

Comment

CUBA'S TRANSITION TO A FREE-MARKET DEMOCRACY: A SURVEY OF REQUIRED CHANGES TO LAWS AND LEGAL INSTITUTIONS[†]

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I. INTRODUCTION

This Comment seeks to provide an overview of the primary changes to Cuba's legal system that will be necessary during the country's transition to a free-market, democratic society. While considerable scholarly attention has been given to the changes that need to be made to Cuba's laws if it is to move to a free-market society,¹ the necessary institutional changes have received little analysis. Institutional changes are extremely important, however, since laws only come to life if there are legal institutions in place to enforce and apply the laws, resolve legal disputes, and fill-in the

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1. See, e.g., Jorge A. Sanguinetti, *The Transition Towards a Market Economy in Cuba: Its Legal and Managerial Dimensions*, in *TRANSITION IN CUBA—NEW CHALLENGES FOR U.S. POLICY* 463, 484-88 (Lisandro Perez ed., 1993) [hereinafter *TRANSITION IN CUBA*]; Nestor Cruz, *Legal Issues Raised by the Transition: Cuba from Marxism to Democracy, 199? - 200?, in CUBA IN TRANSITION—PAPERS AND PROCEEDINGS OF THE SECOND ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY* 51, 54-58 (1992) [hereinafter *ASCE-2*].

details that the laws necessarily must leave open for case-by-case determination.²

The goal of this Comment is not to provide a detailed prescription for making changes to Cuba's laws and legal institutions³ when a transition to democracy and a free-market system takes place.⁴ To develop such a prescription would require resolution of a fundamental philosophical issue which is outside the scope of this Comment: whether Cuba should return to the type of civil law system that existed there before the 1959 Revolution, or adopt some variant of a common law system such as the one used in the United States and

2. CHERYL W. GRAY ET AL., *EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE* 15 (World Bank Discussion Paper No. 209, 1993). The authors of this study of legal changes in the former socialist nations of Central and Eastern Europe note that "[a]mong the biggest challenges now facing Central and Eastern Europe is that of building up the capacity of their judicial institutions to set legal standards, enforce the myriad of new laws now being adopted, and resolve economic disputes." *Id.* The same challenge is expected to be faced during Cuba's transition.

3. It is important to define at the outset what we mean by "laws" and "legal institutions." These terms are used to connote a variety of meanings, as they are used in different contexts. This Comment, however, does not seek to address everything that can be regarded as "legal" or "law-related" in a transition in Cuba; such an inquiry would be far too broad and abstract to have practical value. We will limit our use of the terms "laws" and "legal institutions" to their standard meaning in democratic societies.

"Laws" will therefore be used here to mean "rules of action or conduct prescribed by controlling authority, and having binding legal force." BLACK'S LAW DICTIONARY 795 (5th ed. 1979); see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1279 (1986). In Cuba's transition, the "laws" satisfying the above definition include: (1) a constitution (enacted by a constitutional assembly); (2) statutes, ordinances, and rules (issued by legislatures); (3) regulations (issued by administrative bodies); (4) orders, decrees, and edicts (issued by an executive power); and (5) referendum initiatives (initiated or approved by the People). The set of activities that involve, concern, or relate to the laws of a country is known as the country's "legal system."

The question of what is a "legal institution" is somewhat more complicated. Traditions, customs, taboos, and popular practices are often referred to as "institutions." However, in this Comment we will apply the term institutions to entities, individuals, or groups of persons who perform tasks relating to the laws or the legal system.

Legal institutions can be either public (governmental) or private (non-governmental). The public institutions of the legal system include legislative, administrative, and judicial institutions. The private bar, professional associations, legal service providers, and educational entities are the principal private legal institutions.

4. It is our belief that those outside Cuba with an interest in the success of Cuba's market transition can help define the legal changes that will be needed during the transition. Outside commentators can, among other things: (1) study the issues raised by the transition and recommend approaches to deal with them through legislation; (2) consult with political scientists and economists to determine the political and economic needs for legislation, and what features should be contained in such legislation; and (3) investigate what legal changes have been instituted in Eastern European and Latin American countries undergoing similar transitions and what degree of success those changes have enjoyed.

some other Western countries. Cuba currently has neither; the legal system in Cuba, as in all socialist nations, is based on the concept of *socialist legality*, under which the legal system is a political instrument of the government and is used, not to provide predictable rules of behavior, but to serve as a dynamic agent to further progress toward the building of socialism.⁵ Consequently, Cuba's legal system is an instrument of the Revolution and is obliged at any time to apply the law in a manner consistent with the then-current interpretation of revolutionary goals and principles, to which other interests are subordinated.⁶ This philosophy permeates the content and interpretation of Cuba's revolutionary laws, as well as the day-to-day practices of those who are part of the legal system, and will likely provide the point of departure from which changes to the system must begin.

Reinstatement of the civil system would have the advantage of building on the legal doctrines that developed in Cuba prior to the 1959 Revolution. It would require, however, the drafting of detailed codes, which would explicitly define legal norms, but leave relatively little room for judicial interpretation. A legal system based on a common law approach, on the other hand, would allow for judicial interpretation of the laws (and to some degree, risk judicial law-making), leading to a more activist role for judges and lawyers.⁷ Thus, whether a civil or a common law system is chosen during the transition will have a profound effect on how the entire legal system ultimately develops.⁸

5. DEBRA EVENSON, *REVOLUTION IN THE BALANCE—LAW AND SOCIETY IN CONTEMPORARY CUBA* 2 (1994).

6. *Id.* at 68. As an example of the concept of socialist legality as it applies to the judicial system, Evenson cites a statement from Jose Santiago Cuba Fernandez upon the opening of the 1959 term of Cuba's supreme court, to the effect that Cuba's revolutionary laws have to be applied and interpreted in accordance with revolutionary criteria and that "[s]ociety demands less blindness and more vision of the people, a vision which makes possible that the Revolutionary Law is applied not as a cold norm but as living law dictated by the Revolutionary Power to serve the people." *Id.* (quoting JOSE SANTIAGO CUBA FERNANDEZ, MEMORIA LEÍDA POR EL FISCAL DEL TRIBUNAL SUPREMO (N.D.)).

7. It has been observed that a civil law system elevates certainty in the law "to the level of dogma" and creates a static system that impedes social change. EVENSON, *supra* note 5, at 14 (quoting JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 48 (1985)). It could be argued that under the fluid conditions that will likely exist during Cuba's transition, a common law system would provide greater flexibility to accommodate changing circumstances within the context of an established set of laws and legal principles.

8. It is not within the scope of this Comment to address the circumstances under which Cuba's transition to a free-market democracy will take place. The authors assume that the transition will occur and that it will be orderly enough that laws can be effectively enforced and the necessary institutional changes can take place uninhibited. It is important to note, however,

Cuba's transition to a free-market democracy will necessarily bring about an upheaval in most areas of society, including the legal system.⁹ Many of the laws and legal institutions existing at the start of the transition will become obsolete or of questionable utility as the country moves toward a free-market, democratic system.

One of the laws that will need to be changed at the earliest practicable time is the constitution. Generally, the constitution is the law that defines the powers and duties of the different branches of government, establishes the scope and content of some of the legislation that needs to be enacted, and provides a frame of reference that lends legitimacy to the government's acts.

A permanent constitution will need to be enacted following a constitutional convention.¹⁰ Since this process could take up to two to three years, a constitution most likely will not exist during the early days of the transition. Due to the importance of the enactment of a new constitution, the transition of Cuba's legal system can be divided conceptually into two stages, the "pre-constitution period" and the "post-constitution period."

The pre-constitution period encompasses the time from the start of the transition to the time when the new constitution is enacted. If the market transition proceeds in an orderly fashion, this period should coincide roughly with the stabilization and transformation stages of the economic transition.¹¹ Some of the laws and institutions that must be created in the pre-constitution period will become permanent; others will be discarded as the temporary need for them

that some analysts believe that this eventuality is not likely to materialize. See, e.g., Jorge I. Domínguez, *The Transition to Somewhere: Cuba in the 1990s*, in *TRANSITION IN CUBA*, *supra* note 1, at 5, 35.

9. See Luis P. Salas, *The Maintenance of Internal Order in Cuba: The Administration of Justice During the Special Period*, in *TRANSITION IN CUBA*, *supra* note 1, at 237, 257 ("In all transitions from dictatorial rule to democratic government, the justice sector, especially the police and courts, have played predominant roles, especially in the early years."). On the other hand, during revolutions there is a rejection or abandonment of the existing legal system. Harold J. Berman & Van R. Whiting, Jr., *Impressions of Cuban Law*, 28 *AM. J. COMP. L.* 475, 485 (1980) ("A revolution is a violent rejection of the legal order of the past."). As noted earlier, the revolutionary government in Cuba dismantled the legal system that existed in the country prior to 1959.

10. The scholarly debate on whether post-communist Cuba should draft a new constitution, re-adopt the 1940 Constitution, or combine the 1940 and 1992 constitutions in some fashion is extensive and ongoing. See SALAS, *supra* note 9, at 261-62; Sanguinetti, *supra* note 1, at 481-82; Domínguez, *supra* note 8, at 24-25. The authors believe that enactment of a new constitution that reflects Cuba's contemporary society is essential and inescapable.

11. See discussion *infra* part II.C concerning the various stages in Cuba's anticipated market transition.

disappears. In general, therefore, the changes to the legal system that occur before authoritative legal principles are established in a constitution will likely be of a transitory nature and will be modified or superseded after the constitution is enacted. The post-constitution period refers to that stage of the market transition following the enactment of a new constitution, and is expected to extend through the economic recovery phase of the transition. Most of the changes to Cuba's laws and institutions during the post-constitution period should be of a long-term nature, just as in any constitutional democracy.

This Comment follows the broad division between the pre-constitution and post-constitution periods. Part II of this Comment provides a brief background to the current status of both the legal system and the economic transition in Cuba, and then undertakes a conceptual analysis of the anticipated stages in Cuba's transition to a market economy. Parts III and V examine the required pre-constitutional changes, with Part III focusing on legal institutions and Part V on laws. In parallel fashion, Parts IV and VI analyze the required changes to Cuba's legal institutions and laws during the post-constitution period. Finally, Part VII offers several conclusions and recommendations regarding Cuba's free-market transition.

II. BACKGROUND TO CUBA'S LEGAL SYSTEM AND ECONOMIC TRANSITION

A. Current Status of Cuba's Legal System

In the first half of Cuba's Revolution—during the period extending roughly from 1959 to the enactment of the 1976 Constitution—there was a deliberate effort by the Cuban government to dismantle the legal system, diminish the importance of the courts by replacing them with ad-hoc people's courts and revolutionary tribunals, and discourage the study and the practice of law as a "parasitic bourgeois profession that would be unnecessary in the 'new society'."¹² These policies resulted in "the loss of more than a generation of skilled jurists, including lawyers, judges and prosecutors."¹³ It has been only in the last five to ten years, and particularly since the collapse of socialism in Eastern Europe, that a significant

12. EVENSON, *supra* note 5, at 11-13, 41, 65.

13. *Id.* at 75.

effort has been undertaken to upgrade the qualifications and increase the numbers of those involved in the legal system.¹⁴

This Comment assumes that at the start of the transition there will be few legal institutions in Cuba capable of supporting the massive legal changes that will be necessary. This assumption is based on the precedent established by the transitions in other socialist countries and on the information provided by those who have visited Cuba and studied its current legal system.¹⁵

For instance, Luis Salas reports that as of 1991 there were only 700 professional judges in Cuba.¹⁶ Law practice in Cuba is constrained not only by the inadequate number and qualifications of the legal professionals, but also by the judiciary's lack of independence, the prohibition against the private practice of law, and the expectation that defense counsel in criminal cases will put the interests of the State before those of their clients.

The situation is not much better with respect to the laws. Some of Cuba's laws, such as the Commercial Code, are outdated but could continue to be used on a stopgap basis until modern legislation is enacted.¹⁷ For the most part, however, the laws in effect in Cuba at this time are both obsolete (in that they do not represent currently accepted legal and business practices throughout the world) and so infused with socialist dogma that they would need to be replaced with suitable legislation at the earliest possible time.¹⁸

14. *See id.*

15. It is reported that the judiciary of all the former socialist countries of Central and Eastern Europe lack adequate training or experience to handle the legal issues that arise in market economies. GRAY ET AL., *supra* note 2, at 15. Those who have assessed current conditions in Cuba provide a similar assessment of Cuba's legal profession. *See, e.g.*, EVENSON, *supra* note 5, at 59. Evenson reports, for example, that many of the older jurists in Cuba used to complain bitterly about the poor quality of Cuba's law school graduates, although they have high regard for recent graduates. *Id.* at 56.

16. Salas, *supra* note 9, at 252. By comparison, Czechoslovakia, a country comparable in size and population to Cuba, had 1600 judges at the start of its transition to democracy in 1989. GRAY ET AL., *supra* note 2, at 63 n.42.

17. Cuba is still using a Commercial Code that dates back to 1885, which was enacted during the Spanish colonial rule. Michael Bogdan, *Thirty Years of Cuban Revolutionary Law*, 15 REV. SOCIALIST L. 319, 320 (1989). Although minor amendments have occasionally been made to it, the Commercial Code is seen as "woefully out of date and must be revised substantially if it is to serve a modern society." EVENSON, *supra* note 5, at 205.

18. For example, article 16 of the 1992 Constitution defines the role the state in the country's economy to be as follows:

The State organizes, directs and controls the country's economic activity in accordance with a plan that guarantees the programmed development of the country, to the end of strengthening the socialist system, satisfying in an ever improving way the material

These shortcomings in the legal system may become serious obstacles to the progress of the transition. It is clearly not possible to run a country based on inadequate laws, nor is it practical to enact laws and regulations at a faster pace than can be assimilated and enforced by the legal system.¹⁹ Accordingly, Cuba's transition government should give high priority to upgrading the legal system so that it will be capable of keeping up with the pace of economic and political reforms.

B. Status of the Economic Transition in Cuba

Although the country's leaders are steadfast in their refusal to institute *political* changes, Cuba is already undergoing an economic transition of sorts.²⁰ Carmelo Mesa-Lago, a leading Cuban-American economist, calls the ongoing economic changes in Cuba "the socialist transition."²¹ This transition involves the institution of limited economic reforms dictated by the critical state of the Cuban economy.²² The reforms, however, are seen by many as "ill-advised,

and cultural needs of society and the citizens, promoting the development of the human character and its dignity, and the progress and safety of the country.

CONSTITUCION (1992) art. 16 (Cuba). Altogether, more than half of the articles in chapter I of the 1992 Constitution (on "Political, Social and Economic Foundations of the State") are devoted to defining a socialist foundation for the Cuban state.

19. See generally John Morison, *How to Change Things with Rules*, in LAW SOCIETY AND CHANGE 5 (Steven Livingstone & John Morison eds., 1990).

20. For example, in a June 19, 1994 interview with the Spanish daily *El Pais*, Carlos Lage, then Secretary of the Executive Committee of Cuba's Council of Ministers, emphasized that Cuba's problems are only economic and the solutions to them are to be made within the existing political system. *Lage Rejects Multiparty System, Embassy Occupations* (Radio Havana Cuba radio broadcast, June 19, 1994), available in F.B.I.S. (LAT-94-118), June 20, 1994, at 21. At about the same time, Fidel Castro met with other leaders of Latin America, Spain, and Portugal at the 1994 Ibero-American Summit; the other leaders reportedly pressed him to implement democratic reforms, to which he replied that he would not abandon Marxism. Mary Beth Sheridan & Andres Oppenheimer, *Latin Leaders Press Castro for Reforms*, MIAMI HERALD, June 16, 1994, at 24A.

21. Carmelo Mesa-Lago, *The Social Net in the Two Cuban Transitions*, in TRANSITION IN CUBA, *supra* note 1, at 601, 603-04.

22. For a summary of the economic measures taken by the Cuban government in 1993, see SHAW, PITTMAN, POTTS & TROWBRIDGE FREE-MARKET CUBA BUSINESS JOURNAL, Fall-Winter 1993. More recently, measures have been taken to increase the price of certain articles (e.g., cigarettes, fuel, and alcoholic beverages) and services (e.g., electricity, water, and some transportation services). Canute James, *Income Tax for Cubans Next Year*, FIN. TIMES, Aug. 9, 1994, at 6; *Reduction of Excess Currency Noted* (Radio Reloj radio broadcast, Cuba, Aug. 24, 1994), translated in *BBC Summary of World Broadcasts*, (Part 5: Africa and Latin America), Aug. 30, 1994. Recently, Cuba's National Assembly approved a proposal to start taxing the income of individuals and enterprises, with the exception of income from wages and farming activities. Taxes will also be imposed on real estate, the use of natural resources, and

insufficient and plagued with inconsistencies."²³ The transition's purpose is to buy time for the current government to enable it to remain in power with minimum departures from socialism.²⁴ The fact that some of the reforms have recently been curbed or countermanded highlights the leadership's lack of commitment to genuine reforms.²⁵

advertising. *Cuban Lawmakers Approve New Tax System*, AGENCE FRANCE PRESSE, Aug. 5, 1994, available in LEXIS, NEWS Library, NON-US File. Income taxes were previously levied only on joint ventures and on the self-employed; for example, a July 19, 1994 broadcast by Radio Progreso announced that the Ciego de Avila Province had collected 1.2 million pesos in taxes from self-employed workers. The province was said to be planning to increase the number of inspectors to collect taxes and enforce the self-employment law. *Roundup of Economic Developments* (Havana Radio Progreso Network radio broadcast, July 19, 1994), available in F.B.I.S. (LAT-94-140), July 21, 1994, at 7.

23. Rolando H. Castaneda & George P. Montalvan, *Transition in Cuba: Selected Issues*, in CUBA IN TRANSITION—PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 11, 13 (1993) [hereinafter ASCE-3].

24. Thus, the Cuban government has repeatedly vowed that Cuba is not going to abandon, or even substantially change, its socialist economic structure. Carlos Lage, Vice-President of the Council of State, recently reiterated this point in a January 27, 1995 address at the World Economic Forum in Davos, Switzerland. Lage affirmed, "We don't deceive anyone. We are not offering our foreign partners a transition to capitalism. Cuba is and will continue to be a socialist country." Carlos Lage, Speech at the World Economic Forum (1995), reprinted in GRAMMA INT'L (Havana), Feb. 8, 1995, at 3. Further, Jose Ramon Fernandez, Vice-President of Cuba's Council of Ministers, recently stated that "despite the difficult economic situation confronted by the island, the social system chosen by Cubans more than 34 years ago will remain unchanged . . ." *Council Vice President on Continuing Socialist Plan*, PRENSA LATINA (Havana), July 28, 1994, available in F.B.I.S. (LAT-94-147), Aug. 1, 1994, at 7.

25. For example, the legalization of the possession of U.S. dollars and other hard currencies announced in July 1993 was recently modified to require Cubans to exchange "foreign currency certificates" in lieu of dollars. These "convertible pesos" are used to pay Cuban citizens who work for foreign investors or who provide otherwise special services (e.g., tobacco production). *Reform Measures Help to Ease Economic Crisis*, LAGNIAPPE LETTER, (Cuba Report), January 10, 1995, available in LEXIS, NEWS Library, LAGLTR File. This move is widely seen as, in effect, overturning the legalization of the dollar. See Carlos Batista, *Cuba: A New Currency Planned for this Year*, INTER PRESS SERVICE, June 24, 1994, available in LEXIS, NEWS Library, WIRES File; Mimi Whitefield, *Cuba Outlines List of Possible Reforms*, MIAMI HERALD, May 2, 1994, at 10A. Also, in May 1994, the Council of State approved Legislative Decree 149, which authorizes the confiscation of assets of questionable origin. See *Castro Vows Corruption Crackdown Will Kick Off Reforms*, ASSOCIATED PRESS, May 3, 1994; Pablo Alfonso, *Cuba Aprueba Ley de Confiscaciones*, EL NUEVO HERALD (Cuba), May 6, 1994, at 1A. Enforcement of Legislative Decree 149 has been well publicized within Cuba; as of early August 1994, 377 proceedings under this law had been instituted and property valued at millions of pesos, plus large sums of cash in both pesos and dollars, had been seized. *Cuba Says 377 Charged With Economic Crimes*, ASSOCIATED PRESS, Aug. 3, 1994; see also *Legal Proceedings Commence in 327 'Moneybags' Cases* (Radio Reloj Network Radio Broadcast, Cuba, July 6, 1994), available in F.B.I.S. (LAT-94-130), July 7, 1994, at 8-9; Mimi Whitefield, *Hundreds of Cuban 'Money Hoarders' Hit in Crackdown*, MIAMI HERALD, July 8, 1994, at 13A. A likely consequence of this campaign will be to discourage economic activity by black marketeers, self-employed

Those who have studied the process in other countries predict that Cuba's socialist transition is doomed to fail.²⁶ As the Hungarian analyst Janos Kornai has pointed out, a socialist system is incapable of moving away from its rigid economic structure while retaining its identity.²⁷ Partial reforms in such a system only lead to unsolvable contradictions, such that no partial alteration of the system can produce a lasting breakthrough. As long as there is undivided power of a single party and only one official political and economic ideology, there can be no true reform and no sustainable economic recovery.²⁸

According to Kornai, the rise of the private sector is the most important internal development that reveals the contradictions in a socialist system and ultimately causes its involuntary transition to a market economy.²⁹ A rise in the private sector is occurring in Cuba, although private property rights still have not been recognized for Cuban nationals. The rise in private sector activities includes both a growing black market "second economy" and recently legalized private activities in a variety of service sectors.³⁰ In addition, the government has authorized and is actively seeking joint ventures with foreign investors, soliciting direct foreign investment, and forming quasi-independent government enterprises to engage in foreign trade.³¹ Also, foreign investment—until very recently restricted to tourism and areas in the export sector of the economy—is beginning to be authorized in other areas, most notably the sugar industry³² and telecommunications.³³ Thus, it appears that Cuba's socialist

artisans, service providers, and other small business operators.

26. See, e.g., Carmelo Mesa-Lago, *Will Cuba's Economic Reforms Work?*, MIAMI HERALD, Jan. 2, 1994, at M1.

27. JANOS KORNAI, *THE SOCIALIST SYSTEM: THE POLITICAL ECONOMY OF COMMUNISM* xxv (1991).

28. *Id.* at 377.

29. *Id.* at 433.

30. See Douglas Farah, *Farmers' Markets Help Ease Cuba's Pain*, WASH. POST, Jan. 23, 1995, at A1; see also Saul Landau, *Cuba on its own*, S.F. CHRON., Aug. 30, 1992, § Z1, at 8.

31. Other changes now being implemented or contemplated are described in Jose F. Alonso, *Further Potential Economic Reforms in Cuba*, SHAW, PITTMAN, POTTS & TOWBRIDGE FREE-MARKET CUBA BUS. J., Fall-Winter 1993, at 6-7; see also Mimi Whitefield, *Cuba Outlines List of Possible Reforms*, MIAMI HERALD, May 2, 1994, at 10A.

32. *Foreign Investment Helping, Castro Says*, L.A. TIMES, Feb. 9, 1995, at D4.

33. In June 1994, Cuba agreed with a Mexican investment company, Grupo Domos, to a joint venture under which the company would invest over \$700 million to overhaul Cuba's telephone system. 2 CUBA NEWS, July 1994, at 5. Likewise, the agricultural sector (formerly closed to investors) is beginning to open up to foreign capital. *Cuba: Foreign Investments Continue to Increase*, INTER PRESS SERVICE, June 28, 1994, available in LEXIS, NEWS Library, WIRES File.

transition is slowly, and quite unwillingly,³⁴ creating the conditions for real changes to occur.

This Comment assumes that at some time in the near future this socialist transition will give way to a true market transition that will be based on the application of a coherent set of market policies and will be accompanied by a shift toward democracy in the political organization of the country. The Comment further assumes that such changes will need to be carried out through the enactment of a significant amount of legislation.

C. Stages in Cuba's Anticipated Market Transition

Cuba's market transition can be visualized as consisting of three staggered, overlapping stages.³⁵ At first there will be efforts to stem the decline in economic activity and avoid further deterioration of production and standards of living, while at the same time consolidating political power, maintaining law and order, and preparing the government and the citizens for the actual transition.³⁶ The primary goal of the "stabilization phase" of the transition (lasting approximately the first year) is straightforward: to supply both a sufficient amount of food and adequate levels of health care and other basic services. During this early phase, the transition government must seek to achieve political stability and keep the economic conditions from worsening.³⁷

The second stage of the transition will be a political, economic, and legal overhaul of the socialist system, which will lay the foundation for Cuba's eventual transformation into a free-market society. Some of the major permanent legislation will be enacted during this stage. This second period or "transformation phase" will likely occur during the second year of the transition, and may continue from that point into the indefinite future.

The third stage of Cuba's market transition is one of consolidation of the new political and economic systems and reconstruction of the economy through the development and expansion of industries and markets. The "consolidation phase" will see the completion of the overhaul of Cuba's economic and political institutions and will be

34. See *supra* note 23 and accompanying text.

35. Sanguinety, *supra* note 1, at 472; see Rolando H. Castaneda, *Cuba: Central Elements of a Stabilization Program and the Initiation of Economy-Wide Structural Reforms*, in *TRANSITION IN CUBA*, *supra* note 1, at 419, 425-34.

36. Castaneda, *supra* note 35, at 428-29.

37. *Id.* at 425.

accompanied by the enactment of many new laws whose implementation may not have been practical or feasible during the earlier stages.

III. PRE-CONSTITUTION PERIOD LEGAL INSTITUTIONS

A. Legislative and Executive Institutions That Need to be Established During the Pre-Constitution Period

To facilitate a smooth transition from the beginning, there will need to be official rules to guide the activities of all sectors of society. The task of the pre-constitution period legislative institutions will be to generate the necessary rules to meet this need.

1. *Transitory Legislative and Executive Institutions.* Immediately upon taking control of Cuba, the revolutionary government began working to centralize the legislative power in the chief executive, rather than in the legislature. As one commentator observed:

[T]he Fundamental Law [of 1959] changed the government of Cuba into a constitutional dictatorship. It replaced the former Chamber of Representatives and Senate with the president's cabinet, the Council of Ministers. Under the Fundamental Law, the president's power was unrestricted. It allowed the president to appoint and dismiss members of the Council of Ministers at will. The Council of Ministers was empowered to pass ordinary legislation by a simple majority vote, and could amend the Fundamental Law by a two-thirds majority vote. Thus, the president could order the Council of Ministers to enact any legislation he desired, because he could dismiss ministers who would not obey and replace them with those who would.³⁸

Upon taking power, the revolutionary government ruled by executive decree until enactment of the 1976 Constitution, which re-established a legislative system. To supervise state administration, the government created municipal, provincial, and national assemblies.³⁹ Representatives for the municipal assembly were directly elected and these delegates then elected members of the provincial assembly who

38. William R. Baerg, Note, *Judicial Institutionalization of the Revolution: The Legal Systems of the People's Republic of China and the Republic of Cuba*, 15 LOY. L.A. INT'L & COMP. L.J. 233, 248 (1992) (citations omitted).

39. Marifeli Perez-Stable, *Legislative and Electoral Dynamics: Reforms and Options*, in TRANSITION IN CUBA, *supra* note 1, at 39, 43.

in turn selected members of the National Assembly of People's Power (National Assembly).⁴⁰ However, the National Assembly, the single-chamber legislature created by the 1976 Constitution, is not a true legislative body and suffers from a "rubber-stamp image."⁴¹

Meeting briefly twice a year, the National Assembly had more formal and symbolic purposes. . . . The way the agenda was worded . . . revealed the nature of the debate: discussion and approval of the items at hand. Debate sometimes modified but never rejected proposals. . . . [O]nce Fidel Castro spoke definitively on an issue, discussion was over.⁴²

Similarly, local assemblies failed to fulfill a representative role. "They did not . . . bestow upon the population the opportunity—let alone the power—to discuss and decide matters of substance. Involvement—not substantive participation—was the key characteristic of Popular Power at the local level."⁴³

The 1992 Amendment to the 1976 Constitution provides for the election by direct popular vote to the National Assembly and the provincial assemblies.⁴⁴ This change, however, is a far cry from what is needed to make Cuba's current legislature a suitable vehicle for a transition to democracy. The candidates for election to the National Assembly are selected by national and provincial candidacy commissions. Not only are other official candidates not allowed, but the people can vote only for the candidates selected by the commissions. In addition, the assemblymen are part-time non-professionals without a staff, who convene only twice a year for just four or five days at a time, and meet essentially to sign off on measures already approved by the Communist party and the Council of State.⁴⁵ A National Assembly operating on that basis will be unable to implement a transition of the type that Cuba needs as it simply will not have the power to control the transition.

40. *Id.*

41. See Gillian Gunn, *Prospects for Change in Cuba*, in *TRANSITION IN CUBA*, *supra* note 1, at 67, 73.

42. Perez-Stable, *supra* note 39, at 44.

43. *Id.*

44. *Id.* at 48.

45. EVENSON, *supra* note 5, at 28.

Most likely, the transition government will dissolve the National Assembly.⁴⁶ The initial legislative institution during the pre-constitution period will be the executive power in control of the government, be it a council, junta, individual chief executive, or some other kind of governing body. In the case of Cuba's transition, as in the case of any government that does not have a duly elected legislature, new legislation must emanate from the executive institution that is in control. It will be incumbent on this executive body to issue the decrees and laws that are required to lend order to the transition during the pre-constitution period.⁴⁷ The executive's role in developing legislation during this period will ultimately be assumed by a permanent legislature, which presumably will be elected at the same time as the country's new executive.⁴⁸

2. *Permanent Executive Institutions.* Executive agencies, ministries, and departments must be created or reorganized during the pre-constitution period to carry out and administer the executive's decrees. Cuba currently has a system of weak, limited-power ministries and agencies. As chief executive, Fidel Castro "conducts the general policy of the state, organizes and conducts the work of the Government, controls the activities of the ministries and proposes the appointment or replacement of ministers. He can also at any time assume the leadership of any ministry or central agency"⁴⁹ During the transition and beyond, executive power needs to be decentralized and agencies and ministries need to assume increased responsibility and a meaningful share of executive power, including, but not limited to, rule-making authority. Some agencies (such as those overseeing the workings of the government in order to prevent mismanagement and corruption) must in fact be fully independent and

46. See Sanguinety, *supra* note 1, at 496 n.40 ("[T]his author believes that a transitional government firmly committed to a liberalization process would dissolve [the National Assembly] *ipso facto*."). Were the National Assembly to be retained during the early phase of the transition, it would need to be reconstituted and transformed into a true full-time legislature invested with real powers.

47. The executive body will probably need assistance in drafting some of this legislation. Such assistance may come from existing government agencies, as well as from governmental and non-governmental committees and advisory panels appointed by the executive to help with specific tasks.

48. For purposes of this Comment, we assume that the first executive of the transition period will be succeeded relatively quickly by another one chosen by the people in free elections. For a discussion of how multiparty elections might proceed in a post-communist Cuba, see Perez-Stable, *supra* note 39, at 60-61.

49. Bogdan, *supra* note 17, at 326.

protected from the executive power in order to discharge their duties effectively.

It follows that in order for these actions to be constructive, law enforcement agencies will have to be capable of applying the decrees and legislation that will be forthcoming during the pre-constitution period. Cuba, like other Hispanic countries, maintains an independent agency comprised of prosecutors, which is known as the *fiscalia*.⁵⁰ Cuba's *fiscales* perform traditional prosecutorial tasks and are also expected to supervise "the legality of official acts generally."⁵¹ Like the Soviet procuracy,⁵² the *fiscalia* "may not compel an agency or an organization to change its practices but may only protest illegalities to superior agencies or organizations (unless the practices constitute crimes, in which case the *fiscalia* may also institute criminal proceedings)."⁵³ Salas reports that in 1991, the approximately 850 prosecutors who constitute the *fiscalia* appeared insufficient to handle the case load, prompting the *Fiscal* to request an additional 120 slots.⁵⁴

In addition to the reported shortage of prosecutors, other problems plague the traditional prosecutorial system. In particular, the expertise and professionalism of the *fiscales* need to improve.⁵⁵ Doubts have also been raised about the effectiveness of Cuba's *fiscalia* in dealing with government officials' compliance with the law.

On paper, and in theory, the *fiscalia*, like the Soviet procuracy, is a powerful corrective to official illegality—the most powerful corrective that exists within the formal legal system. However the experience of the socialist countries of Eastern Europe, all of which adopted the Soviet institution of the procuracy, with its power of "general supervision," has revealed wide variations in the practical effectiveness of that institution in different countries and at different times.⁵⁶

It will be necessary to train a sufficient number of *fiscales* during the pre-constitution period to enforce the laws against private citizens

50. Salas, *supra* note 9, at 255.

51. Berman & Whiting, *supra* note 9, at 480.

52. The Soviet procuracy was an organization that investigated the activities of official agencies to detect illegal practices and to follow up complaints about official wrongdoing. *Id.*

53. *Id.*

54. Salas, *supra* note 9, at 255 (citations omitted).

55. See EVENSON, *supra* note 5, at 81 (this applies with greatest force to those operating at the provincial and municipal levels).

56. Berman & Whiting, *supra* note 9, at 480-81.

in a manner consistent with the laws and due process guarantees in effect at that time. Time may show that the *fiscales* are not the best tool to use, but the question of whether the *fiscalia* or some other government instrumentality should perform the general governmental oversight function can best be resolved in the post-constitution period, once the *fiscalia* has had the opportunity to demonstrate whether or not it is capable of performing such a difficult and sensitive task.

Along with prosecutors, public defenders will also be needed from the start of the pre-constitution period to represent indigent defendants in actions brought against them by the State. Although Cuba currently provides public defenders to individuals accused of crimes,⁵⁷ in order to be effective the system must undergo drastic changes. Serious doubts exist regarding the public defenders' willingness to adequately represent their clients. In its 1987 report on Cuban prisons, Amnesty International concluded that "[l]awyers appear to be just auxiliaries and ancillaries in this process rather than clearly defending the interests of their client."⁵⁸ Any system of public defenders in a post-communist Cuba must be operated in a way that comports with democratic notions of fairness towards the accused, and the interests of defendants must be vigorously advocated by counsel. The establishment and enforcement of ethical rules for the conduct of attorneys—a task which, because of other priorities, may not be undertaken before the initiation of the post-constitution period—would be an important step toward that goal.⁵⁹

Other law enforcement agencies, such as the police forces, will also play an important role in the implementation of laws. The

57. *Id.* at 482 ("There is a right to counsel in criminal cases; indeed counsel is required in all cases where the accused is charged with a crime punishable by a sentence of more than nine months.").

58. Quoted in Salas, *supra* note 9, at n.138; see also Baerg, *supra* note 38, at 268 ("Cuban lawyers are not expected to defend the interests of their client . . ."). The shortcomings of the public defenders' efforts in criminal trials were highlighted by the well-publicized trial of General Arnaldo Ochoa for his part in the drug trafficking scandal of 1989. This incident gave many observers the impression that defense counsel was ineffective and passive. EVENSON, *supra* note 5, at 48-49. However, the law and regulations instituted in 1984 governing the practice of law emphasize the independence of lawyers and the lawyers' obligation to defend the clients' interest with maximum diligence. *Id.* at 48.

59. Cuba already has a code of ethics for attorneys, enacted by the Ministry of Justice via Resolution 142 of December 1984. See Paul Bernstein, *Cuba: Last Look at an Alternative Legal System?*, 7 TEMP. INT'L & COMP. L.J. 191, 198 (1993); EVENSON, *supra* note 5, at 47. However, the concerns expressed by international organizations and commentators regarding the lack of adequate representation of clients in Cuba today give reason to believe that the existing code will need to be substantially upgraded and enforced.

reform of these institutions will thus be a crucial, if difficult, task of the transition period. Currently, Cuba's public order forces operate within the Ministry of the Interior (MININT) and are divided into three groups, each under a separate vice-minister: the internal order forces (policemen, firefighters, and corrections personnel); the security forces (counter-intelligence and state security); and the intelligence forces (foreign intelligence).⁶⁰ In addition, in 1991 the Cuban government created the *Servicio Unico de Vigilancia y Proteccion* (Unified Vigilance and Protection System or SUVVP). The SUVVP recruits from non-governmental entities and the population at large; its purposes are to combat crime, suppress anti-revolutionary activities, and perform other security functions at a grass-roots level.⁶¹

The probability of unrest and violence during the transition makes it necessary that adequate internal order forces, particularly the police, be available to ensure domestic tranquility. One of the greatest challenges facing the transition government during the pre-constitution period will be to retrain and enlarge the roster of internal order personnel and ensure that these personnel are capable of maintaining law and order while exercising proper respect for due process and individuals' rights. The somewhat less daunting task of permanently reorganizing the internal order forces could be deferred until the inception of the post-constitutional period.

While police forces will be important to the transition, they are presently vested with too much power to be effective. The security and intelligence organizations that comprise the balance of the MININT personnel, as well as the SUVVP and other para-military organizations, should be disbanded at the start of the transition, and their members disarmed. Indeed the very existence of these groups would threaten the survival of the transition and would be intolerable to many citizens.⁶² Although Cuba will have a continuing need for some form of domestic intelligence capability, such a need is not urgent and can eventually be addressed by the permanent government.

During the transition, it is important that wide dissemination be given to the new laws and decrees so that Cubans may attain sufficient knowledge to understand the government's actions. An

60. Salas, *supra* note 9, at 245.

61. *Id.* at 247-49.

62. *See generally id.* at 245-51, 257-61.

effective means of notification of official actions is also essential to the protection of the citizens' due process rights. Thus the system of legal publications will also prove to be an important instrument in the transition.

For many years Cuba has had an official government publication, the *Gaceta Oficial* (analogous to the *Federal Register* in the United States), where decrees and laws are published. Currently, however, most laws are not being published separately from the *Gaceta Oficial*, nor are they collected in volumes by subject. For a number of years, and particularly since the onset of the current economic crisis, the measures being considered by the government have been discussed at various mass organizations prior to enactment, and then explained at great length in the media by Fidel Castro, Carlos Lage, and other top government officials. While such discussions are certainly not indicative of a democratic rule (nor a substitute for it), they are effective in informing the population about the new laws and conveying the government's position on what the laws accomplish and why they are necessary.

The success of the transition will hinge on the Cuban public's reaction to the actions taken, and its acceptance or rejection of proposed measures. Therefore, the officials of the transition government should make every effort to use publications, as well as the mass communication media, to inform and educate the public with regard to transition issues. As Jorge Sanguinety has observed:

Many underestimate the power of public education. Others ignore the existence of a large body of material and methods that can be applied to raising the public understanding on the economic and legal aspects of policy reform in a democratic setting. Those who propose a radical transformation of the Cuban society with the democratic participation of the Cuban people should make an effort to understand the importance of public education in this immense endeavor. It was an indispensable tool for the current regime and it would be equally effective in the transition.⁶³

B. Judicial Institutions that Need to be Established During the Pre-Constitution Period

Because there will necessarily be vast changes in the law during the transition, and the transition itself will give rise to innumerable

63. Sanguinety, *supra* note 1, at 483-84.

legal issues, there will also be an immediate need for institutions that can adjudicate rights and settle legal disputes. Currently, the judiciary in Cuba is an adjunct to the executive and has little independent power.⁶⁴ During the transition it will be necessary to enact laws reorganizing the judiciary and rendering it independent of the executive and legislative branches, establishing new courts, and instituting an expeditious process for the appointment of new judges and other personnel involved in the administration of justice, while retraining existing judicial personnel.

1. *Transitory Judicial Institutions.* Many legal actions can be expected to be initiated during the transition.⁶⁵ The growing caseload may require that temporary judicial institutions be deployed during the pre-constitution period to handle some of the more frequently litigated matters. For example, special courts should be instituted for handling routine legal proceedings (e.g., debt collection cases) and adjudicating property ownership disputes where either the amount in controversy is below a certain limit or the dispute involves residential property.⁶⁶ General principles for handling such claims could be provided by policy-level legislation, leaving the details to a case-by-case resolution by the courts.⁶⁷

The transition government will also need to create special criminal courts for the expeditious adjudication of complaints against individuals who may have committed human rights violations during

64. In the 1976 Constitution the courts were declared subordinate to the National Assembly. CONSTITUCION (1976) art. 122 (Cuba); Max Azicri, *Change and Institutionalization in the Revolutionary Process: The Cuban Legal System in the 1970s*, 6 REV. SOCIALIST L., Mar. 1980, at 164, 167. Azicri writes:

The broad jurisdiction of the Council of Ministers was expanded even further when the judiciary was also placed under its control. This structural change put an end to the possibility of an independent judiciary which could pursue a course of judicial action and decision-making different than, or opposed to, official revolutionary policies.

Id. Article 121 of the 1992 Constitution declares that the courts are subordinate to both the National Assembly of People's Power and to the Council of State. CONSTITUCION (1992) art. 121 (Cuba).

65. It has been reported that in 1991 alone, 700,000 new lawsuits were filed in Hungary and 121,000 in Czechoslovakia. GRAY ET AL., *supra* note 2, at 58, 86. Unless extraordinary measures are taken to expedite judicial proceedings, Cuba could experience a similar surge in litigation during the transition, with attendant delays in the resolution of cases.

66. The resolution of claims arising from the expropriation of property during the Revolution will perhaps be the among the most vexing problems of the transition. For a brief discussion of laws that will be needed to address expropriation claims, see *infra* Part V.B.4.

67. For an illustration of what a law dealing with specific property issues might look like, see Julio Romanach, Jr., *En Torno al Proyecto de Ley de Viviendas Urbanas y Rurales*, in ASCE-2, *supra* note 1, at 93.

the current regime. It would be prudent, in any event, to segregate these highly politicized trials from the ordinary types of criminal matters, although the same due process rights should be available in both types of cases.⁶⁸

2. *Permanent Judicial Institutions.* While it is clear that some temporary judicial institutions will be necessary, most of the judicial institutions that need to be established during the pre-constitution period will be of a permanent nature. Of principal importance are the national, provincial, and local court systems. These institutions will be the arbiters of public and private civil disputes, and of criminal prosecutions.

Cuba currently has a unified national court system consisting of three levels. At the highest level is the People's Supreme Court, which is divided into six different chambers: (1) criminal, (2) civil and administrative, (3) labor, (4) state security, (5) military, and (6) economic.⁶⁹ The supreme court oversees the operation of the entire court system, but the role of the court is limited due to its inability to review the constitutionality of actions taken by the executive and legislative branches.⁷⁰ The next level of courts is the People's Provincial Courts, one of which is located in each of the fourteen provinces. The provincial courts have initial jurisdiction over crimes with potential sentences of one to eight years and serve as courts of appeal for the third and lowest layer of courts, the People's Municipal Courts.⁷¹ The 169 municipal courts are the principal trial courts in the Cuban judicial system and have initial jurisdiction over civil and minor criminal matters.⁷² In the early phase of Cuba's transition, the existing court system will need to be supplemented and

68. Great care should be taken, however, to avoid imitating the experience of the revolutionary courts that were established in 1959 to try former officials of the Batista regime for their crimes and later used against alleged enemies of the government. The revolutionary courts were military tribunals which used summary procedures and granted little due process protection to the defendants.

69. *Ley de Organizacion del Poder Judicial*, Law No. 1250, published June 23, 1973. This law was amended first by the *Ley de Organizacion del Sistema Judicial*, Law No. 4, published August 25, 1977, and subsequently by the *Ley Sobre los Tribunales Populares*, Law No. 70, published July 24, 1990. The Economic Chambers of the Supreme Court and the Provincial Courts were established by Legislative Decree 129, *De Extincion del Sistema de Arbitraje Estatal*, published August 19, 1991.

70. Salas, *supra* note 9, at 251.

71. *Id.*

72. *Id.*

modified, but its basic structure need not be altered substantially.⁷³ It contains, at least in principle, the framework for a functioning system. Long-term court reform will undoubtedly be needed but would be better addressed in the new constitution and implementing legislation enacted during the post-constitution period.

The main focus during the pre-constitution period should be on the individuals who staff the court system. In particular, the pre-constitution period should be devoted to training and commissioning a sufficient number of competent judges and court adjuncts, such as magistrates, masters, and marshals, to effectively operate the system.⁷⁴ If Cuba's judicial institutions are to establish their authority in the long-term, they must strive for credibility during the pre-constitution period. At the same time it is important to recognize that the success of the individuals who make up the court system will in large part be dictated by the appropriateness of the decrees and laws they are asked to enforce.

C. Permanent Non-Governmental Law-Related Institutions that Need to be Established During the Pre-Constitution Period

In addition to the courts and other public legal institutions, Cuba will need private individuals and organizations that can operate within the legal system. Indications from those who have recently visited Cuba are that there are inadequate numbers of lawyers, law schools, and other legal service providers, and that those that do exist are ill-prepared for the tasks they must undertake in a free-market, democratic legal system.⁷⁵ Given the great demands and stresses that will be placed on the Cuban justice system during the transition, it is essential that viable non-governmental law-related institutions be developed from the outset.

1. *Professionals and Professional Organizations.* At the present time there are no independent law practitioners in Cuba. Under a 1973 law that reorganized the judicial system, all attorneys wishing to

73. Among the new permanent courts that will need to be established as early in the transition as possible are special tribunals with jurisdiction over areas of the law requiring unique expertise such as bankruptcy, intellectual property, and antitrust.

74. Cuba now uses lay judges who serve alongside professional judges at all levels of the judicial system, including within the Supreme Court. EVENSON, *supra* note 5, at 75-77. Lay judges should eventually be eliminated, but may need to be retained during the early phase of the transition to compensate for the shortage of trained judges.

75. See EVENSON, *supra* note 5, at 59.

engage in private practice must join *bufetes colectivos de abogados* (collective lawfirms), defined as "autonomous institutions under the supervision of the Ministry of Justice."⁷⁶ "Attorneys, henceforth, . . . either work for state enterprises, government offices, teaching law school, or on the staff of one of the many *bufetes colectivos* established throughout the country; in the latter, attorneys . . . charge legal fees, officially set by the government, for their services."⁷⁷ The *bufetes colectivos* handle large numbers of cases annually, most of which involve divorce and probate proceedings.⁷⁸

The training currently provided by Cuban law schools will most likely be inadequate for the practice of law in a post-transition Cuba.⁷⁹ It is also not clear that the experience of Cuban lawyers, both within and outside of the *bufetes colectivos*, will have prepared them to practice in a free-market society. Cuban advocates in the *bufetes colectivos*, for instance, deal primarily with criminal and family law in contrast to the work of pre-revolutionary advocates who often specialized in areas such as business law and tax law.⁸⁰

The only legal practitioners who have acquired experience that could be relevant in a free-market economy are those working as legal advisors at ministries, state agencies, and commercial enterprises. These attorneys give legal advice to the enterprises that employ them, assist in the negotiation and drafting of contracts, and provide other services of the type provided by in-house counsel to corporations in industrialized nations. Legal advisors, however, are "almost universally criticized for lack of preparation and skill."⁸¹

After many years of little or no growth the number of lawyers in Cuba appears to be increasing. As of 1982, there were only 5,600 persons out of Cuba's total population of ten million who had law degrees "and many of these did not even work in the field of law."⁸² Evenson reports that in 1988 there were 3,500 students enrolled in the four existing Cuban law schools (Havana, Santiago de Cuba, Villa Clara, and Camaguey).⁸³ However, only a relatively small number

76. Bogdan, *supra* note 17, at 324.

77. Azicri, *supra* note 64, at 168 (citation omitted).

78. Salas, *supra* note 9, at 256.

79. EVENSON, *supra* note 5, at 59. Reforms to the legal education system were instituted in 1982-83, and further reforms were scheduled for 1990-91 but were not implemented. *Id.* at 55-56.

80. Bogdan, *supra* note 17, at 325.

81. EVENSON, *supra* note 5, at 54.

82. Bogdan, *supra* note 17, at 322 (citation omitted).

83. EVENSON, *supra* note 5, at 56.

of lawyers are practicing in 250 *bufetes colectivos* nationwide.⁸⁴ Consequently, it is unclear how many of the rest of the Cuban law school graduates are currently practicing law.

During the pre-constitution period high priority must be given to creating new law schools and other legal training institutions, reshaping law school curricula, and helping reestablish the private practice of law. Law students and lawyers will have to be trained in disciplines that have application in free-market systems including but not limited to: contracts, corporate law, labor law, tax, bankruptcy, commercial transactions, banking, real estate, intellectual property, antitrust, and litigation.⁸⁵ Private firms will also need to be established so that legal representation will be available to individuals and entities in their private and public transactions. Finally, one issue calling for early resolution will be whether attorneys licensed in other countries will be allowed to practice in Cuba, and if so under what conditions.

There will also be a place in a post-revolutionary Cuba for public, court-sponsored alternative dispute resolution (ADR) methods.⁸⁶ The anticipated court backlogs during the pre-constitution period will possibly encourage parties to resort voluntarily to ADR techniques to avoid the potential for protracted litigation in the national court system. ADR methods, which include arbitration, mediation, conciliation, mini-trials, and other tools, could be used in Cuba to resolve commercial disputes between private parties or between such parties and government agencies.⁸⁷ Successful use of ADR methods

84. Salas, *supra* note 9, at 256.

85. For an example of revolutionary period law school curricula see John Carro, *The Structure of Legal Education and the Practice of Law in Cuba*, 25 REVISTA DE DERECHO PUERTORRIQUEÑO 89, 118-21 (1985-86).

86. Until 1991, Cuba had an arbitration system to resolve disputes between state enterprises. See Enrique Dahl & Alejandro M. Garro, *Cuba's System of International Commercial Arbitration: A Convergence of Soviet and Latin American Trends*, 15 LAW. AM. 441 (1984). This system was entrusted to the Organo de Arbitraje Estatal (State Arbitration Agency), an agency which resolved inter-enterprise contractual disputes, promulgated economic regulations, and provided consultation and advice to enterprises and national economic planning units. EVENSON, *supra* note 5, at 206. The inter-enterprise arbitration system was abolished in 1990 and replaced in 1991 with the newly created economic chambers in the supreme court and the provincial courts. *Id.* at 210. Cuba also currently has a non-governmental form of foreign trade arbitration. See Bogdan, *supra* note 17, at 324; see also Bernstein, *supra* note 59, at 202 ("Arbitration continues to play an important role in resolving disputes arising from the growing presence of joint ventures with foreign partners" (citation omitted)).

87. For a summary discussion of current trends in ADR methods and the circumstances in which ADR may or may not be advisable, see Campbell Killefer, *Some Disputes Still Deserve Their Day in Court*, WALL ST. J., Oct. 12, 1992, at A10; see also, Campbell Killefer, *Alternative*

would instill confidence in foreign investors that their rights could be meaningfully asserted and protected. During the pre-constitution period, therefore, the transition government should declare in the Civil Procedure Code or in a separate statute that any determinations (e.g., arbitration awards) that result from ADR proceedings are legally binding and enforceable. The government should also define the methods for enforcing such determinations.

2. *Other Legal Service Providers.* Finally, Cuba will need a number of other legal service providers during the pre-constitution period in order for its legal system to operate effectively. Indeed, without these individuals the legal machinery will grind to a halt. Court reporters, court clerks, and notaries are among the necessary participants in a transition legal system. New educational institutions, or special programs at existing institutions, will need to be developed to train such individuals, although the establishment of such programs should have lower priority than creating programs for training judges, court adjuncts, and attorneys.

IV. POST-CONSTITUTION PERIOD LEGAL INSTITUTIONS

The post-constitution period will mark the most critical stage in the process of altering Cuba's legal institutions. While many changes will be made before the new constitution is enacted, the expectations of the Cuban people, as well as those of the international community, will likely be highest during the post-constitution period.

As discussed above, the pre-constitution period will probably involve governance from the top down, through decrees issued by the executive. The post-constitution period will provide the first opportunity in the transition for democratic principles to be put into practice. Thus, Cubans, along with the rest of the world, will be watching to see whether the new Cuban government respects and abides by the constitution and implements a rule of law. Because the stakes will be so much higher, it is essential that the overhaul of the legal institutions be successfully completed during this period.

A. Legislative and Executive Institutions That Need to be Established in the Post-Constitution Period

As Cuba moves toward implementing the system of governance defined in its new constitution, attention must focus on developing the particulars of how the country's legislative and executive institutions will function. For these new institutions to succeed, great care must be paid to defining the details of their structure and the electoral process itself. While the powers of the legislative and executive branches of government will be defined in the new constitution, other permanent institutions will also need to be established, either by the constitution or by separate legislation.

It will be the task of the framers of the permanent constitution to decide on the form, composition, term of service, and electoral system of the national and provincial legislatures.⁸⁸ Whatever their structure, the post-constitution legislative institutions should have their members chosen through free elections that allow a multiplicity of political parties and a diversity of political positions. The legislatures must also be granted all necessary powers to propose, consider, debate, and enact legislation. These institutions must be truly independent of the executive branch and must be accountable to the people through the electorate's power to recall legislators whose performance is unsatisfactory.

As discussed above, the chief executive of the current Cuban government plays an excessive and over-intrusive role in the legislative process. Because the centralization of legislative power in the executive branch is inconsistent with the functioning of a free-market, democratic system, it should not be extended beyond the initial period of the transition.

Accordingly, the constitution will probably place considerable limits on the legislative powers of the executive branch. Nevertheless, the chief executive, along with his cabinet and advisers, should continue to be a major source of legislative proposals. The executive branch should also retain its traditional, limited law-making and rule-making responsibilities, such as the negotiation of agreements with other countries, the issuance of executive decrees implementing

88. One question that will certainly be debated is whether Cuba should retain the current unicameral structure of the national legislature or should revert to the bicameral system that existed prior to the 1959 Revolution and which was copied from the U.S. model. See EVENSON, *supra* note 5, at 9.

existing laws, and the development of detailed regulations through its administrative agencies or departments. Exercise of these law-making functions should be subject to review by the courts and to modification by the legislature.

The constitution will probably declare the right of the Cuban people to exercise a limited but crucial legislative role through the referendum process. The constitution (which itself will most likely be ratified by popular referendum) should also provide that constitutional amendments and legislation to modify or redistribute the powers of the branches of government will be put to a public referendum.

B. Judicial Institutions that Need to be Established During the Post-Constitution Period

1. *Permanent Judicial Institutions.* As discussed in Part III above, enactment of the constitution should provide the opportunity for the initiation of comprehensive long-term court reforms. It is at this time that the government should delineate the jurisdictions of the various courts, define court procedures and rules of practice, and establish the processes for selecting, promoting, and removing the members of the judiciary. Also, after the constitution is enacted, the government should address any needed changes in the structure of the judicial system.

One structural change that should take place is the permanent establishment of courts of limited jurisdiction to handle specialized matters. A constitutional court, for example, should be created to review the validity of acts by the executive or the legislature under the constitution.⁸⁹ Civil service and military courts may be required to hear cases arising in the context of those public services. Tax courts with jurisdiction over the interpretation of the tax codes will need to be established. Administrative courts should be set-up to adjudicate disputes between private parties and executive agencies or departments. In addition, bankruptcy, intellectual property, and antitrust courts should be created if they have not already been established during the pre-constitution period.

Local courts of limited jurisdiction will also need to be established if they are not already functioning. These could include, for

89. The judicial review function has been implemented in the former socialist countries of Central and Eastern Europe through the establishment of separate constitutional courts. GRAY ET AL., *supra* note 2, at 2-3.

example, police and traffic courts, probate courts, family courts, and juvenile courts.

The post-constitution period will also be the proper time to develop a full complement of court adjuncts. National, provincial, and local courts will need personnel, in addition to judges and their staffs, who are trained to assist the courts in the judicial process. Although court adjunct positions may start to be filled during the pre-constitution period, the training programs initiated early in the transition should graduate increasing numbers of individuals capable of performing these functions during the post-constitution period.

Some of these training programs may be abbreviated. For example, magistrates and masters can be lay personnel who are trained in particular areas of the law and referees can be trained to receive evidence in fields in which they have technical expertise. Commissioners, sheriffs, and marshals can be deployed with a minimum of training to assist in the administrative details of the judicial system, such as service of process, execution of judgments, and the like.

At the same time that the government redefines the role of courts and the training of legal personnel, it can seize the opportunity to redefine how disputes are settled. To reduce the demands on the courts and to expedite conflict resolutions, the government should create viable alternatives to litigation.

ADR methods such as arbitration, mediation, conciliation, and mini-trials should achieve widespread use in civil litigation in the post-constitution period. As court referrals and supervision become more frequent, alternative methods of resolving disputes will likely be favored because they will save both courts' and parties' resources during a time when they are at their scarcest. By sanctioning and even ordering the use of such mechanisms, courts will reassure parties that resort to non-judicial determinations are a binding and efficient way of resolving disputes in Cuba.

2. *Non-Governmental Law-Related Institutions.* During the post-constitution period, legal professionals and other legal personnel will likely band together in voluntary or mandatory organizations of individuals engaged in similar specialties. Cuba currently has two non-governmental legal professional organizations: *Union Nacional de Juristas Cubanos* (the National Union of Cuban Jurists or NUCJ) and *Organizacion Nacional de Bufetes Colectivos* (the National Organization of Lawyers' Collectives or ONBC). Approximately eighty-five percent of Cuba's jurists belong to the UNJC, which

functions as a national bar association.⁹⁰ The UNJC's membership includes lawyers from the collectives, legal advisors, judges, prosecutors, law professors, and notaries.⁹¹

Salas reports that in 1984 there were approximately 700 members in the ONBC.⁹² The ONBC is an autonomous, self-sustaining institution that regulates the conduct of lawyers practicing in *bufetes colectivos*, administers the code of ethics that governs their activities, and imposes penalties on lawyers who violate ethical standards.⁹³ The ONBC carries out a number of other activities, such as sponsoring conferences on legal issues and establishing commissions to make legislative proposals for the government's consideration.⁹⁴

These existing professional associations, particularly the UNJC, could be preserved during the transition. However, in order for them to play a meaningful role in a post-transition environment, they must focus on furthering the professional development of their members and establishing and enforcing standards of practice. Membership should be open to all members of the bar and the organizations should not impose restrictions on the free flow of information and ideas in the programs they sponsor.

For the legal system to operate effectively during the post-constitution period, the Cuban legal community will need access to a number of basic legal services. Principal among such services are those that provide legal information, such as legal research organizations (especially computer-assisted research), legal periodicals, and law text publishing companies.⁹⁵ A range of other providers of legal services, from notaries to tax return preparation organizations, will also be needed during this phase of the transition. The marketplace will likely provide effective mechanisms for the appearance of these legal service providers when there is a pressing need for their services.

90. EVENSON, *supra* note 5, at 58.

91. *Id.*

92. Salas, *supra* note 9, at 256 & n.131.

93. *Id.*

94. EVENSON, *supra* note 5, at 51.

95. The current Cuban legal system has been characterized by a shortage of legal materials and information:

During the first two decades after the revolution, there was a striking paucity of Cuban books dealing with legal issues. There was practically no foreign legal literature available, with the exception of a few Soviet books published in Spanish in Moscow. . . . The scientific legal journal of the National Union of Cuban Jurists, the *Revista Cubana de Derecho*, has been appearing since 1972, but during the first fifteen years of its existence only 27 issues were published . . .

Bogdan, *supra* note 17, at 322.

V. LAWS THAT NEED TO BE ENACTED DURING THE PRE-CONSTITUTION PERIOD OF THE TRANSITION

A. Introduction

A number of analysts have examined the legal changes that will need to be instituted during Cuba's transition to a free-market society.⁹⁶ Most of these analysts do not seek to differentiate between the legal changes that will be required in the early stages of the process and those that will be appropriate when the transition has progressed towards the recovery phase and a new constitution has been enacted. The discussion that follows will attempt to identify which of the legal changes must be made early and which can be—or need to be—deferred until the later stages of the transition.⁹⁷

B. Transitory Laws

Certain changes in the laws must be made during the pre-constitution period of Cuba's market transition. These include temporary measures such as provisional constitutional statutes, laws to maintain public order and stability, public welfare provisions, and legislation to execute the initial economic changes of the transition. Certain high-priority permanent laws will also need to be enacted during the same time frame.

1. *Constitutional Acts.* One crucial change that needs to be made at the earliest possible time is the establishment of a constitutional framework for the transition. Some analysts advocate following Cuba's 1940 Constitution, the last constitution enacted prior to Cuba's 1959 Revolution, which some believe is still in effect.⁹⁸ However, even those who support the framework established by the 1940 Constitution recognize that many provisions of that constitution would be inappropriate for a post-transition Cuba. Thus, a leading proponent of the 1940 constitutional framework recognizes that some

96. See, e.g., Cruz, *supra* note 1; Matias F. Travieso-Diaz & Stephan M. Bleisteiner, Some Lessons for Cuba from the Legal Changes in Eastern Europe, Address at the Shaw, Pittman, Potts & Trowbridge Cuba Business Seminar (April 27, 1993) (transcript available in Shaw, Pittman, Potts & Trowbridge's Library, Washington, D.C.).

97. Of course, making such a division is somewhat arbitrary and the vagaries of the transition process may require significant departures from any prescribed formulas.

98. Jose D. Acosta, *El Marco Juridico-Institucional de un Gobierno Provisional de Unidad Nacional en Cuba*, in ASCE-2, *supra* note 1, at 61, 78.

of the constitution's provisions would be inapplicable; he cites as an example article 15 which declares that Cuban citizenship is lost by those who become citizens of another country. Were that provision to be put into effect after a transition in Cuba, it would deny Cuban citizenship to many hundreds of thousands of Cuban nationals who left the country after the Revolution and who have since become citizens of other countries.⁹⁹ In fact, the 1940 Constitution contains a number of provisions that would hinder the transition, such as its interventionist policies in the sugar industry (e.g., article 275), its expansive labor rules (e.g., articles 60 through 85), and its restrictions on the ability of foreign nationals to own land (e.g., article 90).

On the other hand, the current constitution, which was enacted in 1992, and its predecessor, the 1976 Constitution, are on the whole unsuitable documents which—for both political and legal reasons—would not provide a good foundation on which to base a market transition. Were the 1992 Constitution to be retained, it would need to be amended immediately to remove all socialist dogma, reinstate private property rights, and expressly guarantee private ownership of property and its protection from expropriation without compensation.¹⁰⁰

The form and content of a constitution are important topics for debate. Legal scholars, political scientists, and other commentators may differ, for example, on what topics need to be addressed in a constitution, and what the appropriate level of detail in those discussions should be.¹⁰¹ These issues and others attendant to the enactment of a constitution should not be decided at the start of the transition, when it is likely that the affairs of the nation will be unsettled and the country's leadership preoccupied with keeping the country together.

A better practice would be for the transition government to issue one or more "constitutional acts"—a series of statutes that replace, over a short period, the latest socialist constitution and provide guidance until the enactment of a permanent constitution.¹⁰² Such acts would provide the legal framework for the transition until a constitutional convention could be assembled and a new constitution enacted. These statutes would not pretend to be a comprehensive

99. *Id.* at 82.

100. See Travieso-Diaz & Bleisteiner, *supra* note 96, at 5-10.

101. Cuba's 1940 Constitution encompassed 286 articles and dealt in varying detail with a broad range of subjects; the U.S. Constitution, by contrast, has only seven Articles.

102. The constitutional acts would be repealed by the new constitution.

permanent constitution. Rather, they would merely serve as short-term "super-laws" resting on the emergency powers of the provisional government, not on the constitutional powers of the people. Similar constitutional acts have been used in Hungary, the Czech Republic and Slovakia, Poland, and Bulgaria pending the enactment of new constitutions in those countries.¹⁰³

The constitutional acts promulgated by Cuba's transition government might contain, for example: (1) a proclamation of the existence of three separate and independent branches of government (the executive branch, the legislature, and the judiciary); (2) a declaration of the human, economic, social, and political rights of all juridical persons; (3) a definition of the process for establishing a democratic government through free, general elections; (4) a prescription of the process and timing for assembling a constitutional convention and enacting a permanent constitution; (5) an enumeration of the powers of the provincial and local governments and their relation to those of the central government; (6) provisions for the initial restructuring of the judiciary; and (7) a broad identification of the tasks that the transition government must accomplish and a vesting of power in existing or newly created agencies to accomplish those tasks.¹⁰⁴ For example, the constitutional acts might ordain the establishment of a Central Bank to regulate currency and banking transactions, leaving the development of a detailed charter for the Bank to other legislation.

The constitutional documents that guide the transition must also address fundamental issues such as reinstating the rule of law, guaranteeing property rights, and declaring the country's adherence to free-market principles, while at the same time expressing a commitment to some form of social safety net.

2. *Public Safety and Order Statutes.* A top priority for the transition administration will be to keep peace and maintain public order, for in the absence of internal peace a successful transition will become difficult, if not impossible. If the economic situation is grave and the government does not have either the strength or the appropri-

103. Travieso-Diaz & Bleisteiner, *supra* note 96, at 6-9; see also GRAY ET AL., *supra* note 2, at 24.

104. For an example of the types of provision that could be included in the Constitutional Acts, see ALBERT P. BLAUSTEIN, CONSTITUTION OF THE REPUBLIC OF CUBA—A PROPOSED DRAFT 22-23 (Endowment for Cuban Am. Studies, Cuban Am. Nat. Found, The Cuba Paper Series, 1993).

ate institutions and mechanisms to maintain order, lawlessness, including looting, may result.¹⁰⁵ Criminal laws deter such lawlessness by providing appropriate sanctions for anti-social behavior, while at the same time preserving individual due process rights.

Legislation must also be enacted during the early phase of the transition to reorganize and scale down the armed forces, bolster the effectiveness of the police, dissolve all paramilitary groups, and take control of the vast arsenal of weapons now in the hands of individuals. Likewise, laws will need to be issued defining the benefits to be provided to members of the armed forces who retire or are discharged through the down-sizing of the country's military establishment. Legislation will also be needed defining the actions to be taken against former government officials for criminal acts they may have committed while in office.

3. *Public Welfare Measures.* The governments of virtually all countries that have made the transition from socialism to a free-market system have been besieged by popular demands for the preservation of the extensive social "safety net" that had been previously provided to the population at little or no cost.¹⁰⁶ Cuba has developed probably the most extensive safety net of any socialist country.¹⁰⁷ Even today, as the economy crumbles and Cubans face increased hardship in every aspect of their lives, Cuba's top government leaders point to free education, free health care, and other social benefits as the key accomplishments of the Revolution.¹⁰⁸

105. Sanguinetta, *supra* note 10, at 471.

106. In response to these demands, most Central and Eastern European countries have included express commitments to some form of safety net in their constitutions. For example, Romania and Bulgaria declare in their constitutions the citizens' right to free education and medical care. GRAY ET AL., *supra* note 2, at 2.

107. Mesa-Lago points out that at the beginning of the 1990s Cuba had the most comprehensive and costly "social safety net" in the socialist world and in Latin America. Mesa-Lago, *supra* note 20, at 604.

108. Thus, in a June 30, 1994 address to the National Family Doctor Congress, Fidel Castro stated that despite other changes that had to be made during the current economic crisis, "[t]here are two sacred things, two sacred achievements that should be maintained at all costs and under any circumstances, just as we developed and created them—the right to health and to education." *Castro on Protection of Family Doctor Program* (Havana Radio Rebelde Network broadcast, June 30, 1994), available in F.B.I.S. (LAT-94-127), July 1, 1994, at 3. However, there are strong indications that Cuba's safety net is unraveling as a result of the country's economic crisis. Medical supplies are scant, medications are frequently unavailable, and even aspirin is now rationed. See *Health Care for Cubans May Be Free, But Drugs Are Running Short*, Associated Press, June 29, 1994; Roman Orozco, *Journalist Views "Desperate" Situation*, CAMBIO (Madrid), June 27, 1994, at 44-47; Christopher Marquis, *Cuba's Health Care*

The transition government in Cuba will be faced with the difficult task of balancing the need to revitalize the country's economy with the likely demand for the continuation of benefits such as free education and health care. Thus, among the first pieces of legislation that must be enacted during the transition is one that defines the extent to which free public education will continue to be provided. Likewise, public health statutes will need to be drafted early to delineate which government-funded medical services will continue to be made available, and at what cost.

Guaranteeing an adequate supply of food to the population is yet another essential task that the transition government in Cuba must accomplish from the start. Laws to encourage the production of food and to ensure the efficient and equitable distribution of food among the population must be at the top of the agenda of Cuba's transition government.

4. *Economic Reform Legislation.* As in other former socialist countries, it will be necessary to establish economic legality in Cuba through an unambiguous declaration of adherence to free-market principles and the enunciation of a clear and sufficient set of economic rules.¹⁰⁹ Accordingly, legislation that supports economic legality within a free-market context must be enacted early in the transition.

The principal temporary laws that will need to be enacted during the early phase of Cuba's market transition in order to support economic reforms include: (1) a constitutional declaration of property rights; (2) legislation to initiate the privatization process; and (3) laws dealing at a general level with the property claims issue. Additional laws and decrees must be enacted to implement the economic reforms themselves.

It is important to discuss briefly one of the necessary changes in the economic framework: the issuance of legislation that deals at a policy level with property expropriation claims and outlines the privatization process. The constitutional acts mentioned above should

System, Once Exemplary, Is Now Collapsing, MIAMI HERALD, June 22, 1994, at 1A. In the area of education, starting with the 1994-95 academic year, there will be an end to the free lunches offered in the country's schools and the stipends the government used to provide to college students will be replaced with loans. In addition, entrance fees will be charged at cultural events, museums and galleries, and sporting events and facilities. *Cuba Will Begin to Charge for Items, Services that Used to be Free*, MIAMI HERALD, July 9, 1994, at 18A.

109. See generally John M. Litwack, *Legality and Market Reform in Soviet-Type Economies*, 5 J. ECON. PERSP., Fall 1991, at 77.

create a Privatization Agency to manage the return of state-owned enterprises to the private sector and a Claims Agency to resolve expropriation claims.¹¹⁰ Separate statutes could flesh out the mandates and procedures of those agencies.

If Cuba follows the same path as other countries that have undergone a transition from socialism, final resolution of the expropriation claims may not be accomplished for a long time.¹¹¹ Resolution of such claims will be complicated by the passage of time and by the fact that much of what was expropriated has been moved, destroyed, modified, or merged with other property.¹¹² Furthermore, the government has made investments that have added to or modified the existing assets.¹¹³

While the claims themselves may not be resolved for awhile, a quick decision needs to be made on how title to property in Cuba is to be settled. This is because some areas of the economy must be privatized right away—particularly those providing essential services that the State may not be in a position to furnish effectively. Privatization of these activities may be set back too long if the title issues are not resolved quickly.¹¹⁴ The societal and opportunity costs of protracted litigation over title to property must also be avoided by all available means.

It may be that the transition government will need to reaffirm the revolutionary expropriations for the limited purpose of asserting the State's title to the properties, so that the government agencies can dispose of them without first having to resolve conflicting claims to title. While such a reaffirmation might be contested, it could obviate

110. See, e.g., Sergio G. Roca, *Cuban Privatization: Potential Path and Implementation*, in *TRANSITION IN CUBA*, *supra* note 1, at 567, 583-86; Julio Romanach, Jr., *Privatizacion de la Propiedad Mercantil e Industrial en la Cuba Post Castro: Un Modelo de Implementacion*, in *ASCE-3*, *supra* note 23, at 257, 257.

111. GRAY ET AL., *supra* note 2, at 3; Rudi Dornbusch, *Getting Ready for Cuba After Castro*, *BUS. WK.*, May 24, 1993, at 19.

112. This is particularly true of industrial and commercial assets such as machinery and equipment.

113. Sanguinety, *supra* note 10, at 479-80.

114. Castaneda & Montalvan, *supra* note 23, at 24-25. All the countries in Central and Eastern Europe that have implemented restitution schemes based on former owners' assertion of title to confiscated property (Bulgaria, the Czech Republic, Eastern Germany, and Romania) have experienced a great deal of uncertainty over property rights. This uncertainty has discouraged potential investors and has delayed privatization efforts. GRAY ET AL., *supra* note 2, at 3-6.

protracted litigation over the legal effectiveness of the expropriations.¹¹⁵

Cuba's claims situation is even more complicated than that of other former socialist countries because Cuba has a huge backlog of unresolved U.S. citizen expropriation claims. Although conceptually the claims of Cuban nationals should be handled in a non-discriminatory fashion and in a similar time frame as those by U.S. citizens, the international relations aspects of the U.S. claims may dictate that they receive different treatment, particularly if the U.S. government continues to insist (as it has to date) on the resolution of the U.S. expropriation claims as a pre-condition to the normalization of relations between the United States and Cuba. To the extent that there is restitution of confiscated properties, the restitution award should require that the assets be put to productive use and not laid aside for potential sale to third parties or to await better economic conditions.

Some of the expropriated assets may have been turned over to non-U.S. investors, who may have been exploiting them. A transition government would have to weigh the country's economic interest in leaving undisturbed the existing arrangements with regard to those assets, against the legal interests of the former owners, be they Cuban or American. As the socialist transition unfolds and more state properties are committed to joint venture arrangements, this problem will become more serious and widespread.

A.R.M. Ritter suggests that the best overall approach to the claims issue would be a hybrid scheme encompassing partial compensation, partial restitution, vouchers, rights in joint ventures with the

115. It has been argued that the expropriations carried out by the Cuban government in the early years of the Revolution were legally ineffective. See, e.g., Gregorio Escagedo, Jr., *Posibles Problemas que Confrontaremos en Cuba: Sus Soluciones*, in ASCE-3, *supra* note 23, at 250. Others, on the other hand, assert that under international law principles Cuba's expropriations (at least those involving assets of foreign nationals) were legally effective, although there is an issue as to whether the compensation afforded the owners was "prompt, adequate and effective," as required under international law. A.R.M. Ritter, *Financial Aspects of Normalizing Cuba's International Relations: The Debt and Compensation Issues*, in TRANSITION IN CUBA, *supra* note 1, at 501, 537-41. The question involves a variety of domestic Cuban law and international law considerations. See Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217 (1995) (containing an analysis of the issues to be considered in resolving the expropriation claims of Cuban nationals); cf. Juan C. Consuegra-Barquin, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873 (1994) (containing an analysis of the issue in the context of the potential resolution of claims to title to residential property in Cuba).

government, and partial forgiveness. He proposes that ad-hoc, case-by-case negotiations be used to resolve the most significant claims.¹¹⁶ Whatever methods are adopted, they must be as fair to all parties as possible, and must treat Cuban nationals in roughly the same manner as they do U.S. claimants.

C. High Priority Permanent Laws

Cuba will be in immediate need of permanent laws to implement the economic reconstruction of the country, foster trade with other nations, and encourage foreign investment. Areas of legal change that need to be addressed as early in the transition as possible include at a minimum the following codes and statutes:

1. Bankruptcy Code
2. Companies Act
3. Foreign Investment Act
4. Intellectual Property Protection Codes
5. Labor Code
6. Tax Codes
7. Trade Regulation and Anti-Monopolies Codes

A relatively straightforward example of a permanent law that needs to be enacted on a high priority basis is a Foreign Investment Act. Every country in Central and Eastern Europe that has made the transition from socialism to a free-market economy has enacted such a statute, which is primarily intended to encourage foreign investment.¹¹⁷ As a starting point legislatures usually use whatever laws are in existence before the transition which dealt with joint ventures with foreign investors, and then modify those existing laws to eliminate restrictions on investment by foreign nationals.¹¹⁸

116. Ritter, *supra* note 115, at 559-60.

117. See, e.g., Bulgaria's Law on the Economic Activity of Foreign Persons and on the Protection of Foreign Investments (January 16, 1992), *published in* State Gazette No. 8 of 1992; Hungary's Act XXIV of 1988, *published in* 2 HUNGARIAN RULES OF LAW IN FORCE, (1991); Poland's Law on Companies with Foreign Participation (June 14, 1991), *reprinted in* POLAND: THE NEW BUSINESS FRONTIER (1991); Romania's Law Concerning Foreign Investments, Law No. 35 of 1991, *as amended by* Law No. 57 of July 10, 1993.

One of the first countries in Central and Eastern Europe to enact a Foreign Investment Law was Czechoslovakia, which did so in 1988. Act on the Enterprise with Foreign Property Participation, Act. 173 of 1988, *as amended by* Act 122 of April 19, 1990. In 1992, however, Czechoslovakia essentially abrogated its foreign investment legislation by merging it into the Commercial Code. As a result, foreign investors have neither limitations nor incentives to invest in the Czech Republic or Slovakia and are treated the same as domestic investors. GRAY ET AL., *supra* note 2, at 52, 55.

118. Cuba has developed a framework for foreign investment in the form of Legislative Decree No. 50. Sobre asociacion economica entre entidades Cubanas y extranjeras [On

A typical foreign investment law addresses four main subjects: (1) the definition of foreign investor; (2) allowable forms and areas of investment; (3) investors' rights and guarantees; and (4) incentives for investment.¹¹⁹ The law usually includes the elimination of restrictions on foreign ownership of domestic companies, the removal of almost all prior-approval requirements for foreign investment, the guarantee of full compensation in the event of expropriation, the right to full repatriation of profits, and the creation of special tax incentives.¹²⁰

First of all, the Foreign Investment Act must define "foreign investors" under the law. The Act must specify whether Cuban nationals living abroad will be considered foreigners and determine whether Cuban expatriates who have become citizens of another country will be characterized as foreign investors. Because the purpose of a foreign investment law is to encourage the maximum inflow of foreign-based capital, its definition of who is considered a

Economic Association Between Cuba and Foreign Entities], Decree No. 50, GACETA OFICIAL, February 15, 1982, at 11, translated in *Cuba: Legislative Decree on Economic Association Between Cuba and Foreign Entities*, 21 I.L.M. 1106 (1982). This decree has been the basis for Cuba's aggressive pursuit of joint ventures with foreign investors for the purposes of expanding exports and promoting international tourism. See EXECUTIVE COMMITTEE OF CUBA'S COUNCIL OF MINISTERS, POSSIBILITY OF JOINT VENTURES IN CUBA (1991). Based on this legislation, over 150 joint ventures have been undertaken with entrepreneurs from Europe and Latin America. See *Cuba: Foreign Investments Continue to Increase*, Inter Press Service, June 28 1994, available in LEXIS, NEWS Library, WIRES File.

Legislative Decree No. 50 could be used in the early days of the transition as a vehicle for foreign investment in Cuba. It is, however, "full of ambiguities that would leave foreign investors unsure of their rights and at the mercy of arbitrary actions by the government." Travieso-Díaz & Bleisteiner, *supra* note 96, at 23 (quoting JORGE PEREZ-LOPEZ, THE 1982 CUBAN JOINT VENTURE LAW: CONTEXT ASSESSMENT AND PROSPECTS 73-78 (1985)). This decree and the rules for foreign investment will need to be totally overhauled or replaced at the earliest possible time. See Jorge Perez-Lopez, *Cuba's Thrust to Attract Foreign Investment: A Special Labor Regime for Joint Ventures in International Tourism*, 24 U. MIAMI INTER-AM. L. REV. 221, 277 (Winter 1992-93). As of this writing, a new foreign investment law is under development by the Cuban Government.

119. For example, the Romanian Law Concerning Foreign Investments, *supra*, note 117, is organized as follows: chapter I, "General Provisions" (including the definitions of foreign investment, foreign investor, and participation of foreign investors in Romania, and a definition of the areas where foreign investment is allowed); chapter II, "Guarantees" (setting forth the rights of foreign investors, and guarantees against expropriation without compensation); chapter III "Incentives" (containing reductions of duties and taxes); chapter IV, "Promotion and Registration of Foreign Investments;" chapter V, "Financial, Foreign Currency and Commercial Operations;" and chapter VI, "Final Provisions."

120. GRAY ET AL., *supra* note 2, at 8.

foreign citizen should be as inclusive and flexible as possible.¹²¹ On the other hand, a law that grants broad privileges to Cuban expatriates could lead to resentment by people on the island.¹²²

The Act also needs to explain the types of business organizations that foreign investors may use to operate in Cuba. Central and Eastern European countries now allow foreign investors to use all forms of organization recognized by local law.¹²³ In order to follow this practice, Cuba would need to enact a modern Companies Law to open the country's doors to the wide variety of investment entities that are used in today's business world.

Another goal of the Foreign Investment Act will be to delineate the types of business activities that foreign investors can undertake. Typically, almost all areas of the economy are open to foreign investors without need for pre-approval by the government.¹²⁴ There are three areas where foreign investment is often subject to government approval or prohibited altogether: (1) an activity having national security implications such as the production or sale of weapons; (2) the exploitation of natural resources; and (3) the ownership of agricultural land. For Cuba, the first type of limitation is reasonable, but the other two would exclude foreign investors from access to a large portion of the economy. Any restrictions on foreign investment in those areas will have to be weighed carefully.¹²⁵

121. Bulgaria's foreign investment law has dealt with this question by declaring that Bulgarian citizens living abroad are not foreign investors for purposes of the law. Bulgarians who have acquired dual citizenship have the right to elect whether they want to be treated as nationals or foreigners for purposes of the law. *Id.* at 34-35.

122. One serious political issue that Cuba's transition government will need to face is the fear and animosity of people in Cuba against "carpetbaggers" coming from the United States to take over the country. This fear appears to be shared by many Cubans and is fanned by the current Cuban government. See Jose L. Pujol, Turmoil in Cuba, Address at the Shaw, Pittman, Potts & Trowbridge Workshop on Strategies for the First Year of Cuba's Transition 10-11 (January 27, 1994) (transcript available in Shaw, Pittman, Potts & Trowbridge's Library, Washington D.C.). It will need to be taken into account in all legislation that addresses the legal, economic, and political rights of Cuban expatriates.

123. For example, corporations, limited liability companies, and partnerships.

124. Travieso-Diaz & Bleisteiner, *supra* note 96, at 20; GRAY ET AL., *supra* note 2, at 8.

125. Cuba has recently entered into several joint ventures with foreign investors for the exploration and extraction of oil, nickel, and other minerals. See, e.g., *Cuba Has First Offshore Oil Find; More Wells on Tap*, OIL & GAS J., June 13, 1994, at 40; Larry Luxner, *U.S. Embargo Aids Canadian Ventures—Cuba Also Offers Virgin Resources Without Red Tape*, TORONTO STAR, May 3, 1994, at C1. These foreign investments in the exploitation of Cuba's mineral resources create a strong precedent for allowing continued foreign participation in this crucial area of the country's economy.

The prohibition against foreigners owning land, particularly agricultural land, stems from the fear of foreign takeover of the national patrimony and the attendant loss of sovereignty. In

Additionally, the Act should provide foreign investors with specific assurances against loss or lack of liquidity in investments. Foreign investment laws typically replicate the constitutional guarantee against uncompensated expropriation of foreign assets, declare that the expropriation of the property of foreign investors can only occur in cases of important public need, and assert that such expropriation should be subject to adequate compensation.¹²⁶ These laws also normally authorize the full repatriation of foreign investment profits and other investment proceeds, including those resulting from the liquidation of the investment.¹²⁷ Cuba's Foreign Investment Act will need to provide similar assurances, which in any event will need to be included in any bilateral trade agreements between Cuba and other countries as a prerequisite to normalization of commercial relations.¹²⁸

the case of Cuba, this concern has historic roots. Prior to the 1959 Revolution much of the country's agricultural land was owned by U.S. citizens and other foreign nationals, particularly in connection with the sugar industry. Thus, when the United States set up a process under P.L. 88-666 in 1964 to allow U.S. nationals to file claims before the Foreign Claims Settlement Commission (FCSC) for the expropriation of their assets in Cuba, 6 of the 10 largest claims certified by the FCSC were to U.S. companies that owned sugar mills and plantation in Cuba. Ritter, *supra* note 115, at 533.

126. For example, article 5 of the Romanian Law Concerning Foreign Investments, *supra* note 117, states:

The foreign investments in Romania shall not be nationalized, expropriated, requisitioned or subject to other measures with similar effects, except in cases of public interest, with observance of the legal procedures set forth by the law and upon payment of a compensation equivalent to the value of the affected investments, which shall be prompt, adequate and appropriate.

127. For example, article 9 of the Romanian Law Concerning Foreign Investments, *supra* note 117 gives foreign investors the right to transfer abroad "their entire annual profits" (after payment of taxes); "the sums collected for copyrights, technical assistance, expertise and other services;" "the sums obtained from the sale of shares, partnership rights, bonds or other securities, as well as the proceeds from liquidation of investments;" and "the sums received as compensation in the event of one of the occurrences set forth in Article 5 hereinabove."

128. The United States will probably attempt to enter into a bilateral investment treaty (BIT) with Cuba, as it has done with a number of other developing countries. See Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 657-58 (1990). Such a treaty would establish explicit legal norms to protect future U.S. investments in Cuba and ensure that U.S. investors are protected against expropriation and enjoy the right to transfer the profits and proceeds of investment out of Cuba in hard currency and without interference by the Cuban government. Kristina Smith, Note, *Investing in Democracy: Joint Venture Opportunities in the Czech and Slovak Federal Republic*, 18 SYRACUSE J. INT'L L. & COM. 199, 214-15 (1992).

Cuba has recently entered into BIT-type agreements with Italy, Switzerland, Great Britain and Spain. See *Spanish Official Views Results* (Mexico City NOTIMEX broadcast, May 28, 1994), available in F.B.I.S. (LAT-94-104), May 31, 1994, at 13-14; *Delegates Begin Talks* (Havana Radio Havana Network broadcast, May 27, 1994), available in F.B.I.S. (LAT-94-104), May 31, 1994, at 13. The most recent agreements, which were negotiated with Spain and Great

Finally, the Act needs to offer foreign investors a set of incentives that will encourage participation in Cuba's economic transition. Most of the countries of Central and Eastern Europe have developed a package of incentives to make investment in their countries more attractive to foreign capital and to compensate for the risks of investing in a country undergoing an economic and political transition. These incentives take the form of reduced tax rates, tax holidays for periods of up to several years, tax-free "free trade zones," customs duty exemptions on imports used for export-targeted production, and other similar measures.¹²⁹

There is no question that Cuba will be in dire need of foreign investment during the transition and that it should undertake all reasonable steps to encourage such investment.¹³⁰ The difficulty lies in assessing how much in the way of incentives foreign investors will require before they decide to invest capital in Cuban enterprises.¹³¹ It would seem, in light of the Cuban transition government's potentially dire need for revenue, that tax incentives to foreign investors should be limited in extent and duration and should be focused on those areas of the economy where the injection of foreign working capital is essential, such as in high technology industries that cannot be expected to be developed solely with local resources.¹³²

Britain and are still pending ratification by the Spanish and British legislatures, contain assurances of protection to investors from those nations against actions by the Cuban authorities that would result in the loss of the investment or its proceeds.

129. Travieso-Diaz & Bleisteiner, *supra* note 96 at 25-28.

130. See Jorge A. Sanguinety, Monetary Dualism as an Instrument Towards a Market Economy: The Cuban Case 2 (paper submitted at the Annual Meeting of the American Economic Association, Boston, January 2-5, 1994 and at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy, Miami, August 11-13, 1994) ("[T]he speed of [Cuba's] economic restriction depends on the level of investment activity that can be achieved in Cuba, which at the same time depends on the volume of capital inflows that can be attracted to the country.").

131. It has been argued that incentives such as tax holidays do little to actually stimulate foreign investment, cause adverse domestic consequences because they discriminate against national investors, and lead to significant loss of government revenues. GRAY ET AL., *supra* note 2, at 8. (As noted earlier, Czechoslovakia eliminated tax incentives for foreign investors after offering them for three years.)

132. Hungary, for example, offers foreigners tax incentives that are industry-specific and dependant on the size of the investments. Favored industries include electronics, car parts, machinery, engineering units, pharmaceuticals, packaging technology, agricultural and food technology, energy conservation, telecommunications, tourism, and public transportation. Travieso-Diaz & Bleisteiner, *supra* note 96 at 25-27; Francis A. Gabor, *The Quest for Transformation of to a Market Economy: Privatization and Foreign Investment in Hungary*, 24 VAND. J. TRANSNAT'L L. 269, 298-300 (1991); GRAY ET AL., *supra* note 2, at 79-80 & n.53. A similar list could be developed for Cuba based on existing conditions at the time of the

The above discussion shows how enactment of even a relatively straightforward law promoting the economic transformation of Cuba involves a host of political, legal, and economic considerations that call for careful analysis and a comprehensive approach to economic legislation.

VI. LAWS THAT NEED TO BE ENACTED DURING THE POST-CONSTITUTION PERIOD OF THE TRANSITION

The laws that need to be enacted during the post-constitution period of the transition include those necessary to implement economic reforms and those that provide a permanent legal framework for a free-market in Cuba. The laws enacted during this period should build upon, supplement, and in some instances supersede, those enacted in the earlier pre-constitution stage.

A. Laws Needed to Implement Economic Reforms

The legal changes needed to support economic measures depend to a large degree on the economic programs that are being implemented. Economists are generally divided between those favoring a big bang—a set of drastic reforms instituted all at once¹³³—and those advocating a more gradual approach with a minimum package of essential reforms.¹³⁴ Christopher Clague defines such a minimum package of reforms to encompass taking measures to restore macroeconomic balance to the economy, setting rules for the operation of the new private sector, implementing price reforms, and restructuring the state sector.¹³⁵

transition.

133. An example of this is the “shock therapy” approach adopted by Poland, which included simultaneous institution of a broad range of economic reforms, including the elimination of price controls, the elimination of subsidies to state-owned enterprises, the devaluation of the currency, the lowering or elimination of trade barriers, the enactment of a privatization law, and the provision of legal and financial incentives to the private sector. Jorge F. Perez-Lopez, *Learning from Others: Economic Reform Experiences in Eastern Europe, Latin America, and China*, in TRANSITION IN CUBA, *supra* note 1, at 367, 393 (quoting Jeffrey Sachs, *Poland's Big Bang: A First Report Card*, 5 INT'L ECON. 40 (1991)).

134. For a summary of different views espoused in relation to Cuba's transition, see Rolando H. Castaneda, *Cuba: Una Opcion por la Libertad, el Desarrollo y la Paz Social (Propuesta de Lineamientos Estrategicos para la Completa Transformacion de la Economia Socialista a una Economia Social de Mercado)*, in CUBA IN TRANSITION—PAPERS AND PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 257 (1991).

135. Christopher Clague, *The Journey to a Market Economy*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE 1, 8-10 (Christopher Clague and Gordon C. Rausser

The legal measures that should be taken during the early phase of the transition would at the very least support at least a "minimum bang." These include: (1) tax codes and regulations, with accompanying rules and tax collection mechanisms; (2) a foreign investment law that encourages the entry of foreign capital; (3) labor laws that provide for freedom of hiring of labor and provide continued worker security in old age and disability; (4) legislation establishing a minimum social safety net; and (5) legislation that continues to guarantee free education and limited health care.¹³⁶ To the extent that some of these crucial legal changes could not be completed during the pre-constitution period, they should be finalized after the new constitution is enacted.

The rest of the economic reform legislation to be passed in the post-constitution period will depend on the economic program that is adopted. Many of the law changes enumerated below will be an integral part of any economic reform program.

B. Development of a Legal Framework for a Free-Market in Cuba

Many laws need to be enacted during the post-constitution period to provide an adequate legal framework for a free-market, democratic society in Cuba. These include, among others, the following new or revised laws and codes:

1. Accounting Standards, Financial Reporting, and Auditing Laws
2. Administrative Law
3. Aliens, Nationality, and Immigration Laws
4. Armed Forces and National Defense Laws
5. Banking Law
6. Civil Law
7. Commercial Law
8. Customs Law
9. Education Law
10. Election Law
11. Environmental Law
12. Judicial Reform Law
13. Insurance Law
14. Land Use Law
15. Maritime and Fisheries Laws
16. Mining Law

eds., 1992); *see also*, Perez-Lopez, *supra*, note 133, at 405.

136. Although, as noted above, this social safety net is currently unraveling due to the ongoing economic crisis, at least some of its elements must be preserved during the transition to avoid extreme hardship on the population and avoid civil unrest. Mesa-Lago, *supra* note 21, at 652-54.

17. Penal Law
18. Occupational Health and Safety Law
19. Public Contracts Law
20. Public Employees Law
21. Securities Law
22. Social Security Law
23. Telecommunications Law
24. Transportation Laws

This partial enumeration of the new laws that need to be enacted during the transition serves to illustrate the daunting legislative task that lies ahead for the transition government. Further, it is vitally important that the transition government develop the legal infrastructure to support the drafting, public debate, approval, and implementation of all of this legislation as quickly as possible.

Several of these laws, such as the new Commercial Code and the Election Law, can and probably should be passed before the new constitution is enacted. Others, such as the new banking laws, may be enacted early but may not be capable of full implementation for several years (if the experience in Eastern Europe serves as a guide).¹³⁷ Cuba's current financial system is totally inadequate for commercial or individual use, so its rebuilding will have to start from a "quasi zero" base and may not be accomplished in the first few years of the transition.¹³⁸

137. Trávieso-Díaz & Bleisteiner, *supra* note 96, at 31-34. Jan Svejnar & Jorge Perez-Lopez observed the following about the transformation of banking law in Eastern Europe:

All Central and East European economies have attempted to convert the traditional 'monobank' system into one with an autonomous central bank and a competitive commercial bank sector. The attempt has succeeded on paper, but in practice has so far been a resounding failure. The newly created commercial banks have usually rapidly emerged from branches of the former central bank, but this transformation has been more *de jure* than *de facto*. The commercial banks are undercapitalized, they lack capable professional staff (including loan officers), and the bulk of their assets has been loaned to bankrupt enterprises. The banks provide poor financial services, and their loan activity is frequently oriented toward state enterprises at the expense of new private firms.

Jan Svejnar & Jorge Perez-Lopez, *A Strategy for the Economic Transformation of Cuba Based on the East European Experience*, in *CUBA AFTER THE COLD WAR* 323, 330-31 (Carmelo Mesa-Lago ed., 1993).

138. Alberto Luzarraga, *Anticipating the New Cuba Financial Structure*, Address at the Anticipating the New Cuba Conference (March 17-18, 1994) (transcript available in the Shaw, Pittman, Potts & Trowbridge Library, Washington D.C.). It should be noted that the Cuban Banking Study Group (CBSG), a U.S.-based group of Cuban-American banking experts, was organized in 1992 to study banking reform requirements during Cuba's transition. See Fernando A. Capablanca, *Cuba: Elements for a Modern Financial System*, Address at The Fourth Annual Meeting of the Association for the Study of the Cuban Economy (August 12, 1994) (transcript available in Shaw, Pittman, Potts & Trowbridge's Library, Washington D.C.). Hopefully, the efforts of groups such as the CBSG will result in proposals for expediting the development of

Implementation of changes in other areas of the law may be delayed due to economic necessity. For example, Cuba, like virtually all the former communist countries in Eastern Europe, suffers from the absence of a true governmental commitment to protecting the environment, a lack of enforcement of existing environmental laws, and the press of financial constraints. These problems have caused a growing environmental crisis in Cuba which will call for legislative remedies during and after the transition.¹³⁹

The transition government in Cuba will surely recognize the need for the swift enactment and enforcement of environmental protection laws and regulations.¹⁴⁰ Alternatively, there will be significant pressure on the government to facilitate economic reconstruction by increasing the output of industries, such as sugar production, whose operations have serious environmental impacts through the use of chemical fertilizers, herbicides, and pesticides.¹⁴¹ There will also be pressure to encourage foreign investment by minimizing environmental requirements and liabilities along with opposition to devoting limited governmental resources to environmental reclamation projects.¹⁴² As a result of the clash between these conflicting needs it

a viable financial system in Cuba.

139. JOSE R. ORO, *THE POISONING OF PARADISE: THE ENVIRONMENTAL CRISIS IN CUBA* 8-13 (1992); see generally Maria Dolores Espino, *Environmental Deterioration and Protection in Socialist Cuba*, in ASCE-2, *supra* note 1, at 327. Recent reports indicate that the environmental degradation that is taking place in Cuba is severe and may take many years to reverse. Francisco Garcia Azuero, *Cuba's Environmental Damage Will Take Years to Fix, Some Fear*, MIAMI HERALD, Feb. 18, 1994, at 12A.

140. Cuba's current government has enacted several laws and decrees towards the protection of the environment, starting with the Law on Environmental Protection and the Rational Use of Natural Resources (Law No. 33, published January 10, 1981) and including (among others) the Legislative Decree on the Structure, Organization and Operation of the National System for Environmental Protection and the Rational Use of Natural Resources (Legislative Decree No. 118, published January 18, 1990), the Decree on the Protection, Use and Conservation of Soils (Decree No. 179, published February 26, 1993), the Legislative Decree on Forest and Wildlife Natural Resources (Legislative Decree No. 136, published March 5, 1993), and the Legislative Decree on Surface Waters (Legislative Decree No. 138, published July 2, 1993). This legislation, however, is not self-executing, and implementing regulations have not been issued. Moreover, Cuba's environmental protection agency, the National Commission on the Protection of the Environment and the Rational Use of Natural Resources (COMARNA), has a staff of only two dozen people, lacks enforcement powers, and is unable to take action against state-owned enterprises. Espino, *supra* note 139, at 339-40; ORO, *supra* note 139, at 9-13.

141. Espino, *supra* note 139, at 340.

142. Former socialist countries, notably Eastern Germany, are slowly beginning to curb further environmental deterioration and reverse the effects of environmental abuses under socialism. New environmental protection legislation (such as the Environmental Framework Act in Eastern Germany) includes clean-up obligations on entities causing environmental damage and their legal successors. DAVID E. BIRENBAUM, *BUSINESS VENTURES IN EASTERN EUROPE*

is quite possible that comprehensive environmental legislation may not be implemented until several years into the transition when the economy has stabilized and recovery is on its way.

VII. CONCLUSIONS AND RECOMMENDATIONS

Changes to Cuba's legal institutions must be at the core of a successful market transition. The Russian and East European reform experiences provide examples of the risks of attempting a transition without a sufficient framework of laws, institutions, and trained personnel to implement the changes.¹⁴³ Moreover, in light of the widespread disregard for the law that has developed in Cuba as a result of the deterioration of living conditions, it is essential that a strong legal system be developed to re-instill in the population sufficient respect for the laws necessary for true democracy.¹⁴⁴

The transition government in Cuba will have its hands full keeping order in the country and preventing a major economic disaster. Enacting the needed legislation and instituting the necessary changes to the legal system in a short time frame may be too difficult a task for such a government to accomplish without outside help. It will likely be only through the combined efforts of legal professionals in Cuba and abroad that required changes to Cuba's legal system will be accomplished on a schedule that supports the transition. Since there are political limitations on the work that lawyers in Cuba will be able to accomplish, the impetus for anticipating and defining the changes must at this time come from abroad.

Consequently, a group of U.S.-based lawyers, working on a pro bono basis, should study the changes that will need to be implemented in Cuba's legal system. In light of current conditions in Cuba, such a group should start work immediately.¹⁴⁵

AND RUSSIA § 6.03, at 6-28 (2d ed. Supp. 1994). Enactment of similar legislation in Cuba would act as a disincentive to foreign investment, because it would subject those taking control of former state-owned enterprises to potential liability for the costs of cleaning up the areas affected by previous operation of the facility and disposing of toxic materials that may have accumulated.

143. BIRENBAUM, *supra* note 142, at § 2.01, at 2-6 & n.3 ("Legal uncertainty is consistently cited first among the most significant barriers to investing in Russia.")

144. Again, the example of the current Russian situation is instructive. It is widely reported that crime and corruption have increased since the collapse of the Soviet Union, partly because there was a widespread disregard for the law in Soviet society and insufficient steps were taken to re-establish a strong and effective legal system. *Id.* at 2-10.

145. It is not desirable, however, to actually draft proposed legislation for a new Cuba. First, it would be presumptuous on the part of lawyers abroad to substitute themselves for the

transitional government in Cuba in assessing the needs of the nation. Second, drafting laws from abroad for a transition in Cuba might give the Cuban government another opportunity to denounce the political designs of Cuban exiles. Third, most Cuban American (and American) lawyers have been trained in the U.S. legal system, which is vastly different from Cuba's previous and current systems. Finally, laws cannot be drafted in a vacuum, but must respond to the actual conditions at the time of their enactment.

