

ISSUES OF LEGITIMACY AND CONSTITUTIONALISM IN THE CUBAN TRANSITION

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There is an unspoken assumption in much of the popular media coverage as well as academic treatment of Cuba that the Castro regime's longevity is tantamount to legitimacy, under the further assumption that his hold on power indicates a significant reservoir of majority support. This support is taken to stem from the social welfare gains putatively made during thirty-six years of Revolutionary rule. There are at least two difficulties with this position: (1) It is a facile stance with little empirical grounding, and it cannot dispose of the counter argument that longevity derived from the powers of what Castro himself has admitted is a repressive state (at least as far as freely expressed dissent is concerned) is particularly devoid of legitimacy, on both moral and politico-legal grounds; (2) There is no way to know the extent of support for or disaffection with the regime absent freedom of expression and dissent, nor to gauge independently the extent and depth of Revolutionary accomplishments, especially against the base line of pre-1959 socioeconomic indicators, and the very existence of a near-totalitarian state apparatus that is oriented toward these ends calls into question the presumption of popular support.

These and other conflictive issues over definitions of the Cuban situation amount to a struggle over the definition of Cuban national identity. National iden-

tity has long been at issue in the policy area of Cuban immigration to the United States, and it figures centrally, though largely implicitly, in assessments of the current Cuban transition and its prospects. A balanced evaluation of these questions requires analysis of the issues of regime legitimacy, including the constitutionality of post-regime transitions, and necessary developments in political and social culture in Cuba.

DEBATES OVER THE CUBAN TRANSITION

Recent studies of post-Castro transitions in Cuba have often focused on "overthrow" scenarios, or suggest elements of post-regime restructuring which depend implicitly on such scenarios. Enabling conditions range from internal insurrection and domestic solutions to United States or international military intervention and, in effect, temporary occupation.¹ The emphasis also tends to be formal/legal and institutional, rather than functional or process-oriented, in the treatment of post-regime political and economic change. While acknowledging their value, this paper avoids these lines of argument to focus principally, in broad preliminary terms, on functional prerequisites for a constitutionally legitimate and normatively defensible political transition in Cuba, in direct contrast with the "longevity is legitimacy" premise.

1. As plausible as any "theory" of transition from communism with applicability to Cuba, is Jorge I. Domínguez's tongue-in-cheek "poof factor" hypothesis: "The experience of communist regimes in transition is that they hold on to power for a long time, seemingly in control. Then there's some incident—a disturbance, a demonstration—and, poof, it all comes apart rather suddenly." Quoted by Ricardo Chavira, *Dallas Morning News* (September 28, 1993).

For the sake of argument, specifically argumentation over constitutional legitimacy, the relevant premises of the analysis that follows are (1) that Cuba's 1940 Constitution—never repealed—may be regarded as still having validity, if only because it was long the focus of broad national consensus, even during and after the triumph of the Revolution, whose leaders (including Castro) often spoke of its full restoration; (2) that if it were somehow restored, its most progressive and far-sighted provisions—for example those concerning labor protection and civil rights—should be retained, and for once made enforceable, since criticisms of that Constitution often centered on its non-enforceability; and (3) that, in all likelihood, the entire document, if readopted, would be modified by (or under) an interim or “plebiscitary” government, as the pertinent provisions of the 1940 Constitution provide.

It is essential that any post-Castro Cuban transition be both constitutionally-grounded and maximally participatory. In general, issues of constitutional and governmental legitimacy and (implicitly) national identity and national reconciliation need to be better addressed in transition studies. It is for this reason that consideration of the status of the last democratically-enacted constitutional document of Cuba's is instructive in the context of a critical analysis of regime legitimacy.

If the 1940 Constitution were to be readopted provisionally, consideration should be given to amending several sections—regarding nationality (Articles 8 to 18), public office and civil service (Art. 97-117), the representative composition of the national legislature (Art. 119 ff.), and other matters—for which original dispositions have been overtaken by events, such as demographic transitions, or developments in employment law and in labor relations. Students of Cuban politics and law often make specific recommendations of this sort, which are logical in view of all that has transpired there during the last thirty five

years. However, the intention in assuming the applicability of the 1940 constitution is neither to insist upon it specifically nor suggest that any political structure could or should be imposed from without. Rather, it is intended as a heuristic argument, so as to insist on the imperative need for legitimacy—actual and perceived—from the very outset for any transitional government in Cuba.²

Were one to wager, the odds are that any post-Castro transition will be punctuated by social and political violence, that domestic order will be a paramount concern, and that constitutional questions will be relegated to the end of what could be an extended transition during which there will be other pressing priorities, such as the overhaul of public sector management. However, one might hope for more sanguine prospects, at least in view of the unexpectedly rapid and relatively bloodless, albeit chaotic, transitions in the former Soviet Union and among the Central and Eastern European states. Renewed exile debates about Cuban migration and unprecedented turns in U.S. immigration policy, as well as recent legislative initiatives to strengthen the U.S. embargo, make deliberation about transition prospects all the more pressing.

PRELIMINARY QUESTIONS: CONFLICT AND CONCILIATION

An operative assumption in this paper is that the Cuban transition will be directed toward major political and economic openings, discontinuous with the Castro regime, with a movement toward a market economy (or a mixed economy relying principally on market mechanisms) and a democratic political system. Another assumption is that the transition will very likely be contentious, involving many competing groups: domestic dissident or opposition groups with a claim to involvement in anti-regime activities, exile groups with like (or differing) claims, emerging political groups (including not only political parties but also more diffuse political movements, newly estab-

2. It bears repeating that this article does not advocate restoration of the 1940 Constitution as a necessity for the legitimacy of a transitional political system in Cuba; nonetheless, the fact that there is continuing debate about the 1940 *magna carta* in exile circles points to fundamental questions about the legitimacy of post-1959 impositive political structures, including Castro-era constitutions. There is no reason why the 1940 charter could not serve to lend legitimacy to a participatory political transition.

lished or reestablished labor and professional groups, and the like), and remnants of the previous regime wishing to participate (typically technocrats, along with Castro-era ministerial officials, many of whom might attest to clandestine, or simply surreptitious, resistance). Such patterns have been evident in Russia and Eastern Europe. It might be anticipated, moreover, that Cuba will be no less polarized and conflict-ridden during a transition than it has been for most of this century, and indeed for most of its history.

Consequently, a central question to consider is the following: What are the functional requirements for democratic political re-structuring in Cuba, in light of (a) the simultaneous transition to a market or mixed economy, and (b) the need for arbitration, mediation, and adjudication of interests, and for collaboration, if not immediate reconciliation, among many social and political groups with divergent viewpoints and values? Secondly, what sort of process should determine the legal and political structures which will constitute a new Cuban society so as to make for a substantive, rather than simply declarative, legitimacy?

RECONSTITUTING THE PUBLIC SPACE OF CIVIL SOCIETY

Guillermo O'Donnell and Philippe Schmitter characterize a typical post-authoritarian (or post-totalitarian) transition as follows, in a manner that seems apt in the present case:

No description of the forms that [a restoration of civil society] can take could expect to be exhaustive: it might involve the resurgence of previous political parties or the formation of new ones ... the sudden appearance of books and magazines on themes long suppressed by censorship; the conversion of older institutions such as trade unions, and universities, from agents of government control into instruments of interests, ideals, and rage against the regime; the emergence of grass-roots organizations articulating demands long repressed or ignored by authoritarian rule; [and] the expression of radical concerns by reli-

gious and spiritual groups previously noted for their prudent accommodation to the authorities.³

These authors add that artists, intellectuals, professionals and professional bodies (new and old), and “[h]uman rights organizations, relatives of the victims of prison, torture, and murder, and often churches are the first to speak out” during both late regime and early post-regime transitional phases, along with, ironically, many of those individuals and groups who were most privileged under the previous regime, and who reassess it in light of its passing.⁴

Domestic human rights advocacy groups, most of relatively recent origin, would include the Association of the Defenders of Political Rights, the Cuban Commission for Human Rights and National Reconciliation, the Harmony Movement, and the Cuban Committee for Human Rights—these have worked on monitoring activities at considerable risk and under ever-changing rules, often with outside organizations, such as Americas Watch and Amnesty International. Exile groups of very different political orientations would include (most prominently) the Cuban American National Foundation, along with the avowedly pro-dialogue *Cambio Cubano*, the recently-formed, and militant, Cuban Unity group, and the Madrid-based, social democratic Cuban Democratic Platform. Finding an Archimedean point of agreement among these groups, which are putatively united in their opposition to the regime, would be a daunting task in itself; adding to them the Catholic Church and other religious groups, organized labor (which has been relatively outspoken and factional even under Castro), military officers and bureaucrats, municipalities-in-exile, and academics and other professionals, among many participants, complicates the task of concertation exponentially.

“Concertación,” or concertation in politics and public policymaking, is a fond ideal in Latin America; in Cuba’s case, concertation during and beyond a dem-

3. Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: The Johns Hopkins University Press, 1986), p. 49.

4. *Ibid.*, p. 51.

ocratic transition may be an unlikely prospect, but also a pragmatic necessity in any attempt at fundamentally reorienting a very fractionated Cuban society and polity. All of this presupposes significant modification of the extant political culture, which has been characterized since 1959, as Aguirre argues, by the “conventionalization of collective behavior” by means of mass organizations such as the Committees for the Defense of the Revolution and the Central Organization of Cuban Trade Unions, and by the electoral mobilization afforded by the 1976 socialist constitution.⁵ Horowitz characterizes Cuba’s political culture, along with North Korea’s, as resting on the “pseudo forms of legitimacy” of family dynasties or dictatorships, which as such are resistant to liberalization—in conventional political terms—even more than they are averse to economic liberalization.⁶

Democratic political culture requires the widespread acceptance of democratic procedural rules and of differing interests, values, and perspectives. In other words, a civic culture of republicanism, entailing political participation, liberty, freedom of expression, pluralism, and tolerance of dissent, is necessary if Cuba is to move from ritualized to democratic forms of political behavior, as well as to abandon statism and overcentralization. Historically, republicanism has meant the development of a “public sphere of influence” for citizens and for voluntary groups and associations of all kinds. Democratic theory regards this space either as a market-like political arena or as a domain for interest mediation by the state, where power is competitively structured and conflict is contained by consensus.⁷ Political tradition, and particularly constitutional tradition, in pluralist systems may be seen as the aggregate outcome of continual conflict and bargaining. Even when the resolution of conflict is really only an agreement to disagree, and

to build a space for continued interest competition—a very partial and temporary accord—it is normatively significant if it forms part of a vital democratic tradition.

To accept the provisionality and even ambiguity of pluralist democracy is difficult under the best conditions, much less during the contemplated transition in Cuba, when inherent pressures toward forced consensus would be great. However, it is precisely the move from forced conformity to free participation that is necessary, as a precondition, in fact, to new political institutions. Therefore, if Cuban democracy is to be marked by pluralism and the diffusion, separation, and balancing of political power, as the 1940 constitution envisioned, and not some unitary alternative, commitment to a project of democratic nation-building—to the reconstitution of national identity—and to political education would become a fundamental requirement, as important as electoral rules and constitutional or institutional design. Revitalization of political culture—as well as of civic commitment, which those in a transitional government must above all exemplify—would be as determinative of democracy as any written constitution.

THE GOVERNMENTAL TRANSITION

It seems clear that the new Cuban government must strive for maximum efficacy throughout, in pursuit of the urgent goals of a democratic and concerted transition. Antonio Villamil, a Senior Fellow at the Florida International University Latin American and Caribbean Center, argues convincingly that a post-Castro Cuba will have to: (1) move effectively toward a free-market economy, and (2) successfully engage both international financial institutions and the United States in a partnership aimed at the accelerated reconstruction of Cuban infrastructure, harnessing of scientific and technological potential, and development of factor endowments in the cause of the

5. Benigno E. Aguirre, “The Conventionalization of Collective Behavior in Cuba,” *American Journal of Sociology* 90 (November 1984), pp. 541-566. Aguirre speaks of the “joyful crowd,” the rote celebration of “death and martyrs,” the mass political gathering, and the “testimonial of solidarity,” among other forced rituals.

6. Irving Louis Horowitz, “Longevity and Legitimacy in Communist States,” *Studies in Comparative International Development* 27 (Spring 1992), pp. 61-75. Horowitz argues that mere longevity is not tantamount to legitimacy, as often assumed in the Cuban case.

7. Gianfranco Poggi, *The State: Its Nature, Development, and Prospects* (Stanford: Stanford University Press, 1990), pp. 136-138.

most rapid possible reconstruction.⁸ It may be wise, nonetheless, to look to the Russian and Eastern European experience so as to avoid the traps of wrenching liberalization.

What are the systemic requirements of this extraordinarily difficult and dangerous time of managed change in Cuba? Matías Travieso-Díaz and Steven Escobar project a three-stage transition, during which the integral development of political, economic, and legal institutions proceeds.⁹ The core of his proposal is that these developmental dimensions are necessarily interlinked. They would also need to operate in tandem with the planned as well as evolutionary development of political institutions, and political and civic culture, as was suggested previously.

OPEN QUESTIONS ON GOVERNABILITY AND CONSTITUTIONALISM

One unknown is whether there would (or should) be a national referendum on the restoration of the Constitution of 1940, in its totality or in part, at least temporarily pending its amendment by a constituent assembly—which would presumably be convened and conducted under the constitution's own provisions. This presents logical and procedural quandaries that stem from the self-referential nature of constitutions and of law, and which can only be resolved by prior agreement. These rule-making questions suggest again the importance of a project of public

education, since the 1940 charter will not be familiar to most Cubans born since the Revolution.

A contemporary “crisis of governability” is much discussed in the political science and public administration disciplines today, as much in Latin America as in the United States.¹⁰ This crisis is understood to encompass all forms of contemporary government, and it is traced to a single overriding cause: the tendency of states, including democratic ones, toward overpromising and overcommitment. The Swedish economist Stefan de Vylder, in a study of Cuba, along with Chile, Nicaragua, and Peru, finds that professedly progressive policies, though aimed at combating inequality, have quite often worsened income and resource disparities and inadvertently promoted various forms of corruption. These policies betray complex, self-defeating causation: overspending based on “exaggerated optimism,” which engenders shortages and deficits, a lack of financial and monetary discipline, and overvaluation and overuse of central planning and control, including price controls and subsidies. There are also, incidentally, clear indications that the Cuban government has long overpromised on the issues of racial and gender equality, among other social projects, and that these should be paramount concerns for a transitional government and constituent assembly.¹¹

A conundrum which would surely face a transitional government is how to balance: (a) managing the process of building democratic institutions with the goal

8. Antonio Villamil, “The Impact of Global Economic, Investment, and Commercial Trends on Post-Castro Cuba,” *North-South* 2, no. 6 (1993), pp. 29-32.

9. Matías Travieso-Díaz and Steven R. Escobar, “Overview of Required Changes in Cuba’s Laws and Legal Institutions During Its Transition to a Free-Market Democracy,” in *Cuba in Transition-Volume 4* (Washington: Association for the Study of the Cuban Economy, 1994).

10. E.g., Mauricio Merino Huerta, ed., *Cambio Político y Gobernabilidad* (Mexico: Colegio Nacional de Ciencias Políticas y Administración Pública/Consejo Nacional de Ciencia y Tecnología, 1992).

11. Stefan de Vylder, “How Progressive are Progressive Economic Policies? A Note on Latin America’s ‘Catch 22,’” *Economic and Industrial Democracy* 12 (February 1991), pp. 19-29. On discrimination, see: (1) Jorge I. Domínguez, “Racial and Ethnic Relations in the Cuban Armed Forces: A Non-Topic,” *Armed Forces and Society* 2 (Winter 1976), pp. 273-290. Domínguez found Black under-representation in the Cuban officer corps and over-representation in the ranks, due to the channeling of Blacks in particular into military service; (2) Benigno E. Aguirre, “Women in the Cuban Bureaucracies: 1968-1974,” *Journal of Comparative Family Studies* 7 (Spring 1976), pp. 23-40. Aguirre found women to be underrepresented, and segregated by traditional lines of work, in the bureaucracy; and (3) Raúl J. Cañizares, “Cuban Racism, and the Myth of the Racial Paradise,” *Ethnic Studies Report* 8 (July 1990), pp. 27-32. The author found a persistent history, and characteristic pattern, of racism as well as sexism in Cuba, with continuing or deepening attitudes and practices of prejudice, stereotyping, and segregation, “despite Fidel Castro’s revolutionary discourse against discrimination.”

of wide democratic participation; (b) deliberate planning for limited government with its own, immediate, self-limitation; and (c) providing for economic reconstruction with the decentralization of economic power (and privatization). It also must avoid the temptation, common to transitional governments, of remaining in place beyond its mandate. In other words, it has to avoid the errors of the regime it is replacing, while its incumbents must exhibit an ethic of true public commitment.¹² An obvious way to try to ensure this kind of self-abnegation is to disqualify the members of the provisional body from holding office in the subsequent government, barring unanticipated circumstances.

PUBLIC ADMINISTRATION AND POLITICAL RECONSTRUCTION

The functional requirements for a reconstituted public sector are, at minimum, two-fold. One is for the utilization of Cuba's relatively rich human resource base along with exile expertise, not only because these represent technical assets but also because professionals can play a significant role in fostering social and political integration during and after a transition. A second is for the intensive preparation of public managers, both in Cuba and abroad. These underscore the need for conciliation and political concertation at home, along with support from the United States and from international institutions.

To appreciate the attendant difficulties, one might consider just a few of the policy challenges which labor economist Jorge Pérez-López sees facing Cuba in any attempt to build institutional frameworks for the market and democracy: legal and fiscal reform, constitution-building and political reconstruction, creation of decentralized economic structures, and institution of competent, and transparent, management information and control systems. Furthermore, these

problems have to be addressed all at once, while avoiding, as Pérez-López argues, the "overzealousness" which resulted, in an analogous situation, in the destruction of those Eastern European institutions which had been engaged in similar functions, before new structures could be put in place.¹³

Even more than institutions (the legitimacy of which may well be questioned), it is the many individuals with the training, experience, and commitment necessary for effective participation in a transition who must be brought into the project of national reconstruction. Accomplishing this would require a good measure of mature and disinterested accommodation.

CONCLUSION: REGIME LEGITIMACY, U.S. POLICY, AND NATIONAL IDENTITY

There are contradictory tendencies in current U.S. policy toward Cuba that bear directly on the interrelated questions of regime legitimacy and the prospects for a Cuban transition consistent with national identity and with conciliation. One current runs in the direction of changing U.S. immigration policy emanating from the executive branch. The other, originating in the Republican-controlled Congress, aims at strengthening the U.S. trade embargo toward Cuba and conditioning full diplomatic recognition not only on tangible and specific steps toward democracy but also on the restoration of confiscated property.

The Clinton administration's decision to interdict Cuban rafters at sea and return them to Cuba amounts to a repudiation of a thirty-five year policy of recognition of Cuban claims to refuge and asylum. The unique recognition extended to Cubans in this regard, found most distinctly in the now imperiled Cuban Adjustment Act, derived from a tacit if not explicit recognition of a unique identity of interests

12. A question which will surely arise, for example, is what emergency powers the transitional government, as well as the succeeding government, might legitimately claim. Article 27 of the American Human Rights Convention, and the 1940 Constitution itself, provide for the declaration of national emergency by appropriate political entities, when "concurrent" conditions of "extraordinary gravity" are duly found to threaten the independence, security, or viability of the state. See Claudio Grossman, "El Régimen Hemisférico Sobre Situaciones de Emergencia," *Revista IIDH* 17 (January-June 1993).

13. Jorge F. Pérez-López, "Economic and Financial Institutions to Support the Market," in *Cuba in Transition-Volume 4* (Washington: Association for the Study of the Cuban Economy, 1994).

and values between the United States and Cuban exiles, or Cuba-in-exile. As Queiser Morales suggests, Cuban migration to the United States since 1959 has been about the search for and defense of national identity and culture in a difficult but protective host country environment.¹⁴ The divide between Cubans in exile and Cubans on the island is cultural as much as political, turning on attitudes toward economic as well as political freedom, as well as conflicting definitions of nationalism, national identity, and even social justice. National reconciliation and the perceived legitimacy of post-transition institutions will depend on mutual adjustments around these divergent conceptions of what constitutes the national good.

The Cuban Democracy Act of 1992 stipulates that U.S. sanctions on Cuba will remain in place until specific moves toward democracy bring about a calibrated adjustment. The Cuban Liberty and Democratic Solidarity (Libertad) Act—or Helms-Burton bill—which Senators Helms, Dole et al. have introduced in the Senate, goes further in strengthening in-

ternational sanctions, establishes a civil right of judicial action for U.S. citizens having ownership of or interest in expropriated properties—with reference either to fair market value or amounts certified by the U.S. Foreign Claims Settlement Commission. These features of the Helms-Burton legislation, which have prompted the most vigorous resistance from the Cuban government, are a clear affirmation of the legitimacy of property claims irrespective of the passage of time.

It should be said that Cubans themselves—on the island, in the U.S., and elsewhere—rather than academicians, journalists, or other opinion-makers in the United States—should be the ones who set the terms of debate and define the pertinent criteria for political legitimacy. It is the moral province of those who have been seriously aggrieved by the Cuban regime to establish the terms for national reconciliation and restoration—certainly not the prerogative of those with a vested interest in the regime's longevity.

14. Waltraud Queiser Morales, "In Search of National Identity: Cuban and Puerto Rican Migration," *Revista/Review Interamericana* 4 (Winter 1980/81), pp. 567-574.