

## THE LEGAL RELATIONS BETWEEN THE U.S. AND CUBA

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My first trip back to Cuba was to the Bay of Pigs in April of 1961. My second trip was in October of 1995. When Cuba did not have an Eastern European-type of transition after the Soviet Union collapsed I went back to try to understand why Cuba had survived. I was able to reach a number of conclusions that are explained in some detail in my book *What I Learned About Cuba by Going to Cuba* published in June 2013. I did not return to Cuba until after the visit by Pope John Paul II in January of 1998. Although I greatly admired the Pope and had actually met him when he visited Miami, my main interest is the law and not religion. However, his “Cuba should open to the world, and the world should open to Cuba” statement convinced me that I should go back for another visit.

I learned about a conference on tourism law and development to be held in Varadero in the summer of 1998. At the time I was interested in the sales of condominiums in Havana. The Varadero conference had several presentations on condominiums and time-shares. I applied for a license from the U.S. Department of the Treasury (OFAC) which was quickly granted. At the same time I was able to obtain an entry permit for my trip from the Cuban authorities.

When I registered at the conference I realized that I was the only American or Cuban-American participating. At the end of the first day no one had spoken to me and I felt pretty isolated. The second day started by one of the organizers introducing professor Juan Vega Vega. After the introduction it was clear

that Vega was the most important lawyer in Cuba at that time. At mid-morning there was a coffee break and I saw Vega coming directly towards me. I was sure that Vega had been given at least a note about my participation in the conference. Based on the first day I was expecting that Vega was going to expel me from the event. Instead, when he was directly in front of me, he extended his hand and said that he wanted to give the son of Juan Clemente Zamora a warm welcome on behalf of himself and all Cuban lawyers. Professor Vega told me that he had been a student of my father in the early 1940s and that he was a great professor and jurist. Indeed my father had taught Constitutional Law and Political Theory at the University of Havana from 1917 to 1946. He had degrees from Harvard University and the University of Havana. Vega talked to me for about five minutes, at one point putting an arm around me. The next day the Board of Directors of the Cuban Bar Association (Unión Nacional de Juristas de Cuba) invited me to lunch. I was now acceptable and even popular with Cuban lawyers.

After my successful 1998 trip and the publication of an article about the sale of condominiums in Havana I decided to go back for more legal research. In August of 1999 I applied for a license to conduct professional research. I was pleasantly surprised when I received an email from OFAC telling me that the regulations had been amended and now professional research was under a general license authorization. Under a general license authorization there is no

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1. This paper is based on Chapters 4 and 5 of my book *What I Learned About Cuba by Going to Cuba* (Info. CubaNews/Amazon 2013).

need to apply for a license just to meet the conditions of the category. The conditions for professional research are: (1) a full time professional; (2) with a non-commercial research project; and (3) a reasonable expectation of publication. I clearly met all three conditions.

Before the end of 1999 I went back to Cuba for more research on foreign investment. In 2000 I participated in a U.S./Cuba Business Conference held in Cancún and in Havana. At the end of 2000 the *Probate and Property Magazine* of the American Bar Association published my paper “Foreign Investment in Cuba: A U.S. Perspective.”

As 2001 started, my work on Cuba legal issues was beginning to be noticed. While there were some positive comments, many of my colleagues in South Florida were critical. The criticism was mostly ideological in nature and coming from Cuban-American lawyers promoting an Eastern European-type transition in Cuba. This position is still held by some even though more than 20 years have passed since the collapse of the Soviet Bloc and what happened in Eastern Europe has very little in common with the Cuban experience. Now we have some Cuban-Americans hoping for an Egypt-type rebellion in Cuba. I find that ridiculous: the conditions in Cuba are not at all similar to the conditions in Egypt, Libya, Syria or any of the other Middle-Eastern countries in turmoil. First, Cuba is a very homogeneous country; there are no tribes, different languages or customs. Second, in the Arab Middle East the population under 35 years of age is more than 60% of the total; in Cuba the situation is the reverse because of a very low birth rate and steady migrations. Third, Cuba has a much higher level of education than the typical Middle Eastern country. Finally, Cuba’s government resulted from a popular revolution that drastically changed the country.

There is another type of criticism that has persisted to this day from some members of the legal community of South Florida. This is the argument that there is no law in Cuba; therefore, there is nothing to study or write about. A prominent Cuban-American attorney was quoted in a legal newspaper that “there is no value at all; they have a totally different system than

ours in the sense that it is a communist system.” Another comment in the same story was “the legal problem in Cuba is that there is no legal system.” As a result of this type of thinking every so often some legal organization in the U.S. comes up with a plan to establish the “rule of law” in Cuba. In 2010, the Cuban-American Bar Association (CABA) with two other organizations drafted a proposed transitional law for Cuba to promote a transition to democracy in the Island.

I was one of the founders of CABA and I know many of its members. Unfortunately, most members of CABA know very little about Cuba. Some have not been in Cuba in more than 50 years and others have never visited the Island. The concept that an organization in Miami, Madrid, or any other non-Cuban venue is going to tell the Cubans how to organize and operate their legal system is totally futile.

A legal system requires four essential elements: a constitution, a general theory of the law, an established structure to resolve disputes and a formal procedure to become a legal professional. Cuba’s current constitution is the Constitution of 1976. This Constitution is the longest running constitution of Cuba since the Island became independent in 1902. Cuba drafted its first Constitution after the end of the Spanish Colonial Rule in 1901. The Constitution of 1902 was in place for about 32 years with a few interruptions. In 1940 a new constitution was adopted that lasted only 12 years until March 10, 1952 when Fulgencio Batista assumed power in a military coup. The Constitution of 1976 has had 37 years of uninterrupted operation as Cuba’s fundamental legal document.

Cuba is a civil law country; therefore, Cuba’s legal system is based on the principles of the civil law. The civil law originated in the system of jurisprudence developed and administered by the Roman Empire. The civil law was further developed in Europe particularly by Germany and France. Spain and all its former colonies also followed the civil law. Cuba follows the civil law with some small influences from the Soviet Union and the United States.

Cuba has a well-organized court system. It includes different levels of responsibility such as municipal

and provincial, and different areas of the law such as family, criminal and commercial. The appeals process is well established with a functioning Supreme Court at the top. Basic mediation and arbitration tribunals are also part of the system. Finally, Cuba today has twice the number of law schools that existed before 1959. The University of Havana, School of Law graduates about 250 lawyers per year. A substantial number of Cuban law graduates go on to obtain post-graduate degrees from Universities in Spain, Mexico, Canada and other countries. The Cuban Bar Association, the Unión Nacional de Juristas de Cuba (UNJC), has more than 20,000 members although it is a voluntary organization.

There is no question that Cuba has a functioning legal system. There are good reasons to study Cuban laws and practices like we study China, Vietnam and many other countries with legal systems substantially different from ours. Notwithstanding the U.S. embargo on Cuba there are legal activities that are authorized under present U.S. laws. One example is the registration in Cuba of trademarks and patents owned by American entities. Two other activities are the sale of agricultural products to the Island and telecommunications between the two countries.

There are also many issues under the category of Family Law. With more than 1 million Cubans living in the United States, there is a great need for birth certificates, divorce decrees, marriage certificates, death certificates, etc., for all kinds of legal situations in the United States. There is also the need, particularly in litigation situations in the United States, to obtain legal opinions from Cuban lawyers and expert testimony from Cuban experts.

Another very important area is Inheritance and Probate. There are literally thousands of Cubans with relatives in the Island that have died in the United States, leaving their relatives property and money. These cases have to be probated and have to be handled by U.S and Cuban lawyers. In addition, when thousands of people from the United States visit Cuba—in 2012 the number was 400,000—there are going to be car accidents, fights, criminal activities, people arrested, etc., where legal services will be needed.

Finally, most readers will remember the famous case of Elián González. He was a Cuban boy, seven years old, that in late 1999 was found in the Atlantic Ocean close to Florida's east coast. He was part of a group of Cuban migrants trying to reach the United States. His mother and most of the others in the group drowned in the attempt. His father had remained in Cuba and was unaware of Elián's mother, his former wife's, attempt to flee to the United States with his son. After a long inter-family fight involving Florida and Federal authorities, Elián was returned to his father and went back to Cuba. What I am sure most readers don't realize is that there have been at least three other parents living in the United States that have taken children to Cuba fleeing their spouses and U.S. authorities. These three situations were resolved fairly quickly through negotiations involving Cuban lawyers and American lawyers going to Cuba representing parents residing in the United States.

One day I was driving with the radio tuned to the most popular Cuban-American station in Miami, when there was a call from a lady in near panic. The caller was screaming that her cousin was going to be executed or incarcerated for life in Cuba. She said that her cousin was visiting relatives in Havana and rented a car. Two nights earlier, he had ran over two persons in a motorcycle, killing them both. She was begging for help from the radio station program moderator. The moderator told her that she had two suggestions: to call U.S. Representative Lincoln Díaz-Balart or the organization Judicial Watch. I laughed at the suggestion because I knew that these two choices were totally useless since neither one had legal contacts in Cuba. But at the same time I felt sorry for the caller. When I got back to my office I called the managing partner of the international branch of the largest law firm in Cuba who is a friend. To my surprise she was well aware of the case and in fact was representing the Cuban-American driver. They had already arranged bail for the driver and he was flying back to Miami the next day. She also told me that no one had been killed, that the most serious injury was a broken leg. She was expecting that the driver was not going to be charged with a violation since the motorcycle had no lights and its

driver did not have a valid driver's license. I was very grateful for the information and happy to see that if you know the right person, even with strained relations between Cuba and the U.S., you can get good and fast results.

This incident and a number of conversations with South Florida attorneys that actually did work in Cuba led me to propose a legal organization to establish a bridge between the two countries. As a result, two colleagues, José Pallí and Jesús Sanchelima, and I incorporated the US/Cuba Legal Forum, Inc. (USCLF), as a Florida Not For Profit Corporation on March 19, 2001. The purposes of the USCLF are as follows: "To contribute to the development of normal legal relations between the Republic of Cuba and the United States of America.... and to study the legal system of the Republic of Cuba." The list of members grew quickly to almost 100 with most members from Florida. We also had members in New York, California, Texas, Massachusetts and other states. One of the first things that we did was to elect a Board of Directors and the officers of the organization. I was elected President, José Pallí, Treasurer, and Jesús Sanchelima, Secretary.

One of our first activities was a seminar hosted by the Cuban Research Institute of Florida International University with the participation of four prominent Cuban attorneys. The seminar took place on December 18, 2001 and it was a success. As a result, we started working on the idea of a conference in Havana in 2002. The Cuban attorneys who came to Miami, Rodolfo Dávalos, Carlos Grillo, Raúl Mantilla and Juan Mendoza, agreed that a legal conference in Havana with participation of U.S. and Cuban lawyers was a good idea and promised to help in making it a reality.

In early 2002 we filed an application with OFAC for a license authorizing U.S. lawyers, law students and other legal professionals to participate in a conference in Havana under the auspices of the USCLF. We also asked the School of Law of the University of Florida to be a sponsor of the event. That took care of the U.S. side of the equation; now we had to deal with the Cuban side. In April of 2002 a few members of the USCLF, including myself, Alfredo Durán, Sergio

Méndez, who was a past-president of CABA, and María López, a Massachusetts Judge, traveled to Cuba to participate in a workshop organized by the UNJC. We used that opportunity to lobby the Cuban authorities for the approval of the proposed conference in Havana. The idea was well received and the Law School of the University of Havana agreed to co-sponsor the event with the University of Florida. After some effort we received the license from OFAC and the approval of the Cuban authorities. The conference took place in August, 2002. The USCLF and the UNJC acted as co-sponsors and we even got Continuing Legal Education (CLE) credits from the State of Florida and a few other states such as New York and California. The conference was a huge success with the participation of almost 90 U.S. lawyers and more than 100 Cuban lawyers.

The conference established a number of rules that were followed in the organization of the event and during the conference itself. First, we agreed that there would be panels to cover the different topics included in the conference. Each panel had two Cubans and two Americans as presenters. The moderator role would be alternated between Cubans and Americans. Second, the topics to be discussed in the conference would be selected by mutual agreement. We also agreed that everything could be discussed including criticism of the legal system and practices of Cuba or the United States. The discussions had to be respectful and based on facts and legal principles. Last, we agreed that each side had to have some leeway for political positions and considerations. For instance, Pallí, Sanchelima and I met for a couple of hours at the hotel lobby where the conference was taking place with dissidents Marta Beatriz Roque and Félix Bonne Carcassés. We also attended a reception at the home of Phil Nigro, one of the principal officers of the U.S. Interest Section in Havana. Ambassador Vicky Huddleston, the Chief of the U.S. Interest Section, was present. So were a few dissident lawyers like René Gómez Manzano. The Cubans in turn, had an event to present Cuba's position in relation to the recent trial of five Cuban alleged spies in Miami. The sentences issued by the Miami Court were under appeal. The Cubans also decided not to allow any participation of officers of the U.S. Interest Section

in the conference even though an officer of MIN-REX was actually a speaker in one of the conference panels. This was later changed by the Cubans under pressure by the USCLF. The new rule was that in future conferences, lawyers in the U.S. Interest Section in Havana could attend.

The 2002 legal conference in Havana created respect, understanding and even cooperation between U.S. and Cuban lawyers. It also created a precedent for future conferences, seminars and workshops. The U.S. legal establishment took notice of the event and what was accomplished. Several representatives of the American Bar Association attended the conference. Even members of the U.S. Congress, especially lawyers such as Representatives Bill Delahunt of Boston and Jim Davis of Tampa, wanted to be involved if another conference that was planned for 2003. Early in 2003 I received a call from J. Clifford Wallace, Senior Judge of the United States Court of Appeals for the Ninth Circuit, based in San Diego, California. Judge Wallace told me an interesting story about having met a Judge of the Cuban Supreme Court in a legal conference in South Africa. The Judge in question was actually somebody I knew from my trips to Cuba, Narciso Cobo. They had several conversations and came up with the idea of having a panel of judges at the next USCLF/UNJC conference in Havana. Judge Wallace got my name and telephone number from Representatives Bill Delahunt and Jeff Flake, who at that time were co-chairmen of the Cuba Working Group of the U.S. House of Representatives. A few days after the call from Judge Wallace we had a meeting of the Board of Directors of the USCLF and we agreed to apply for a license for a 2003 legal conference in Havana and include a panel of Cuban and U.S. judges as part of the program.

We filed our license application on February 6, 2003. At the same time, we started planning the panel of judges. We ended up with two panels of four judges each, two from Cuba and two from the United States. These two panels would take a whole afternoon of the conference. The four U.S. judges were from the Ninth Circuit, among them a judge from the San Francisco area who was born in Spain, lived

in Cuba for a few years and was fluent in Spanish. The Cuban side, also with four judges, was coordinated by Judge Cobo, who was the Chief Judge of the Commercial Chamber of the Cuban Supreme Court. Both groups decided to abide by the rules established for the 2002 conference. Unfortunately, on May 14, 2003, the application for the license from OFAC was denied because approval “would not be consistent with current U.S. policy.”

George W. Bush was elected President of the United States of America in 2000 because of his victory in Florida. This victory was possible in part because of the support of pro-embargo Republican Cuban-Americans. The Administration of George W. Bush imposed controversial new restrictions on travel to Cuba. Representatives Delahunt and Flake were so upset about the denial of the license that they held a press conference in Washington to criticize the decision and included their comments in the Congressional Record. Judge Wallace was quoted in a Miami publication as follows: “I thought it would be a very important conference, and beneficial for us to learn about each other’s judicial system.”

The George W. Bush Administration not only restricted travel but also remittances and created all kinds of initiatives and plans to do away with the Cuban government and have an Eastern European-type transition in Cuba. It seemed like a rerun of an old program. Like before, the new efforts had little or no effect on Cuba. However, the Bush Administration did not change the travel category of professional research. Therefore, I continued to travel to Cuba to conduct professional research and the results of my work continued to be published.

With the election of Barack Obama in 2008, U.S. policy towards Cuba changed considerably. During the campaign Obama promised to eliminate the restrictions on Cuban-American family travel imposed by the Bush Administration. A few months after his inauguration President Obama kept his promise and made Cuban-American family travel a general license category. The definition of who is a relative was expanded and most restrictions on remittances to family members were eliminated. Another important early change made by the Obama Administration was

that the confrontational mood that existed during most of the Bush Administration was considerably toned down.

On January, 2011, the White House announced more changes to U.S. policy towards Cuba. The new directive was aimed at restoring the concepts of “purposeful travel” and “people to people” that prevailed in the last years of the Clinton Administration. Religious and academic travxels were given general license status under most circumstances. Also, additional U.S. airports were approved for flights to Cuba. Among these airports are Fort Lauderdale and Tampa.

Basically, in the same time period, 2008–2011, the government of Cuba under the leadership of Raúl Castro announced a profound restructuring of Cuba’s economy. The proposed changes to Cuba’s economic system are very comprehensive. They include a drastic reduction of the role of government including the reduction of the government payroll by as many as one million employees over a period of several years. They also include expanding the private sector of the economy by allowing more private employment and more private businesses to operate in the Island. Foreign investment will be encouraged and facilitated. Two large real estate residential developments around golf courses and marinas have been approved. Sales of residential units will be on the basis of leases of up to 99 years. The changes also include the sale and purchase of houses and automobiles by Cuban citizens.

These changes go far beyond what was done in the early 1990’s. In a paper that I wrote for *Latin Lawyer Magazine* in 2006, titled “How Cuba’s Legal System

will Adapt to a Business Opening,” I concluded that “Cuba’s legal system could adapt well to a business opening.” The business opening is now happening and the basic laws that will facilitate the economic restructuring are in place or are being prepared. In another paper I wrote in 2009, titled “Real Estate Development in Cuba: Present and Future,” published by Nova Southeastern University, I stated the following: “The Cuban government could improve the economic situation of most of the population by liberalizing the rules and regulations applicable to residential properties.” This is now actually happening, and in a country where about 90% of the population has ownership rights over their homes, this new policy will have significant impact. In that paper, I also discussed the possibility of large residential developments with golf and marinas.

With these developments in the United States and Cuba it is important for Americans to understand Cuba’s legal system and this is especially true of Cuban-American lawyers. A number of basic things must be clearly understood. First, there is a working legal system in Cuba. Second, that legal system is based on the civil law, which has considerable differences with the common law that we follow in the United States. Third, Cuba’s legal system has been affected by U.S. policy toward Cuba, particularly the embargo and legislation such as Helms-Burton. Fourth, whatever changes are made to Cuba’s legal system will be made by Cuban lawyers. Fifth, the best way for U.S. lawyers to contribute to Cuba’s legal system will come about as a result of the exchange of ideas in legal meetings such as the one held in 2002.