

Legal-Institutional Foundations for Reconstruction in a Post-Revolutionary Cuba: A Conceptual Exercise

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ABSTRACT: Cuba is certainly in transition. But that means very different things to groups competing to drive transition. The resulting dissonance, guided by sometimes incompatible formative premises, complicates the challenge of transition, its forms, where that transition leads, and what may be necessary. Whatever the form and trajectories of transition, it is clear that transition will require substantial attention to the construction of aligned institutional-legal foundations. The purpose of these remarks is to consider the form and challenges of developing robust institutional-legal foundations in the Cuban context. It is organized in five parts. After the introduction the remarks first considers conceptual starting points—the importance of the development and choice of political-economic models as a predicate for the construction of robust institutional-legal foundations. It is divided into two parts, the first focusing on normative political orders, and the second examining institutional-legal orders. The remarks then considers two starting points of analysis. The first situates the Cuban political-economic model as a conceptual baseline. The second the current state of institutional-legal foundations in Cuba. The remarks then articulates the context in which the challenge of transition appears in contemporary Cuba—the end of the long arc of the Cuba revolutionary regime. That brings the remarks to the heart of the matter: what the future can bring. This is divided into several organizing-normative questions: (a) Who is to make decisions about transitioning?; (b) What ideological political economic model is to serve as the basis of post-revolutionary institutional-law building?; (c) Through which institutional actors ought this ideological political-economic model be realized?; (d) What timeline is to be chosen to develop and implement this transition?; and (e) The Marie Kondo moment—what of the present system is to be kept and what is to be discarded or repurposed?

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1. Introduction.

Dear participants, fellow speakers, discussants, and the organizers of this year's excellent event.

I am grateful for the opportunity to contribute again, in some small way, to the great work of the Association for the Study of the Cuban Economy as it continues its generation long engagement with Cuba and the contemporary Cuban situation.

It is increasingly rare for me to be challenged to approach issues of contemporary Cuba in interesting and possibly useful ways. Jorge Pérez López, however, has managed to do just that. He has challenged me to consider the legal-institutional foundations for reconstruction in a post-revolutionary Cuba.

I was intrigued. I was intrigued not because of the profundity of the task. After all, people have been writing one thing or another about the construction and reconstruction of the legal-institutional foundations of a Cuban state in contemporary style since at least the 1860s. And certainly one can argue that Cuban history is more the story of endless transition (with different amplitudes of course) than it is of periods of stability and organic development, one always undertaken in the shadow of some dominant state of other.¹ That academic-conceptual-political-economic talking, endless, sometimes repetitive, and always mimetic in the sense that it always seeks to reproduce in a contextually relevant way what may fit best within polycentric systems of global power into which Cuba must be situated if it is to survive, and perhaps thrive. Indigeneity of form and function, therefore, tends to serve as a mask beneath which much more interesting forces must be aligned. It is a mask that covers not just Cuban politics but also the construction of the ethno-racialism of the Cuban people.² What remains of all of these efforts is a mountain of text about the cultures and character of whatever institutional apparatus they might fancy tied to the ideology of whatever political legal ideology is strategically useful for operationalizing and controlling whatever vision they might wish to convince a critical number of others to embrace.

I was intrigued because of the possibility of conceptualizing a normative operational legal-institutional framework that might be able to resist the lusts of the current crop of actors, all with knives and forks at the ready, and eager to feast on the body of the Cuban State and through that apparatus, on its people. That feast is not meant to destroy; it is meant to extract value without killing the host. That is perfectly fair, and certainly has been the *modus operandi* of human collectives and their individuated structures of power, for a very long time. It was not avoided in the construction of post 1959 Revolutionary Cuba, and then a mimetic Soviet Leninist (not Marxist) state, now decaying—like the structures of *La Habana Vieja*—into three co-existing governance apparatus: the military state (which has survived and transformed itself from its 1959-76 origins), the apparatus of a Caribbean style Soviet³ nomenklatura that emerged after 1976, and the structures and cultures, including institutional-legal cultures, of the informal economy, one that is at once both domestically targeted and transnational in scope and operation.

I was intrigued because the conceptual foundations of transitions have become important features of contemporary social relations that tends to get lost in its politics and in the strategic calculus of those engaged in moving forward whatever project tickles their fancy. These conceptual foundations exist beyond the strategic calculus who see in the possibility of transition only the objectification of their desires, which are in turn the manifestation of their belief systems from which it is possible to form desire in the first place. The foundational conception of transition, then, focuses on the way in which one identifies, signifies, orders, and values “things” (tangible and intangible physical and abstract objects) that become the objects, processes, rules, and institutions of a political economic order, now understood as a conceptual cage of premises and ways of viewing the world that shapes the preferred rationalization

¹ Ada Ferrer, Cuba: *An American History* (NY: Scribner, 2021).

² Discussed in Larry Catá Backer, “From Hatuey to Che: Indigenous Cuba without Indians and the U.N. Declaration on the Rights of Indigenous Peoples,” (2008) 33(1) *American Indian Law Review* 201-238.

³ On Soviet Marxist-Leninism, see Leszek Kolakowski, *Main Currents of Marxism* (P.S. Falla (trans), MY: Norton, 005).

of the reality of social relations. That conceptual cage then shapes transition, now better understood as the space (platform in modern conceptions of the location of human action) where law, ideology, institutions, and value analytics themselves are objects with their own value and for which there are markets. Transition, then, in human economic-political spaces are themselves objects for which there are markets of desire. To speak of transition then is to speak to the mechanics of transactions in cognitive cages within which social relations may be realized through the application of the premises and tastes for collective organization that each represents.

And that is the fundamental story of, and the challenge for, Cuba—the land of permanent transition. Cuba is among the most vitally important laboratories of this contemporary performance of transition in its political, normative, strategic, utilitarian and legal sense. With as a critically important Cuba object of study, I was intrigued about the possibilities of the way on which one might identify, signify, order, and value “things” that become, in turn, the objects, processes, rules and institutions of a political-economic order—and especially how that shapes transition, where law, ideology, institutions, and value analytics themselves become objects in transition. All of this transition becomes more interesting still where all of these objects and significations acquire a value, in relation to the political-economic model that serves as the baseline for measurement, and for which there are markets.

It is only within these contextual borders that it may be useful to consider the possibilities of foundations, the consideration of which would be triggered by some sort of post-revolutionary state, of institutional and legal structures on which another apparatus of governance, for both institutions and individuals, might be conceived. That is, how can one approach this specific instance of transition within Cuba’s two centuries of constant transition by focusing on the construction and instrumentalization of institutional-legal foundations toward the ideological ends that drives the current efforts at transition.

Dear participants—this is my task.

And with this task a caution most ironically culled from the mouth of a barber pretending to be a prince send to the house of a minor noble with two daughters and a stepdaughter who is consigned to the cinders of the kitchen fireplace in order to discover a wife for his prince dressed as his servant:

¿Pero qué tragedia debe surgir aquí al final de nuestra comedia? (“But what tragedy must arise here at the end of our comedy?”).⁴

And indeed, the history of Cuba in respect of the constitution of institutional legal foundations guided by the flavor of the month ideological conceptual cage that tickles the fancy of those with the power to make it happen may be summed up since the middle of the 19th century as an accumulation of an endless production of comedy producing its own version of tragedy in generationally contextual ways. But if it to

⁴ Jacopo Ferretti, *La Cenerentola* (music by Gioachino Rossini; 25 January 1817, Rome),)Scena sesta (Dandini), available <http://www.librettidopera.it/zpdf/cenere.pdf> (“Ma al finir della nostra commedia, che tragedia qui nascer dovrà!”)

the start of a new cycle of comedy that the trajectories of the current Cuban situation points, then it may be worth writing its script, if only to ameliorate the tragedy that comes at its end.

To those ends, I will start with the foundations of any discussion of institutional legal foundations. From this it is possible to briefly situate the discussion from out of the current, and now deeply naturalized, language, habits, and behavior expectations of Cuba's current form of Caribbean Marxist-Leninism. From there one can consider the current state of institutions and law within that system. It is on that basis that one can start to play with what comes after. One can then consider turning points—what sort of post-revolution will produce what sort of political-ideological foundation on which it will be possible to build an institutional-legal foundation that both manifest that ideology and produces the baseline from which stability and ideologically constructed goals can be fulfilled. That turning point analysis then serves as a reasonable conceptual basis from out of which it may be possible to rationalize an institutional-legal foundation for Cuba—any system really. It doesn't matter, except to shape the task of naturalizing its "rightness" with the masses, which is also a function of the ability of the apparatus to deliver. I end these remarks with a brief consideration of the range of institutional-legal foundations may follow.

To leave no room for surprises, I will suggest the following end point for any exercise of institution-law foundation building: Institutional legal foundations do not build the necessary solidarity of a collectively embraced political-economic normative order. But institutional-legal forms that draw on and elaborate current expectations and provide pathways toward development driven by indigenous elements offer some promise for a more stable and prosperous future. None of this necessarily requires revolution; nonetheless transition may over time move a political collective substantially along any path toward development that they might choose.

2. Conceptual starting points:

(a) *Normative Orders*. The conceptual starting point for any task directed toward a model of an institutional-legal foundation must start with an inquiry into the foundations on which this second order foundation building may take place. This consists of those generative assumptions and premises on which it is possible both to rationalize an institutional-legal order and provide a basis for judging that product as good or bad, as useful or ineffective, and the like. Order and judgment are critical elements of any institutional legal system, and the rules—the normative cage—within it is possible to craft such a thing satisfactorily provide both meaning and measure to the task.

That core foundation is rarely acknowledged; it is assumed. And so with my task today. The underlying assumption for Cuba has always rested on transitions—though Cuba has, as I have suggested spent the last two centuries in a constant state of transition, one which appears not quite ready to end. But transition from what to what sort of conceptual cage: generally that easy question produces an equal easy answer—an aspirational contemporary manifestation of liberal democracy, one driven by markets that are in turn driven by the fundamental rationalizing premise of the autonomous individual, the separation of management (the state apparatus and its institutions) from control (popular sovereignty),

and the performance of the politics of liberal democratic representative government of delegated sovereign authority through mechanisms of exogenous democracy. These are grounded in cycles of elections of representatives of political control within institutions of power, against the exercise of the power of which ordering premises encased in the normative position of law and the premises of expectations of behavior within political institutions (grounded in a law of process) are developed.

The founding ideology makes the character of forms of institutions and legal foundations inevitable, their character set within the rationalizing premises of the ideological foundations from which they arise and for which they represent the manifestation, protection, and operationalization of foundational normative objectives. Once a guiding ideology is embraced the rest merely follows, though arguments about the best form of what follows assume titanic characteristics, witness the current dialogue within the United States, only because one fights over articulation and operation rather than the guiding ideology itself. In this Hemisphere, and especially in the case of Cuba, liberal democratic ordering is assumed, as is the sanctity of elections as the means by which one pledges alliance to the system. The rest follows, including the quibbling among variations in the practice of liberal democracy within and about the ordering of economic activity, human rights, welfare and the relationship of the autonomous individual with the organs and power of the state, its officials, apparatus, presumptions and conceits as a source of doing “good.” For Cuba to transition properly then, it must aspire to institutional-legal foundations that express the underlying premises of liberal democracy, if not exactly like the United States, then perhaps Mexico or Brazil.

Whatever fetishized incantations are used in and as discourse, this is what is on order. The only question is, are there those who might be drafted into the project to make this real, and if so, which among the various forms of the liberal democratic reality ought to be expressed in, through, and as Cuba?

(b) Institutional-Legal Orders. Once one understands the role and purpose of core conceptual political economic ideological ordering it is possible to start thinking about institutional-legal foundations of that ordering. In this sense institutional and legal orderings are second order concerns. To be effective these tasks require an authoritative and deeply naturalized conceptual cage—presumptions of the appropriate cocktail of normative values, societal objectives, presumptions about the relationship between government (collective political authority) and an individual, and the privileging of collective or individual human persons. Institutional and legal foundations constitute both the administrative apparatus through which political power can be manifested in an ordered way, and the rules through which such institutions operate and power may be authoritatively and legitimately expressed. All of that would be assessed as a function of the basic premises that animate the governing political-economic model.

Institutions are the spaces within which political power may be rationalized and organized, and through which the leadership and guidance of those with the authority to do both may implement their programs. The language through which this is undertaken is that of law. Law constitutes the authoritative voice of power. Law serves both as a command (e.g. “do this,” “don’t do that,” etc.) and as an authoritative means of constituting institutions to exercise the commands of power. Law can also serve as

the mechanisms through which power delegated to administrative agents can be managed—usually through principles of abuse of discretion, fiduciary duty, and more basically through the foundational constraints on the exercise of political authority, even power legitimately delated through law. The meta-principle of this interlinking of power, law, and institutions can in at least one sense be understood as the rule of law (broadly conceived). It radiates from the organizing ideological principle that law represents the means by which public authority speaks and acts (and through contract private authority can speak as well within a smaller space). It is a language, and the manifestation of decisions and actions within the acceptable parameters set out in the political-economic model. It is also a thing in itself—autonomous of the institutions that operate in and through it, and the actors who must conform their performance and activities within its parameters. It represents norms, values, processes that are meant to reaffirm legitimacy and authority as long as whatever is done is in accord with the political-economic model. It is a means of layering the assurance of predictability, certainty, and stability on its objects.

Any political-economic system that purports to be popular, in the sense of exercising power from through or in the name of the people, is judged against its conformity to its political-economic model manifested through institutions created by law, which also sets the parameters for the exercise of political authority. One speaks here to what is popularly packaged as “rule of law,” the unified core of which then finds expression in sometimes substantial variation when attached to a political-economic model. That means that liberal democracy does not have a lock on notions of authoritative rules based institutions or legal systems. Marxist-Leninist systems can, in ways that fulfill the expectations of its fundamental model, produce strong institutional-legal foundations for the organization of political and economic power. The rise of so-called Socialist Democracy and Rule of Law attests both to the power of this organizing principle and its flexibility to be applied across absolutely incompatible political economic models.

With that in mind it is possible to understand the context in which one can speak about institutional-legal foundations for reconstruction of post-revolutionary Cuba. One must have firmly in mind for that task both the starting and end point; and one must be prepared to accept that such reconstruction may be legitimately drawn in a variety of ways—the only necessary connection between norm and implementation is the alignment between the core principles of the political-economic model adopted and the elaboration of the institutional machinery developed to fulfill its objectives expressed through an authoritative language of law constituted both as a means of expression and as the autonomous manifestation of parameters that protect norms for individuals and the integrity of the system instituted as government.

3. Points of departure: The Cuban Political-Economic Model as a Conceptual Baseline

The Cuban political-economic model has long been studied, especially by friends and enemies of the system. As such much of that discussion has lost all connection with anything that approached something like objectivity. Cuba practices a form of Praetorian Marxist-Leninism since the establishment of its Marxist-Leninist institutions with the first Congress of the PCC in 1976. It us a system that remains stuck in its initial revolutionary stage. Everything from the language of its cadre ordering (for example

the cultural complex around *militantes*) to its rhetoric of sacrifice are arranged to give effect to a transformative revolution stuck in time at the moment of its formation. One sees this surface occasionally in the rhetoric produced by the PCC for public consumption: In 2024 Díaz-Canel noted

«de que tengamos organizaciones de base en todos los lugares, y que esas organizaciones de base tengan una militancia que realmente sea ejemplo, una militancia fuerte. Si no hay militantes, no hay organizaciones de base con las que desplegar el trabajo del Partido, para asegurar políticamente los procesos económicos y sociales».⁵

What is a Marxist-Leninist system? It is one that posits that the goal of every political organization (themselves a manifestation of the detritus of failed (feudal-capitalist) systems subject inevitably to transition) must be to accelerate the inevitable process of transitioning human collectives from its current stage of historical development on a Socialist Path toward the realization of a Communist society. To that end the vanguard of societal forces that embraces this objective has a duty to take political power, and the means of production, both of which are meant to be utilized to realize this purpose. It follows that all aspects of social relations become instruments deployed in the service of this goal—markets, economic activities, normative frameworks and human beings, and more importantly the institutional and legal foundations of political-economic organization. The system, on its path toward communism favors development, state management, and the welfare of the collective in its drive toward the goal. This is a collection of abomination for liberal democrats and the normative constructs of social relations built on the grounding principle of personal autonomy and a government formed for enhancing the possibilities of aggregated individual self-actualization. But abomination works both ways.

That is the case in Cuba where there is divergence in some respect between its own theory, especially as lately set forth in the *Conceptualización del Modelo Económico y Social Cubano de Desarrollo Socialista*, a product of the 8th Congress of the Communist Party of Cuba.⁶ To this model is also attached the aspirational “to-do list” introduced in its current form at the start of the leadership of Raúl Castro in 2008 as the *Lineamientos de la Política Económica y Social del Partido y la Revolución*.

4. Points of Departure: The Current State of Institutional-Legal foundations

Cuba is not without a vigorous and sophisticated legal structure and the institutions that frame it. The problem, especially when observed from the perch of liberal democracy, is that the system elaborates values incomprehensible to and incompatible with the normative baseline values of liberal democratic states. But that does not detract from their organization, utility and usefulness within the parameters of

⁵ “La fortaleza del Partido son sus militantes,” Granma (31 October 2024), available <https://www.granma.cu/cuba/2024-10-31/la-fortaleza-del-partido-son-sus-militantes-31-10-2024-23-10-04>.

⁶ Comité Central del Partido Comunista de Cuba, *Conceptualización del Modelo Económico y Social Cubano de Desarrollo Socialista* (Habana 2021), available <https://www.mined.gob.cu/wp-content/uploads/2021/09/CONCEPTUALIZACION-DEL-MODELO-ECONOMICO-Y-SOCIAL-CUBANO-DE-DESARROLLO-SOCIALISTA-Y-LINEAMIENTOS-DE-LA-POLITICA-ECONOMICA-Y-SOCIAL-DEL-PARTIDO-Y-LA-REVOLUCION-PARA-EL-PERIDO-2021.pdf>.

the system for which they were developed. As María Elena Cibas Cobiella noted in a 2024 article published at the Florida International University Law Review, “The design of the bases of the Civil Code was based on politics, rather than on legal technique, with a component of the prevailing ideology in Cuba and in the countries of Eastern Europe, from which they took the model both constitutionally and in private law, creating a private law close to administrative law.”⁷

Nonetheless, that is precisely the point. All legal systems are meant to incarnate both the politics and normative values of the states in whose service they are articulated. To change the political environment of Cuba necessarily requires evolution of the expression of those transitions in law and in the constitution and practices of the administrative apparatus charged with its enforcement. That, in turn, points us to the layered system that is the current institutional-legal foundations of the Cuban state, a concoction of layered legalities meant to align with or fulfill the aspirational premises of the political economic model.

I call this layering a Sacher Torte Legality. In the case of Cuba, the layered legalities include remnants and re-imaginings from Cuba’s colonial, republican; revolutionary; “retrenchanist;” evolutionist; and traditionalist rectification past. Through 1959 the Cuban institutional-legal system was deeply embedded in its colonial heritage and in the engagement with legal currents within Latin America and the needs and desires of its great friend to the North. The legal system at the time of emancipation from Spanish colonial rule provided the baseline—while there may have been antipathy toward the Spanish metropolis as the political hierarch, that antipathy did not leak into the fabric of colonial legality. Cuban legality and its institutional structures then were molded after 1898, at least to some to some extent, by its encounter with the United States, most intensely at least through 1933. It is evidenced in Cuban legality by both borrowing and resistance to Anglo-American legality, aided in part by the U.S. experience with Puerto Rico.

The Cuban 1959 Revolution represented a departure from the old layering, though not its abandonment. Between 1959 and 1991, Cuba’s institutional and legal foundations were subject to both pruning and revision. While much of the Spanish era origin civil code survived, the rest of Cuban legality was reshaped to conform to the vision of proper Soviet style legality.⁸ The effect appeared in several forms. The first was the withering away of private law and private law institutions—the corporation, contract, property, and civil and political rights as they were imagined within a liberal democratic normative environment. In its place the Soviet model was substituted. The second was in the reshaping, in fundamental ways, of public law. Institutional legality was reshaped to conform to the practices of Soviet style governance and the Leninist theories implemented in their own way by the Soviets and imposed on their imperial peripheries. Institutions did not manage, they directed. Law did not produce

⁷ María Elena Cibas Cobiella, *The Influence of the Spanish Legal System And Socialist Legal Systems On Cuban Civil Law*, (2024) 18 FIU Law Review 735-753 (“The value lies in the fact that it systematizes the principles that inform Cuban legal relations in civil law, at a given stage.” *Ibid.*, p. 753).

⁸ Cf., John Quigley, *Socialist Law and Civil Law Tradition*, (1989) 37(4) *The American Journal of Comparative Law* 781-808; Frank Negron, “An Overview of Socialist Legality: From the Russkaia Pravda to Glasnost and Perestroika,” (1988) 1 *St. Thomas L. Rev.* 89-110 (1988)

commands but objectives that were meant to be implemented through complex webs of discretionary decision making within an elaborate nomenklatura of central planning. While this is remembered most for its efforts to substitute administrative direction for the aggregated decision making of autonomous individual actors within markets the rules of which were overseen by the State, the impulse to substitute the nomenklatura for individuals at virtually every level of human organization was also evident.

From a legal cultural perspective the effects were profound. First. The post-1959 military-revolutionary government engaged in a project of institutional-legal pruning. This project was serendipitous but also conscious, one designed to align the institutions of State and the legal structures through which they were fulfilled and furthered with the aspirational and normative vision of revolutionary discourse. The result was both quite public and publicly condemned within establishment liberal democratic circles and lauded elsewhere. It served as a quite interesting theater in which enthusiasm and aspiration were thought to be able to carry a society and its leaders through to “triumph” as if by some sort of magic inherent in the logical rationalization of the aspirational system itself. It did not work. But it produced a set of substantive changes that reshaped the institutional-legal foundations of the Cuban State.

First it shriveled private law in substantial respect. That required, in turn, the obliteration of the notion of the autonomous human person, replaced within institutional and legal frameworks by the revolutionary and then ideological cadre—a collectivization of the individual that left little room for autonomous-individual-driven institutional and legal structures. This included the private corporation (and then virtually any form of aggregation of capital outside of the ambit of the State), and all of the legal-institutional paraphernalia of private economic activity, contract law, insurance, and business torts.

Second, it transformed public law to adopt, increasingly, the practices, sensibilities, and expectations of a Soviet style Marxist-Leninist legality. That transformed the cultures of institutional operation from state organs focused on the management of policy/laws and compliance-related, to institutions that planned, directed, oversaw and managed all activity within its “portfolio.” As was the working style of Soviet Leninism, the State and its apparatus absorbed not just the power to apply law but also to manage human relations in the service of revolutionary meta-policy, the elaboration of which also became a matter of concern for political vanguards and fulfilled by that vanguard’s apparatus. That turn eventually imported late Soviet decrepitude, the shriveling of private law, and the triumph, not of the revolution, but of the classical Caribbean Soviet nomenklatura.

It was a turn that reshaped the legal architecture through which institutional foundations were constructed and the State apparatus operationalized. Law, in particular acquired a Soviet Socialist vibe. Law was the means by which objectives were made mandatory, in the sense of a direction to the apparatus to make good on the direction. Law created the mandate, the fulfillment of which was to be undertaken by the exercise of administrative discretion in two significant respects. The first was with respect to the systems by which officials strove to meet policy directives. That generally required structures of application, review, and approval for all activity to be undertaken with any connection to State undertaking. Second, it embraces the premise that all such applications or conduct were within the

purview of officials to interpret and apply. There were little if any means of contesting abuses of administrative discretion. And many of the decisions taken and discretion exercised were exercised and undertaken with and through the supervision of the Cuban Communist Party. That was made easier where officials wore two hats. It was in this sense that a liberal democratic perspective might see in the system an authoritarian lawlessness (in the sense of an absence of a strong structure of law which drove decisions). Yet the system was not lawless in the sense that matters were undertaken without rules or expectations. That was not the case; it was only that such expectations and rules were suffused with both policy expectations and political calculation. It was within this framework that it was possible in Cuba to grow a mature nomenklatura that inherited all of the propensities toward ossification and decay that its Soviet model eventually exhibited to the extent it became a joke.

Below this was the so-called lawless zone—that space left to the formal and informal economies. The formal economy was the product of a complex systems of regulations that started form the premise—what is not permitted is prohibited—and then was built on a complex system of application, review, negotiation, and supervision by State officials. informal economy. These interactions were subject to the restrictions on ownership, expectations of tax and employment obligations, and otherwise subject to the “law of the application,” the conditions and expectations within which official approval for the activity was obtained. This approach further eroded traditional concepts of contract and enterprise organization. The informal economy occupied all other available spaces for economic and to some extent social activities that could be undertaken under the shadow but beyond the direct control of the Cuban-Soviet apparatus. It ranged from bater systems to more sophisticated interactions with the State and official private sector. By the second decade of the 21st century it had appeared to have begun to acquire the characteristics of a common law system among its participants, and with it a sort of transnational law merchant based on the customs and traditions of engaged participants.

Lastly, the Cuban system became impermeable, especially after the collapse of its Soviet friend. By the turn of the century one could speak about a “Fortress Cuba” and its Special Economic Zones. By the 1990s and the Special period, Cuba has become, from an institutional-legal perspective a closed system. Rather than a Cuban style version of Chinese “Reform and Opening Up” policies,⁹ the State apparatus under the guidance of the PCC produced an architecture of insularity and distrust of the corruptive force of mass interaction with foreign elements.¹⁰ Though there was substantial engagement with the rest of the world, much of it was undertaken by and through the State, or under State supervision. It was the State that, as the sole capitalist, managed all productive forces where they were projected aboard—including human productive forces. Inbound investment was strictly controlled and managed by and through the State. The State provided employees, the State through its approval, conditionality, and supervisory powers, managed inbound investment. The State provided a barrier

⁹ Bernard Z. Keo, “Crossing the River by Feeling the Stones: Deng Xiaoping in the Making of Modern China” Association for Asian Studies (2020), available <https://www.asianstudies.org/wp-content/uploads/crossing-the-river-by-feeling-the-stones-deng-xiaoping-in-the-making-of-modern-china.pdf>; Ahana Roy and Siddhant Nair, “1978 Reforms and the Four Modernizations,” Organization for Research on China and Asia Backgrounder, available <https://orcasia.org/1978-reforms-and-the-four-modernisations>.

¹⁰ Consider Joseph Stalin, *Problems of Leninism* (Moscow, 1952) 756-760, 777-779.

between inbound investment and the interior of the State with only limited and well supervised exceptions, mostly in the tourism sector. Lastly, substantial and important sectors of inbound investment was undertaken in institutional-legal ghettos—special economic zones, through which Cuba could obtain capital but which it could control

5. Turning Points: End of the Long Arc of the Cuba Revolutionary Regime

I have described the societal-political material that Cuban “transitionalists” have to work with as they seek to consider pathways toward the next revolution in and on Cuba. Their only delusion is that somehow this is a backwards traveling transitioning. Yet the nature of linearity in human cognition suggest that there is never a going back—whatever one salvages from an increasingly hazy past will in its manifestation in the present always be something new.

And yet even the baseline is deceptive. It provides at best the aspirational starting-ending point for assessment within system, parameters. At the same time it hides a substantial amount of transition within the parameters of the revolutionary government and the state it sought to create to oversee its “triumph.” One might divide the post “triumph” transitions into four broad periods. The first post-revolutionary triumph period could be said to extend roughly from 1959-1976. This was the period of direct rule through the apparatus of the military/guerilla forces that were triumphant (and thus the focus on the discourse and imagery of revolutionary “triumph) over the reactionary forces of the Batista dictatorship. This is the period that locked in the discourse and tropes of military victory and of continuous armed struggle in the preservation and projection of the Cuban revolution. One is assaulted at all levels by the imagery of the *militantes-militares* as the vanguard of social forces. It was also the period of the stripping away the detritus of past. The second post-Triumph Period extended roughly from 1976-1991. It represents the high water mark of the Marxist element of military (praetorian) Leninism. It was the time of the institutionalization and outward revolution, and the transformation of the military as a global force against “capitalist” empire as well as the deepening of the tropes of militarization in defense of the homeland. The third post-Triumph Period: the “Special Period.” It was a time of crisis as the Soviet imperial metropolis, long decaying, finally collapsed. It was marked by transition as retrenchment and as survival. It embraced the ideal of sacrifice and inward revolution that laid the groundwork for the present “State of Misery” of which I have recently written.¹¹ The fourth post-Triumph revolutionary period extended from 2004-2016. This was the time of the revolutionary Spring. It was a time when it was possible to speak to revolutionary consultative democracy,¹² and to reform of the Sovietism that continued to frame all theoretic discussion about reform. It was the moment of the triumph of the Lineamientos.

¹¹ Larry Catá Backer, “Cuba and the Constitution of a Stable State of Misery: Ideology, Economic Policy, and Popular Discipline: Economic Policy, and Popular Discipline, (2025) 13(2) *Penn State Journal of Law & International Affairs* 1-84.

¹² Larry Catá Backer, Flora Sapio, James Korman, “Popular Participation in the Constitution of the Illiberal State—An Empirical Study of Popular Engagement and Constitutional Reform in Cuba and the Contours of Cuban Socialist Democracy 2.0,” (2020) 34 *Emory International Law Review* 183-276.

And that brings one to the fifth and current period of post-Triumph transition, starting roughly from 2016. This is a time of rectification and a return to 2nd period conceptual purity. Once again, the State and its political-economic foundations are in crisis in the face of pressure from one hegemon, the collapse of regional friends or their reluctance to embroil themselves in the U.S.-Cuba relationship, and serendipitous aid from hegemons at a greater distance from the Island Republic. The defense of the 1059 “triumph” of the revolution again takes center stage, and with it the inevitable privileging of the FAR tasked, as it was from the 1950s, with the defense of the revolution against foreign (and internal) threat. What appears to triumph most spectacularly is the transition to an stable state of misery, one the discursive and ideological foundation of which is built on the nation and practice of sacrifice. With it the risks to revolutionary triumph acquires an internal dimension that matches the risk of external threat posed by the United States—that the actual state of misery that sacrifice produces may be beyond the tolerance of the masses from whom sacrifice is demanded.

This fifth period of revolutionary transition is also a period in one encounters a political economic model robust in its discursive power but increasingly detached from the realities of its manifestations as an institutional-legal system. It is one that is also fracturing along its own lines of power under the PCC—a military, institutional, and informal sector the authority and operations of which might be coordinated by the PCC but over which the PCC as a superior institutional authority has a debilitated power to control. Systematic rectification designed to capture something from out of which a State has already transition are actions both fraught with risk and essentially unattainable for some of the reasons that have already been alluded. But the call of the past is irresistible and its mimicry creates a powerful illusion of the power of time travelling backwards in ways that may be comforting bit that at the same time intensify the gulf between the way the cognitive cage is perceived and the way it actually manifests.

It is in this sense that one might argue, as I have done elsewhere¹³, that these systems can sometimes lose their way, and sometimes they may diverge from its theoretical foundations. That divergence is a product of the history of the constitution of the institutional-legal foundations of Cuban Marxist-Leninism established in the mid-1970s. The Cuban divergence produces a three part division of political authority within Cuban Leninism, a division between military power over military controlled institutions, the power of the bureaucracy over civil institutions, and the more generalized, diffused and superior political authority of the Communist Party of Cuba. There are several institutional principles that follow.

The first is that the PCC occupies the center of power in Cuba, Liberal democratic intellectuals and their clagues try their best to erase the PCC from the discussion of Cuba and its problems. The PCC is a nuisance that has no place in proper discussions of the distribution and practice of power; the PCC is extra-legal and extra constitutional; it is an aberrational institution that can be ghosted especially by “realpolitik theorists, economists and the like—along with its normative and system building structures

¹³ Larry Catá Backer, *Cuba's Caribbean Marxism* (Little Sir Press, 2018).

and premises. Nonetheless, the PCC occupies a core role in the elaboration of an authoritative system of Socialist democracy. It represents the core vanguard elements of social forces to which has been entrusted the political authority of the people in trust for the great project (in China) of moving along the Socialist Path toward communism and in Cuba protecting the triumph of the revolution from enemies internal and external.

Second, that the military establishment may have formally receded into the background after themed 1970s but has never lost its autonomy, however much that autonomy is masked in official documents and the appearance of practice. The *Fuerzas Armadas Revolucionarias* are formally subordinate to the PCC but it remains autonomous of the state apparatus. They operate within their own spheres of activities that produce a system that runs in parallel to that of the civil authorities and their institutional-legal foundations. This souvenir of the revolutionary period is essential for the constitution of Cuban Leninism: for a state still in the primary stage of revolution, one with foundational routes in military revolutionary government and its sensibilities, the military must be both Leninist and autonomous—not of the PCC but of the state apparatus built by the PCC after the end of the initial stage of revolutionary governance as an instrument of its management of non-military sectors. And, indeed, as recent reporting from the Miami Herald reveals, the military establishment is now one of the most sophisticated and successful corporate entrepreneurs in Cuba and the Caribbean region.¹⁴

The third, is the civil establishment itself. There is little that needs be said about them that has not already been said far more often than is necessary. They were Fidel's bulwark against a military that he needed but also need a counterweight. They sit, like undigested gravel in the bellies of parakeets, as an aid to the digestion of the work of the body politic under the direction of the PCC. Like the institutions on which they were modeled, they have decayed from a revolutionary civil force to a nomenklatura in the classic sense. This gravel has become the cancer that is slowly displacing food within the bellow of the parakeet that is the Cuba polity. It is a small step from this to the sort of polycrisis¹⁵ that is the state of misery within the parameters of which Cuba continues to seek to govern itself.

Usually overlooked in the fourth. A revolutionary Praetorian Marxist-Leninist government under unrelenting siege from the moment of its "triumph" cannot exist without a lively and well-ordered informal sector. And it is the Cuban informal sector—revolutionary in its own way, interlinked with official structures but autonomous of them, even as they may be subject to its power, exercised from time to time—that provides the engine of survival where the formal apparatus of legitimate political organs are incapable of meeting even the minimal necessities of its people. As in many traditional societies, and some modern ones, it is generally within the suppressed and "lawless" sectors of social organization that one may find the seeds of change and the governance models that may emerge as the outer shell of stability and control deteriorates to the point of dissipation. Jorge Pérez López and Archibald Ritter,

¹⁴Nora Gamez Torres, Where is Cuba's money? Secret records show the military has massive cash hoard, *Miami Herald* (6 August 2025), available <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article311488962.html#storylink=cpy>, last accessed 24 October 2025.

¹⁵Edgar Morin, and Anne Brigitte Kerne, *Terre-Patrie* (Paris: Éditions du Seuil, 1993).

among others have written insightfully about the informal sector.¹⁶ And yet the possibility of the relevance of the informal sector as the indigenous rebirth of markets-driven and private autonomy emphasizing political structures in spaces in which private law might well have a decisive role remains unacknowledged. And yet it is the common law of the informal sector, more than virtually anything else that might come from experts abroad or intellectuals within Cuba that may have the most important practical impact on an indigenous development of the very sort of robust civil element that is an essential element of the production of a stabilizing authentic and authoritative institutional-legal system focused on private relations.

In the absence of this context it is impossible to even begin to consider transitions that promise a more vigorous and positive institutional-legal order. That is so if one wants to escape the disastrous arrogance of the actions of liberal democratic elites, intoxicated on “their” victory over Soviet power, and then again after a victory over nationalist Islamists in Afghanistan and Iraq, who deluded themselves and the power of their own normative ideological orders into thinking that having destroyed their enemies, almost magically liberal democratic mini-me’s,¹⁷ smaller cloned versions of the triumphant power, would arise unbidden by the natural progression of “things”. And indeed, as emerges in any consideration of future transitions, other than a decapitation replacement strategy (either internal or more likely external), these baselines and realities significantly affect the construction and viability of alternative transition enhancing prognostication.

6. End Point: What the future can bring.

The end point of a process of political decrepitude is an opening for transition. That decrepitude provides the outward manifestation of an internal decay of the normative premises that made possible the adhesion of orienting values that constituted a political society.¹⁸ But change is hardly ever transformative, or transformative for long. Old foundational patterns persist even as the surface appears to have changed irremediably. Cuba retains echoes of its colonial, Republican and Marxist-Leninist past. There is no helping that. To fight against that, for example as the Leninist government sought to do in revolutionary Cuba in the 1980s, always ends badly. Inertia and traditional sensibilities will find ways of expressing themselves even in new form.¹⁹ There is no escaping Cuba’s past, even as the powers of

¹⁶ Jorge Pérez López, *Cuba’s Second Economy: From Behind the Scenes to Center Stage* (Routledge, 1995); Archibald R. M. Ritter, 2004. “*Cuba’s Underground Economy*,” *Carleton Economic Papers 04-12*, Carleton University, Department of Economics, revised 14 Jan 2005.

¹⁷ Mike Myers and Michael McCullers, *Austin Powers: The Spy Who Shagged Me* (New Line Cinema, 1999).

¹⁸ Abd al Rachman Ibn Khaldûn, *The Muqaddimah: An Introduction to History* (Franz Rosenthal (trans), Princeton University Press, 2005 (1406)).

¹⁹ For a fascinating view from the perspective of conflict resolution over the arc of a century, see Juan Antonio Blanco, *The Political Transformation of the Cuban Regime, Seen Through the Perspective of Conflict Resolution*,” Real Instituto Elcano Documento de Trabajo N° 32/2008 (26 June 2008), available <https://www.realinstitutoelcano.org/en/work-document/the-political-transformation-of-the-cuban-regime-seen-through-the-perspective-of-conflict-resolution-wp/>.

change seek to eradicate this past. It did not work in 1898, it did not work in the 1930s, and it certainly did not work in the 1960s. It is unlikely to work well now.

Nonetheless, that does not mean one is captive to the past. The glories, triumphs and tragedies of the past exist only as recollection and are imprinted through ritual repetition, each repetition introducing sometimes even the smallest deviations that, over time, sometimes produce profound change in what is still revered as an adherence to tradition and the preservation of the past. Calls for restoration, then, are discursively appealing but manipulative at the same time; one thinks that imitation is the most glorious form of flattery or allegiance to that which can no longer be recaptured; it is actually the doorway through which innovation and transition can be introduced behind the façade of mimetic reproduction. Indeed, try as one might, one cannot yet resurrect the dead, only their memory—and memory can be managed even as institutional muscle memory can be reframed to some extent. But one must work with, not against, what one has. That is a lesson that victorious forces of virtue have, over the two centuries forgotten at their peril.

At last that brings one to the central task of these remarks—conceptualizing a path toward post-revolutionary institutional and legal foundations for whatever governmental system emerges from the current cocktail of Revolutionary Praetorian Marxist-Leninism. Its first step requires choices, which then make it easy to determine the shape, timing, and content of actions and normative performances necessary to hard-wire transition through post-revolutionary institutional-legal foundations in Cuba.

(a) Who is to make decisions about transitioning?

In the first instance it must be decided, and I am not sure by whom, who is to make decisions that affect transition in all its forms and effects. Traditionally one did this the way George Washington, Robespierre, Oliver Cromwell, Lenin, and Fidel Castro did it—through victory in combat against the forces of opposition leaving vacant those centers of power which could be taken up by the victorious revolutionary forces.

Palace revolutions, like the English Glorious Revolution of 1688 change things at the margin but not the fundamentals. When these are imposed from outside one either must commit, and ruthlessly for the long term, to some form of imperialism—whether of the old-fashioned territorial kind or in its post-global emerging forms. That is possible but requires commitment that falls outside of the national situation. But Palace revolutions within Marxist-Leninist systems might produce a re-arrangement of institutional hierarchies of authority within the broad body of the PCC itself, a re-arrangement that can itself augur broader consultative democratic practices.

In the case of Cuba one encounters a n issue of post revolution hybridity. If this is led or driven by elements of the Cuban diaspora and projected by them into the national territory the issue becomes complicated. But this is a complication natural to Cuban history. Martí was situated both inside and outside and it has been traditional for the forces of change to seek refuge in the peripheries of the adjoining imperial powers and from there to leverage their independence inward to the territory to be

“worked on.” After two or three generations of exile, however, one might wonder whether and to what extent the forces of the diaspora are national or extra-national though related to the internal politics of a state in which the connection has become though intense still attenuated. There are example of long exiles that still generate national legitimacy and also of the cultivation of national feeling within highly disciplined separated exile communities, though in the contemporary era those have had substantial subsidies by strategically acting international actors.

That produces the consequential question: So what sort of transition is expected? One can speak to internal collapse, though the current government model appears strongly resilient in ways that might have toppled many other systems. One can speak to externally enhanced internal collapse. However the sanctions driven relations between the United States and Cuba suggest that this can be complicated. Or one can assume, as many outsiders have assumed over the last forty years that the State apparatus is on the point of collapse and then this is the right moment to plan ahead. For the purpose of developing a robust institutional legal framework the answers to these questions become critical, especially as no system will long survive if its foundations are viewed as illegitimate.

My sense is that what makes sense at this juncture is more a pruning than a removal of the institutional-egal apparatus presently operating in Cuba, That suggests avoidance of a revolution-collapse approach that is indiscriminate and a strategic encouragement of a rearrangement of power relations among the critical actors in Cuba today—military, nomenklatura, PCC, and critical stakeholders in the informal economy. That would be possible through strategically initiated signaling that indicated that internal rearrangement of power would produce significantly positive responses from outside actors that effectively manage the possibilities of misery in Cuba.

(b) What ideological political economic model is to serve as the basis of post-revolutionary institutional-law building?

Without even thinking one would likely posit, from the outside, that it ought to be a liberal democratic model. Though there would be argument about its characteristics at the margins, liberal democracy, especially the sort the diaspora community has become comfortable with in the U.S. and Europe is either appealing or “natural.” But perhaps it is less natural to the indigenous population—one now quite accustomed to the operation of a quite different system. And here I am not speaking only about the official political-economic model but also of a now old and deeply robust informal sector model.

On the one side it is not clear that except for a few theorists, there is a deep penetration of the subtleties of the comprehensive theory of Leninist governance as a vanguard force the object of which is the establishment of a communist society. The fatal mistake of the revolutionary regime and thereafter of the initial Leninist operations, augmented to some extent by the corrupted decrepitude of Communist theory in the USSR, was to equate the revolution itself as the aurora of a communist society (one can also trace this error to its Latin American utopian roots, but that is another story). It was not. It was a revolutionary enterprise in which the military served as a vanguard, and a defender. But the damage was done. The current apparatus is now stuck, theoretically at least, as having to convince the population of

its efforts to return to the communist style ideals of half a century ago in the way that elements of the exile community also seek to time travel back to some idealized vision of Cuba as it ought to have been in 1958 before the corruption of revolutionary victory.

On the other side it appears clear that the Cuban taste for public intervention is far more advanced than in the United States and Europe. While the abhorrence of markets by the nomenklatura has been evidenced for years and is in danger of abandonment by that power sector, it is also clear that the military and some civil elements, as well as the informal economy is comfortable with markets driven behaviors, whether as an instrument for the achievement of public policy objectives or as an ends in itself, within some sort of policy confines. This suggests the need, recognized even by the PCC earlier in this century, to further develop institutions, capacity and law in a critically deficient area—contract law. But not just contract law but also in the complex interpenetration of legal norm and market based conduct expectations and the judicial or administrative capacity to undertake a rationalized system of dispute resolution under law that enhances the autonomy of law and the legitimacy of its application through capacitated institutions. For that purpose, certainly, there is a very large role for a Cuban diaspora to play.

Lastly, and of critical importance is the issue of the insularity of Cuba. The construction of “Fortress Cuba” by the military and nomenklatura elements of power has certainly served their short term interests. However, at some point Cuba will have to open up. That also requires the development of a host of institutions and legal regimes. The issue is complicated depending on how strong the desire to avoid instability may be. It is likely that the safest route is a gradual opening up by expanding, in stages, the reach and operation of Special Economic Zones, like Mariel. Those can be used, as the Chinese did a generation ago, as the spaces where the apparatus can experiment with transition, develop institutions and legal regimes to suit the context, and then roll them out to provinces and then nationally. At the same time, here institutional and legal development might profit more from the dual circulation model of the Chinese or its American version as part of the America First project, as a way of protecting the internal integrity of the state while preparing for better integration with the rest of the world. In any case, given the size and diversity of experience of the diaspora community, a community the penetration of which into the national territory is inevitable, such a project of institution-law building, a project of the law of Special Economic Zones, may play a vital role in the short and medium term.

(c) Through which institutional actors is this ideological political-economic model to be realized?

One might be persuaded to believe that the weak link in the possibilities of transition in Cuba is the nomenklatura. Not that the nomenklatura ought to be eliminated. Quite the contrary, in a system that has inculcated a substantial dependence of institutional guidance, approval, supervision, and monitoring, eliminating the nomenklatura would cause the sort of chaos that produced a half generation of tragedy in other places. That is especially the case if the Cubans seek to transition out of their decrepit version of Soviet Marxist-Leninism of the last century into something more viable in the current stage of their historical development, and that of the rest of the world. There are uses for the nomenklatura,

certainly, but not in its current form and with its current habits and with the prerogatives vested in them by the current architectures of power, but legal and political.

That leaves a broad spectrum of alternatives within which it may be possible to elaborate a range of quite contextually distinct architectures of institutions-law foundations. The first might focus on the return of Cuban to its revolutionary origins as a military revolutionary state under the leadership and guidance of the FAR. That sort of arrangement, however, is not as popular as it was at the time of the establishment of the revolutionary military government by Fidel Castro and his companions in 1959. Such an arrangement would be a fig leaf over a transition to something else—what some might hope to be something closer to a liberal democratic model. And yet the military, as a supra-administrative apparatus. Might well be a useful vehicle for managing transition from the current manifestation of the Cuban political-economic model to something else.

Perhaps it is here that the PCC may serve a quite interesting and useful purpose. It is quite possible to develop a Leninist constitutional arrangement in which the PCC serves as the core of a guidance and leadership role, but that its duties might be more carefully interlaced within the structures of a Caribbean Leninist consultative democratic edifice. The movement in that direction also has a long thought attenuated development arc in post 1959 revolutionary Cuba. This is the stuff of advancing Leninist constitutionalism and socialist democracy with local characteristics in ways that push forward the development not of the traditional performances of liberal democratic exogenous democracy grounded in elections, but in the endogenous democratic characteristics of a Leninist democratic sensibility Cuba has already been developing he structures of this constitutional recharacterization of its role, but it could be further elaborated in the service of a transition that preserves the stability of the forms of the current political economic model without a stubborn adherence to its decayed practices and sensibilities.²⁰ That changes the constitutional baseline for civil and political rights. One which starts from the premise that all political authority is vested in the PCC and that within it democratic debate may take place, subject to robust collective systems of consultation, and framed by popularly elected bodies.

That, then, frames the issue of civil and political rights in transition. At a minimum, and drawing on the Chinese mass line as a starting point, it is clear that the people ought to be given robust measures to complain about the administrative machinery whose officials engage in significant discretionary decision making that impacts people. With respect to political debate, it is possible to start within the PCC, and then expand the PCC so that, at the end of an arc of development, anyone who wishes to exercise political authority within the grounded in political-economic model might join the PCC.²¹

²⁰ Larry Catá Backer and Flora Sapio, “Popular Consultation and Referendum in the Making of Contemporary Cuban Socialist Democracy Practice and Constitutional Theor.” (2020) 27(1) *University of Miami International & Comparative Law Review* 37-130.

²¹ Cf. Larry Catá Backer, “The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The “Three Represents”), Socialist Rule of Law, and Modern Chinese Constitutionalism,” (2006) 16(1) *Journal of Transitional Law and Contemporary Problems* 101-174.

All of this musing is grounded in educated guesses about contemporary realities. During the “revolutionary Spring” of 2008–2016 it was possible to contemplate the transitioning of the nomenklatura. Instead that apparatus emerged stronger after the 8th PCC Congress in 2016. At the same time, it appeared to cement a division of the engines of state, especially the economic engines of State to be shared between the nomenklatura and the military. At the same time the military’s position remains unassailable. It is the vanguard of

(d) What timeline is to be chosen to develop and implement this transition?

Change does not quickly, certainly not if it is to last. Moreover the time required for changes may be a function of the significance of the change. And all of that is a function of the relation of the changes to the evolution or affirmation of core normative structures of the political society onto which it is to be projected. Cuba cannot be changed overnight. Neither might it be remade in an instant. And the possibility of transporting the nation back in time to 1958 is the stuff of science fiction. Quick changes produce paradox sometimes—as well as instability and violence, and sometimes large population movements at a time when large population movements to escape danger are not popular occurrences. That paradox suggests that quick changes produces an inverse relationship between the appearance of change and the underlying reality of change.

The essence of deeper change requires stability and the controlled ability of current social and economic forces to begin to be reorganized within the logic of their own development. Those, in turn, may be managed, and to some extent guided, by the institution of law elaborated by institutions authentically constituted for that purpose and implemented by others also so constituted. But a movement to a new equilibrium state will take years—and cost a lot of money. Whose money and to what ends remains a question beyond the scope of these brief remarks, but its significance cannot be underestimated. There is value to chaos as well. But the results can be either unpredictable or serve as a violent interlude to some sort of return to the habits and behaviors of the past—that, certainly might be extracted from the trajectories of transition in Iraq, Russia and Afghanistan.

(e) The Marie Kondo moment²²—what of the present system is to be kept and what is to be discarded or repurposed?

One works with what one has and then moves forward in stages designed to develop a comprehensive interlocking system of law supported at appropriate points by an administrative apparatus and the courts. Cuba has a well-developed public law system. It requires tweaking to move it from its Soviet roots—gap filled, ambiguous, with far too much opportunity for indiscriminate acts of administrative discretion with respect to which there is no recourse. Moreover, the administrative apparatus becomes infinitely more useful once it can be retrained within structures of compliance and supervision based administrative tasks. While it will take time to rewire the nomenklatura, that project,

²² Marie Kondo and Scott Sonenshein, *Joy at Work: Organizing Your Professional Life* (NY: Little Broen, 2020).

itself, would pay dividends—providing a measure of stability in transition while utilizing available human resources now repurposed for a different administrative functionality.

The administrative apparatus, though, can be tamed, even if the framework of a Marxist-Leninist political-economic model is kept. That would require reworking Cuban administrative law and developing mechanisms for checking abuses of discretion. At least initially that check ought not to be placed in the courts. The courts themselves, and the law of judges, ought to focus in the first instance of the core elements of the judicial function—the criminal law, and private law (torts, contracts) which will provide a substantial capacity building project in itself—once the parameters of each is developed.

The major project, though, would have to focus on the private sector. For that particular attention would have to be devoted to the (re)construction of contract and tort law. The old civil law provides an excellent starting point for the development of a workable contract, tort, and property law. And the *Lineamientos* themselves provide substantial clues about gaps and necessary reform. Providing a legal basis for the rationalization of the relations among people is a central element of reform that shifts the center of gravity of governance from the state apparatus to the organization of conduct and normative expectations in the people, articulated and rationalized through the courts. Within that several areas of law would require immediate attention—construction law, insurance law (especially with respect to the application and operation of foreign insurers within the Cuban national territory).

The judiciary is already available for development. The critical question is whether it makes sense to burden it with the baggage of the sometimes fractious obligation to serve as the site of interpretation of public law much less to embrace a role as a site of interpretation of constitutional prerogative, constraints, and rights. Initially it makes little sense to train the courts into a political function. I would be inclined to focus principally on the development of capacity to apply ordinary law within the traditions of Latin American/Spanish (pre-EU) jurisprudential traditions. The issue of the development of a constitutional court (I am less inclined to recommend the American model outside of states deeply integrated into ancient common law traditions).

What may require very little reform may be family law, the law of marriage, termination of pregnancy, and the law of inheritance and adoption, though in these instances, Cuba may be able to draw on legal forms in Latin America modified to reflect their own normative values—values that ought not to be interfered with from the outside. To a great extent the informal structures and understandings evolving in Cuban society may be a useful source for legalization—to the extent necessary.

The big unknown centers on an aspect of legality near and dear to liberal democracy—civil and political rights. Cuba has, in concert with Global South and Marxist-Leninist States, adhered to the prioritization of economic, social and cultural rights as a predicate for the realization of civil and political rights. And yet, the affirmance of the autonomy of the human person and the elaboration of markets as a form of that expression requires some movement toward the protection of civil and political rights. These might, at first, be directed toward the perfection of a reimagined administrative system law, one in which individuals might play an instrumental role in disciplining abuses of administrative discretion in

accordance with law, and in that sense, at least at the beginning, start to engage in political life at a level most intensely connected with their everyday lives. But even that would be a great leap forward, though one that may be essential in the retraining of the cultures of the nomenklatura.

Perhaps more important than specific reform is the effort at codification. Modernization requires law not merely to be available as text but for it to be organized in accessible form. This has been understood from the time of the Institutes of the 6th Century A.D. It becomes even more important, and accessible through technological innovation.

7. Summing Up.

Dear Participants.

Well, there it is. The project of transition ought to please no one; ought to be directed to the strategic benefit of no group; and ought to avoid the arrogance, so much on display by leaders of the past several generations, that they are best situated to declare what is right, good, and necessary, including the determination of the political economic model of sovereign peoples and the institutional-legal systems created for the fulfillment of its objectives.

That is not to say that transition is to be avoided. All states are in a constant state of transition; one need only look closely at the United States, Cuba, and China since 2008 to see quite clearly the unavoidability of that trajectory. The development of strong, authoritative and legitimate institutional-legal foundations in aid of transition is vital. In the case of Cuba that is meant to accompany not transitions that may sit of the margins of stable political economic models, but at its very center. That creates a more dynamic element in which such restructurings may be profound and profoundly transformative. At the same time, a lust for collapse and chaos ought not be satisfied, even by those who might be tempted to work toward those ends. In Cuba transition must start from the current situation. It might prune that which impedes and nurture that which moves state, government, and the satisfaction of popular need forward. That will require a change in the political economic model, a change that can be undertaken even within the broad umbrella of Marxist-Leninism. But the nomenklatura must be reformed and its role refashioned, and the role of the informal market must become part of the operation of the political economy of a state in transition.

To those ends, the Cuban legal institutional system requires tweaking but not comprehensive reform; it requires capacity building in the context of administrative law (protect against abuse of discretion), in the law of economic collectives that exist beyond the state, and especially in the law of contract. Those changes require the develop of institutional capacity, one with respect to which may provide a basis for the re-education and repurposing of the nomenklatura. It is not for us to make the determination of details. That ought to be left to the people; but it does require a reconstitution of the PCC and its work style and objectives in ways that they may not be willing to take. If that is the case then a transition back to a military post-revolution government may be the best way forward. The bottom line,

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though, is simple: unless one is planning to absorb the Cuban Republic into a larger metropolitan State-empire, it is improbable to develop before the fact any detailed set of institutional legal structures that might be applied to Cuban transition. I leave that to utopians, politicians, and revolutionaries.