlier Law 387 of 1997 on assistance to displaced persons and its implementing decrees prohibit notaries and

¹⁹ COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO [FORCED DISPLACEMENT MONITORING COMMISSION], PRIMER INFORME A LA CORTE CONSTITUCIONAL: PROCESO NACIONAL DE VERIFICACIÓN DE LOS DERECHOS DE LA POBLACIÓN DESPLAZADA [FIRST REPORT TO THE CONSTITUTIONAL COURT: NATIONAL VERIFICATION PROCESS FOR THE RIGHTS OF THE DISPLACED POPULATION] 5 (2008).

²⁰ *Id.*

²¹ *Sistema de Información Sembrando Paz: Módulo Decisión Judicial*, FUNDACIÓN FORJANDO FUTUROS, <https://perma.cc/7DHT-9S5T> [hereinafter *Sistema de Información Sembrando Paz*].

²² For fact finding on the scenarios discussed in this paragraph, see COMISIÓN DE SEGUIMIENTO, VI INFORME, *supra* note 4.

²³ *See id.*

²⁴ *Id.*; L. 1152/07, julio 25, 2007, DIARIO OFICIAL [D.O.] arts. 127–32 (Colom.).

²⁵ Corte Constitucional [C.C.] [Constitutional Court], marzo 18, 2009, Sentencia C-175/09, Gaceta de la Corte Constitucional [G.C.C.] (vol. 35, p. 53) (Colom.).

registries from recording land transfers for property recognized to be in areas of forced displacement.²⁶ However, these types of provisions would not be sufficient to support a massive land restitution program.²⁷

Law 1448 of 2011 is much more comprehensive. It provides a judicial procedure by which displaced persons' rights to property can be restored. Claims may be brought for real property dispossessed, or involuntarily abandoned, after January 1, 1991, until the law expires in 2031.²⁸ The law also provides material assistance for these individuals to return, cover past debts, and receive subsidies for improvements and maintenance.²⁹ It is an example of a transitional justice mechanism in the area of private law.³⁰

Transitional justice is mostly understood as a temporary exception to the application of criminal laws.³¹ However, it can also be applied to private law. It is a way to overcome the ordinary legal rules that impede more effective restorative justice programs.³² In this mold, the 2011 restitution law lays out an exceptional legal regime: special administrative agencies, a distinct procedure, different substantive rules, and a multidimensional role for land judges.³³ Property previously held by displaced persons is to be notified to a special administrative unit for land restitution. The unit verifies and registers the property and is charged with pursuing restitution proceedings. Displaced persons enjoy legal presumptions in their favor and a shifted burden of proof onto opponents—i.e., the current occupants of the land. Judges may provide for land restitution, regularization of title, compensation, and other remedies.

Yet, even under this advantageous regime, the law is likely to fall short of expectations. There are economic interests that, unsurprisingly, stand against it. No doubt, the law will likely prove ineffective against some of the grossest

²⁶ Decreto 2007 de 2000, octubre 4, 2000, 7 DIARIO OFICIAL [D.O.] (Colom.) (implementing L. 387/97, julio, 18, 1997, DIARIO OFICIAL [D.O.] (Colom.)).

²⁷ COMISIÓN DE SEGUIMIENTO, VI INFORME, *supra* note 4, at 51.

²⁸ L. 1448/11, *supra* note 15; *see also* BAUTISTA REVELO, *supra* note 7, at 56.

²⁹ *See* L. 1448/11, *supra* note 15.

³⁰ COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO, POLÍTICA DE TIERRAS PARA LA POBLACIÓN DESPLAZADA. PROPUESTA DE LINEAMIENTOS EN EL MARCO DE LAS ORDENES DEL AUTO 008 DE 2009, at 77–78 (2009) (claiming that JTC, or Justicia Transicional Civil (transitional justice in private law) was first discussed in Colombia in 2006 and recommending that the Constitutional Court require legal presumptions and an inverted burden of proof).

³¹ *See generally* Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANS. JUST. 266 (2008).

³² *See* Diana Esther Guzman-Rodriguez, *Dignity Takings and Dignity Restoration: A Case Study of the Colombian Land Restitution Program*, 92 CHI.-KENT L. REV. 871 (2017) (developing the concept of dignity takings and its partial application to the Colombian context).

³³ *See generally* MANUEL FERNANDO ET AL., EL AMPARO DE TIERRAS: LA ACCIÓN, EL PROCESO, Y EL JUEZ DE RESTITUCIÓN (2015); *cf.* Lina Buchely, *The Conflict of the Indicators. A Case Study on the Implementation of the Victims' and Land Restitution Law in Cali, Valle del Cauca, Colombia*, 12 INT'L ORGS. L. REV. 19, 22 (2015) (criticizing Law 1448's excessive focus on a return to the economic status quo *ex ante*, rural land, and an "exotic" conflict: "government data focuses on lands as opposed to lives, social processes of reintegration into everyday life, welfare, or tranquility").

usurpers of land. Only areas well under government control can realistically be the subject of these actions. Intimidation and physical violence have been reported and will likely continue against claimants of the most prized parcels.³⁴ Criminal gangs known as *Bacrim*s (bandas criminales) have been formed to intimidate displaced persons against reclaiming their lands.³⁵ Amnesty International reported in 2014, three years after enactment of the law, that progress was slow, and 35 individuals connected with land restitution had been assassinated.³⁶ A generalized return to armed conflict cannot be ruled out. Colombia has a long history of violent struggle over land.

Progress might best be assessed, however, by the law's *relative* contribution to its overall goals. With the end of formal hostilities with the FARC and the potential for talks with the ELN, the restitution law likely has better chances now. As of mid-July 2020, reports indicate that 5,677 judgments have been handed down.³⁷ It is estimated that there are upwards of 360,000 potential claims.³⁸ The government reports that about 125,000 claims were filed by end of May 2020.³⁹ Approximately two-thirds of all claims have been uncontested, and the vast majority relate to rural lands.⁴⁰ Fundación Forjando Futuros, a non-governmental organization, lists over 55 large companies that have been defendants in restitution claims.⁴¹ Many of them are agro-industrial corporations, but not all. The list includes the Colombian national oil company, large banks, and financial firms.⁴² During the entire period the law has been in effect, only 13 corporate defendants have been able to prove the requisite defense of "good faith exempt of fault," discussed further below.⁴³ Journalistic accounts show that, as of June 2020, 66 companies in the financial, cement, mining, agricultural, and ranching sectors have had their land titles canceled without compensation when challenged by claimants.⁴⁴ Additionally, according

³⁴ AMNESTY INT'L, A LAND TITLE IS NOT ENOUGH: ENSURING SUSTAINABLE LAND RESTITUTION IN COLOMBIA 32 (2014), <https://perma.cc/G8D8-DW6Q>.

³⁵ *Id.*

³⁶ *Id.* at 34.

³⁷ *Sistema de Información Sembrando Paz*, *supra* note 21.

³⁸ Gerardo Vega Medina, *¿Por qué ha sido tan lenta la restitución de tierras?*, LAS 2 ORILLAS (May 22, 2017), <https://perma.cc/45S8-GRT8>.

³⁹ UNIDAD DE RESTITUCIÓN DE TIERRAS, ESTADÍSTICAS DE RESTITUCIÓN, <https://perma.cc/YJP4-3TFC>.

⁴⁰ Medina, *supra* note 38.

⁴¹ *Empresas Opositoras*, FUNDACIÓN FORJANDO FUTUROS, <https://perma.cc/U4SN-68QJ> (last visited June 30, 2021).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Héctor Santamaría Villota, *En 9 Años de Restitución de Tierras se han Condenado 66 Empresas del País*, CARACOL RADIO (Mar. 6, 2020, 12:48 PM), http://caracol.com.co/emisora/2020/06/03/medellin/1591205735_043734.html; see also *Magistrados Condenan a Reconocidas Empresas a Devolver Tierras*, PARES (Nov. 2, 2016), <https://pares.com.co/2016/11/02/magistrados-condenan-a-reconocidas-empresas-a-devolver-tierras/>; Colprensa, *Estas Son las Empresas que han Sido*

to the country's mining association, as of mid-2017, 129 cases involved mining companies and 69 mining concessions were canceled as a result of land restitution proceedings.⁴⁵

Notably, the 2011 law also includes some mechanisms to protect *current landholders*. For example, it authorizes the land judges to arrange for lease contracts for claimed land where “productive projects” of large-scale agriculture or industrial mining presently exist.⁴⁶ Restitution claimants may agree to receive a rental payment instead of the actual use of their land.⁴⁷ Still, only current landholders having previously acquired the land in “good faith exempt of fault” may receive this accommodation.⁴⁸ Otherwise, the productive project transfers to the state for assignment to a different operator. Still, the displaced person may elect to forego immediate possessory rights.⁴⁹

B. Innovations of Law 1448

Two quite distinctive legal features merit attention. One is the establishment of certain legal presumptions, and the other is the shifted burden of proof.⁵⁰ Their novel or even “revolutionary” character was noted by Senator Avellaneda Tarazona of the Polo Democrático Alternativo party at the time.⁵¹ He stated during the Senate debate:

It seems to us very good that the project has brought a very revolutionary thing from a legal point of view which is the reversal of the burden of proof. For all of us who went through law school, they taught us that the burden of proof falls on the proponent and here we are inverting the burden of proof, but Mr. President let me sustain this, sustain that one of our contributions to this project, is the establishment of certain presumptions, presumptions that were welcome by the

Condenadas a Restituir Tierras, EL UNIVERSAL (Nov. 2, 2016, 4:54 PM), <http://www.eluniversal.com.co/colombia/estas-son-las-empresas-que-han-sido-condenadas-restituir-tierras-239156> (indicating that these 19 cases add up to approximately 53,821 hectares of land returned).

⁴⁵ Alfonso López Suárez, *Por Restitución de Tierras, 69 Títulos Mineros Cancelados*, PORTAFOLIO (May 29, 2017, 7:14 PM), <https://perma.cc/E66A-MWRJ>.

⁴⁶ L. 1448/11, *supra* note 15, art. 99 (author's translation).

⁴⁷ Corte Constitucional [C.C.] [Constitutional Court], septiembre 13, 2012, Sentencia C-715/12, Expediente D-8963, Gaceta Judicial [G.J.] (Colom.) (upholding the constitutionality of the provision, stating that it required the consent of the restitution claimant, who may opt for the physical return of the land instead).

⁴⁸ Reported data shows that out of 5,677 decided cases (not all of which were contested), only in 312 cases was the defendant able to prove “good faith exempt of fault.” *Sistema de Información Sembrando Paz*, *supra* note 21.

⁴⁹ As of yet, this Author has not found any case in which this complex remedy has been granted.

⁵⁰ Summers, *supra* note 8, at 229–30.

⁵¹ BAUTISTA REVELO, *supra* note 7, at 33 (showing that the only declared opposition party to the government's national unity coalition in the Colombian legislature at the time—with 4.8 percent seats in congress—was the principal champion of victims' rights groups).

National Government and were welcome by my colleagues here presenting, we sustain that the creation of two presumptions, that when the relevant circumstances arise, legal transactions that try to create a fictional legal basis for dispossession, then we can say given the relevant circumstances and the presumption is irrebuttable, that here no proof can be brought to overcome it, all legal transactions [falling in this category] are presumed to be without consent, or without licit causa.⁵²

The Constitutional Court's Follow-Up Commission had urged the Court in 2008 to mandate special procedural rules as part of a land restitution program.⁵³ Specifically, the Commission recommended shifting the burden of proof to opponents of restitution claimants and relaxing evidentiary requirements to show a past connection to the land by displaced persons.⁵⁴ Following that recommendation and going further, the Constitutional Court in 2009 specified that the government may consider presumptions of illegality and reversals of the burden of proof.⁵⁵

1. Legal Presumptions in Favor of "Informal" Restitution Claimants

The Colombian Constitutional Court suggested such modifications in three scenarios: land abandoned during periods of dispossession expressly recognized in the transitional process; lots located in zones where reports of risk were issued; and, indigenous, Afro-Colombian and collective territories where a request for titling had been presented.⁵⁶ In addition to the Constitutional Court mandate, the 2011 legislation also refers to influential principles elaborated at the international level regarding situations of land restitution. The most relevant are the Pinheiro Principles.⁵⁷ These are standards formally endorsed in August 2005 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights. Initial work began in 1997 when the Committee on the Elimination of Racial Discrimination (CERD) proposed that the Sub-Commission study the "return of refugees" or displaced persons' property. In their final version, they were named after the Sub-Commission's Special Rapporteur, Paulo Sergio Pinheiro, the Brazilian sociologist who conducted the study. The Pinheiro Principles are a series of guidelines and best practices recommended for states and

⁵² Presentation by Senator Luis Carlos Avellaneda Tarazona, Senado de la República, Actas de Comisión. Comisión Primera Constitucional Permanente Honorable Senado de la República, marzo 18, 2011, Gaceta del Congreso [G.C.] (vol. 102 p. 24–25) (author's translation).

⁵³ COMISIÓN DE SEGUIMIENTO, VI INFORME, *supra* note 4, at 68.

⁵⁴ *Id.* at 68–69 (showing that the Commission also recommended that land restitution claims be decided by a proposed Truth and Restitution Commission. Law 1448 of 2011 places these decisions in the hands of land judges).

⁵⁵ Auto No. 008 de 2009, *supra* note 14.

⁵⁶ *Id.* ¶ 83.

⁵⁷ Attanasio & Sánchez, *supra* note 7.

international agencies undertaking the process of returning housing and property to former occupants in the context of transitional justice.

Specifically, the Pinheiro Principles contain one important provision on legal presumptions. Under Principle 15 on housing, land, property records, and documentation, it provides:

15.7 States may, in situations of mass displacement where little documentary evidence exists as to ownership or rights of possession, adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims.⁵⁸

Notably, an early draft of the 2011 Law of Victims and Restitution of Land failed to include any of the relevant legal presumptions.⁵⁹ But, they were subsequently introduced during parliamentary debates. As evident in congressional records, the Court decision weighed heavily in the discussion.⁶⁰ Law 1448 of 2011 provides an even longer list of presumptions than those suggested by the Court.⁶¹ Essentially, the proponents of the incorporating amendment explained:

The foregoing (restitution of lands), founded on the framework of transitional justice and the establishment of priority areas for the process of restitution of lands dispossessed, as elaborated by the Government. A registry system of despoiled lands is created, that establishes possession, occupation and despoiled property, such that the judges apply legal presumptions and inverted burdens of proof in favor of those dispossessed and that they order restitution [of the land] in processes at the trial level with exceptional appeals, just as those who oppose such restitution must make their rights effective in an expedited process.

This process will revolve around the presumption of an absence of consent of all transfers or changes of possession in zones

⁵⁸ Paulo Sérgio Pinheiro (Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons), *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, princ. 15.7, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005).

⁵⁹ Uprimny-Yepes & Sánchez, *supra* note 7, at 305–22.

⁶⁰ Ponencia para primer debate al proyecto de ley 107 de 2010 Cámara, por la cual se dictan medidas de atención y reparación integral a las víctimas de violaciones a los Derechos Humanos e infracciones al Derecho Internacional Humanitario. Acumulado proyecto de ley no. 85 de Cámara, por la cual se establecen normas transicionales para la restitución de tierras, Bogotá (Nov. 2, 2010); L. 1448/11, *supra* note 15.

⁶¹ COMISIÓN DE SEGUIMIENTO, VI INFORME, *supra* note 4.

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*where there has been illegal armed violence at the time of dispossession and over which the dispossessed claim restitution of their rights despoiled.*⁶²

The ordinary property law rules are thus set aside. Claimants need only declare their past connection to the land. The administrative unit set up by the law is then charged with verifying the claim, registering the parcel in the Registry of Dispossessed Lands, and pursuing the restitution process. Whether in administrative or judicial proceedings, the presumptions then favor displaced persons and shift the burden of proof to opponents.

An irrebuttable presumption of invalidity applies to transfers of land to parties participating in the armed conflict.⁶³ The transfer is simply void in these cases, as are all subsequent transfers of this same land. Several *rebuttable* presumptions against valid transfer apply in other cases. These include:

- (1) In areas adjacent to armed violence, mass displacement, or occurrence of grave violations of human rights;
- (2) Where concentration of land in the hands of one or more individuals has occurred during or after violent acts and forced dispossession in adjacent territory; where significant changes occurred in the use of neighboring land, from subsistence farming to single crop agriculture, extensive ranching, or industrial mining;
- (3) Transfers to persons extradited for drug-trafficking or related crimes, and to those acting on their behalf;
- (4) Where the contract price or actual amount paid is below 50% of the market value;
- (5) For collective property titles previously granted by the state, when there has been a transformation in the composition of the participating interest-holders.⁶⁴

No formal set of past property rights are required of claimants. These can consist of either prior registered ownership, possession on private property, or occupation of state lands.⁶⁵ The 2011 law aims, at a minimum, to reestablish the situation *ex ante*. In cases where claimants were possessors or occupants, they would not have official documents.⁶⁶ In the case of registered owners, they

⁶² JUAN FERNANDO CRISTO B. ET AL., PONENCIA PARA PRIMER DEBATE AL PROYECTO DE LEY 213 DE 2010 SENADO, 107 DE 2010 CÁMARA ACUMULADO CON EL PROYECTO DE LEY NO. 085 DE 2010 CÁMARA (2011) (author's translation, emphasis added).

⁶³ L. 1448/2011, *supra* note 15.

⁶⁴ *Id.* (author's translation).

⁶⁵ *Id.*

⁶⁶ *Id.*

may have been coerced into signing away their land. These transfers may be fully documented and registered. Nonetheless, the 2011 law requires only an extrajudicial declaration by claimants as to their past relation to the land to begin the process.⁶⁷ As such, it privileges these *informal* property claimants.

2. Shifted Burden of Proof to Defendants

The law also requires defendants, or opponents of restitution claims, to carry the burden of proof. These may be current occupants, formally or informally, or others claiming rights. They must negate the presumption against them of an invalid transfer. The standard requires a showing of “good faith exempt of fault.” Law 1448, itself, does not specifically describe its elements. However, the Constitutional Court has provided some guidance on the interpretation of this standard.⁶⁸ According to the Court, it contains both a subjective and an objective component.⁶⁹ Demonstrable diligence is required to ascertain the consensual circumstances surrounding the transfer.⁷⁰ According to a study of the first two years of case law, the land restitution courts have found the standard met when “the opponent could not have known of the context of violence or the presence of armed groups...[and] when it has been demonstrated that the opponent has not taken advantage of the context of violence to obtain the landed property.”⁷¹ A successful rebuttal of the presumption does not mean, however, that defendants are entitled to retain the land. Rather, the benefit is monetary compensation by the state.⁷²

Indeed, this shifted burden onto opponents of restitution claims has not been without its critics, including the national association of *campesinos*.⁷³ These features have been widely criticized for the onus it places on them.⁷⁴ In many cases, “secondary” occupants—as they are known—are not shadowy figures. They can be the former neighbors of the displaced, other displaced persons themselves, or even agrarian reform eligible individuals. When defendants are secondary occupants, the Constitutional Court has mandated

⁶⁷ *Id.*

⁶⁸ Sentencia C-330/16, *supra* note 6, para. 88.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ MANUEL FERNANDO QUINCHE RAMÍREZ ET AL., *EL AMPARO DE TIERRAS: LA ACCIÓN, EL PROCESO Y EL JUEZ DE RESTITUCIÓN* 126–27 (Bogotá: Editorial Universidad del Rosario, 2015) (author’s translation).

⁷² As of July 2020, defendants in 312 cases have met the burden of proof with respect to “good faith exempt of fault.” *Sistema de Información Sembrando Paz*, *supra* note 21.

⁷³ Colprensa, *Corte Constitucional estudiará polémico punto de Ley de Restitución*, EL PAÍS (June 20, 2016, 12:00 AM), <https://perma.cc/SA3V-6NBE>.

⁷⁴ *Juan Camilo Restrepo Salazar, Minister of Agriculture and Rural Development, Address to Senado de la República, Acta de Comisión No. 47 (April 12, 2011)*, in GACETA DEL CONGRESO [G.C.] no. 294 (stating that any “good faith exempt of fault” transferee in a chain of transfers is entitled to compensation).

judicial attention to the consequences of eviction.⁷⁵ In particular, *vulnerable* secondary occupants, consisting of previously displaced persons themselves or potential beneficiaries of land reform programs, benefit from a more flexible standard of “good faith exempt of fault” in order to qualify for compensation or alternative accommodation. The Constitutional Court has decreed a “variable” or lower burden of proof of “good faith exempt of fault” for socio-economically vulnerable secondary occupants attempting to obtain compensation.⁷⁶ In exceptional cases, restitution courts have even allowed vulnerable secondary occupants to keep the land—despite failing to prove “good faith exempt of fault”—by providing compensation to the claimants instead, whether monetary or alternate property.⁷⁷ As such, restitution courts have fashioned themselves as courts of equity, of sorts, in which equally vulnerable secondary occupants may be allowed to remain or are provided alternative remedies.⁷⁸

C. Progressive Property Theory in Practice

Creating presumptions in the law is not novel. On the contrary, legal presumptions and shifting burdens of proof are quite common techniques, in both common law and civilian legal traditions.⁷⁹ They provide a great procedural advantage to their beneficiaries. In the property context, however, Law 1448’s presumptions favoring “informal” claimants and reversals of burdens of proof are rather unusual.

The accepted procedural vehicles for claiming usurped or otherwise unlawfully taken land are, in the civilian tradition, the action for revindication, which is available only to owners.⁸⁰ Additionally, the laws generally provide for causes of action for possessors which favor their rights over subsequent occupants.⁸¹ However, in both situations, claimants must satisfy their burden of showing their rights either as owners or possessors. A simple assertion of past occupancy would not suffice. Moreover, under general property law, it is the owner, and in some cases the actual material possessor, that automatically enjoys the legal presumptions in their favor. Once ownership is demonstrated, especially through registered property documents, it is the challenger who

⁷⁵ Sentencia C-330/16, *supra* note 6.

⁷⁶ *Id.* ¶ 118 (author’s translation).

⁷⁷ *See, e.g.*, Tribunal Superior del Distrito Judicial de Bogotá [T. Sup.] [Appellate Court for the Judicial District of Bogota], Sala Civil Especializada en Restitución de Tierras septiembre 30, 2016, Oscar Humberto Ramírez Cardona, 50001312100120150000401 (Colom.); Tribunal Superior del Distrito Judicial de Bogotá [T. Sup.] [Appellate Court for the Judicial District of Bogota], Sala Civil junio 8, 2017, 50001312100220150020401 (Colom.).

⁷⁸ *See, e.g.*, Sala Civil Especializada en Restitución de Tierras septiembre 30, 2016, *supra* note 77; *but see* Attanasio & Sánchez, *supra* note 7, at 27 (interpreting Law 1448 as only allowing judges to provide compensation to victims instead of restitution with their consent).

⁷⁹ *See, e.g.*, Jorge L. Esquirol, *Formalizing Property in Latin America*, in *COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES* 333 (Michele Graziadei & Lionel Smith eds., 2017) (discussing presumption shifting in the Colombian 1936 Agrarian Reform Law).

⁸⁰ *See generally* MAURICIO RENGIFO GARDEÁZABAL, *TEORÍA GENERAL DE LA PROPIEDAD* (2011).

⁸¹ *Id.*

must prove better rights. This order of priorities is at the heart of traditional property law.

Less traditional approaches to property law demonstrate that this need not always be the case. A common legal-realist way of understanding property is by reference to the analogy of a bundle of sticks. The underlying idea—if not the metaphor itself—was popularized by Wesley Hohfeld.⁸² In an attempt to clarify ambiguities in case law, he distinguished types of relationships—which would be the various sticks—encompassed by legal concepts such as property and rights. These relations have different characteristics. Some are actual rights with countervailing duties on others. Other types of relations, however, are more properly characterized as privileges, powers, and immunities, with different countervailing positions on others. They all reflect different types of relations sanctioned by law, and they each strike a different balance. However, they are all subject to different countervailing interests. This is a useful way of understanding the relational nature of property: property is the allocation of control among people. It also demonstrates its relativity. No allocation is absolute. It is subject to competing degrees of control by others. Nonetheless, in the classical definition, the owner is deemed to hold all the sticks. A possessor holds most, but not all. And, a challenger might be recognized as presenting some competing claim that may, or may not, rise to the level of a property interest.

Alternatively, property rights may be understood in the language of “entitlements.”⁸³ That is, the various array of rights, privileges, powers, immunities, and even certain claims may all be considered entitlements. This perspective highlights that there are property interests on all sides of disputes. It is not just identifying a predetermined owner versus the non-owner; but, in fact, the very dispute reveals a question over who should be the recognized “owner” on a particular matter. As such, controversies over property rights are not primarily about state regulation versus individual freedom. Rather, they are about conflicting claims to control among individuals. And, state regulations and judicial decisions ultimately determine who is the prevailing “owner” in a particular contest, and what those prerogatives consist of.

One could also transpose these insights on entitlements and legal relations into the procedural realm. That is, another way to look at entitlements is as a set of presumptions and burdens of proof.⁸⁴ Under traditional property law, most cases appear relatively straightforward. The registered owner benefits from all the presumptions. A challenger may in some cases prevail, but not without first overcoming a significant burden of proof. For example, a

⁸² WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 35–42 (1919).

⁸³ JOSEPH W. SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 91–94 (2000) (distinguishing between the bundle-of-rights approach and entitlements approach to property).

⁸⁴ *Id.* at 94 (“In assigning presumptive powers of control and burdens of persuasion, property law shapes the contours of social relations.”).

registered owner has the presumptive power to sell land. Still, it may be thwarted. A mortgage holder may have competing rights that effectively preclude its actual transfer. In another example, the presumptive *privilege* to make noise on one's own land may be rebutted by neighbors with a statutory power to enforce noise regulations.

In short, allocations of entitlements are quite embedded in the logic of rebuttable presumptions. One party is assigned a presumption, and the opponent bears the burden to defeat it. The rebuttability, or not, of the presumption and the weight of the required burden of proof to rebut it can vary. They can be set by statute or judicially determined. A noise regulation may look straightforward on the books, but its vindication may require proof of sustained dog barking over a period of time, decibel levels, or whatever else. Mortgage holders may hold up the transfer of clear title, but only in certain situations. Failure to make their claim known at a scheduled judicial sale could wipe out their continuing rights. In sum, the legal presumptions framework can serve to highlight the practical procedural dimension of property claims.

What the transitional justice regime does in Colombia is that it legislatively switches those common presumptions. Rather than prioritizing the titled owner, the presumption of superior entitlement is assigned based on other factors. These criteria specifically relate to the type of transferee and the proximity to areas of armed conflict. What is most important is not the formality of landholding. Rather, it is the recognition of the informal conditions affecting these lands. Those facts are privileged in the form of a legal presumption, holding that the transfer of land under these conditions is presumptively invalid. Most of the law's presumptions are rebuttable, but they do require the transferee to meet a heightened burden of proof.

III. FORMALIZATION PROVISIONS OF LAW 1448

The law also converts most restituted land into full title holdings, whether or not the restitution claimants were previously owners. After an initial two-year prohibition on alienation of newly restituted land, the property is then freely marketable. As such, questionable economic actors could easily buy out the desired land two years hence, rather than forcing off newly restituted residents with violence. In this way, future purchasers would be in an even better position to obtain a clear title. Indeed, critics claim that this is the real aim of the law: under the pretext of land restitution to displaced persons, title to state land is granted and formalized and title to private land is cleared, making it more valuable for agricultural and mining interests.⁸⁵

In the legislative debates, the reasoning was expressed in this way:

The judicial decision [of restitution] will order the titling of property restituted, independently of its previous condition. In

⁸⁵ BAUTISTA REVELO, *supra* note 7, at 51–52.

this way, the transformation of the property restituted into negotiable assets in the formal market will be achieved.⁸⁶

The drafters' intent was thus both restitution and formalization. The law aims to restore displaced persons to their previous holdings. At the same time, it works to achieve formalization.⁸⁷ The final law retained this formalization feature. Still, it authorizes judges to grant full title formalization only in cases where the claimants meet the relevant requirements.⁸⁸

Essentially, two main avenues are offered for titling. Either the claimant meets the formal requirements for civil code adverse possession (*prescripción adquisitiva*) or they meet the requirements for government-sponsored adjudication of state lands. Adverse possession is a common property rule in most legal systems including Colombia.⁸⁹ It recognizes superior rights even over a registered owner, where there has been open and notorious possession by a third party and a certain amount of time has passed. In Colombia, it can be as short as five years.⁹⁰ Additionally, agrarian reform programs have been in place in Colombia, in one form or another, since 1936.⁹¹ They are intended to provide land to landless farmers and those with unproductively small plots. Over the years, they have met with uneven success.⁹² The largest gains were in the 1961 to 1994 period with approximately 5 million hectares of land awarded. Between 1962 and 2000, 103,084 families benefitted from approximately 1.7 million hectares redistributed—amounting to 0.4 percent of property within the agricultural frontier.⁹³

Agrarian reform was recently given a boost by the peace accord. It was a main topic of the negotiations with the FARC. The accord's first chapter contains an ambitious three-million-hectare land redistribution program over twelve years.⁹⁴ The program will presumably run concurrently with ongoing

⁸⁶ CRISTO B. ET AL., *supra* note 62 (author's translation).

⁸⁷ COMISIÓN DE SEGUIMIENTO, VI INFORME, *supra* note 4, at 51 (showing that one 2004 estimate places the informality rate at 40 percent of all land registered in the (incomplete) national cadaster).

⁸⁸ Cf. FERNANDO ET AL., *supra* note 33, at 128–31 (arguing that the precedent set by the Tribunal Superior del Distrito Judicial de Bogotá, Sala Civil Especializada en Restitución de Tierras, authorizes formalization even when the conditions for agrarian reform grants are not met).

⁸⁹ L. 791/02, diciembre 27, 2002, DIARIO OFICIAL [D.O.] (Colom.) (amending the civil code provisions for adverse possession period. There are two types: extraordinary adverse possession requires 10 years, and ordinary adverse possession requires five.).

⁹⁰ *Id.*

⁹¹ L. 200/36, diciembre 16, 1936, DIARIO OFICIAL [D.O.] (Colom.).

⁹² See Helena Alviar Garcia, *The Unending Quest for Land: The Tale of Broken Constitutional Promises*, 89 TEX. L. REV. 1895, 1899 (2011).

⁹³ Marilú Franco Devia et al., *Evaluación e Impacto de Los Programas de Reforma Agraria*, in COLOMBIA TIERRA Y PAZ: EXPERIENCIAS Y CAMINOS PARA LA REFORMA AGRARIA, ALTERNATIVAS PARA EL SIGLO XXI, 1961–2001, at 175–76 (Instituto Colombiano de la Reforma Agraria ed., 2002).

⁹⁴ For the most recent assessment of progress on fulfilling the 2016 peace accord with the FARC, see KROC INST. FOR INT'L PEACE STUD., STATE OF IMPLEMENTATION OF THE COLOMBIAN FINAL ACCORD, DECEMBER 2018 TO NOVEMBER 2019, EXECUTIVE SUMMARY (2019).

land restitution cases. The peace accord contains a full chapter on the compensation of victims. However, on the question of land restitution, it limits itself to endorsing the government's 2011 legislation. Notably, the eligibility requirements for agrarian reform land grants are referenced by the formalization provisions of the restitution law. They are one of the bases for awarding full title in restitution cases, where claimants were previously not owners but merely possessors eligible for agrarian reform grants.

In any case, if either of these two options is present—adverse possession or agrarian reform eligibility—the land restitution judge will grant both restitution and title. Otherwise, claimants may be returned to their previous legal condition with respect to the land. They can be recognized as something other than full title holders. They can be recognized as simply entitled to possession of the land.⁹⁵

A. Formalizing Property Rights

Since the 1990s, the preferred, internationally-supported practice has been to formalize informal land holdings as a tool of economic development.⁹⁶ This has been executed in a very particular way. Rather than merely formalize, that is, document and register the existing set of rights and obligations normally associated with informality, full title ownership is awarded. This approach was popularized by Peruvian economist, Hernando de Soto.⁹⁷ The idea, according to de Soto himself, stems from his reflections on Peru and its contrast with developed countries. Faced with the 1980's Maoist guerrilla movement, the Shining Path, he recognized the subversive group's appeal to the poor. The latter had nothing to lose. They were not part of the capitalist game, so to speak. They needed to have a stake in the system to prevent them from wanting to blow it up.

This formula has gained phenomenal popularity in the developing world and international financial institutions. It has appealed to both the left and the right. For the left, it provides a transfer of wealth to the poor. Whereas in the past, countries of the region were loath to acknowledge the chaotic invasion of public and private lands, now there was an argument from the world of finance for their recognition. From the right, formalization offers the possibility of regularizing private property into the more monolithic and regular form of fee simple, or full titled property known in the civilian world. It consolidated the preeminence of this form of property for all: the most absolute form known in the civil code. It also offers more ease of alienability to previously locked-in pieces of land, clouded by unknown title, multiple claimants, and informal possessors. Moreover, it encourages and expands a

⁹⁵ See, e.g., Juzgado Primero Civil del Circuito [Juzg. Circ.] [1st Cir. Civil Court], Especializado en Restitución de Tierras Distrito Judicial De Antioquia, diciembre 2, 2013, Sentencia No. 61, Jueza Á. Peláez Arenas (Colom.).

⁹⁶ David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 ACCT., ECON. & L. 1, 43 (2011).

⁹⁷ See generally HERNANDO DE SOTO, *THE OTHER PATH* (2002).

financial market of mortgage credit, a renewed industry to be developed from the emission of newly minted land titles.

This has been the relatively uniform type of formalization effected by titling programs in Latin America. There are some exceptions: ancestral communities have been recognized as possessing collective titles.⁹⁸ These may be organized as separate legal jurisdictions, areas with different regulations, or simply undivided land. However, in their vast majority, urban squatters, rural land redistribution programs, and restitution programs for those displaced by civil war have turned to formal civil code titles. Moreover, in the Colombian rural context, many commentators have attributed that country's armed conflict to the extensive informality of landholding.⁹⁹ This then becomes another argument for formalization. Unclear land rights, as this thinking goes, are responsible for the longstanding conflict in rural areas. Indeed, the first negotiating point with the FARC guerilla group was the land question. The FARC insisted on a new "integral rural reform."¹⁰⁰ And, the main result was the agreed reallocation of 3 million hectares of land in the form of full title, subject to a seven-year restraint on alienation.¹⁰¹

B. Drawbacks to Full Title Formalization

The full title legal form however has some significant drawbacks. In the case of agrarian reform, such as that contemplated by the Colombian peace agreement, as noted above, the main vehicle for redistribution is in the form of full title. However, this legal form is quite vulnerable to re-concentration of land in the hands of economically powerful interests. The latter may want to reconsolidate the land for agricultural, mining, or other industrial purposes. The FARC initially proposed a ten-year period of restraint on alienation, likely aware of the dangers of immediate alienation and the coercive effects of the market.¹⁰² In the end, a seven-year restraint was agreed upon in the final peace accord.

In the case of restitution of land, the process also aims at full-title formalization. Full title is granted along with restitution, wherever possible,

⁹⁸ See, e.g., KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* (2010); Karen Engle & Lucas Lixinski, *Quilombo Land Rights, Brazilian Constitutionalism, and Racial Capitalism*, VAND. J. TRANSNATIONAL L. (forthcoming, on file with author).

⁹⁹ See, e.g., Vicente Torrijos R., *Cartografía del Conflicto: Pautas Interpretativas sobre la evolución del conflicto irregular colombiano*, in *CONTRIBUCIÓN AL ENTENDIMIENTO DEL CONFLICTO ARMADO EN COLOMBIA 652* (Comisión Histórica del Conflicto y sus Víctimas ed., 2015).

¹⁰⁰ Comunicqué de Las Fuerzas Armadas Revolucionarias de Colombia, *Diálogos por Paz con Justicia Social para Colombia* [Dialogues for Peace with Social Justice for Colombia] (Jan. 14, 2013), <https://perma.cc/D85Y-CDC8> (author's translation) [hereinafter *Comunicqué de Las Fuerzas Armadas Revolucionarias*].

¹⁰¹ Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera [Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace], Colom. Fuerzas Armadas de Colombia-Ejército Popular [FARC-EP], Nov. 11, 2016.

¹⁰² Comunicqué de Las Fuerzas Armadas Revolucionarias, *supra* note 100.

subject to a two-year restraint on alienation. These parcels are often small to medium holdings. Their restitution is also commonly perceived as an additional means of redistribution of land. In fact, commentators have noted that the ongoing guerrilla war has been a process of divesting rural residents and amassing large holdings by business interests.¹⁰³ It has amounted to, effectively, a counter-agrarian reform. Restitution seeks to reverse this war-generated concentration. Like agrarian reform programs, these re-assignments of land also serve social policy goals, and they are vulnerable to being reversed.

1. The Lessons of Informality

Quite paradoxically, there are some benefits to informality. Informality makes the land less attractive to developers, speculators, and other investors. Certainly, this affects its value. Indeed, the Lincoln Land Institute in Cambridge, Massachusetts estimates that untitled property is sold at twenty percent less than titled land.¹⁰⁴ But, it can be sold. In other words, informal property is also in circulation. It just sells in a different market. In the case of shanties, these properties circulate among people that want, or can only afford, to live there. Thus, it structures a low-income housing market. This is not unknown in other places. A separate dual market for housing may be structured in various different ways. In some low-income housing projects in the U.S., for example, separate markets for the permissible sale of units are created by including restrictive covenants in title deeds. Future conveyances are limited to other low-income transferees, as specified in relevant clauses.

Informality is the developing world's rather organic creation of a separate real estate market. By converting informal landholdings into full title, however, wide-scale titling programs disintegrate these separate markets. They extend the same underlying property form to informal holdings as those in the formal real estate market. As such, they bring them into one single market. In fact, this is the very design of these programs. The argument behind a single market is that it will benefit low-income residents.

However, for some of the reasons described above, this may not be the case. Rather, residents may feel more pressured to sell—either because of actual coercion by powerful developers or because they are poor and financially stressed.¹⁰⁵ At any one point, residents with precarious jobs and uncertain incomes may be forced by economic pressures to sell in the face of a minimally attractive offer. They may be facing illness or the inability to feed their families. Of course, this could occur as well if they were untitled. The option then would

¹⁰³ COMISIÓN DE SEGUIMIENTO, VI INFORME, *supra* note 4 (showing that the official figures in 2007 were that 1.4 percent of proprietors own 65.4 percent of the land).

¹⁰⁴ EDÉSIO FERNANDES, REGULARIZATION OF INFORMAL SETTLEMENTS IN LATIN AMERICA 24 (2011), <https://perma.cc/KN3G-83H7> (indicating a 25 percent increase on untitled price, which corresponds mathematically to a 20 percent decrease from titled price).

¹⁰⁵ See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

be to sell to a purchaser willing to accept an untitled transfer. The difference would be, on average, twenty percent less.¹⁰⁶ However, this reduction in private property values may be outweighed by other social policy goals.

Varying degrees of economic coercion may weigh on informal settlers to sell if developers ultimately stand to gain formal title. These are cases of significantly unequal bargaining power. The law in Western countries, and Latin America, has a long history of protecting parties in a position of disadvantage. Consumer protection laws, labor laws, and housing laws, in effect, have the specific purpose of regulating the market in favor of protecting the weaker party, or the party most susceptible to undue pressure. In the case of informal housing, it is not the formal law that is doing the work of protecting. It is, rather, the informality that operates in much the same way as a consumer protection law. Informality reduces the likely outside pressures to sell but does not foreclose the possibility of selling. It also reduces the risk of predatory lending and foreclosures. These benefits admittedly come at a price. They translate to the reduction in value noted above, and no access to mortgage loans.

Still, the benefits associated with access to mortgage loans may not place residents in any better position. To the extent they are employed in unstable and intermittent jobs, their compromised ability to repay these loans places them in great jeopardy. A few missed payments would subject their only shelter to foreclosure. This in turn makes their tenure security more unstable rather than less: the opposite of that promised by formalization. The record continues to be compiled on communities that have pursued these formalization programs. Early reports suggested that private banks have not been willing to grant mortgage loans on the basis of shanties as collateral.¹⁰⁷ Indeed, from the perspective of lenders, this is the sub-prime market by definition. It was the root of the financial crisis in 2007 and 2008 that started in the U.S. It is not a good risk for the banks and may be calamitous for the economy as a whole.

The risk of foreclosure may in fact never materialize because private banks are not granting these loans in the first place. As such, to keep the objectives of these programs going, governments would need to step in as the primary mortgage lender or guarantor. However, if this is the case, it defeats the promise of the titling programs as a market solution to both housing and deepening capital markets. It just becomes a government transfer, in the form of subsidized interest rates, guarantees on defaults, and credit diverted to this sector. Especially in the developing world, welfare programs are greatly scrutinized due to tight fiscal constraints and macro-economic management concerns. Subsidizing mortgage loans, on the basis of the equity of informal settlements, may not be the best targeted social welfare program.

¹⁰⁶ FERNANDES, *supra* note 104.

¹⁰⁷ Klaus Deininger & Gershon Feder, *Land Registration, Governance, and Development: Evidence and Implications for Policy*, 24 WORLD BANK RSCH. OBSERVER 233 (2009).

2. Sustainable Social Policy

From the perspective of social policy, full title grants may again not be the best course. This legal form may make government redistribution programs less sustainable. Redistribution and restitution programs may at first distribute land to the landless or those dispossessed quite effectively. However, market forces may soon act to reconcentrate that same land. Thus, some legal protection may be necessary to keep that land in the hands of intended beneficiaries, and the broader class of eligible beneficiaries.

Indeed, to the extent that informality in land has—at least in some cases—shielded areas from the formal land markets, it has provided a protective function.¹⁰⁸ Assuming the continuation of the current form of the global economy, a low-income sector of the population will be an endemic feature of national economies. Affordable housing is thus permanently needed. If there are no massive public housing investments, then shantytowns in fact fulfill this function.¹⁰⁹ Informal settlements serve as the *de facto* stock of low-income housing, serving a significant public purpose. They provide an increasing supply of low-income housing. Informality has been an organic method of maintaining a stock of affordable housing. If this housing were to be converted to the formal sector, it would likely aggravate low-income housing shortages.

Admittedly, informal settlements suffer from many well-known shortcomings.¹¹⁰ Their continuing existence requires tolerating certain incursions on public and private property.¹¹¹ They also involve a relaxation of formal building and housing codes. In effect, the disregard for permits and non-enforcement by code inspectors produces an alternative regulatory regime for these neighborhoods. They do not necessarily meet safety and sanitary codes, may be impenetrable to the forces of law enforcement, and a number of other ills.

However, informality may not mean an all-or-nothing proposition. Its positive features in terms of sustainability may be highlighted, while its negative aspects may be addressed. Thus, it is not out of the question to increase regulation and social programs in the informal sector. At the same time, the protective aspects of informality in terms of housing tenure, differential *de facto* regulatory regime, and separate markets for the transfer of housing may be upheld. They may even be “formalized,” yet not necessarily into a one-size-fits-all definition of full title private property.

One approach could be to recognize “informal” property as just a separate form of property that exists but has not been formally recognized in positive

¹⁰⁸ Jorge L. Esquirol, *Titling and Untitled Housing in Panama City*, 4 TENN. J. L. & POL'Y 243 (2008).

¹⁰⁹ *Id.*

¹¹⁰ William Mangin, *Latin American Squatter Settlements: A Problem and a Solution*, 2 LATIN AM. RSCH. REV. 65 (1967).

¹¹¹ See generally Kenneth L. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550 (1971).

law. This would provide for the public-notice function of property which deregulated informality notoriously fails to provide. Indeed, it is often this aspect that is credited with tenure instability. Of course, in the face of all-out warlike conditions in the Colombian context, neither formality nor informality can stand in the way of violent predation. If anything, public notice—or formality—simply offers a clearer record that can be used for subsequent reparations after the period of violence is over, if politically feasible.

This extreme situation notwithstanding, the particular elements of a newly-recognized property form could be more precisely defined with its specific combination of rights and duties. Rather than full title, it would express the features currently associated with informality. Notably, it would be subject to different public law regulation, and it would not be mortgageable in public registries. In this way, it would create a separate market for this property that could presumably circulate among low-income individuals.

Historically, in civil code countries, there are various enumerated “real” rights.¹¹² The closest existing formal real right to this situation may be a long-term lease, like that provided by emphyteusis for example. However, a completely new property form could be legislated as well.¹¹³ Such innovations are not unheard of in Latin America. A number of novel property types have been legislated in the past, like the *patrimonio familiar* which was meant to preserve rural landholdings within families and protect them from creditors¹¹⁴ Likewise, the *Unidad Agrícola Familiar* (UAF) was created in the 1960s in Colombia as a vehicle for agrarian reform.¹¹⁵ Its alienation was made permissible only with the authorization of the responsible government agency.

These innovations may certainly be pursued and should be the object of greater discussion. However, there is much resistance to formalizing property with a different type of real right.¹¹⁶ First, anything short of full title may seem like second-class ownership. It is a limitation on the recipients’ abilities to dispose of the land. It may also appear excessively patronizing of disadvantaged sectors of society. Moreover, depending on the features of a different property form, there may be a tendency to be over-restrictive. The UAF, for example, tried to prohibit alienation. This is certainly an undue limitation on the possibilities and life plans of recipients.

On the other hand, these are, in fact, social programs. And, social programs do generally have eligibility requirements and limitations. Cash transfer recipients do not dictate how much they will receive in their monthly allowance,

¹¹² See, e.g., CÓDIGO CIVIL [C.C.] Book Two (Colom.); see also GARDEÁZABAL, *supra* note 80.

¹¹³ See generally Lee Anne Fennell, *Fee Simple Obsolete*, 19 N.Y.U. L. REV. 1457 (2016) (articulating the “Chicago critique” of fee simple, leading to alternative property forms).

¹¹⁴ No. 8476, *Gaceta Oficial*, 22 Mar. 1995 (Colom.); No. 14300, *Gaceta Oficial*, 29 Dec. 1960 (Colom.).

¹¹⁵ L. 135, diciembre 15, 1961, DIARIO OFICIAL [D.O.], 801 (Colom.).

¹¹⁶ See, e.g., Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, 44–45 (2017) (discussing personal autonomy and anti-subordination).

for example. As such, the individual transfer must also be subjected to the overall goals of the articulated social policy. Still, to the extent property formalization programs are a social justice measure, they should satisfy the objectives of recipients as much as possible, without neglecting public policy objectives. In the case of low-income housing, those objectives are to preserve a relatively permanent stock of low-income housing. In the rural sector, the relevant social policies may include designating certain expanses of land, or plots of land, for small scale or associative farming in keeping with traditional *campesino* lifestyles.

C. Procedural Variations on Full Title

Nonetheless, full-title formalization remains very attractive. The promise of granting full rights to residents and irregular occupants is very compelling. Indeed, it even appears as a form of restorative compensation in land restitution programs. As already discussed, Colombia's restitution legislation provides not only for the return of displaced persons, but it also directs the granting of full title, regardless of their previous status if participants meet the requisite conditions. Formalization to full title is thus a remediation of sorts for past wrongs.

As such, a worthwhile objective may be to consider legal instruments that could offer the benefits of full title while averting the downsides. The downsides, to repeat, are the absorption of the low-income housing stock and the rural small farming sector into formal markets. This would reduce the availability of low-income housing and the sustainability of a *campesino* agricultural sector. In the urban context, it affects the quality of life of low-income residents, their access to shelter, their commutes into and out of the city, and their exposure to the social life of the city. In the rural sector, it threatens the sustainability of a continuing territory for small and medium farmers by an encroaching agricultural industry and mining sector.

A lesson may be drawn from the exceptional regime instituted by the 2011 restitution law itself. The presumptions and burdens it sets up are meant to be transitory. They only work for the short-term purpose of deciding restitution claims. However, analogous presumptions and burdens could be made permanent for certain designated lands. The underlying property right would still be full title. However, presumptions may be established that transfers to non-low-income residents in the urban context, or non-peasant farmers in the rural context, would be invalid. These presumptions could work to create a differential market in which only transfers to other low-income residents or peasant farmers would be unquestionably valid. The presumption mechanism may offer an alternative to a prohibition on alienation. Instead, there would only be a presumption against valid transfer when transferred to someone ineligible for low-income assistance, agrarian reform, or displaced persons benefits. Transfers to agribusiness, mining companies, and others not qualifying would be presumably invalid. Even without going to court, this may incentivize such non-eligible purchasers against trying to acquire these lands. There would be a cloud on their title, which may be enough. It may deter banks

from lending on that uncertain collateral. Moreover, even if registries were to record the transfer, it would not be enforceable in court. Banks would not be able to assume ownership of the land upon foreclosure, although they might not be stopped, *ex ante*, from selling to a third party subject to whatever compromised rights such a purchaser would obtain.

Furthermore, the presumption need not be absolute. It could be overcome. The amount of proof to rebut it could be set by reference to social policy objectives, as well. If a small farmer has additional property somewhere else, or property beyond a certain size, the presumption may be rebutted. Additionally, if the overall demand for agrarian reform plots has been satisfied in a particular area, then the presumption may be countered. The various standards would need to be specifically tailored. Nonetheless, these procedural mechanisms could fill a continuing role in at least slowing down the process of land re-concentration.

Certainly, there are problems of administration with this idea. The suggestion is undoubtedly not fail-proof. There is no *ex ante* mechanism in effect to prevent a material transfer to a non-eligible transferee. However, the proposal here counts as a private law cloud on title—and potential rescission of the transfer without compensation—to deter non-eligible conveyances. In any case, the working out of these ideas in greater detail must remain for another day. Law 1448, nonetheless, offers some insights in refashioning the rules of property to align them better with social justice concerns.

IV. CONCLUSION

In Colombia, two related but separate processes are driving land formalization in rural areas. The first is directed by the country's attempt to provide restorative justice to internally displaced persons because of the guerrilla war. Law 1448 offers some creative approaches to property law to accomplish the objective of land restitution. It sets up several legal presumptions in favor of displaced persons and shifts the burden of proof to opponents. There are certainly numerous obstacles to obtaining successful results under this legislation. There are many complex cases to be resolved. There are perennial shortages of resources. There is active resistance by those who would be affected. Violence and intimidation against claimants have been widely reported.

Still, land restitution tribunals have been processing a number of cases. Decisions have been handed down against powerful economic interests, including agribusiness and mining companies. By the government's count at the end of May 2020, more than 380,000 hectares of land have been returned. However, even assuming that the law can be labeled a relative success, despite all the irregularities that a process like this cannot eliminate, its objectives of restitution and redistribution may be quickly undone. It may result not from the program's failure but from its success. The combination of market forces and the granting of full title on newly restituted properties may accelerate future market dispossession. Indeed, dispossession does not occur solely through violence and war. The combination of formal legal rules, market forces,

and vulnerable sectors of society often also produce inequality and unfairness. Indeed, this is the general rationale behind legal rules such as those that protect labor, consumers, and tenants. The law often recognizes certain groups or circumstances in society for protection.

Restitution of land to displaced persons is another such situation that requires long-term legal protections. Certainly, the restitution program in Colombia does not concern solely the vulnerable. It may benefit some large landowners, as well. The law does not discriminate between poor and wealthy previous owners as eligible restitution claimants. However, the law is partly intended as a redistributive program. Many of its beneficiaries are in fact peasant farmers. To the extent these newly redistributed lands are not to be quickly “re-dispossessed”—this time through the operation of market forces, legal yet coercive forms, and socio-economic vulnerability—new legal protections need to be employed. This Article discussed the role that informality has played in the past to fulfill this protective function. Granted, it has a number of drawbacks. It is clearly not the only, or possibly even the best, way to achieve some level of housing protection. Alternative property forms could be devised. For example, different property categories may be employed that would not directly plug into transactions in formal land markets, and thus would not be under the same pressure from these sectors. Surely, dual markets have their own drawbacks. One of them may be excessively limiting the alienability of “protected housing” as well as the appearance of a second-class property category, which are not negligible considerations.

The discussion here draws on the conceptual creativity of Law 1448 to suggest yet another possibility, if only in a preliminary way. It may be that full title can be effectively employed but in a refashioned manner. The outward grant of full ownership rights satisfies popular expectations of the full array of property rights and avoids the impression of a second-class category of ownership. However, the kind of presumptions and burdens, effectuated in Law 1448 in its transitory regime, could be made to function long-term for a different purpose. They could become a permanent modification on full title for certain designated lands. Thus, property vested with a low-income housing public policy objective would be presumed alienable only to other low-income qualifying individuals. Likewise, in the case of rural land, restituted land and agrarian reform redistributed land would only qualify for valid conveyance if transferred to other redistribution eligible recipients. These and other ideas remain to be worked out more fully, toward goals such as sustaining low-income housing and a small-farming sector.