

THE REPORT OF THE COMMISSION FOR ASSISTANCE TO A FREE CUBA: BIG BOOK—GOOD ADVICE?

Juan Tomás Sánchez

This paper comments on selected aspects of the Report of the Commission for Assistance to a Free Cuba.¹ Our purpose is not to gratuitously criticize the Report—which is probably the best effort any government has made to help another country’s reconstruction since the Marshall Plan for the reconstruction of Europe—but rather to comment on the direction the Report recommends Cuba should take, evaluate the recommendations, and, where appropriate, make suggestions for a more pragmatic approach to reach the desired goal of returning Cuba to normalcy quickly.

Instead of commenting on all aspects of the lengthy Report, in this paper we focus on the following issues the Report identifies as among the most critical in the transition: (1) the long-term task of promoting a culture of lawfulness and rule of law and establishing a truly independent judiciary; (2) settling the issue of expropriated properties; and (3) creating a renewed trade relationship with the United States.

CULTURE OF LAWFULNESS, THE RULE OF LAW, AND A TRULY INDEPENDENT JUDICIARY

Consistently, the Report is on the side of making changes to the current Cuban regime. But the changes are not necessarily aimed at promoting something new, or returning to the status quo before the Revo-

lution. This is perhaps the principal element of surprise that we find in the Report.

The Report ignores a long history of constitutional and legal practice and teaching in Cuba. Thus, among the recommendations in the Report are (p. 178):

Revise labor laws and reform the structure and functioning of the Labor Ministry to help establish a free labor market...

Provide help in redrafting, reforming, or amending, as appropriate, Cuba’s electoral code and related legislation...

These Recommendations frame the intent of the Report: reform the current system as the chosen option, rather than replacing it with pre-regime legislation, or by legislation consistent with a specific set of guiding principles.

The first recommendation above, in the area of labor rights, would be powerfully challenged by a freely organized Cuban labor movement. Pre-regime labor laws constitute one of the most strongly and widely held convictions regarding fairness to workers. The prevailing pre-regime labor code and legislation should have been one of the most researched and better understood areas of the Commission’s work.

Most, if not all, of the freely elected labor leaders of Republican Cuba ended before a firing squad, in jail,

1. *Report to the President of the Commission for Assistance to a Free Cuba*, Collin L. Powell, Secretary of State, Chairman, Washington, May 2004.

and/or in exile during the early days of the revolution. Pre-regime labor rights will not to be forgotten or ignored by the next generation of labor leaders. Labor rights in pre-regime Cuba resembled more closely present-day European labor relations than those in the United States. It would be wise to assume that one possible scenario during the earliest stages in the transition would be the demand by labor for the restitution of their rights, especially those that were protected under the 1940 Constitution.² For organized labor it is better to start negotiations from the pre-regime workers' rights, than to start with a blank paper. For the membership, it would be better to hold the leadership to the rules and regulations prevailing before the regime, than to start without any guidelines.

The Commission should have also been aware that there is a belief among some exiled economists and intellectuals that restoring pre-regime Cuban labor protection laws will severely damage the possibilities of an economic recovery because those rights may be thought of as excessive. I do not agree. I believe that a clear understanding between management and labor is a great beginning.

Let me cite an example. The prevailing sugar industry workers, farmers, and mill owners' pre-regime legislation is a very clear case of workers' rights that I can explain in more detail in another presentation. But if anyone is interested in reading a 330-page (available in electronic format) volume compiling labor laws I would be glad to share it.³ The centerpiece is the Sugar Coordination Law, *Ley de Coordinación Azucarera de 1937*, which established the basic rights of workers, farmers, and mill owners, and the relationship among them in the agricultural and industrial sectors of the sugar industry. The book provides a wealth of information on procedures to be used by management with workers to protect their rights. It highlights the practical application of labor legisla-

tion is complex and therefore could not be developed overnight from scratch.

A special case from the first day will be the sugar industry, with more than 150,000 workers remaining (at the time of this writing), perhaps the largest single employer in Cuba and with a solid potential to grow after political change. Every labor leader in the sugar sector has signed symbolic agreements of understanding with management in exile demonstrating their intentions to work subject to the mentioned legislation.

The second recommendation, regarding help in re-drafting the "Electoral Code" of the regime, if indeed this was the intent of the recommendation, should be explained better to the readers of the Commission Report. Once political parties begin to form, as with organized labor or any other civil society institution, the immediate comparison will be with pre-regime codes and legislation, and less likely with the regime's so called Electoral Code, or any U.S. electoral code. One only needs to think if it is practical to start with a written document and change it as the provisions permit, or start from scratch.

In the areas of Rule of Law and a Constitutional Reform, beginning in page 189, the Report offers the following:

Cubans will be able to access the intellectual resources to draft and approve a new constitution, reconstitute criminal and civil procedures and codes, modernize the legal profession, develop new law school curricula and standards as well as bar associations, ... and operate under the rule of law. ...

If asked, the U.S. Government would be prepared to offer technical assistance either to amend the current communist constitution through interim legislation and executive orders or to suspend it entirely.

Accessing intellectual resources should be a two-way deed by the Commission. Perhaps the Commission

2. Paid holidays, overtime pay, job security, minimum wages, equal opportunity for women, paid vacation, bonuses, appeal processes, health insurance, retirement, 48 hours paid for 44 hours worked, and right to organize, to cite a few.

3. *Recopilación de la Legislación Vigente de Mayor Uso en el Sector Agrícola de la Industria Azucarera*, por el Dr. Eduardo Varona, abogado, y Rafael D. González Labrada, contador. Imprenta Úcar, García, S.A., La Habana, 1958.

would have been better prepared to write the Report if it had engaged some Cuban jurists—with experience about Cuban law and practice before or during the present regime—as sources for information and ideas regarding rule of law and Constitutional processes in Cuba.

The foundation of the next Cuban government will be based on the constitutional choices it makes. A good task for the Commission might be to consider opening a Web or chat site that would provide an electronic journal for jurists to write their ideas and discuss them. Those proceedings would be available on the Web to Cuban attorneys in Cuba who could access them and possibly provide comments/criticisms at their own risk. The facts show that the Web is more easily available in Cuba than any other means of communication. In talking recently to attorneys presently practicing in Cuba's *Bufetes Jurídicos*, one has to keep in mind that no one in Cuba will advocate, for fear of jail or death, changes to the present Communist Constitution.

The summary of the Recommendations on the subject of Rule of Law and Constitutional Reform states:

Ultimately, the full consolidation of democracy will require a wholly new constitution. Thus, an early priority for a transition government—no doubt will be to begin deliberating specific ways to amend it. A constitutional convention of popularly elected delegates specifically empowered to debate and draft a new charter will be one option (p. 191).

There are practical as well as legal and moral arguments against starting the time-consuming process of a constitutional convention. Practically, it may take two years to arrive at a constitutional convention, and then a year for the convention to deliberate.

Why not open for discussion a shorter route, having an independent judicial system established on a given constitutional framework? This first action would limit the transition government's executive power authority to make and change laws. The 1940 Constitution may provide an approach to make such a selection, indicating that the Supreme Court would be selected by the provisional president from qualified candidates submitted by the University of Havana

School of Law and the free-Colegio Nacional de Abogados de Cuba, the Cuban Bar Association.

The talent and conditions prevailing in 1939, compared with today's, may leave many to think, like I do, that we are better-off adopting a constitutional regime that was the sovereign decision of the Cuban nation, than to take any chances on a nation that has been without civil society and freedom for almost 50 years. It is not worth taking the chance to embark on a constitutional assembly path. The Commission should engage in research on this challenging topic. The situation can be compared to what we could imagine if the South had won the American Civil War, destroyed the Nation, and upon restoring a new transition government, President Lincoln had proposed that a new Constitutional Congress be formed, rather than continue with the written legacy of the original framers of the American Constitution.

On the very critical subject of judicial independence, the Report states that among democratic countries, there are different views on judicial independence between common and civil law (p. 193). Is the Commission Report suggesting Cuba may have the option of changing its legal tradition, from the Constitutions dating from the time the island was a Spanish colony, to the Constitution of 1902, to the Constitution of 1940, and in the future to a common law nation? What change is the Commission recommending? I understand that even in the Commonwealth of Puerto Rico, common law principles are applied only when federal statutes are in question.

In summary, the Report recommends drafting new civil and criminal codes, constitutional amendments, and judicial code reforms. These recommendations should be reconsidered.

The Report lacks references to past constitutional and legal teaching and developments in Cuba in the last 400 years. Developments from the Spanish land title laws, to the Spanish Commercial Code 1832, to the Constitution of 1902, and to the Constitution of the Republic of 1940, to the labor legislation in effect before the revolution. One example: the Judicial Branch Code, in effect long before the revolution. Thus, the advice in the Report may trigger much dis-

appointment and frustration, in Cuba and in Miami, when it is analyzed from a Cuban perspective of justified pride in the results and with pride of civil society and economic development achieved from 1902 to 1958.

As the Report is reviewed and revised, it would be greatly beneficial to engage Cuban jurists, whose devotion to the rule of law is unquestionable and who oppose with all possible vigor the crimes and injustices of the present Cuban regime. There are independent opposition organizations in Cuba today organized by Cuban lawyers. With a good measure of discretion, Cuban attorneys practicing civil and criminal law in the island that have a wealth of experience could be consulted. Present day University of Havana Law School professors can also be approached for their opinions. In Miami, as well as in Spain and Puerto Rico, to cite a few locations, there are groups of Cuban legal professionals with practical and teaching experience in Cuba. It would be a good idea to connect with those that ultimately could be called to be members of the Cuban Courts, judges and attorneys. One example worth citing is the web page of Alberto Luzárraga, www.futurodecuba.org. It would be useful to read the *Ciclo de Conferencias de la Constitución de 1940*, by the National Association of Cuban Lawyers, Inc., which includes 10 papers on the subject. In addition, Erik Luna, professor of Law, Utah School of Law, has taught criminal and constitutional law in recent years as visiting professor at the University of Havana School of Law.⁴

One assumption on the future of rule of law in Cuba is that those who become judges and practicing attorneys in a free nation with judicial independence will hear and present, accordingly, the arguments in favor of those victimized by the revolution and/or by the transition government; whether they are believed or not, whether they are proved or not, nevertheless they have the right to be judged. And those arguments that are based on the legal premises prevailing in Cuba in the past, comparable to “life, liberty and

the pursuit of happiness,” will be strongly defended and appealed to the last legal recourse available in Cuba or even outside Cuba if appropriate. Shortcuts regarding the rights of victims are not conducive to a healthy environment that sustains peace and progress. As long as Cubans feel that they have fewer legitimate rights than in the past, there will be social and economical insecurity.

The Report should consider the effects of the Recommendations in the area of Rule of Law, and evaluate other options, among them to assess what would happen under different alternatives for the installation of a new legal framework. There is a practical argument to be made in favor of full restoration of all rights and legislation in effect before 1959, free of present day populist and demagoguery affectations, and free of powerful selfish interests. This creates a base of rights and legal predictability in the shortest period of time. Another recommendation would be for the Commission to consider the report of the International Jurists Commission titled *El Imperio de la Ley en Cuba* (Geneva, 1962). This report sets the background of violations of basic legal principles that occurred since the first days of January 1959 and documents cases of retroactive changes to the penal code and the passage of laws that justified confiscation of properties for political reasons.

SETTLING THE ISSUE OF EXPROPRIATED PROPERTIES

The Report recognizes that settling the issue of expropriated properties will be critical to the transition. Potential investors and lenders will most likely be reluctant to get involved if the questions of ownership and property rights remain unsettled. To facilitate the reconstruction, the U.S. Government, on the one hand, encourages Cuba to settle outstanding U.S. claims issues as expeditiously as possible, using an open and transparent process. On the other hand, the Report conspicuously recommends privatization and distribution of assets of expropriated properties among workers (p. 163). Two topics were not prop-

4. www.law.utah.edu/faculty/bios/lunae.html. “Cuban Criminal Justice and the Ideal of Good Governance,” *Transnational Law & Contemporary Problems* [future of Cuba symposium], 2004.

erly addressed by the Report: (1) options for the disposition of the Certified Claims;⁵ and (2) the full set of issues related to privatization. Similarly, the Report should clearly define the terms expropriated, confiscated, and others, to explain to the readers what happened in Cuba with property rights.

On the first of the two issues, from a practical point of view, the expropriated American companies⁶ should be surveyed to determine their reaction vis-à-vis restitution. What would be the role of the Treasury Department's Internal Revenue Service (IRS) that gave millions in tax credits? How would the IRS be involved, if at all, in transactions such as leasing or selling assets? How could the claimed assets be or remain productive without reducing the rights of the legitimate owners and claimants?

I do not elaborate on compensation here because I find it very unlikely that given the nature of the U.S. Claimants (mostly Brand name corporations), the state of the Cuban economy at the time of transition, and the public's natural distrust of the role of the state bureaucracies in privatizations, compensation may not happen before free elections are held.

The largest foreign claimants—except for the oil, power, and telephone companies—would likely be American sugar companies that are not in the business of producing sugar, and certainly will not want to get involved in a new sugar venture without access to the American market. The rest of the claimants⁷ would most likely accept restitution because there would be a legitimate business interest in returning with their presence to Cuba, but their views should be investigated. The largest group consists of companies that have brand loyalty and market share to protect, such as Colgate-Palmolive, Coca Cola, Pepsi, B.F. Goodrich, and others. Proper planning is essential with regard to the claims of the Cuban Tele-

phone and Cuban Electric companies. A critical element in analyzing the behavior of claimants would be how soon would U.S. Government sanctions be lifted.

The American sugar holdings are the least predictable claimants. The time is now to contact their representatives, assess their options, make them public, share them with potential investors, set a conference to meet each other, and create a better environment for planning the transition. One interesting option for the American sugar mills and land Claimants would be to lease their properties. This would be an option that is neither new nor complicated in the sugar business: leases are usually agreed on a fixed percent of gross revenues or of the amount of sugar produced.

The role of the Commission would be greatly enhanced if it acquired a good understanding of the Cuban Commercial Code, the Bankruptcy Code, and others. It is probable that many situations could be handled in Bankruptcy Court, with trustees appointed from all sides for the protection of assets on behalf of owners, claimants, and debt holders.

The authors of the Report ignore Cuban legal tradition. I would advise research on the long history of Cuban constitutional property rights protection,⁸ the Civil Code in effect for over a century, and the entire legal framework that prevailed in Cuba before 1959. Ignoring it, as the Report does, narrows the scope of listeners that could be engaged in exploring other practical approaches.

The Report underestimates the value of real property in Cuba during and after a regime change. The value of those assets, when legally protected and not under an empty populist promise of free property for all, would be a magnet for private banking to lend, getting the economy in motion without delays.

5. Certified by the United States Foreign Claims Settlement Commission as of June 1972.

6. See the list at <http://www.cubatrade.org>

7. In decreasing order: Boise Cascade, International Harvester, Borden, Navistar, Uniroyal, Amstar, Sterling Drugs, Texaco, Ford, Coca Cola, Moa Mining, Colgate-Palmolive, American Brands, and so on.

8. Antonio Alonso Avila, *La Propiedad Privada en Función Social. El Latifundio*, Ciclo de Conferencias sobre la Constitución de 1940. National Association of Cuban Lawyers, Inc./Colegio Nacional de Abogados de Cuba, Inc. 1990.

Private banking is literally unmentioned in the Report. Not even one sentence is dedicated to private banking. There are private banks in Cuba today, of course owned by foreigners. More banks could come immediately to the economy's "rescue." Former Cuban banks will compete for a place in the market. The presence and role of private banks in the Cuban transition is a practical subject well worth consideration by the Commission.

Banks will lend if there is collateral. It is not impossible to estimate the value of real property in Cuba today and in the future. We could find out the value of urban real estate in similar places like the Dominican Republic. For agricultural land, especially for sugarcane lands (maybe 50 percent of the best agricultural land or about 3 million acres), Brazil might give us an indication of what they are worth. A rough estimate based on land and mills in Brazil capable of producing the raw sugar equivalent of 2 million tons or 330 million gallons of fuel ethanol, is almost \$3 billion.⁹

The Report, like the World Bank, recommends immediate actions to privatize. Cuba's future should not be compromised with privatizations. Privatization is not a panacea. There is very little to privatize. You cannot privatize that for which you do not have title. Because there is an apparently complex title and compensation situation, it is a lot more fruitful to let parties reach their own agreements. Conflicts may emerge between labor and foreign investors claiming damages during the current regime; there could be clear title real property owners on whose land structures have been built. Let negotiations take place, with the government as a facilitator. Let arbitration take its course. And then, let the judicial process play its role.

TRADE RELATIONSHIP WITH THE UNITED STATES

The Report recognizes the importance of U.S. firms in maritime transportation, tourism and exports of wheat, rice, fats, and oils to stimulate the economy. Similarly, it also notes the benefit to the United States of access to less expensive Cuban nickel and cobalt. The Report states that the U.S. Patent and Trademark Office will be prepared to provide assistance in the area of intellectual property rights protection. Two points are clear: (1) the American interest in selling in Cuba maritime transportation and agricultural products; and (2) the importance the drafters of the Report give to the protection of patents and trademarks.

In its future work, the Commission should take into consideration the following two issues:

1. U.S. trade with Cuba should be a two-way proposition.¹⁰ The Commission should consider that Cuba will only have for export raw sugar in the first years of reconstruction. If access for Cuban sugar to the American market is denied because of import quotas, the same treatment should/could be given by Cuba to American agricultural imports. Just raising import duties on U.S. goods would not be practical or effective, as the negative impact of such measures would be greater on Cuba than on the U.S.
2. The importance of intellectual property protection is obvious in today's global markets. Recent events have indicated that threatening to suspend patent and trademark protection, as in the case of Brazil and U.S. subsidized cotton exports, is a reality today when fair trade is denied.

Cuba's export sector enterprises, states the Report, will be a key determinant of the success or failure of the economic reconstruction and development programs of a transition government. Cuban-Americans

9. \$2 billion in sugar mills at \$15 thousand per daily grinding capacity in a 120 day harvest; \$750 million in land yielding 75 tons of sugarcane per hectare, at 12.5% net sugar yield, on 200,000 hectares.

10. Professor Antonio Jorge, one of Cuba's most prominent economists, in exile, proposed in a radio program in Miami on July 29, 2005, that the U.S. should give Cuba trade benefits without requiring reciprocity from Cuba. This represents the expectations of a well meaning, knowledgeable Cuban economist and academic.

are looked upon to provide financing for Cuban exports. This sort of financing is almost always provided by banks and institutions, not by individuals. Even in the unlikely case of Cuban American venture capitalists operating in Cuba one day, the bulk of the assets for reconstruction are in the value of real properties and people.

CONCLUSION

Employment is the single largest challenge for the Cuban transition. The transition will find 4 million employable persons. For the average family, employment is a greater need than any other. The more successful the transition is in generating jobs and keeping unemployment low, the more stable the transition will be. There is no greater incentive than the satisfaction and the security that work provides. There is no greater motivator than incentives. But the creation of employment is not an easy task. We see daily how important this measurement in politics. We recall election results that differed from expectations as a result of changes in unemployment rates.

Two of Cuba's most promising sources of employment and small and medium size enterprise creation played this role on the island 50 years ago: construction and agriculture. The creation of services sector jobs is around the corner. But construction and agricultural production will be at the forefront in generating jobs. For construction and agriculture to take-

off, there has to be a "culture of lawfulness." The culture of lawfulness is not created by demagoguery; it is created by taking risks in investment and giving them time to result in something that we want.

To conclude, the Commission for Assistance to a Free Cuba has produced a very lengthy report on Cuba's transition that is a helpful starting point. We believe that in its future work, the Commission should give larger consideration to consultations with knowledgeable Cuban professionals expand its work to areas such as the role of private banking and sugar/ethanol market prospects. Perhaps one of the soundest recommendations of the Report (p. 203) is:

Consider establishing a Standing Committee for Economic Reconstruction (SCER) to review specifically and regularly reconstruction plans and to ensure that appropriate U.S. Government agencies are prepared to implement programs immediately.

The Commission may think about conducting "listening forums" where the public periodically may be able to express views, along the lines of the forums held by the present U.S. Secretary of Agriculture on the subject of the 2007 Farm Bill. Finally, as we approach the subject of the Cuban transition, we should all endeavor to be pragmatic. Let us try to reach for practical objectives, rather than reaching for a philosophical and a political Nirvana. We will not succeed in reaching agreement on what Heaven should be like.