

## LEGAL POLICY FOR A FREE CUBA: LESSONS FROM THE CIVIL LAW

Néstor E. Cruz

It can truly be said that the magistrate is a speaking law, and the law a silent magistrate.

—Cicero (106 b.c. - 43 b.c.).

A republic [is defined] to be a government of laws and not of men.

—John Adams (1735 - 1826). Second president of the United States.

This short essay attempts to compare the Civil Law to the common law as alternative legal paradigms for a free Cuba. Although the author is a common lawyer and not a civilian lawyer, theory and experience has persuaded him the Civil Law model is superior to the common law model for reasons of cost, clarity, simplicity, and stability. The author would even attempt to persuade his colleagues in the United States that this country should convert to the Civil Law, if that were possible, but the weight of history cannot be overcome with logic. Cuba, on the other hand, was a civilian country before the revolution. Although the so-called “socialist” system prevails in Cuba, a return to the Civil Law, with some changes and adjustments would seem to be not only desirable, but almost inevitable. Nonetheless, the author believes such a paper as this is helpful to remind Cubans, in and out of Cuba, that the Civil Law system is quite respectable.

Codes are the heart of the Civil Law system. Precedents exist but only to fill the lacunae in the codes. Moreover, few precedents are used and only after they have been confirmed several times by the courts. Put another way, codes are drafted to cover systematically a whole area of law and they are the primary

source of law. Precedent is purely secondary and of little importance in day to day practice. When a civilian attorney is confronted with a legal problem of a civil nature, the attorney reaches for the Civil Code and carefully studies the articles in the Code applicable to the problem. The attorney then applies the Code to the facts and comes up with the legal answer. In case of ambiguity, which is rare, the attorney would first consult a treatise explaining the Code and in the last instance the body of jurisprudence. Treatises often refer to the applicable precedent, if any. A treatise is generally more authoritative than an isolated case. Fortunately, precedents are hard to find and rarely well indexed or digested so as a practical matter they matter even less than in theory.

Although codes have existed since the times of Hammurabi, king of Ancient Babylon, modern codes owe their existence to Napoleon I. In fact, codification is probably one of the most enduring achievements of Napoleon and he even dictated to his secretaries the first drafts of some articles in his Code. Napoleon’s theory was that the law should be available, without the intervention of lawyers, to the emerging French middle classes. This set the tone for subsequent codes throughout the Civil Law world. Codes should be comprehensive, clear, concise, to the point, simple, and terse. Legal problems should admit of only one answer after applying the codes to the facts. Although codes have always had a partial empirical basis, the logic of the legislator has been no less important. If the natural sciences can truly be said to be a marriage of induction and deduction (observations plus math-

ematics), the codes were supposed to be analogous. It is thus, as we shall see, that when John Keats (1795-1821) wrote that “a thing of beauty is a joy for ever” he could have been referring to the Colombian Civil Code.

In Civil Law jurisdictions those fields of law known in the United States as domestic relations, real property, contracts, torts, and others familiar to laymen are covered in one Civil Code. When the author interned in a Bogota law firm the summer of 1970, right after law school, the author only knew American law and Spanish (not that well). A client of the firm had a problem of easements (“servidumbres”), a common problem in real property. The senior partner gave the author the facts, literally threw at him the Civil Code, and instructed the author to come up with a solution pronto. The solution was easy, not because the author is a particularly able lawyer, not because his Spanish is particularly good, but because all the author did was look up “servidumbres” in the detailed table of contents, carefully study the relevant articles in the Code, apply the articles to the facts, and draft a memorandum of law offering a simple and elegant solution for the client. When the memorandum was discussed with opposing counsel, he agreed with our client’s position, and the case was over before it started. Had that been an isolated instance, one could assume the outcome was pure luck. However, the author repeated the same process three more times using the Colombian Labor Code, the Venezuelan Tax Code, and the Venezuelan Labor Code. Clearly, more than luck was involved here. The Codes operated just as the legislators had intended. Were it not for the wonderful draftsmanship of the jurists who codified the law, the outcomes would have been complex, unstable, inelegant, couched in uncertain language, of limited value to the client, and, worst of all, might have resulted in interminable litigation. Next, the author will examine the American system and its completely opposite outcomes.

To fully understand the nature of American law, one must delve into English legal history. After the Battle of Hastings in 1066, William the Conqueror was faced with enormous administrative problems. He

attacked some with great tenacity. For example, he ordered minute and accurate surveys of all his new land, which were compiled in the Domesday Book. On the other hand, since there was no Parliament or legislature, the process of making law was left to the courts as they decided controversies on a case by case basis. This is what is meant by common law: judge-made law. Given this historical accident, judges in England and later in the United States were enormously powerful figures because they were literally legislators as well as adjudicators. The common law of England was imported wholesale to the American colonies and remained intact after the Constitution was adopted. In modern times, however, the common law approach has created at least two serious problems for the American legal system: first, the question of precedent and “Shepardizing”; second, the stubborn insistence by American judges and other adjudicators to make law in the common law tradition, even when a field of law has been codified.

Due to the doctrine of stare decisis, all reported cases are precedent. This might have worked when the number of reported cases was small. It does not work now because there are fifty states, D.C., several commonwealths, and an enormous body of Federal law. There are literally 3 or 4 million reported cases and they are all precedents. This brings us to the subject of “Shepardizing.” When an American lawyer renders a legal opinion, litigates, or designs transactions, the lawyer must state that as of the moment in time when the opinion is rendered, the litigation starts, or the transaction closes, the underlying law is “good law”. That means that every case on which the attorney relies must be “Shepardized”. The process of “Shepardizing” is tedious, time-consuming, and, therefore, expensive. “Shepardizing” consists of taking any given case which was good law at the time it was decided, and looking up the case in a series of forbidding volumes known as Shepard’s Citations. There one will find whether the case is still good law, or whether the case has been modified, reversed, superseded, vacated, criticized, distinguished, limited, questioned, or, most importantly, expressly overruled. Manual “Shepardizing” is the most boring thing an attorney must do. With the advent of computerized legal research, “Shepardizing” has now be-

come a matter of pushing a button. However, to the author's knowledge, "Shepardizing" is not offered as an un-bundled service, so "button Shepardizing" is still beyond the means of the average client.

The second problem adverted to is the attitude of modern judges and other adjudicators. Some fields of American law have been either legislated or codified by the legislative branch. One would think that at that point, precedent would be relegated to a well-deserved oblivion. Such is not the case. American statutes or Codes are remarkably obscure compared to Civil Law Codes. This is probably because American legislators have no experience in drafting laws, because laws are sometimes intentionally vague if a majority cannot be found for a clear statement of the law, and because American legislators sometimes insist on covering every possible detail. Nevertheless, all these drafting problems aside, American adjudicators still believe themselves to be omnipotent common law judges. The outcome is complexity and uncertainty for the client. An example or two will suffice. The National Labor Relations Act, the labor code of the United States, is only about 20 pages long. The published decisions of the National Labor Relations Board, a quasi-judicial agency established in 1935 to administer the Act, run into more than 300 volumes of around 1000 pages each. All the decisions in those volumes are precedent, and each decision ever cited must be "Shepardized." If the Board had been true to its mission, it would have merely applied the Act to cases before it and published just a few important precedents. However, for fifty years the Board has been acting *ultra vires*, not out of malice but out of misperception of its proper function. The final irony of this saga is that upon researching the law in many different areas, the author has found "good law" cases on both sides of every issue. Judges and other adjudicators accomplish this dubious feat two ways: first, they simply ignore other cases and decide cases before them as they see fit; second, they "distinguish" inconvenient cases on the facts, even when the operative facts are identical. It is thus that an American lawyer can give the client sound advice one way, while opposing counsel can give the client sound advice going precisely the opposite way. The predictable outcome is the present litigation explosion

where both parties can in good faith claim that they are legally correct.

This sad state of affairs brings us back full-circle to the wisdom of the Civil Law which virtually ignores precedent and sticks to the plain meaning of the Codes. In the common law setting the surplus of precedent means, in practice, that there are no precedents at all. One can only reach the realistic, but not cynical, conclusion that the common law method "is a tale told by an idiot, full of sound and fury, signifying nothing." Macbeth.

With respect to the law of evidence there are marked differences between the Civil Law and the common law, due to the presence of juries in the latter system. In the Civil Law there are few rules of evidence. Judges are given the power to freely evaluate the proof ("*libre apreciación de la prueba*"). That is why they are judges in the first place. In the common law, the law of evidence is a tangled web designed to keep facts from the jury. In other words, the common law treats jurors as a bunch of morons incapable of common sense or good judgment. The recognition of this anomaly led England to abolish juries in 99% of civil cases sometime ago; yet, even after our mother country saw the errors of its ways, we cling to juries in civil cases despite overwhelming evidence from both sides of the Atlantic, that the jury system is very expensive and inefficient. The author can offer no explanation for this anomaly, except, perhaps as a form of cultural isolationism. Needless to say, even in the face of a jury, it is very easy for a corrupt common law judge to throw a case by his rulings on objections, jury instructions, or the use of judgment *non obstante veredicto*.

With respect to civil and administrative procedure, the American system is theoretically superior. In practice both systems have problems. The guiding light of American procedure are the Federal Rules approved in the late thirties. The drafters, all jurists of some note, however, could not foresee that their straightforward code of procedure would be abused by attorneys and distorted by judges in the manner already discussed with respect to the National Labor Relations Act and other laws or codes. Almost every impartial authority on the subject has called for dras-

tic reform and simplification of the rules of procedure. The rules were designed for the efficient administration of justice, but because of The Law of Unintended Consequences, the rules have become an almost insurmountable obstacle to that end. Reaching the merits in many civil and administrative cases has become nearly impossible because of procedural maneuvers. Attorneys can quite ethically, if not morally, use the rules to frustrate reaching the merits with highly technical devices, motions, and discovery abuse. Some judges are reluctant to interfere in the common law tradition of judge as referee, instead of the modern view of judge as active participant and litigation manager. In the Civil Law, on the other hand, civil and administrative procedure expressly require so many long written pleadings, that the average litigant cannot afford vindication of rights or defense of interests. Since most law, despite rumors to the contrary, is practiced as a tailor would craft a made to order suit and not simply by filling-in the blanks in off the rack forms, as many believe, the requirement of several detailed pleadings of fact and law, by nature labor intensive, make litigation prohibitive. A happy combination of both systems, with two short pleadings of fact and law and limited discovery, would seem to make more economic sense without sacrificing the quality of the ultimate decision. Put another way, the author suggests that drastic simplification of procedure (not to mention substance and evidence) would lower legal unit costs at a small cost in quality. In fact, the possibility even exists that quality would improve since parties and judges would concentrate on the important and not on the tangential.

In fact, if unit costs (and prices) decline significantly, one could assume that quantity demanded would increase, attorneys could still earn their target hourly rates, and consumers would have more affordable legal services. The author has always found specious the argument often heard that lawyer income is directly proportional to legal complexity. The author suggests, to the contrary, that income per lawyer is inversely proportional to legal complexity. Controlling for GDP per lawyer or population per lawyer, there is no reason why this suggestion might not be true. Arguing by analogy, in the long run real wages

grow at about the same rate as output per hour. Then, if through efficiency gains derived from demystifying law, the cost of one unit of law produced and consumed can be lowered sufficiently, real wages of attorneys, at the very least, should not suffer.

Perhaps the alternative dispute resolution (ADR) movement in the United States constitutes partial verification of the propositions in the previous paragraph. The most efficient ADR mechanism is final and binding arbitration. The parties submit to an arbitrator the issues to be decided with terms of reference containing the law and uncontested facts. The arbitrator holds hearings in which witnesses and documents are examined under very informal rules of procedure and evidence. At the end of the process, the arbitrator issues his or her award. The award is virtually incontestable in the courts. The parties obtain a swift resolution of their dispute, the attorneys earn their regular hourly fee, and the arbitrator earns his or hers. The total cost to the parties is a mere fraction of litigation in the courts. It is argued in opposition to arbitration, that the parties lose their right to appeal. This argument, however, is fallacious. Appeals in the courts are expensive and interminable. In fact, most decisions of trial courts are never appealed. Moreover, most trial court decisions are affirmed on appeal. Therefore, in practice, losing parties in the courts are no better off than losing parties in arbitration. ADR has grown organically, slowly but surely, perhaps because sophisticated consumers of law had tacit knowledge of the real legal world. ADR is now consciously and expressly pursued by many legal actors. The American Bar Association created an ADR section in 1994 and ADR courses are proliferating as part of continuing legal education. One of the temptations ADR advocates should avoid is replication of the regular legal system. The failure of the Federal Rules of Civil Procedure should give pause to those who forget the key word in ADR: "alternative." It is not too soon to worry. Ian R. Macneil, the author's contracts professor at Cornell Law School, has just published a five-volume treatise titled "Federal Arbitration Law." After all that has been discussed above, ADR and Professor Macneil's \$645.00 treatise appear to be manifestly incompatible.