Legal Issues Raised by the Transition:
Cuba from Marxism to Democracy, 199?-200?

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I. Introduction

The transition of Cuba from Marxism to democracy raises a number of important constitutional and legal issues. In this short paper all I can hope to do is make the reader aware of some of these questions and suggest solutions for some of them. However, as almost always in law, especially when dealing with policy issues, the answers are charged with political and economic considerations, and one man's prescription is another man's poison. Each of the issues discussed can be isolated for purposes of research and further discussion in separate papers. The eleven topics discussed herein are the Constitution, eminent domain, privatization, labor legislation, antitrust, safety nets, taxes, higher education, economists as policymakers, privatization of the administration of justice, and government crimes.

A. Constitutional and organizational issues

The first question after the fall of the regime is who will govern and under what kind of governmental organization. It appears to me that the provisional government that will be inevitably established should be short-lived and have only two objectives: keeping the peace and calling for immediate elections under the Constitution of 1940 with a very brief campaign period as in the United Kingdom. There are, of course, problems with this scheme. The provisional government will have few powers to deal decisively with a mountain of problems, political parties which are not well organized will be handicapped, and a government which will soon self destruct will lack credibility.

On the other hand, there are advantages: one of Cuba's long-standing problems has been the legitimacy or lack thereof, of government. Cuba, as other countries, cannot have economic stability without constitutional rule and without the consent of the people. It seems to me that post-1958 organic laws are flawed in this respect, unless an interpretation is given to them, such that the government will be periodically accountable to the people. Moreover, purely from a legal standpoint, post-1958 laws were passed by a government which is illegitimate.

Another advantage of the scheme suggested is that it will prevent the perpetuation in power of a provisional government. Always and everywhere there has been a marked tendency for temporary governments to become permanent. One should remember that after promising quick elections, the Cuban revolutionary government ended up by asking the people the rhetorical question: "Why elections?" Indeed, why? To have an executive power to take charge of government quickly and legitimately, a legislative power which can change the Constitution and laws whenever pre-1959 legislation is deemed obsolete, and last, but certainly not least, to establish an independent judiciary to decide the myriad disputes which will inevitably arise in the transition and post-transition periods, not only between person and person, but even more pressing, between persons and government. Clearly, a new elected government can amend the Constitution, and change or revoke old laws and pass new ones in a comparatively short period of time.

To understand the prima facie legal and economic absurdities resulting from illegitimate government, one need not look beyond February 7, 1959, around five weeks after the revolutionary government was established. On that date, the government "reformed" the Constitution of 1940 without benefit of constitutional processes. Some of the provisions: ex post facto criminal laws applicable to the prior regime's supporters (Art. 21 and 22; Title IV, Order No. 4); Death penalty [in the form of a Bill of Attainder] for members of the prior regime plus death penalty for "treason" against the new regime and

"subversives" [not defined] (Art. 25). Under this clause many honest people who had nothing to do with the prior regime were shot; Exclusion from public life of citizens who, because of their "public acts" and participation in the prior regime's "electoral processes", "aided" the prior regime to "stay in power" (Title IV, Order No. 5). None of the prior terms were defined; Minimum wages for all workers, according to each worker's occupation or profession, and standing as head of family (Art. 61). The Executive and Legislative Branches were merged and neither the President, nor the Ministers were subject to election (Art. 119, 120, 121, and 125). Judicial tenure was suspended (Title XII, Sec. 2 Order; Added Transitional Order No. 5). Prosecutorial tenure and independence was suspended (Title XII, Sec. 5 Order; Order No. 5). Laws and Regulations of the High Command of the Rebel Army remained in force (Added Transitional Order No. 1). Habeas Corpus and the jurisdiction of ordinary courts were suspended for all members of the prior regime, as well as for persons subject to the jurisdiction of Revolutionary Tribunals, as established by the criminal laws issued by the High Command of the Rebel Army (Order No. 3). Again, many honest people were prosecuted before Revolutionary Tribunals and shot under Order No. 3. The right of persons "defined" in Order No. 3, supra, to file appeals based on the unconstitutionality of the government's laws and inferior court judicial opinions, before the Supreme Court and the Tribunal of Constitutional and Social Guarantees, was suspended (Order No. 4). Public Defender tenure was suspended (Order No. 5). No pensions were payable to judicial officers removed by the government, until such time as the government completed the "reorganization" of the Judicial Power (Order No. 5). Public employee tenure was suspended (Title VII, Sec. 2, Order No. 3). Thus did the revolutionary government "pack" the courts and the ministries with its adherents, eliminate the jurisdiction of ordinary courts over its presumed enemies, and abolish appeals to the highest courts when defendants complained about government violations of its own "reformed" constitution.

The constitutional "reform" was a big mistake, even just on its face, let alone in its use. It is human to make a big mistake once. Quaere whether a similar mistake will be made during the transition.

After the elected government is in place, the laws and the Constitution itself can be changed swiftly. Some will say such a scheme is a luxury and what is needed for some time is a period of "mano dura" without the distractions of parliamentary maneuvers and interfering courts. Certainly such worked in post-civil war Spain and post-popular front Chile. The Adenauer-Erhard scenario, however, is also a valid alternative model. What actually transpires, however, will be a function of the degree of entropy during the transition. If it is very high, there will be a strong temptation to imitate the Spanish and Chilean model. On the other hand, if the majority of the people are sufficiently fed up with the quiescent chaos of the revolution, they may have the self-discipline for self-rule, without ukases from above, which are, after all, the distinctive marks of the revolutionary government.

B. Compensation for nationalizations

The Neanderthal exile in Miami with the title to his house in Guanabacoa firmly in the coat pocket of his Drill 100 suit waiting to jump on a plane to Rancho Boyeros in order to summarily evict the occupants of his confiscated property is an amusing caricature, but not a very helpful one analytically. Nowhere is it written that compensation must be in kind. In fact, eminent domain is almost by definition a matter of payment in money, not kind.

Cuba will confront two questions: whether there will be compensation for nationalizations and what form it will take. From a strictly legal point of view, under the Constitution of 1940 and/or some post-1958 laws, property taken by the State must be compensated. The revolutionary government even took legal steps to issue bonds. The question of whether the post-revolutionary government ought to compensate will inevitably become a political and economic question decided by the popular branches. However, the possibility exists that if an independent judiciary is established and the government denies compensation, the Supreme Tribunal may overrule the government and hold compensation is required constitutionally.

The form of compensation, including valuation schemes and sources of funds, will present a number of legal issues. As to valuation: will it be at market, present value of future earning streams of businesses, or earnings times a reasonable multiple such as 15? Will compensation be reduced by the net amount recovered from deductions from U.S. income? Will payment be in cash or bonds? If in bonds, at what interest rate? Will interest be paid from the time of nationalization? If so, at what rate? Three percent real plus the rate of inflation in the United States? Will those bonds issued by the revolutionary government be honored? Another problem will be: if compensation is to be paid at all, from where will the funds come--taxation, borrowing, privatization?

C. Privatization

Privatization raises some of the same issues as compensation, especially with respect to valuation. I assume that, analytically, property nationalized will be compensated and only property created post-1958 by the revolutionary government will be privatized. In reality, such division will be difficult because some property, say a sugar mill, will have some plant and equipment from the original owner and some added by the revolutionary government. A careful accounting must be made to separate out the components, allocate them to total value, and compensate or privatize, as the case may be, in proportion to the accounting results. Since compensation in money is administratively simpler, the government may give the former owner the choice of receiving the value of the property offset by the part of the value that would have been privatized. Alternatively, an investor may pay the government the value of the property to be privatized, if the investor pays over to the former owner that portion of value which is former ownership to be compensated.

With respect to the ascertainment of price for purposes of privatization the bottom line may be who will pay the most for a particular property although other factors are being taken into consideration in Eastern Europe. But another question will arise, especially at the beginning. Will the bids be so low that it might behoove the government to retain properties to be privatized and operate them until sufficient investor confidence and interest builds up or should there be a conclusive presumption that no matter how low the bids, the properties should be privatized post haste in order to let investors propel the economy forward without delay?

D. Labor laws

Any discussion of post-revolutionary legal issues will inevitably involve the "advanced" labor laws of the Republic, especially with respect to unions, discharge only for cause (Decree No. 798 of 1938), women's equality and benefits, and others. Many have argued persuasively that such legislation burdened the Cuban economy while others have argued, equally persuasively, that a secure worker is a productive worker. The debate boils down to the age old equity vs. efficiency conundrum in a subtropical setting. The post-revolutionary government will face the following issues: are such laws desirable? From whose point of view? Economically? Socially? Equitably? Morally? The assumptions, analyses, and answers are frequently value-laden. Are economic values paramount? Are they necessarily at odds with other human values? Are they necessarily mutually exclusive? Are they complementary? Can they be harmonized?

When I suggest for pragmatic reasons that the post-revolutionary government be quickly elected under the Constitution of 1940, I do not mean to imply that the Constitution and prior labor laws ought to be immutable. To the contrary, such an elected government would give the people, through its representatives in Congress assembled, the opportunity to revise what was before under rules of procedure established for that purpose. Whenever the Cuban people (or any people for that matter) have circumvented established processes in the name of some type of expediency ("straightening" the economy, "eliminating" corruption, establishing "true" democracy) the results have not been pleasant as all manner of passion has been unleashed.

An alternative is to use the Constitution of 1940 only for three purposes: electing officials, appointing the judiciary, and securing elementary civil liberties of speech, habeas corpus, and due process. All other laws would be deemed revoked and the new government would write on a tabula rasa. The Congress may delegate to the President authority to legislate, reserving to itself a legislative veto. That would quicken the pace of legislative reform, and the people would be protected from Executive excesses by the Congress and the courts.
Another topic on this subject arises, i.e., the validity of government acts post-March 9, 1952 and pre-1959. It would appear that they are prima facie invalid as the Constitutional process was not followed. However, to the extent that such acts were consistent with the Constitution and its laws, I would argue for their validity, especially as the government made an attempt, albeit hypocritical, to maintain the form of government. On the other hand, the post-1958 government repudiated the Constitution and its laws, openly, in substance, in form, and in process. One would reason that that is a completely different species.

In any event, whatever labor laws Cuba adopts will have an economic impact. The debate leading up to such adoption should consider experiences in Eastern European countries undergoing liberalization, and in other developing countries, especially successful Asian NICs. The experience of European nations with "advanced" labor laws (e.g., Germany, Scandinavia, Benelux, and others), although not completely relevant because of the two very different levels of development, is partially relevant for "costing purposes"; i.e., can Cuba "afford" such laws?

E. Antitrust

In "Long-Term Objectives and Transitional Policies - A Reflection on Pazos' "Economic Problems of Cuba" [p. 13] (August 13, 1991), E. Hernández-Catá makes the excellent suggestion that post-revolutionary Cuba adopt "at a very early stage, comprehensive antitrust legislation". This is a point worth elaborating. First, it should be emphasized that due to the unmanageable nature of antitrust litigation (a case can take more than ten years just in the discovery phase) trustbusting has not been as effective as free trade in fostering competition. Nevertheless, the most egregious acts of price fixing, market division, and cartelization (so prevalent in pre-WWII Europe and even in Latin America today) can be prevented with proper enforcement.

Another neglected aspect of antitrust enforcement in the United States, due in no small part to the lobbying of professional and occupational associations, is the encouragement by government of the proliferation of licensed "professions" whose main objective is to keep outsiders from the ranks of the "profession" under the guise of quality control. This can be considered rent-seeking. The antitrust laws may serve to promote maximum competition by allowing freer entry, prohibiting minimum fee schedules, allowing price advertising, and, in general, doing away with unreasonable restrictive practices. For example, professional associations may be required to accredit all schools which meet minimum admission standards of intellectual ability for entrants into particular professions and minimum standards of instruction quality. Moreover, associations may be prohibited from dictating to schools the maximum number of students they may graduate each year (again, as long as such students are qualified for the profession in question). Furthermore, all post-graduation exams administered by the government or by associations with government sanction may be eliminated. Entry into a profession may be made automatic upon graduation from an accredited school. Finally, some professions, such as law or accounting, may be opened to persons who "read law" or "do numbers" for a number of years under another professional, thus permitting entry into the profession by persons who cannot afford college training.

An aspect of partial failure of antitrust in the United States has been the neglect to specify violations, other than the obvious ones of price fixing and market division. Some commentators have proposed (and

this may be worth looking into in drafting Cuban legislation) that possible antitrust violations (such as "shared" monopolies or conscious parallelism) be defined statutorily, rather than left to protracted case-by-case adjudication. This would presumably let firms know precisely what the law is and would save judicial time. There are three aspects of U.S. antitrust legislation and enforcement that should be avoided. First, price discrimination and resale price maintenance, which were designed not to protect competition but to protect inefficient competitors. Another one is to penalize successful firms which achieve economic profits through efficient and superior management rather than market power. Although theoretically economic profit should disappear in the long run, the fact is that there are firms, or at least individual entrepreneurs, who year in, year out produce outstanding results through ability not predation. Antitrust authorities should be mindful that one of the principal raisons d'etre for such legislation is to provide fertile soil for entrepreneurial activity, which, after all, is the only source of wealth. A third aspect, related somewhat to personal occupational restrictions, is business licensing restrictions. There appears to be no reason why a person should not have free entry into any business. Capital, competence, licensing, and other restrictions for purely money-making enterprises such as real estate brokerage, contracting, pest control, and many others may be viewed as an attempt to restrict competition, again under the guise of public safety and other abstract concepts that have little to do with delivering a service.

F. Safety nets

In the aforementioned paper, Hernández-Catá also makes a second excellent suggestion, i.e., full price decontrol and elimination of price subsidies coupled with safety net payments, is the liberalization option "most compatible with the concept of a free-market economy where poverty issues are tackled through a system of direct government transfers rather than through subsidies and price-distorting measures" [p. 16]. This is another point worth elaborating. "Welfare" legislation in the United States is an abject failure. In an attempt to devise an impossibly perfect system which leaves nothing to chance or to wrong decision-making by clients, legislatures have produced the opposite of what was desired. As Justice Antonin Scalia would put it, this is a good example of the operation of the Law of Unintended Consequences. There are no incentives to work because after-tax and after-childcare expense income from work is less than from "welfare". There is no curb on irresponsible childbearing. Clients may lose health insurance if they leave the system to work for employers who have no health plan, another lessening of the incentive to work. Housing is sometimes provided in kind, with resulting overcrowding, lack of pride of ownership, no incentive for working on maintenance or an aesthetic environment, crime, drug-dealing, and prostitution.

It appears that these problems can be avoided in at least one of two ways: a negative income tax which gives people some incentive to work or a requirement for work for the government in exchange for "welfare" payments. Predictably, public employee labor unions fight the latter proposal tooth and nail because they have a good thing going and do not want competition. This is an illustration of the necessity of integrating legislation with an economic effect so it works to the advantage of society and not of entrenched groups. Under either alternative, public housing may be undesirable and clients may be better off seeking housing in the private market. Even a "bad" slum may be better than a "good" housing project.

G. Tax legislation

A third excellent suggestion by Hernández-Catá is that the tax system in post-revolutionary Cuba ought to be "administratively simple and transparent" [p. 12]. This point also merits brief discussion from a comparative law point of view. Whether taxes are on consumption (as Hernández-Catá correctly suggests) or on income (as others argue), complexity and obscurity should not be part of a tax system. First, some of the best minds are drawn to a redistributive activity like the interpretation and administration of the tax system, rather than to productive endeavors. In may own experience, the first man in our law school class, who scored at the 99th percentile in the LSAT and had an undergraduate

cum of 3.9, went on to become a tax consultant and professor. To waste such talent on taxation instead of using it on something productive is a serious misallocation of resources. Moreover, the sheer number of people in the tax field is staggering: lawyers, CPAs, CFPs, ChFCs, CLUs, tax preparers, estate planners, internal revenue agents, forms analysts, drafters of legislation and regulations, judges, and economists. It is not without some truth that the Internal Revenue Code of 1986 is referred to as the "Lawyers and Accountants Welfare Act."

The products of this enormous amount of pointless ingenuity are a thick, incomprehensible tax code which reminds one of "certain passages of Hegel: they were no doubt written with a passion for rationality; but one cannot help wonder whether to the reader they have any significance save that the words are strung together with syntactical correctness." Hand, Thomas Walter Swan, 57 YALE L. J. 167, 169 (1947); tax treaties; voluminous IRS regulations, revenue rulings, revenue procedures, letter rulings, and technical advice memoranda; and decisions by the Tax Court, the Claims Court, the district courts, the courts of appeal, and the Supreme Court. There are at least five major tax services running into the dozens of volumes, which are expensive, but also indispensable to good tax research. There are also at least 16 major tax journals. If Cuba cannot afford "advanced" labor laws, it can afford a similar tax system even less.

H. Legislation subsidizing higher education

All higher education is not created equal. For example, the social return on engineering, science, and management (ESM) is higher than that on law. Probably most reasonable men would agree on that point. In Cuba, higher education of all types was heavily subsidized. Consequently, there was a great outpouring of rent-seeking lawyers and physicians. If a person wishes to self finance a nonsocially productive career, that is fine, but I question whether such an education should be subsidized in whole or in part by the government. On the other hand, careers in ESM should be prime candidates for subsidies, especially in a developing country needing above all technical, rather than forensic, skills. Dare one speculate that if in pre-1959 Cuba careers in law had been priced at full cost, perhaps the country might have had fewer revolutionaries and more engineers?

There are other studies, especially in the liberal arts and the social sciences that are not only desirable in themselves as consumption items, but also socially desirable, if only so that ESM students and practitioners understand the context of their activities. It is hard to consider an engineer educated who ignores literature and economics, and just as hard to consider a writer or sociologist cultivated who ignores the physical sciences and business. It is important to give incentives to technical education, and indeed it is through the high standard of living which results from applied science, that the arts are available to the average man. Conversely, the direction of technological and economic change must be guided, at least in part, by the humanities and their long tradition of thinking about problems that seem to appear always and everywhere.

I. The role of economists in policy making

Something may be wrong when economic policy is administered exclusively by politicians. Even partially granting the popular view that all economists laid end to end around the globe could never reach a conclusion, it is incredible to watch the enormous number of laws pouring out of legislatures every year without any input from economists or, at most, with token participation. The same can be said of courts, with the possible exception of trailblazers like Federal Appellate Judges Richard Posner and Frank Easterbrook. There is, in fact, deep in the bowels of agencies such as EEOC and NLRB, that have economic impact, at best an arrogant fear, at worst a petulant ignorance, of anything remotely connected with the operation of markets or quantitative methods.

I would suggest that in a restored republic, some function be given to economists in legislation, execution, and adjudication beyond merely advising. I do not know the precise contours, but, for example, in the area of litigation with economic repercussions, it can be required that apart from expert witnesses presented by the parties, tribunals have at least one third of their membership composed of economists. In cases of one person courts, it can be required that an economist master be appointed to make findings of fact on all economic issues.

In legislation and execution it would perhaps be difficult to have unelected economists hold actual power, but it can be required that a Council of Economists, one in each branch, be appointed for long terms (14 years?) with almost absolute job security, like Federal judges, and instructed to comment critically and publicly on all executive policy, legislation, and landmark judicial opinions with economic impact. Perhaps, the fear of being exposed as frauds might nudge presidents, congressmen, senators, and judges to act less irresponsibly. The annual cost in salaries and xerox copying may be minimal compared to the intangible gains of letting the people know that public economists who are not under the thumb of the politicians may speak truths worth listening to. At present, there are numerous private economists who speak publicly on important issues (e.g., shadow FOMC, shadow SEC). However, their reach is limited because they speak in hypertechnical terms and some members of the public believe they have an ax to grind. An independent Council of Economists that, because of its members' long terms would straddle administrations, could have credibility, especially if it speaks clearly, allowing, of course, for dissenting opinions from a minority of the body.

J. The privatization of the administration ofjustice in civil and administrative matters

I assume that after the revolution, the Cuban Government will return to the civil law system, with its simplicity and efficiency, rather than convert to the common law system, with its complexity and inefficiency. In fact, some American lawyers believe that the United States is suffering from "terminal jurisprudence". It would be well worth it for an econometrician to test the hypothesis that the increasing complexity of our legal system is a partial cause of the post-1973 growth slowdown. (See statistical appendix). Even U.S. Supreme Court Justice Antonin Scalia, a pure product of the Common Law, is increasingly having grave doubts about the viability and predictability of our present system. The Rule of Law as a Law of Rules, 56 UNIVERSITY OF CHICAGO LAW REVIEW 1175, 1178-79 (1989).

In any event, even under an efficient civil law system, Cuba can still reach both higher efficiency and more just results by partial privatization of the administration of justice. Ironically, such experiments have been conducted in the United States after WWII and with increasing speed recently. First, it should be kept in mind that ultimately the courts have the final say by deciding the most difficult cases and setting the few important precedents allowed in a civil law system. However, parties to almost any type of dispute can enter into agreements to resolve their differences extrajudicially. As long as such agreements meet certain predetermined standards of due process, they are virtually uncontestable, with little recourse to the courts. In effect, the parties gain speedy justice (justice delayed is justice denied) and the services of a reputable arbitrator/mediator in exchange for giving up protracted litigation and interminable appeals, not a very tasty prospect anyhow. Some of these alternative dispute resolution (ADR) mechanisms even operate in the absence of lawyers, a consummation devoutly to be wished in many cases.

ADR, moreover, is not an untested, theoretical, abstract concept. Ever since the U.S. Supreme Court Steelworkers Trilogy in 1960, and its progeny, literally hundreds of thousands of purely legal disputes arising under the National Labor Relations Act have been decided by private arbitrators without direct court supervision. Currently, construction, stock brokerage, insurance, contract and other claims are resolved under the rubric of "commercial" arbitration. Domestic relations matters, so sensitive from a human standpoint, are also arbitrated as a matter of course. Thus, the privatization of justice works. It

economizes on judicial, attorney, and litigant time, and, because of the simplified rules of civil procedure and evidence obtaining in such ADR schemes, the parties can focus on the substantive issues indispensable to a fair result, rather than on the procedural and evidentiary sideshows which make contemporary litigation so frustrating for parties and so burdensome for the courts.

K. Government crimes

The crimes committed by the revolutionary government against the life, liberty, and bodily integrity of citizens are so well established as to require no further documentation. Such acts were crimes under the Constitution of 1940 and its laws (not even necessarily political crimes, but common crimes) and, therefore, the suspects should be investigated and prosecuted if cause found. Those found guilty should be sentenced, the only question left being the severity of the punishment. Note there is no Nuremberg or ex post facto issue. No punishment should exceed that permitted by prior law. The precise sentence that can be imposed on a particular criminal can only be determined by the court at the time of the trial and there is enough jurisprudence and legislation to make legally justifiable decisions.

Some will be tempted to go outside the law to punish crimes committed during the revolution. Such temptation should be resisted as one ought only remember that the revolutionary government established extra-constitutional military courts and passed ex post facto laws to try "war crimes" and "crimes against the people". Many of the accused were innocent, yet they suffered the death penalty or life imprisonment. These trials were evidence enough that the revolutionary government had a program totally unconnected to constitutional means and processes, and that it was prepared to deal harshly with those who would not follow the program. A post-revolutionary government showing similar disregard for the law should at least raise suspicion.

II. Conclusion

The reconstruction of Cuba will be impossible in the absence of a solid, legitimate, legal foundation. Much as a new government may try to rush events, cut corners, or jump steps, if the foundation is not sound, the superstructure will suffer. Moreover, the superstructure of the most libertarian economy is itself built upon beams and columns of contract and property rights, which can ultimately be vindicated only in court, even in the presence of good alternative dispute resolution mechanisms. Hence, the emphasis on procedure and availability of <u>independent</u> courts with a decided tilt towards speedy justice, no matter what the substantive rules of law. Simplicity in civil procedure, and substantive civil and administrative law is essential to prevent the arteries of industry and commerce from getting sclerotic from "hyperlexis". The siren song of the richness of complex law should be appealing only to those who earn their living by obfuscating rather than clarifying. Nature is difficult and complex enough. Law is man-made for the service of man not vice-versa. Ergo, law should be simple. Man is not made for the caring and feeding of lawyers.

Statistical Appendix
(Refer to Section 10 of text)
[From Cruz, *Can We Afford Our Legal System?* (in preparation)]

A simple linear regression of the following form was estimated: $Y = a + b (\ln X)$
where:

Y = percentage point changes in output per hour from 1961 to 1989.
X = U.S. Courts of Appeals cases terminated per capita per year from 1961 to 1989.

RSQRD = 0.2755, F test = 10.27 (significant at the 1% level). n = 29, k = 2

b = -1.38; a = 7.67