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THE PROBLEM OF LABOR AND THE CONSTRUCTION OF SOCIALISM IN CUBA: ON CONTRADICTIONS IN THE REFORM OF CUBA'S REGULATIONS FOR PRIVATE LABOR COOPERATIVES

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ABSTRACT: One of the most difficult issues facing Cuba today is the problem of structuring aggregations of economic activities. In most states, individuals are understood to be able to aggregate capital in corporate or partnership form and to aggregate productive activity otherwise through cooperatives. But Cuba's version of Marxist Leninism has complicated that structure, producing a political culture whose ideology views formal aggregations of individuals with some suspicion. Thus while it has become clear that aggregating productive activity is critical to expanding economic activity, and for aiding in Cuban economic growth, as an economic matter, the forms of permissible aggregation remains contested, as a political matter. This paper considers the form and effectiveness of recent Cuban efforts to develop a viable framework for labor cooperatives in a small private sector now being made available outside of the state sector. It first reviews the Communist Party developed framework within which cooperatives are embedded into the Marxist Leninist political economy of Cuba and its recent efforts at reform. It then critically examines the regulatory structures for labor cooperatives promulgated in December 2012. Lastly, it suggests structural issues and consequences of the new regulations within the context of the larger issues constraining Cuban economic reform.

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I. Introduction.

On July 1, 2013, the official organ of the Cuban Communist Party announced the approval of 124 cooperatives to operate in the non-agricultural sector.² Grisel Tristá Arbesú, head of the *Grupo de Perfeccionamiento Empresarial de la Comisión Permanente para la Implementación y Desarrollo* was quoted as explaining that this push to open a small area for private economic activity focused on activities in which state enterprises had not been efficient and which were not critical to the national economy.³ The majority of the first batch of state approved cooperatives represents efforts to devolve operation of non-essential state enterprises;⁴ only twelve cooperatives were approved from the non-state sector.⁵ The emergence of the cooperative marks a multi-year effort to reform the Cuban economy while preserving the fundamental character of the Cuban political economy characterized by strong central planning and state control of productive capital. Indeed, the announcement was careful to remind readers that though the operating premise of the new regime was grounded in markets to determine demand and prices, the state retained unconstrained authority to intervene to set prices.⁶

The road to this point has not been either easy or straightforward. Even this small change—the creation of a small, though tightly regulated space within which individuals may provide goods and services without direct state direction or control—required a substantial amount of debate within the Cuban Communist Party. That debate, in turn, exposed the contradictions of Cuban Marxist-Leninist political economy—one with the objective of creating an appropriate role for the control and exploitation of capital consistent with Marxist principles but which acknowledge that the Soviet experiment, turning the state into a monopoly capitalist and the Communist Party as its operator, has not produced the movement toward socialism intended after 1959. To complicate the debate, Cuban Communists have rejected the approach of Chinese and Vietnamese Communist Parties, which have moved to more indirect control of capital and markets as part of their development of Marxist economic principles since the 1970s. As a consequence, the range of flexibility left to the Cuban Communist Party is quite limited.

Central to the debates, and one of the most difficult issues facing Cuba today, is the problem of structuring aggregations of economic activities.⁷ In most states, individuals are understood to be able to aggregate capital in corporate or partnership form and to aggregate productive activity otherwise through cooperatives. But Cuba's version of Marxist Leninism has complicated that

² Yaima Puig Meneses and Leticia Martínez Hernández, *Comienzan a funcionar cooperativas en diversos sectores de la economía*, Granma, <http://www.granma.cu/espanol/cuba/5jul-Comienzan%20a%20funcionar.html>.

³ Id.

⁴ Id. (“Ellas están llamadas a ocupar un lugar importante en la economía del país, aunque el papel principal lo continuará teniendo la empresa estatal socialista”, enfatizó. Las cooperativas no son resultado de un proceso de privatización —aclaró—, sino que administrarán la propiedad estatal que es, en definitiva, de todo el pueblo.” Id., quoting Rubén Toledo Díaz, jefe de grupo en la Comisión Permanente para la Implementación y Desarrollo)

⁵ Id.

⁶ Id. (“Al respecto, Tristá Arbesú destacó que aun cuando los precios estarán determinados según la oferta y la demanda, se exceptúan de esta regla algunas actividades y productos”).

⁷ See, Larry Catá Backer, “The Cooperative as a Proletarian Corporation: The Global Dimensions of Property Rights and the Organization of Economic Activity in Cuba,” *Northwestern Journal of International Law and Business* 33:527-618 (2013).

structure, producing a political culture whose ideology views formal aggregations of individuals with some suspicion, as a challenge to the paramount role of the Cuban Communist Party. More importantly, the current economic system is based on the premise that only the state, under the leadership of the Communist Party, may own and direct the use of productive capital for economic production. These issues are bound up in recent efforts by the Cuban Communist Party to change the economic model that has been substantially unquestioned since the early 1960s, without changing, in any significant respect, the premises of that organizational model. Thus while it has become clear that aggregating productive activity is critical to expanding economic activity, and for aiding in Cuban economic growth, as an economic matter, the forms of permissible aggregation remains contested, as a political matter.

This paper first reviews the new conceptual and regulatory structures for cooperatives. This requires first understanding the Communist Party line expressed through the Lineamientos.⁸ It then focuses on the form of economic aggregation that the Cuban state has tentatively opened to individuals—the economic cooperative, examining in some detail cooperative regulations promulgated in December 2012. Lastly, it suggests structural issues and consequences of the new regulations within the context of the larger issues constraining Cuban economic reform. It concludes that, like China before it in the 1970s, the issue for Cuban Marxism is not how to resolve the issue of capital, it is instead the question of labor under Marxism as something other than a commodified form of useful capital. Successful resolution of this issue will test the Cuban legitimacy of the current political economy of the state. Cuba has sought to nod in the direction of labor through its focus on labor cooperatives. But it remains very much committed to the primacy of capital. Until that contradiction of Cuban Marxism is solved, the best one will be able to hope for are small steps toward the amelioration of the subordination of labor in a system that remains very much grounded in the primacy of capital.

II. The Labor Cooperatives Regulations.

As a state that adheres to a form of State-Party Marxist-Leninist organization, all legislation can be understood only through the lens of the Party line. This serves as the framework within which legislation, when enacted at all, is subsequently structured. That is certainly the case in Cuba, which perpetuates a European form of Stalinist Marxist-Leninist political organization. To understand the cooperatives legislation, then, it is first necessary to understand the Communist Party line and then to examine its coherence with subsequently passed legislation.⁹

1. *The Lineamientos.* The Lineamientos cooperative provisions seek to carve out a form of enterprise organization that preserves to the state the control of productive capital but that permits workers to come together to pool their efforts for collective gain. The possibilities of the cooperative provisions must be read together with the earlier non-state sector regulations. That is,

⁸ Lineamientos de la Política Económica y Social del Partido y la Revolución [Guidelines on the Political and Social Economy of the Party and the Revolution], VI Congreso del Partido Comunista de Cuba [Sixth Congress of the Communist Party of Cuba] (adopted Apr. 18, 2011) (Cuba) [hereinafter Lineamientos], available at <http://www.granma.cubaweb.cu/secciones/6to-congreso-pcc/Folleto%20Lineamientos%20VI%20Cong.pdf> (translation available at <http://www.cuba.cu/gobierno/documentos/2011/ing/1160711i.html>).

⁹ This section is derived from Larry Catá Backer, "The Cooperative as a Proletarian Corporation: The Global Dimensions of Property Rights and the Organization of Economic Activity in Cuba," *Northwestern Journal of International Law and Business* 33:527-618 (2013).

the limited authorization for collective enterprise is itself contained within a narrow area defined for the non-state sector, principally the nearly 180 retail and service sector professions permitted.

The Lineamientos contemplate two classes of cooperatives. First level (*primer grado*) cooperatives are recognized an economic organization with legal personality that aggregate goods and labor.¹⁰ Interests in cooperatives have the character of social property that may not be negotiated (in contrast to shares).¹¹ They may enter into contracts with other entities and natural persons. They may also determine the distribution of funds to participants.¹² Second level (*segundo grado*) cooperatives are made up of first level cooperatives.¹³ They can be formed as separate juridical persons. Their objective is to facilitate the business of the associated cooperatives.¹⁴

The cooperative is understood as an aggregate personality with limited authority to act autonomously. But cooperative autonomy can be exercised only within tight conceptual constraints. The focus of association is not on the exercise of autonomy for the exploitation of productive capacity and collective gain but rather of the cooperative as an organization to which a small amount of state authority has been delegated. The basic organizational premise of Cuban political economy stands, with the state at its center and the cooperative purposed “con la finalidad de producir y prestar servicios útiles a la sociedad” within the framework of Cuban state-centralized control.¹⁵

Likewise, the Lineamientos limited any power of cooperatives to negotiate cooperative assets to other private enterprises.¹⁶ The CCP was at pains to emphasize that cooperative property was public property (*propiedad social*) whose use was delegated to the cooperative participants. The scope of cooperative activity was also subtly restricted, permitting private transactions but strengthening the direct power of the state to manage those relations. As approved, the provision imposes a requirement that cooperatives first satisfy whatever economic needs the State imposes

¹⁰ “Se crearán las cooperativas de primer grado como una forma socialista de propiedad colectiva, en diferentes sectores, las que constituyen una organización económica con personalidad jurídica y patrimonio propio, integradas por personas que se asocian aportando bienes o trabajo, con la finalidad de producir y prestar servicios útiles a la sociedad y asumen todos sus gastos con sus ingresos.” (Lineamientos § 25).

¹¹ “La norma jurídica sobre cooperativas deberá garantizar que éstas, como propiedad social, no sean vendidas, ni transmitida su posesión a otras cooperativas, a formas de gestión no estatal o a personas naturales.” (Lineamientos § 26).

¹² “Las cooperativas mantienen relaciones contractuales con otras cooperativas, empresas, unidades presupuestadas y otras formas no estatales, y después de cumplido el compromiso con el Estado, podrán realizar ventas libremente sin intermediarios, de acuerdo con la actividad económica que se les autorice.” (Lineamientos § 27).

¹³ “Se crearán cooperativas de segundo grado, cuyos socios son cooperativas de primer grado, las que tendrán personalidad jurídica y patrimonio propio y se forman con el objetivo de organizar actividades complementarias afines o que agreguen valor a los productos y servicios de sus socios (de producción, servicios y comercialización), o realizar compras y ventas conjuntas con vistas a lograr mayor eficiencia.” (Lineamientos § 29).

¹⁴ “Las cooperativas, sobre la base de lo establecido en la norma jurídica correspondiente, después de pagar los impuestos y contribuciones establecidos, determinan los ingresos de los trabajadores y la distribución de las utilidades.” (Lineamientos § 28).

¹⁵ As finalized, Lineamientos P. 25 provides:

Se crearán las cooperativas de primer grado como una forma socialista de propiedad colectiva en diferentes sectores, las que constituyen una organización económica con personalidad jurídica y patrimonio propio, integradas por personas que se asocian aportando bienes o trabajo, con la finalidad de producir y prestar servicios útiles a la sociedad y asumen todos sus gastos con sus ingresos.

Tabloide P. 25.

¹⁶ Originally, Lineamiento P. 26 provided: “El Reglamento General de las Cooperativas deberá garantizar que la propiedad cooperativa no sea vendida, alquilada o arrendada a otras cooperativas o formas no estatales de producción.” (Tabloide P. 26).

before the cooperative can engage in private economic activities in the non-state sector,¹⁷ and reinforces the limits of private activity as authorized for individuals proprietorships.¹⁸ This last imposition represents a significant effort to bring the cooperative back into the state sector—cooperatives will have to service the state before it can engage in private activities; and the state ministries can then effectively delegate state sector obligations to the cooperatives.

The focus on expense and fiscal responsibility¹⁹ is reinforced by provisions on the tax obligations of cooperatives.²⁰ As adopted, Paragraph 28 provides that the primary obligation of the cooperative is to pay its taxes and other contributions to the state, then determine worker income, and then make additional distributions.²¹ This mirrors concerns among Party cadres that cooperatives be required to bear a large burden of social responsibility. That was meant to provide the state with revenue to meet its social services expenses. More importantly, perhaps, it was also meant to retain the close tie between cooperatives and the state apparatus itself. The notion that cooperatives generate income for the state first and its stakeholders after is substantially different from the idea more common in the West that enterprises generate income for investors subject to tax impositions. The difference is subtle but important.

The last provision deals with second level cooperatives, which are meant to be aggregations of first level cooperatives. As originally conceived, second level cooperatives had as their object the organization of common processes of production or service provision among cooperatives, or the aggregation of cooperatives to buy and sell goods with greater efficiency.²² As adopted, the objectives of second level cooperatives changed in some respects: their principal objective now is described as organizing similar or complementary activities that add value to products and services of their partners (production, and marketing services), or joint purchases and sales in order to achieve greater efficiency.²³

The CCP also recognized, in limited ways, this need for a system of rules and enforcement. Lineamientos Paragraphs 2 and 27 speak to the need to arrange relations among state and non-state sector enterprises, including cooperatives, which Lineamiento Paragraph 22 emphasizes is to

¹⁷ The cooperative may engage in private economic activity only “después de cumplido el compromiso con el Estado.” *Tabloide*, supra note – at P. 27.

¹⁸ The provision as approved reads in full as follows: “Las cooperativas mantienen relaciones contractuales con otras cooperativas, empresas, unidades presupuestadas y otras formas no estatales y después de cumplido el compromiso con el Estado, podrán realizar ventas libremente sin intermediarios, de acuerdo con la actividad económica que se les autorice.” *Tabloide*, supra note --, at P. 27.

¹⁹ Lineamiento supra note --, ¶ 25.

²⁰ Lineamiento supra note --, ¶ 28.

²¹ “Las cooperativas, sobre la base de lo establecido en la norma jurídica correspondiente, después de pagar los impuestos y contribuciones establecidos, determinan los ingresos de los trabajadores y la distribución de las utilidades.” (*Ibid.*).

²² “Las cooperativas de primer grado, de forma voluntaria, pueden acordar entre ellas la constitución de cooperativas de segundo grado, con personalidad jurídica y patrimonio propio, con el objetivo de organizar procesos comunes (de producción y servicios), realizar compras y ventas conjuntas con vista a lograr mayor eficiencia.” *Tabloide*, supra note --, P. 29.

²³ “Se crearán cooperativas de segundo grado, cuyos socios son cooperativas de primer grado, las que tendrán personalidad jurídica y patrimonio propio y se forman con el objetivo de organizar actividades complementarias afines o que agreguen valor a los productos y servicios de sus socios (de producción, servicios y comercialización), o realizar compras y ventas conjuntas con vistas a lograr mayor eficiencia.” (*Id.*). The change was justified on grounds of producing greater clarity but it also noted a large number of questions about second level cooperatives. *Id.*, commentary.

be implemented through contracts.²⁴ Lineamiento Paragraph 16 includes a provision for the liquidation of state enterprises that fail to meet their contractual obligations. Lineamiento Paragraph 73 expresses the ideal that the state will increase its international credibility through strict compliance with its obligations.²⁵ Lineamiento Paragraph 181 emphasizes the need to arrange contracts in a form that encourages compliance with their terms.²⁶

Taken together, the CCP proposed a framework for the legal regulation of aggregated private economic activity within very constrained limits. The corporate form was forbidden individuals, just as the ownership of productive capital continues to be understood as solely property of the state. The state is accorded a monopoly of all economic activity except to the extent it chooses to delegate activities. Unless specifically delegated it is forbidden individuals. The state has developed a system of licensure for a number of professions mostly in the service and retail sector. These require individual application and submission to a process of monitoring and reporting that is meant to ensure that the primacy of the state is respected. However, within this small and retail/service sector, the state may permit individuals to aggregate their labor in cooperatives as long as they conform to the basic principles outlined by the CCP in its Lineamientos. These also ensure that non-state sector enterprises, even labor cooperative enterprises, remain substantially tied to state planning and, at the instance of the state, also subject to price regulation. These fundamental premises serve as the heart of the approach followed in the development of the first set of cooperative regulations announced in December 2012.

2. *The December 2012 Regulatory Framework.* The regulatory enactments of the policy reflected in the Lineamientos suggest that this tension between potential and fear of private market activities, especially by enterprises not directly controlled by the state, remains quite strong. The cooperative regulations were announced only after a long period of gestation and with the strong support for an innovative approach from influential academics and others at the University of Havana, on December 11, 2012, the Cuban government published the long awaited regulations on cooperatives.²⁷ The new Cooperative regulations actually comprise a cluster of related regulations, including two decree-laws of the Council of State,²⁸ one decree from the Council of Ministers,²⁹ and -- two ministerial resolutions.³⁰ The principal focus of the analysis that follows is on Decreto-Ley 305 that establishes the organizational framework for cooperatives. and the ministerial decree, Decreto 309, that provides the administrative regulations for cooperative formation.

²⁴ See also Lineamientos, supra note --, Paragraph 22 ("El contrato constituirá una herramienta de trabajo en la planificación y control de todas las etapas del proceso inversionista, asegurando el resultado final de la inversión, con la calidad requerida y dentro de los plazos previstos en el cronograma de ejecución." Id.

²⁵ "Trabajar con el máximo rigor para aumentar la credibilidad del país en sus relaciones económicas internacionales, mediante el estricto cumplimiento de los compromisos contraídos." Lineamientos, supra note --, P. 73). On this point see also Lineamientos, supra note --, Paragraphs 90, 98,

²⁶ "Adecuar la producción agroalimentaria a la demanda y la transformación de la comercialización, elevando la calidad y exigencia en los contratos, para que las partes cumplan sus obligaciones; limitando la circulación centralizada a aquellos renglones vinculados a los balances nacionales; otorgando un papel más activo a los mecanismos de libre concurrencia para el resto de las producciones." Lineamiento, supra note --, P. 181).

²⁷ *Gaceta Oficial de la República de Cuba, No. 53 Extraordinaria*, CE DL. No. 305, 306; CM D. No. 309; MEP 570/12; MFP 427/12 (December 11, 2012). Available http://www.gacetaoficial.cu/pdf/GO_X_053_2012.rar.

²⁸ Consejo de Estado Decreto-Ley No. 305 and Decreto-Ley No. 306 (2012).

²⁹ Consejo de Ministros, Decreto No. 309 (2012).

³⁰ Ministerio de Economía y Planificación Resolución No. 570/12, and Ministerios de Finanzas y Precios Resolución No. 427/12.

a. *Consejo de Estado Decreto-Ley No. 305; the corporate law of cooperatives.* Decree-Law 305 is preceded by a short preamble³¹ that substantially restate the justifications for the development of non-agricultural cooperative regulations that were included in the Lineamientos.³² But it also quite clearly suggests the tentative nature of the reforms and the limited scope within which these regulations will be given effect. It notes that since 1987 cooperatives have been recognized as separate juridical persons and as a legitimate form of collective property that contributes positively to the national economy. More importantly it reluctantly concedes that in order to develop the Cuban economic model, it is necessary, but only as an experiment, to create a legal framework for non-agricultural cooperatives. These conceptual constraints structures the framework that guides the organization, powers, and authority of non-agricultural cooperatives elaborated in the decree-laws, decrees, and resolutions that follow.

The regulations follow the Lineamientos³³ dividing cooperatives into two classes--*primer grado* cooperatives and *segundo grado* cooperatives.³⁴ *Primer grado* cooperatives are the focus of the Decreto-Ley; *segundo grado* cooperatives are governed by the rules of this law-decree unless the rules are incompatible with its operation.³⁵ Beyond this division, the Decreto-Ley is divided into 32 substantive articles covering cooperative regulation from formation to dissolution and liquidation.

Articles 1-10 focus on general principles and provisions. Article 1 sets out the objectives of the experimental decree-law--to establish the norms that regulate the constitution, operation and dissolution of cooperatives within non-agricultural sectors in the national economy.³⁶ Its characterization of the legislation as fundamentally experimental in nature, emphasized both in the preamble and in Article I is especially troubling. It suggests both the impermanent nature of the legal structure being created, provides notice that the state might at any time end or change the rules of the experiment, and that the legitimacy of the project within the Cuban economic model is still not settled. The importance of this characterization cannot be understated--by signaling that the rules may not survive, it serves to substantially increase the risk of forming and operating a cooperative. It deprives the law of the sort of legal certainty fundamental both to rule of law and necessary for planning and reliance b individuals. This may well reduce the number of people willing to take the risk of investing substantial effort or resources into a cooperative form that may be yanked out from under them at any time.

³¹ The Preamble provides in relevant part:

POR CUANTO: La Ley número 59, "Código Civil", de 16 de julio de 1987, reconoce a las cooperativas como personas jurídicas, y una forma de propiedad colectiva, que contribuye al desarrollo de la economía nacional.

POR CUANTO: En el proceso de actualización del modelo económico cubano es necesario la creación, con carácter experimental, de cooperativas en sectores no agropecuarios, lo que requiere de una norma jurídica que instrumente su creación y funcionamiento.

Consejo de Estado Decreto-Ley No. 305, supra, Preamble.

³² Lineamientos, supra note --, at P. 25

³³ See discussion supra at III.C.1.

³⁴ Consejo de Estado Decreto-Ley No. 305, supra, Article 5.

³⁵ Id., Disposiciones Especiales, Cuarta. It is likely that the state ministries will have the discretion to make that determination and not the members of the Segundo grado cooperatives.

³⁶ "ARTÍCULO 1.-El presente Decreto-Ley tiene por objeto establecer con carácter experimental las normas que regulan la constitución, funcionamiento y extinción de cooperativas en sectores no agropecuarios de la economía nacional, en lo sucesivo cooperativas." Consejo de Estado Decreto-Ley No. 305, supra, Article 1.

Article 2 emphasizes that cooperatives have economic and social objectives; that it is invested with private and public obligations that extend beyond the individuals involved.³⁷ This reflects the debate in the 6th Party Congress about the social role of economic aggregations, like cooperatives, and their insistence that, whether public or private, such enterprises must serve the state and its economic policy objectives even as it serves to increase the well being of its operators. The principal objectives of cooperatives are to serve the retail sector through the production of goods and the offer of services, all of which must be compatible with social objectives (managed by state organs and the Communist Party) and the interests of the cooperative's members. As long as it meets these objectives it may enjoy autonomous juridical personality, use and distribute its property, meet its expenses from its revenues and otherwise comply with its obligations (contract).³⁸

Articles 3 and 4 treat the internal organization of the cooperative. Article 3 identifies the set of rules that define the regulatory universe of cooperatives.³⁹ These include the relevant law-decrees, decrees, resolution of ministries, as well as its own internal organizational documents. Article 4 sets out the core substantive premises that define the fundamental characteristics of the cooperative and the standards under which they are to be operated. More specifically, Article 4 articulates the seven basic organizing principles of operation of cooperatives. These include (1) cooperatives are voluntary organizations formed and dissolved by mutual consent,⁴⁰ (2) all members are expected to collaborate in the work of the cooperative,⁴¹ (3) management decisions are to be made by all members, each of whom have the same participation rights; decision making is guided by democratic principles,⁴² (4) cooperative expenses must be paid out of its revenues, and after payment of taxes and other impositions owing to the state, net revenues may be distributed to the members but only in proportion to the members' contribution,⁴³ (5) all members are to comply with their work obligations in conformity to the terms of the agreements establishing the cooperative and in conformity to the direction of those charged with its administration,⁴⁴ (6) the social obligations of cooperatives are to be emphasized in establishing and managing its objectives, in addition to which cooperatives must in their operations contribute to the economic and social development of the nation, protect the environment, avoid speculation, and ensure compliance with law; the members of the cooperative must work to promote cooperative culture and to satisfy the material, training, social, cultural, moral and spiritual needs

³⁷ Consejo de Estado Decreto-Ley No. 305, *supra*, Article 2.1 ("La cooperativa es una organización con fines económicos y sociales, que se constituye voluntariamente sobre la base del aporte de bienes y derechos y se sustenta en el trabajo de sus socios, cuyo objetivo general es la producción de bienes y la prestación de servicios mediante la gestión colectiva, para la satisfacción del interés social y el de los socios.").

³⁸ Consejo de Estado Decreto-Ley No. 305, *supra*, Article 2.2 ("La cooperativa tiene personalidad jurídica y patrimonio propio; usa, disfruta y dispone de los bienes de su propiedad; cubre sus gastos con sus ingresos y responde de sus obligaciones con su patrimonio.").

³⁹ Consejo de Estado Decreto-Ley No. 305, *supra*, Article 3 ("Las cooperativas se rigen por el presente Decreto-Ley, su Reglamento, las disposiciones complementarias a estos, sus estatutos, y de forma supletoria las disposiciones legales que les resulten aplicables.").

⁴⁰ *Id.*, Article 4(a) (Voluntariedad).

⁴¹ *Id.*, Article 4(b) (Ciooperación y ayuda mutua)

⁴² *Id.*, Article 4(c) (Decisión colectiva e igualdad de derechos de socios)

⁴³ *Id.*, Article 4(d) (Autonomía y sostenibilidad económica)

⁴⁴ *Id.*, Article 4(e) (Disciplina cooperativista)

of its members and their families,⁴⁵ and (7) cooperatives will express its relations to other enterprises through contract, collaboration agreements, exchanges and other lawful means.⁴⁶

These organizing principles are notable, at first blush, not merely for their breadth and ambiguity. That is too easy a charge to lodge against these provisions, and are ultimately a distraction. The principles are useful for establishing the conceptual limits of cooperatives. It is clear that these enterprises are meant to remain small and closely tied to the primary contributions of its members. The efficiencies of corporate form of denied this form of organization. Yet there is a hint of movement toward conventional rule of law notions in the emphasis of the use of contract in managing relationships among entities. That may well open the door to the construction of state organs (judicial) for the vindication of these rights and might contribute in that way to the development of a body of private and commercial law that may in turn contribute to the development of a more robust commercial sector.

More important, though, is the emphasis on the social obligations of cooperatives. This is not meant as mere rhetorical bluster. Rather, it is the gateway through which state management of the business of cooperatives may be effectuated. Because the state may control the meaning and application of social obligations, it may, as it likes, also control the functioning of cooperatives. It is in this way that the state ministries may still be able to control cooperatives even as they appear to be directed by their members. In effect, the state seeks to transfer the risk of the enterprise to the members but retain a substantial control over its operation, at least at a macro level. It remains to be seen how aggressively state organs, and functionaries seek to use this power to interfere in the operations of cooperatives, and to what ends. It will also be interesting to see if in these powers the law provides an opening to corruption in the relations between cooperatives and the functionaries responsible for their oversight.

But social objectives can be a liberating principle as well. Free of bureaucratic micro management, and perhaps subject to review and reporting on a periodic basis, requiring businesses to adopt something like a broad stakeholder model and reject the traditional shareholder or investor model of conventional enterprises, can provide the values based foundation for assessing the value of enterprise activity that can much more efficiently produce socially useful objectives than the traditional system of control and regulation managed by state bureaucrats. The reason for this is simple--incorporating a stakeholder model as the foundational basis of the assessment of the value of enterprise activity internalizes the values and objectives of socially conscious activities. As a consequence monitoring and management costs (to the state) are reduced substantially as the objective becomes internalized and self managed. That, for example, is the objective of moves outside of Cuba to provide a regulatory space for socially conscious enterprises.⁴⁷ The difficulty of traditional control policies is that it remains something that is exogenous to the cultures of enterprises, is imposed and controlled by state actors who are

⁴⁵ Id., Article 4(f) (Responsabilidad social, contribución al desarrollo planificado de la economía y al bienestar de sus socios y familiares).

⁴⁶ Id., Article 4(g) (Colaboración y cooperación entre cooperativistas y con otras entidades).

⁴⁷ See, e.g., Larry Catá Backer, [Edward Waitzer on Fiduciary Duty and Corporate Social Responsibility; Are Benefit Corporations a Step in the Right Direction?](http://lcbackerblog.blogspot.com/2012/03/edward-waitzer-on-fiduciary-duty-and.html), *Law at the End of the Day*, March 6, 2012. Available <http://lcbackerblog.blogspot.com/2012/03/edward-waitzer-on-fiduciary-duty-and.html>.

not intimately connected with enterprise activity and who may impose transaction costs in the form of corruption.⁴⁸

In effect, because the enterprise itself does not own its own obligation to increase stakeholder (or social) value, and because it appears alien to the operation--something imposed by an outside actor--it will not be easy to internalize the values of social welfare within the cultures of enterprise operation. The concern with the system created by the Decree-Law, then, is precisely this--it points to a system of internalizing the requirements of stakeholder operations while retaining the inefficient structures of control of the specific implementation of social objectives through state management and control. That is the tension between the potential expressed in the general operational principles of Article 2 and the impositions of the regulatory framework.⁴⁹

Article 6 turns to cooperative formation. It describes the lawful forms of contributions (only by natural persons) to the formation of *primer grado* cooperatives. These include (1) cash aggregated for collective activity,⁵⁰ (2) use of property or services contributed to the venture without transferring ownership,⁵¹ (3) contributions of the use of the means of production owned by the state, the right to the use of which has been acquired lawfully including state enterprises whose operations might be privatized (through leaseholds or otherwise),⁵² and (4) any combination of these.

The contribution of state assets under Article 6(c) is particularly noteworthy. It suggests the possibility of privatizing state operations through cooperatives under appropriate circumstances, none of which are specified. That suggest in turn that the state might, as it suits, to contribute or not under standards that may not be either transparent or uniform and that may be arbitrarily applied. The transfer of the rights to use state assets is treated further in Articles 7-9, which focuses on the use of state property. Article 7 limits lease transfer contributions of state assets to a maximum term of ten years.⁵³ Article 8 permits state entities to sell equipment and other goods to cooperatives in accordance with law.⁵⁴ Article 9 permits cooperatives (whether not not fully

⁴⁸ See, e.g. Larry Catá Backer, *Corruption in Cuba--The Cuban Communist Party Signals Public Recognition and Party Obligation, Law at the End of the Day*, July 16, 2011. Available <http://lcbackerblog.blogspot.com/2011/07/corruption-in-cuba-cuban-communist.html>.

⁴⁹ See, e.g., Consejo de Estado Decreto-Ley No. 305, *supra*, Article 11 (below) and the implementing regulations, Council of Ministers--Decreto No. 309, discussed below.

⁵⁰ Consejo de Estado Decreto-Ley No. 305, *supra*, Article 6(a) ("A partir del patrimonio integrado por los aportes dinerarios de personas naturales que deciden voluntariamente asociarse entre sí bajo el régimen de propiedad colectiva.").

⁵¹ Consejo de Estado Decreto-Ley No. 305, *supra*, Article 6(b) ("Por personas naturales que decidan voluntariamente asociarse entre sí, solo con la finalidad de adquirir conjuntamente insumos y servicios, comercializar productos y servicios, o emprender otras actividades económicas, conservando los socios la propiedad sobre sus bienes.").

⁵² *Id.*, Article 6(c) ("A partir de medios de producción del patrimonio estatal, tales como inmuebles y otros, que se decida gestionar de forma cooperativa y para ello puedan cederse estos, por medio del arrendamiento, usufructo u otras formas legales que no impliquen la transmisión de la propiedad.").

⁵³ *Id.*, Article 7 ("El término del arrendamiento, usufructo u otras formas legales que no impliquen la transmisión de la propiedad a la cooperativa, a que se refiere el inciso c) del artículo anterior será de hasta diez (10) años, prorrogables por igual término en períodos sucesivos.").

⁵⁴ *Id.*, Article 8 ("Las entidades estatales podrán vender a las cooperativas que se constituyan, equipos, medios, implementos u otros bienes muebles que se determinen, de acuerdo a lo legalmente establecido.").

established in accordance with law) to bid for state property and to contest the award of property let out to bid.⁵⁵

Corporate formation is the subject of Articles 10-16,⁵⁶ most of the provisions of which are supplemented by the implementation regulation of the Council of Ministers.⁵⁷ Article 10 specifies the mechanics of cooperative formation. Members are limited to natural persons, at least 18 years of age, who are permanent residents of Cuba and are able to perform productive work or services which constitute its activity.⁵⁸ Where state enterprises are contributed, the workers of those enterprises will have priority in becoming cooperative members.⁵⁹ Lastly, new members may be added in accordance with the operating principles of article 4.⁶⁰ Articles 11-16 focus on the governing documents of the cooperative and the process for obtaining state consent for operation. These include identifying the appropriate review agency,⁶¹ scope of review by local authorities and the Council of Ministers,⁶² the supervision and control responsibilities of state agencies authorizing cooperative formation,⁶³ the writing requirements for cooperative constitutions,⁶⁴ authority to regulate cooperative combinations,⁶⁵ and sources of law.⁶⁶

These provisions raise a number of interesting issues of control, supervision and the relationship of the state to these enterprises on an ongoing basis. The framework of formation and supervision creates the structures for the choke points of the regulation. Article 11 specifies the governmental unit from which approval must be obtained to form a cooperative, distinguishing between cooperatives formed from private contributions from those organized from privatized state enterprises. The request must include the cooperative's constitution, though it is not clear what sort of review process or what sort of forms must be filled out. Article 14 provides for the formalities of the preparation of a cooperative constitution. Article 12 indicates that all applications for cooperative formation must be reviewed by the Council of Ministers (Consejo de Ministros) as well as appropriate local regulatory bodies. Article 13 provides that approval for cooperative formation will also specify in some detail the authorized activities of the enterprise and such other obligations as the approving agencies might deem appropriate. Article 13 also provides that the approving agency remains responsible for the control and evaluation of the operations of the cooperative. Indeed, under Article 15, cooperatives may not merge, dissolve, split up, or modify its organization or operations without the approval of the state organ that approved its constitution.

What is clear is that though anyone who meets the requirements for cooperative formation may apply, the state has reserved to itself the right to refuse the formation of any cooperative,

⁵⁵ Id., Article 9 (“podrán participar en la licitación de arrendamientos de inmuebles y de la venta de otros activos fijos de un establecimiento estatal. . . . podrán impugnar la decisión firme en la vía judicial conforme a lo legalmente establecido.”).

⁵⁶ Chapter III of this Decree-Law is entitled “De la Constitución (articles 11-16).

⁵⁷ Ministerial Decree 309 (Consejo de Ministros, Decreto No. 309), *supra*, which are examined *infra* at text and notes --

⁵⁸ Consejo de Estado Decreto-Ley No. 305, *supra*, Article 10.1.

⁵⁹ Id., Article 10.2.

⁶⁰ Id., Article 10.3. These principles include non-discrimination, collective decision making and equal rights for members. Id., *supra*, article 4(a), (c), and (f).

⁶¹ Id., Article 11.

⁶² Id., Article 12.

⁶³ Id., Article 13.

⁶⁴ Id., Article 14.

⁶⁵ Id., Article 15.

⁶⁶ Id., Article 16.

apparently for any reason. The cooperative regulations are not structured like modern Western enabling statutes that merely require adherence to basic requirements and the filing of an appropriately completed set of forms. Rather *each cooperative is viewed as an individualized request for permission to engage in non-state sector economic activities*. Such applications, in a political economy still committed to the value of central planning, is then treated as a central planning event, to be granted only on those terms that satisfy government functionaries of its compatibility with state sector planning objectives. Negotiation for cooperative formation, activities, pricing and the details of its business plan, then, are likely to be based on an assessment that the cooperative does not appropriately meet the social or national objectives. This is a significant method of control of both individuals and of cooperative activity. The state stands as the gatekeeper in a way that has no parallel in the West where, since the early 20th century, most enterprise formation that complies with formal requirements are not otherwise subject to particular review. It also substantially limits cooperatives in their engagement with market changes. Any change in the operations, business or focus of the cooperative will require governmental review and approval. This is another way by which the state retains substantial control over the operations of cooperatives--it effectively serves as the ultimate controlling entity with respect to changes in the operations, scope of business or operations of the cooperative. That authority extends not just to consent rights for cooperative business decisions that change its operations but also to evaluation and control of the cooperative.

The structures of corporate governance is the subject of Articles 17-19, which regulate the internal organization of cooperatives. Article 17 provides that the general assembly of the members is the supreme governance unit of the cooperative.⁶⁷ The General Assembly elects a President, presidential alternate and secretary by direct and secret ballot.⁶⁸ It also may appoint an administrator or administrative committee,⁶⁹ and elect a board of directors (Junta Directiva) overseen by the cooperative's president.⁷⁰ These provisions are similar to organizational provisions for private companies. Article 18 provides a waiver of these organizational requirements for small and less complex cooperatives.⁷¹ Whatever their organizational form, Article 19 provides that all cooperatives must administer their financial affairs through a specially designated member or through a Control and Audit Committee (Comisión de Control y Fiscalización) appointed by the General Assembly.⁷²

Issues of corporate (cooperative) finance are the object of Articles 20-25. Article 20 specifies the principle of accounting standards to be applied by cooperatives.⁷³ It does not, however, specify accounting conventions, which are specified in the Regulations. Article 21 specifies the initial

⁶⁷ Id., Article 17.1 ("El órgano superior de dirección de la cooperativa es su Asamblea General, de la cual forman parte todos los socios.")

⁶⁸ Id., Article 17.2.

⁶⁹ Id., Article 17.3.

⁷⁰ Id., Article 17.4.

⁷¹ Id., Article 18. Cooperatives with 20 or less members may operate by appointing an administrator. Cooperatives with more than 20 but no more than 70 members may operate through an Administrative Council (Consejo Administrativo). Cooperatives with more than 70 members may elect both an administrative council and a board of directors. Id.

⁷² Id., Article 19 (the form of the financial oversight will vary by the number of members and the complexity of the cooperative organization, "teniendo en cuenta la cantidad de socios y complejidad de la actividad")

⁷³ Id., Article 20. The form of accounting standards adopted are based on the organizational characteristics of the cooperative. "Las cooperativas aplican normas específicas de contabilidad y elaboran sus planes de ingresos y gastos en correspondencia con el nivel de producción y servicios proyectado, tomando en cuenta los vínculos contractuales que establezcan con las empresas, unidades presupuestadas y demás formas de gestión económica."

capital of the cooperative using a qualitative standard.⁷⁴ The focus is on "work capital" (capital del trabajo) rather than financial capital,⁷⁵ all of which constitute the cooperative's capital under Article 22.⁷⁶ Article 23 provides an important disciplinary element grounded in the quality of work capital--it requires all members of a cooperative to participate in the work in the enterprise.⁷⁷ That, of course, is at the heart of this form of economic organization--the notion that the labor and production rather than capital is at the heart of the organization and operation of the enterprise. Lastly, Article 24 deal with distributions, providing for the development of rules for the distribution of net revenues (utilidades or profits) to members in conformity to the principles and other limitations of law.⁷⁸ More important, and implied in this article, distribution rules must also conform to the conditions for approval imposed by the state agencies with regulatory and supervisory authority over each cooperative under Articles 13 and 15.

Articles 25 and 26 deal with issues of cooperatives in markets—pricing authority and the authority to hire labor. Article 25 regulates the particularly sensitive issue of the pricing goods and services.⁷⁹ The provision illustrates the conflicted nature of the cooperative regulations—at once solicitous of a small market sector and deeply suspicious of markets as a driver of economic activity. On the one hand its basic premise is that the cooperative may set prices for goods and services in accordance with market conditions. Yet the provision also specifies that this rule may be altered by rules promulgated by competent state authorities. In effect, the provision makes it possible for the state to privatize its operations without loss of any power over the management of pricing. Markets for goods and services may be tolerated only as and to the extent, and for as long as, competent state agencies permit. But the state, it is clear, can at its option, step in at any time and regulate pricing. For cooperatives seeking to maximize welfare maximization, and even ones sensitive to their social obligations, this may work against the creation of robust enterprises that might be able to survive. Worse, to the extent that pricing is not centrally controlled, it is possible that pricing schemes for cooperative goods and services may vary among regulatory regions, creating incentives for strategic behaviors and corruption.

Article 26 deals with the equally sensitive issue of hiring labor by cooperatives.⁸⁰ The provision represents a compromise between an enterprise view of cooperatives that would treat them like other economic enterprises able to hire capital and labor and a social view of cooperatives that understands this form as grounded in the equality of labor participation. Article 26.1 permits cooperatives a very limited power to hire labor. People may be hired for no more than three months, and hiring is permitted only when there are no members able to perform the task. The

⁷⁴ Id., Article 21 ("que le permita sostener sus operaciones al nivel previsto").

⁷⁵ Id., Article 21.

⁷⁶ Id., Article 22 (corporate assets include work capital, other contributions and any bank loans).

⁷⁷ Id., Article 23 ("están en la obligación de participar con su trabajo.").

⁷⁸ Id., Article 24. The provision is ambiguous about the need to distribute profit. It is clear that at year end the cooperative must determine the "utilidades a distribuir en cada cooperativa." Id., Article 24.1. But it also provides that the cooperative must establish rules for distribution from profits, subject to the limitations of the Regulations (of Council of Ministers Decree 309). Article 56 of the Regulation provides for setting aside reserves for obligations to the state, as well as other reserves established by the General Assembly, limiting distributions to net profits.

⁷⁹ Decreto-Ley 305, *supra*, Article 25 ("Los precios y tarifas de los productos y servicios que comercialicen las cooperativas se determinan por estas, según la oferta y la demanda, excepto aquellos que se establecen por los órganos estatales competentes.").

⁸⁰ Id., Article 26.1 ("Las cooperativas pueden contratar trabajadores asalariados hasta tres meses en el período fiscal, para las actividades y tareas que no puedan asumir los socios en determinado período de tiempo.").

The provision is sensitive because, at its limit, the ability of hiring labor is fundamentally incompatible with an Enterprise founded on the premise that all labor will be contributed for the production of revenue to be divided among the participants articulated in Article 2.

object of this regulation, of course, is to create incentives to eventually convert hired labor into cooperative members. In effect, labor hire provision appears to be meant to serve as a means of creating something like a probationary period for potential members.⁸¹

The regulation of resolution of conflicts among members is the subject of Articles 27-29. Article 27 urges negotiation as the first step to resolving conflicts among members or between members and the cooperative.⁸² Negotiation is initially between the principles to the dispute. The provision leaves open the possibility of setting up some sort of institutional mechanism with the cooperative for mediating disputes. Article 28 provides that after 60 days without resolution of the dispute, the dispute may be taken to the administration of the cooperative, again under rules and through systems that may be organized by the cooperative.⁸³ If this does not resolve the dispute then the dispute may be taken to judicial bodies.⁸⁴ Article 29 reminds all participants that disputes are to be resolved in accordance with this Decree-Law (rather than some other law or principle) and the regulations developed to implement it, and the internal cooperative governance documents.⁸⁵

The last sections of the Decree-Law provide a legal basis for dissolution and liquidation. Articles 30-32 deal with dissolution. As in conventional corporate law statutes, cooperative extinction is organized as a two step process—dissolution and liquidation.⁸⁶ Dissolution is covered under Article 31,⁸⁷ the legal effects of which are described in Article 32.⁸⁸

b. Consejo de Estado Decreto-Ley No. 306; governmental impositions and the private sector contributions to the national social security system. A companion statute, Decreto-Ley 306,⁸⁹ sets out an ambitious program of capturing hoped for revenues from the operations of cooperatives. Yet, given the extent of state control and management of both markets and entities in Decreto-Ley 305, it is hard to imagine the market derived revenues the production of which is the premise that animates the financial optimism of Decreto-Ley 306. Beyond that, of course, the object of this provision is the same as that of similar provision in Western welfare states—to tax economic enterprises with the social costs of maintaining public support services for individuals. But taxes are transaction costs to enterprises. And these present a substantial burden on new enterprises. Taken together with the potential for substantial state control of cooperative activities and internal organization, and the possibility that the state could rescind the entire experiment at its whim, the burdens on the cooperative enterprises beyond the usual business risks of business activities becomes formidable indeed. Ironically, it is unlikely that there would have been sufficient political will to undertaken even this anemic step toward a fundamentally sound Marxist Leninist approach to collective activity without these institutional hobbling mechanisms. Yet the tensions that result makes it as likely that this experiment will fail

⁸¹ See *Id.*, article 26.4.

⁸² See Decreto-Ley 305, *supra*, Article 27. The provisions apply not just to the cooperatives activities, but also to the interpretation of the application of the Decree-Law and the implementing regulation to the cooperative.

⁸³ *Id.*, Article 28 (“podrá someterse al conocimiento de los órganos de dirección o administración de la cooperativa; agotada esta vía, queda expedita la acción judicial, según la naturaleza del conflicto.”).

⁸⁴ *Id.*

⁸⁵ *Id.*, Article 29.

⁸⁶ *Id.*, Article 30.

⁸⁷ *Id.*, at Article 31. It provides for dissolution triggers, including by operation of the cooperative governance documents, by principles of impossibility, upon the loss of critical leases or use permits, by judicial order and for other lawful reasons.

⁸⁸ *Id.*, Article 32.

⁸⁹ Consejo de Estado Decreto-Ley No. 306 (2012).

as a consequence of institutional impediments as it is likely that it can succeed because it serves the public interest in robust markets to satisfy basic consumer demands. And thus the great irony in Cuba--they have the intellectual and academic capacity to approach the issue of creating potentially path breaking approaches to the aggregation of human productivity on a basis other than capital, but it does not have the political will to create the institutional mechanisms to maximize the possibility that the experiment might succeed even comfortably within the parameters of a largely state driven and controlled (now better put managed) economy.

c. Council of Ministers--Decreto No. 309, the Implementing Regulations. These regulations form an integral part of the governance framework of the cooperative. Articles 1-2 set out the framework of the regulations. Article 1 reinforces the character of the cooperative as a regulatory experiment, and it describes the objectives of the regulation--to specify rules for the constitution, registration, operation and dissolution of cooperatives.⁹⁰ Article 2 also emphasizes that, despite the rhetoric about the operation of cooperatives within markets for consumer goods and services, cooperatives are subject to the supervision and enforcement of tax regulations, pricing, accounting and others that may be made applicable.⁹¹ Market regulation is in effect the residuary premise of the regulations.

Articles 3-6 regulate the constitutions of cooperatives. The requirements are quite specific. They mandate, for example, the articulation of both the activities to be undertaken by the cooperative and the expected territorial scope of the activity.⁹² Articles 3-5 detail the approval path to be taken for the constitution of cooperatives. All cooperatives must be reviewed⁹³ and some approved by the Council of Ministers.⁹⁴ Of course, depending on the volume of applications, this procedure, requiring local and national approvals may substantially slow down the process of cooperative formation. As a result fewer than optimal numbers of cooperatives may be formed, or as likely, cooperatives will be formed outside of the process. The possibilities for corruption may thereby also be increased.

As a further alternative, cooperatives "in formation" may be tolerated while they await approval. But those will exist in a semi-official limbo, and as a result may also increase the temptations of corruption, because officials will have a greater power to shut them down. This possibility, of a large number of cooperatives "in formation" is the object of Articles 7-10 of the regulations. Article 7 contemplates the⁹⁵ operation of cooperatives without official approval by permitting these entities to operate with an indication of their status. This permits the cooperative "en formación" to lawfully engage in a limited number of transactions and in furtherance of the

⁹⁰ Consejo de Ministros Decreto No. 309, supra, Article 1 ("El presente Reglamento establece con carácter experimental el procedimiento para la constitución, registro, funcionamiento y extinción de las Cooperativas no Agropecuarias de primer grado").

⁹¹ Id., Article 2. This appears to set to the tune for the rest of the implementing regulation—that this experiment in markets based private enterprises will be closely monitored by the state.

⁹² Id., Article 3.1. Cooperatives founded on privatized state operations are subject to a special provision. Id., Article 4.

⁹³ Id., Article 5 ("La Comisión Permanente para la Implementación y Desarrollo evalúa las solicitudes de creación de Cooperativas a que se refieren los artículos 3 y 4 del presente Decreto y con sus consideraciones presenta al Consejo de Ministros la propuesta sobre su incorporación o no a la experiencia.").

⁹⁴ Id., Article 6.

⁹⁵ Id., Article 5 ("La Comisión Permanente para la Implementación y Desarrollo evalúa las solicitudes de creación de Cooperativas a que se refieren los artículos 3 y 4 del presente Decreto y con sus consideraciones presenta al Consejo de Ministros la propuesta sobre su incorporación o no a la experiencia.").

development of their internal organization.⁹⁶ However, cooperatives "en formación" are not deemed to acquire juridical personality,⁹⁷ so that the individual members remain liable during this formation period. While the cooperative is in formation, and pending final approval, the local approval agency is empowered to negotiate the final form of the cooperative constitution.⁹⁸ Among the objects of negotiation are (1) the social objective of the cooperative,⁹⁹ (2) the organization of cooperative financial structures,¹⁰⁰ (3) the property to be leased to acquired,¹⁰¹ (4) goods or services to be sold;¹⁰² (5) goods or services to be utilized from the state sector,¹⁰³ (6) the pricing of goods and services to be offered by the cooperative,¹⁰⁴ (7) draft contracts or agreements,¹⁰⁵ (8) if applicable deferments of lease payment provisions,¹⁰⁶ (9) the materials (consumables) necessary for the production of goods or services to be rendered,¹⁰⁷ (10) environmental impacts,¹⁰⁸ (11) the ways in which the cooperative will comply with land use regulations,¹⁰⁹ (12) the proposed governance framework (articles of association),¹¹⁰ and (13) anything else considered appropriate.¹¹¹ Some of these items appear better suited to agricultural cooperatives (the establishment of which provided the framework for these regulations). Others might be evidence that the state appears to intend to treat these cooperatives substantially like any other state enterprise within a highly centralized planned economy. If that is true, the regulations substantially impede any effort to permit cooperatives to develop to serve consumer demand. Instead, it appears that the planning needs of the state take precedence over the ability of the cooperative to adjust supply and price to market and demand. This is especially true with respect to price and objects offered for sale or service. If these will require state approval before they can be changed, the ability of the cooperative to operate in markets is substantially eviscerated.

Articles 11-12 set out the details for setting up the cooperative (its constitution, including its constituting documents). The principal focus is on the content of the cooperative constituting documents,¹¹² and the acquisition of property.¹¹³ Article 13 focuses on the process of bidding for state assets. The process is also heavily managed by the state, whose officials are given approval and supervisory authority.¹¹⁴

⁹⁶ Id., Article 8.

⁹⁷ Id., Article 10.

⁹⁸ Id., Article 9.

⁹⁹ Id., Article 9(a) (posible objeto social).

¹⁰⁰ Id., Article 9(b) (diseño financiero).

¹⁰¹ Id., Article 9(c) (inmuebles y otros bienes a arrendar).

¹⁰² Id., Article 9(d) (medios, utensilios y herramientas a vender).

¹⁰³ Id., Article 9(e) (bienes o servicios que constituyen el pedido estatal).

¹⁰⁴ Id., Article 9(f) (los precios de bienes y servicios que se mantendrán centralmente establecidos).

¹⁰⁵ Id., Article 9(g) (los proyectos de contratos de arrendamiento, usufructo, compraventa y otros).

¹⁰⁶ Id., Article 9(h) (si procede, la determinación del período de exoneración del pago del arrendamiento).

¹⁰⁷ Id., Article 9(i) (los insumos principales a suministrar).

¹⁰⁸ Id., Article 9(j) (el impacto ambiental).

¹⁰⁹ Id., Article 9(k) (el cumplimiento de normas y regulaciones sobre el ordenamiento territorial).

¹¹⁰ Id., Article 9(l) (el proyecto de estatutos).

¹¹¹ Id., Article 9(m) (otros aspectos que se consideran de interés).

¹¹² Id., Article 11. These include much of the basic information found in a corporate charter, and in addition, they are also meant to lock in pricing where pricing discretion is not permitted as a condition of approval ("los precios de bienes y servicios que se mantendrán centralmente establecidos, cuando corresponda" Id., Article 11(h)).

¹¹³ Id., Article 12.

¹¹⁴ Id., Article 13.1.

The foundational character of the cooperative, that it has a *social purpose*,¹¹⁵ is fleshed out in Articles 14-15. Article 14 defines the social object simply as the commercial activities of the cooperative.¹¹⁶ This is possible because no cooperative can be licensed without approval of the state; it stands to reason, then, that what the state approves must of necessity also include a sufficient social objective.

Articles 16-19 specify requirements for the setting up (constitution) of cooperatives and the role of the general assembly. Articles 20-22 deal with the articles of association (*estatutos*). The constitution of the cooperative appear to function like a corporate charter; the *estatutos* seems to have been assigned the function of corporate bylaws, but with substantially more detail about the business to be undertaken and substantially more limits on flexibility of operation. The constitution is prepared by a Notario,¹¹⁷ the costs of the preparation of which are borne by the founding members.¹¹⁸ The constitution is filed with the *Registro Mercantil*.¹¹⁹ The *estatutos* are approved by the general assembly.¹²⁰ The *estatutos* include the fundamental regulations for the operation of the cooperative,¹²¹ and form part of the constitution. The minimum content of the *estatutos* is prescribed in Article 21.¹²² These include many of the items usually found in both corporate charters and bylaws. Article 22 presents rules for the modification of the *estatutos*. These include super majority provisions for cooperatives with more than 20 members. For smaller cooperatives, such rules can be made to suit the members. Revisions to the *estatutos* must also be filed with the *Registro Mercantil*.¹²³

Chapter III of the regulations are devoted to issues involving the members of the cooperative.¹²⁴ These include minimum rights of members.¹²⁵ These include rights touching on labor obligations of members as well as rights relating to their interests in the cooperative. Article 29 focuses on member obligations, including the obligation to provide the labor services that represent the "benefit of the bargain" in exchange for which the individual obtained an interest in the cooperative. Article 30 lists the bases on which a person can lose his status as a cooperative member (expulsion, death, retirement, incapacity, etc.). Member discipline is elaborated in Articles 67-68. These include fines, suspension or expulsion. Worker discipline is provided in Article 69.

Sections 33-45 provide rules relating to the governance organs of the cooperative. Much of this is similar to the provisions of corporate rules for private companies (ordinary and special meetings of collective bodies, quorum rules, notice of meetings, agendas, and the like), though some of the rules are more specific. For example, collective bodies are required to have an odd

¹¹⁵ Decreto-Ley 305, supra, Article 2.

¹¹⁶ Consejo de Ministros Decreto 309, supra, Article 14 ("El objeto social de la Cooperativa comprende las producciones, prestación de servicios o la actividad de comercialización, a que se dedicara de acuerdo con lo que se autorice."). Article 15 provides the basis of the use of trademarks and the like.

¹¹⁷ Id., Article 16.

¹¹⁸ Id., Article 19.

¹¹⁹ Id., Article 23.

¹²⁰ Id., Article 18.

¹²¹ Id., Article 20.

¹²² Id., Article 21 and include items such as of members, the requirements of membership, banking information, distributions for members, conflict resolution, amendment to the *estatutos*, and procedures for dissolution and liquidation.

¹²³ Id., Article 24.

¹²⁴ Id., Articles 26-30.

¹²⁵ Id., Article 28.

number of members.¹²⁶ The General Assembly is the supreme organ of cooperative authority. It elects a president. It has a long list of attributes specified in the regulation.¹²⁷ Their authority resembles in a general way that of shareholders. The authority of the President of the General Assembly is also specified¹²⁸ many of which resemble those of the chair of a board of directors; that of the Secretary is also specified.¹²⁹ The Junta Directiva appears to act like the standing committee of the General Assembly.¹³⁰ The administrator (or the administrative council) functions like a chief executive officer¹³¹ with a number of functions elaborated in some detail. Lastly the Control and Audit Commission functions like a legal and audit committee of a board of directors.¹³²

Articles 46-62 deal with issues of cooperative capital and accounting. Cooperatives account for their operations using the [Normas Cubanas de Información Financiera](#).¹³³ The cooperative is required to prepare an annual business plan,¹³⁴ though its scope feels more like the plans required for ministerial action in a centrally planned economy than the form of business plans more common in market driven economies. That again suggests the pull of traditional patterns of planning that may hamper the exercise in small opening to market based economic activity within the consumer retail sector. But it does little to deepen market rather than planning driven practices.

Dividend distributions are tightly managed.¹³⁵ The Regulations effectively mandate that at least 30% of profits (understood in this case as revenues net of expenses and taxes) and above reserves set aside to serve as a corporate stated capital account,¹³⁶ are meant to be reinvested by the cooperative in a number of specified areas.¹³⁷ Reserves are meant to provide funds for payment of workers in lean years and to pay obligations.¹³⁸ Advances are possible and the proportion of distribution to members is specified.¹³⁹ Articles 63-65 treat payments to members and contract labor, which must be at least equal to statutory minimums. Article 66 treats the commercialization of goods and services, noting that cooperatives may compete with other

¹²⁶ Id., Article 33.1(2).

¹²⁷ Id., Article 37(a)-(j)

¹²⁸ Id., Article 38 (a)-(j)

¹²⁹ Id., Article 39(a)-d)

¹³⁰ Id., Articles 40-41

¹³¹ Id., Articles 43-44

¹³² Id., Article 45)

¹³³ Id., Article 52 (“La Cooperativa está obligada a llevar la contabilidad de sus operaciones a efectos fiscales, a partir de las Normas Cubanas de Información Financiera, con las especificidades que al respecto se establezcan.”). See Ms C. Sergio Pozo Ceballos “Las Normas Cubanas de Información Financiera (NCIF: [Una visión desde la auditoría](#).” Available

[¹³⁴ Consejo de Ministros Decreto 309, supra, Article 54.](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&ved=0CFEQFjAD&url=http%3A%2F%2Fcofinhabana.fcf.uh.cu%2Findex.php%3Fopcion%3Dcom_docman%26task%3Ddoc_download%26gid%3D242%26Itemid%3D&ei=7bD8UIm1F6rg0gHv7IH4Aw&usq=AFQjCNFvakGOD3hIQ04dvywDBmddYzhEZw&bvm=bv41248874.d.dmQ.</p></div><div data-bbox=)

¹³⁵ Id., Articles 56-62.

¹³⁶ See id., Article 56.1.

¹³⁷ Id., Article 57.1(3) (“La diferencia con el 100 % de las utilidades que no se distribuyen a los socios, se destinan al fondo de operaciones, inversiones, actividades socio-culturales, incrementar el fondo de contingencia y otros, según se aprueben en los estatutos.”).

¹³⁸ Id., Article 59 (“Las Cooperativas que tengan pérdidas las solventarán, en primera instancia, por medio de la reserva para cubrir contingencias.”).

¹³⁹ Id., Article 60 (in proportion to the complexity, amount, and quality of the work of each of the cooperative’s members. The operationalization of this standard remains unspecified.

enterprises on an equal basis, but only to the extent of its permitted activities (as approved by the state). Additionally, the unregulated market in which it may sell without state approval is available only after it has rendered such services or provided such goods as may be required of it by the state. Lastly, Articles 70-74 provide procedures and structures for mediating conflict.¹⁴⁰ Articles 75-77 treat dissolution and liquidation of cooperatives.¹⁴¹

d. The Ministerial Resolutions. Two ministerial resolutions were included in the basic package of cooperative relations. One provides, in 22 articles, the procedures for bidding on state property that is to be contributed to the operation of a cooperative.¹⁴²

The second resolution deals with issues of taxation, accounting, and pricing for goods and services provided by cooperatives.¹⁴³ Its object is to embed cooperatives within the state based planning for prices and production. The resolution contemplates the generation of monthly streams of tax payments from cooperatives.¹⁴⁴ This resolution is based on the premise that prices are set by the market unless they are otherwise required to be set at a particular amount by the state (Paragraph 12). Prices may be set in CUP (*pesos cubanos*) or CUC (*pesos convertibles*) (Paragraph 13). The state continues to regulate the price margins between wholesale and retail markets. That can significantly limit competition among cooperatives. It is clear that the state may be discouraging price competition. But that may significantly affect the development of markets. It again suggests an unwillingness to permit markets to develop in the absence of significant regulation that may be significant enough to make it impossible for robust markets to develop. The consequence may be that cooperatives may be expected to operate like privatized state sector organs. But that essentially defeats the object of the redirection of the Cuban economy at the heart of the objectives of the Lineamientos. It also suggest the triumph of the factions within the Cuban elite that view any change with great suspicion.

III. The Problem of Labor and the Construction of Socialism in Cuba.

The move to the small and highly regulated non.-state sector, now envisioned to be dominated by cooperatives, many of which are re-invented second order state enterprises, tells us much about the shape of the new Cuba. It also tells us much about the constraints within which any sort of change is possible and the distance between the possibilities within those constraints and the goals of the current Cuban leadership. The Cuban Communist Party, and the state apparatus which serves it, are trapped in a conceptual box of its own making. That box is unnecessarily constraining and may well prove to be the principal reason for any limitation on the success of reform efforts. Let me suggest a number of lessons and insights that this experiment in cooperatives may provide:

A. The Lineamientos Points to Substantial Conceptual Differences Among factions of the CCP. The leftist elements within the Cuban Communist Party is still powerful enough to block even the sorts of reforms possible in China in 1978. A close reading of the Lineamientos cooperative

¹⁴⁰ Complaints are to be made in writing, and provisions for notification are specified. Id., Articles 70-71. The administrative organ mediating disputes usually has 30 days to render a decision. Id., Article 73.1.

¹⁴¹ These provisions follow the Decreto-Ley 305 format. The supervising agencies are assigned responsibility for dissolution. Id., Article 75. A liquidation committee established by the General Assembly has responsibility for winding up. Id., Article 76.

¹⁴² Ministerio de Economía y Planificación Resolución No. 570/12.

¹⁴³ Ministerios de Finanzas y Precios Resolución No. 427/12

¹⁴⁴ Id., Tercero

provisions suggests both the tensions within the CCP over liberalization, and a clear tilt in favor of tight state control even of the non-state sector. The final version of the cooperative form in the Lineamientos evidence sometimes significant changes from the initial version that suggest the extent of a conservative push back from elements in the CCP that viewed the liberalization of economic activity, even in this small space, as potentially threatening to their understanding of the core values of the Cuban Revolution. These core values were embodied in Soviet style central planning that has been the hallmark of Cuban political economy since the early 1960s. Thus, for example, the Lineamientos originally provided for a broader conceptualization of the cooperative, grounded in the basic premise that workers were free to join together in cooperative enterprises.¹⁴⁵ This power of association for cooperative economic activity extended to ownership, lease or use of the means of production in permanent usufruct—echoing the idea of usufruct being developed for the lease of non-productive agricultural land.¹⁴⁶

Rather than promote free associations of workers with control in usufruct over the means of production, the final version of the Lineamientos emphasized the socialist collective nature of the cooperative and its property. It underscored the power of the state to manage the scope of the economic sectors within which it can operate. Significantly, it also limited the forms of contributions specifically to goods or labor to the enterprise and only for the production or offer of socially useful services, for which privilege these collectives would assume their own expenses. The explanations for the change was quite clear—uneasiness with the idea of private aggregation or collectivization outside the direct control of the state. One can understand this as a means of privatizing central planning and exporting operation costs.¹⁴⁷

The scope of cooperative activity was also subtly restricted, permitting private transactions but strengthening the direct power of the state to manage those relations. The original provision permitted economic activity in the non-state sector as long as these conformed to approved social objectives.¹⁴⁸ The approved provision emphasized that social objectives must be met first before the cooperative could satisfy the needs of its members. Rather than create an autonomous private sector that responds to local needs, *the cooperative appears to run the danger of becoming a vehicle for privatizing the state sector without a loss of control*. The commentary made clear that

¹⁴⁵ As originally drafted, P. 25 provided: “Estarán basadas en la libre disposición de los trabajadores a asociarse en ellas. Pueden ser propietarias de los medios de producción, arrendarlos o emplearlos en usufructo permanente.” (Tabloide, P. 25).

¹⁴⁶ Marc Frank, *Cuba Grants Land to Thousands of Farmers*, REUTERS, Feb. 2, 2009, available at <http://www.reuters.com/article/globalNews/idUSTRE51131Y20090202>. On usufruct in the agricultural sector, see, e.g., Laura Enríquez, *Economic Reform and Repeasantization in Post 1990 Cuba*, 38(1) LATIN AMERICAN RESEARCH REVIEW 202-218 (2003).

To stimulate the domestic production of foodstuffs and substitute imports, the government started to allow the leasing of small plots of State owned land in usufruct by private individuals and corporate bodies. To this end, landless individuals could obtain up to 13.42 hectares and existing landholders could bring their total up to 40.26 hectares under licenses valid for up to 10 years, with the possibility of being renewed (Decree Law 259 and Decree Law 282).

Joaquín Pujol, *Cuba at the Crossroads in the 21st Century The Cuban Economy as Seen by Economists Within the Island and Other Observers*, Union Liberal Cubana, www.cubaliberal.org/economia/pdfs/Cubaneconomyin21st.pdf 10 (and passim).

¹⁴⁷ “Aclara y especifica el concepto de cooperativas de primer grado, 1 130 dudas en todo el país. Agrega que la cooperativa es una forma socialista de propiedad colectiva, por 29 opiniones en 9 provincias.” Tabloide, supra note --, at P. 25 (commentary).

¹⁴⁸ “Las cooperativas mantienen relaciones contractuales con otras cooperativas, empresas, unidades presupuestadas y otras formas no estatales, y realizan ventas directas a la población de acuerdo con el objeto social aprobado.” (Tabloide P. 27).

the presumption for cooperatives must be to service and supplement the state sector—non-state sector transactions must be understood, from that perspective, as the exception rather than the rule, and possible only after all of the needs of the state sector have been satisfied.¹⁴⁹ The resulting narrowing of the activities of cooperatives could be significant.

The fiscal responsibilities of cooperatives also emphasize the primary place of the state in the operations of cooperatives. That represents a further limitation on cooperative autonomy. The Lineamientos contemplate cooperatives whose principal obligation is to generate income for the state through taxes. It can then distribute revenues to workers and use the funds for other purposes. As originally proposed, Paragraph 28 would have that cooperatives, within the requirements of any enabling rules, would set the income allocation for its workers, provide for additional distributions, make public contributions, and pay taxes.¹⁵⁰ The change is subtle but telling. The initial focus was on the wealth creation possibilities of the cooperative—the benefits of private sector activity. The final focus was on the utility of the cooperative for the production of wealth for the state—to be distributed as the state apparatus determines. It reduces the scope of the autonomy of the cooperative and ties it more closely to the state sector by re-focusing the purpose from one centered on the activities of the workers to one focused on the production of income for the state.

Lastly, the ministerial regulations' delegation of power to the state authorities to set pricing and to control wholesale market pricing can substantially reduce the likelihood of demand based market pricing. Here again, the CCP wants it both ways—the appearance of a market, with transactions between consumers and providers unconnected to the state. But where the state sets the price of materials used to provide consumer goods or services and where the state may set the price to consumers, then the disciplinary value of the market, and its ability to generate revenue (and the provision of adequate supply) will continue to be adversely affected.

B. The Economic Reforms May be Impeded by the Need for Legal Reform. A number of provisions of the Lineamientos focused on the shift from state directive to contract. But economic systems based on contract require the public apparatus of implementation and enforcement: courts, agreement on common meaning for terms, establishment of customary practices that will be given the forces of law and confidence in the dispute resolution institutions to produce consistent and predictable decisions that are fairly enforced and fairly corruption free. Alternatively, it requires the space for merchants to develop these institutions themselves. It is not clear that Cuban institutions are yet capable of supplying the necessary public infrastructure; and it is certain that Cuban authorities will forbid the creation of non-state alternative dispute resolution structures. Indeed, the Lineamientos focus on the need to move to systems of agreement by contract suggest both the coming importance of systems of contract rules, but also the absence of such a system today. It also suggests that the rules for the enforcement of obligations among individuals remains informal and customary—and is situated well below the structures of state enforcement vehicles. Lastly, it points to the absence of certain and consistently applied practices at the state level. The result may be a fear of arbitrariness in the management of economic activity, and especially economic activity in the non-state sector. That

¹⁴⁹ That, perhaps, explains the somewhat curious explanation for the change in the Tabloide. “Agrega la posibilidad de venta sin intermediario y se mejora la redacción. Responde a 438 opiniones en 14 provincias.” Tabloide, supra note --, at P. 27.

¹⁵⁰ “Las cooperativas, sobre la base de lo establecido en su Reglamento General de la cooperativa, definen los ingresos de los trabajadores y la distribución de las utilidades, y liquidan al Estado los impuestos y las contribuciones establecidas.” Tabloide, supra note --, P. 28.

fear might be fed by the very public narrowing of the scope of cooperative activity. The consequence is a likelihood that, for small operators, the risks of investing, and of doing business increases. Increased risk substantially increases the transactions costs of operation. This may make transactions uneconomic in general. But more importantly, it may impede, in substantial respect, the value of forming cooperatives.

C. The Regulations Produce the Form of Rule of Law Frameworks But Preserve the Political Discretion of the State to Make the Rules Available to Individuals. One of the most striking elements of the regulatory framework is the large divide between its *form* and its *effect*. From the outside the regulatory framework provides for the development of what appears to be a robust non-state sector enterprise that would conform to Cuban Marxist Leninist principles. But from the inside, read through its exceptions, provisos and delegations of discretionary authority, what emerges is a system in which state sector officials continue to control virtually every aspect of the organization, operation, pricing and transactions of these enterprises in ways that might reduce these to little more than extensions of state operations. Cooperative activity remains very much a privilege, granted and revoked at the discretion of the state; it is not a right available to anyone that can meet the statutory requirements. At its worst, the regulations will operate much like those of foreign investment: virtually completely dependent on a variety of local and national approvals in the hands of officials with substantially unlimited discretion, whose decisions may not be challenged against written and uniform standards, and who may impose a variety of conditions on approval that can reduce autonomy of labor cooperatives to something small indeed. The connection between regimes of unaccountable discretion and corruption are powerful deterrents to improvement in the economy.¹⁵¹

Worse, perhaps, such discretion may vitiate the rule of law framework, grounded in the resort to regimes of contract, that the regulations are seeking to enhance. Indeed Grisel Tristá Arbesú, a member of the *Comisión Permanente para la Implementación y Desarrollo* made it clear that cooperative application approval would be contingent on a determination that the purposes and operations of proposed cooperatives are of benefit to the state.¹⁵² This is one very small step from central planning. Perhaps that is all that could be managed in the current political environment. But it affects the fundamental character of the regulations in operation that may well belie its market creating and autonomy enhancing objectives for workers. The reality will no doubt fall somewhere between the hope of the form of the regulations and the extreme application of the discretionary effects and exceptions written therein. But the result, then, will fall far short of the hopes for even a small and limited private sector market producing sufficient revenue to make up the shortfalls from the badly managed state sector.

¹⁵¹ Raúl Castro's last speech to the National Assembly is a long lament and call to action against both corruption and the blatant disregard of law. Raúl Castro Ruz, "The loss of ethical values and disrespect for good manners can be reversed by concerted action on the part of all social actors," Speech by Army General Raúl Castro Ruz, First Secretary of the Communist Party of Cuba Central Committee and President of the Councils of State and Ministers, during the 1st Ordinary Session of the 8th Legislature of the National Assembly of People's Power, in the International Convention Center, July 7, 2013, reprinted and translated in *Granma* July 8, 2013. Available <http://www.granma.cu/ingles/cuba-i/8jul-The%20loss.html>. The problem, of course, is that law itself creates incentives toward arbitrary conduct and thus to corruption by vesting in officials a discretion to approve or modify decisions without regard to actionable standards.

¹⁵² Yaima Puig Meneses Y Leticia Martínez Hernández, "Una apuesta por la eficiencia," *Granma*, July 13, 2013 available <http://www.granma.cu/espanol/cuba/11jul-COOPERATIVAS.html> ("Durante este proceso experimental se valora la factibilidad de los proyectos y su consecuente beneficio para el país.").

The issues raised here, of course, are merely a variation of the long understood problem of discretion in rule of law states. The solution for Cuba is likely similar to that advanced in other states—reduce the exceptionalism in Cuban law by taking rule of law seriously, which can be done only by constraining discretion within well understood and enforced limits, and vesting aggrieved parties with the robust right to appeal discretionary decisions. However, in Cuba, it may be possible to consider the discretionary system in a different way—one that advances rule of law by permitting bargaining between cooperative and state sector officials in a way that would have been unthinkable a decade before.¹⁵³ That labor cooperatives can now negotiate with the state over its operations, formation, governance and the like may well be a step forward in the creation of autonomy within the non-state sector. It is too soon to tell.

D. The Problem of Labor Under the Regime of Capital. Both capitalism and Marxism from their origins as theoretical constructs in the 18th and 19th centuries have traditionally focused on capital. Yet at the heart of the contradictions of both is the issue of labor. Capitalism speaks to the division of labor and its routinization of production, reducing laborers to the simplest state. The solution to this problem for Adam Smith is state intervention in the form of education. Since then the offer of capitalist society have been a form of mass political power and the promise of upward class mobility if labor effectively utilized the education provided. Capitalism then, embedded itself in free markets (upward mobility) and democracy (the promise of political power as a check on capital).

Marx also took a similar view as Adam Smith on the contradictions of the division of labor. But where Smith opened the possibility of amelioration through upward mobility and mass power, Marx believed that labor would irrespective of ameliorative measures, always be abstracted and reduced to commodity, to a living means of production. So commodified, labor could achieve no better state than as an abstract object—a means to capital accumulation. But this process-based commodification of labor was, for Marx, unsustainable.¹⁵⁴ If left to its own devices, capitalism would collapse for lack of consumers. Leninist states sought to move the process along through the techniques of hyper-socialism; state capitalism for a good cause. Central to the solution was to substitute for democracy and free markets (upward mobility and political power with educational leveling) political education through the leadership of a vanguard party the dictatorship of which would divert the profits of production to labor in ways that overcome the problems of routinization and the hierarchies within the division of labor. But therein lies the contradiction for Leninist States that continue to advance a Stalinist agenda. State capitalism masks but does not solve the central problem of Marxism—not capital but labor. Marxism, like capitalism, sees the need to wrestle with the control or management of capital for purposes dear to each. Yet that leaves traditional Marxist states like Cuba in a conceptual tangle—for the forms it has embraced since the 1920s suggest more state capitalism, and an infatuation with capital, rather than Marxism understood as managing economic policy to solve the problem of the imbalance between the privilege of capital over labor. Cuban communism thus reflects late capitalism rather than Marxism precisely because it is grounded on the same assumptions as capitalism—the

¹⁵³ I am indebted to Jorge Esquirol of the law faculty at Florida International University for this insight.

¹⁵⁴ There is a reflection of this in some of Castro's writings about the global economic system, with little understanding of the way in which Cuba's own political economy reproduced this relationship in its own way. See discussion in, Larry Catá Backer, "Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes," *Duke Journal Of Law & Contemporary Problems* 70:1-46 (2007)

primacy of capital as a unique good in the production of wealth. For Marxist states, like China, the answer was to revert to notions of upward mobility through education and state intervention, but to impose strict political control through the vanguard party that would serve as a check against the unsustainable impulses of unconstrained capitalism. Thus what separates Adam Smith from Deng Xiaping could perhaps be summarized as differences in the way in which the state is used to overcome the contradictions of capitalism—one through free markets and democracy; the other through markets overseen by a vanguard party committed to eventual labor primacy. Both systems remain works in progress even for their most vocal supporters.

The move toward cooperatives represents an important nod in the direction of empowerment. But the implementation of the concept continues the long tradition, in both capitalism and Leninist Marxism, to understand economics through the privileges of capital. Thus, the core issue for socialist development of its political economy is in essence a variation of that issue in so-called capitalist (now “free market”) states: each is focused on the way in which capital is formed, owned and exploited, and with it, of course, is *who* can profit from the exploitation of labor, *and to what ends*. In the West that privilege is exercised through investors and other holders of capital, individuals whose rights to exploitation is protected through structures of law and ameliorated through the use of tax systems as a means of wealth transfer, albeit in mild form. In Cuba the state substitutes itself, and as the only capitalist in the national territory takes onto itself all profit from the exploitation of labor. Where the State itself is not the direct exploiter of labor, for example when it seeks to open a small non-state sector, it continues to ensure its effective role as the primary incarnation of capital by constructing “tax” systems designed to draw into the state whatever it considered the “profit” from capital exploitation. The issue of labor exploitation remains. That imbalance is foundational to the economic reforms in Cuba: corporations remain available only to the state. Control of capital remains a state function. The generation of capital is to some great extent diverted from labor to the state. Wealth generation is understood in fundamentally capitalist terms—enterprises are understood solely in terms of their financial condition—that is on the ebbs and flows of the values of commodities (including labor) for the production of revenues. And capital is understood by reference to that relationship between rights to control, income and assets over the enterprise by those who are deemed to have a primary financial interest in it (equity and debt). The interests of labor is not measured in the same way as that of capital, nor is it understood in relation to rights to income, assets or control, though to some extent it is capable of such characterization. And thus to the critics of this variation of the socialist path, free market critics point to the development of unofficial markets, fairly substantial in Cuba, in which individuals seek a greater control of capital. But that still leaves the issue of privileging labor as something other than a commodity the exploitation of which serves as the foundational issue of economic systems.

Cuban economic organization, thus, reflects the same basic premises of economic organization as accepted by the most traditionally capitalist states, but in Cuba’s case inuring to the instrumentalities of the state—for the benefit of the people to be sure, but that is the rhetorical stance of Western states as well. Where the West offers the possibility (however remote in fact) of upward mobility through education and effort coupled with a limited political participation through democratic institutions (and collective action through civil society elements), Cuba offers hyper-socialism controlled by the state and democracy through the leadership of the Communist Party (though the deep institutionalization of the CCP in Cuba remains a work in progress). Both still understand labor as a function of capital and capital formation. That is the problem in Cuba that the cooperatives point to but don’t solve. Cooperatives highlight a problem that the very organization of Leninist political economy may find difficult to overcome. As such, it may well

be that Cuban labor cooperatives will be unable to succeed in any capital privileging state, whatever the form of its political economy. What may be required, both in capitalist and Marxist states, to consider the problem of labor, is a rethinking of the relationships between capital and labor as stakeholders in relation to the form, grounded in their rights to control, income and assets of the enterprise—that is, to rethink the power relationships among investors and employees and to understand firms not merely as the sum of their financial performance, grounded in the premises of GAAP, but perhaps also in terms of the effects of their activities on social, environmental and other conditions. This is a challenge that future generations may choose to take up.

IV. Conclusion.

Both Party and State have sought to create an institutional and legal foundation for the emergence of a private sector. The principal vehicle for aggregated private enterprise is the labor cooperative, a form of company that seeks to preserve to the state the ownership of productive capital but permit individuals to join for a common purpose and retain the profits thereof. But the CCP's reaffirmation of a pre-1980's Soviet style Marxist Leninist political economy theory may substantially impede the objectives that the CCP has sought to attain through the efforts to "open-up" the economy and permit individual private aggregations for that purpose. It is too early to tell whether this experiment will be sufficient to successfully reform the Cuban system to permit more wealth creation but consistent with Cuba's political and economic values. It is also not clear that Cuba's insistence on its form of Marxist Leninist political economy is either necessary or appropriate under Marxism-Leninism. Certainly the Chinese and Vietnamese would disagree. But the Cuban Party has staked a out a strong leftist position relative to that of the Communist arties of Vietnam and China. Only the future will tell which is the better reading of Marxism and can succeed in a world very different form the one in which the Cuban Revolution triumphed in 1959.