

A horizontal banner with a blue background. The left side features a faint, light blue graphic of the Cuban flag, including the stars and stripes. The right side is a solid, vibrant blue. The title text is centered across the banner in a bold, black, sans-serif font.

**THE ROLE OF THE JUDICIARY IN A  
POST-CASTRO CUBA:  
RECOMMENDATIONS FOR CHANGE**

**By**

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# Cuba Transition Project – CTP

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# **THE ROLE OF THE JUDICIARY IN A POST-CASTRO CUBA: RECOMMENDATIONS FOR CHANGE**

Prepared for the Cuba Transition Project (CTP)  
Institute for Cuban and Cuban-American Studies  
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**By**

**Laura Patallo Sánchez**

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## Executive Summary

Establishing a constitutional culture that limits government is essential to the creation of a law based state. The role of a well functioning judiciary in creating such a state is significant as it is the courts that are charged with protecting human rights and property rights and enforcing the legal frameworks that support optimal market functioning. Without the participation of a well functioning judiciary, both efforts to democratize and efforts to further economic development will be adversely affected.

A well functioning judiciary is one that is capable of functioning fairly and impartially within the system. It should have the power to regulate the legality of state acts and it should be independent; that is, it should operate as a separate body within government, within a broadly defined institutional scope of authority. Individual judges should have the ability to decide cases based on their own determinations of the evidence and the law without interference from other political branches, government authorities or private citizens.

The judiciary in Cuba today is not independent but rather a political arm of the state directed by the Cuban Communist Party. During a transition to democracy, the judiciary must be adapted to the new system and institutional changes must be made that will foster the development of an independent judiciary. This goal may be reached by broadening the scope of judicial power and by developing institutional mechanisms that insulate the courts from the influence of other state actors or any political party.

Any judicial reform process should begin by establishing the judiciary as a separate branch of government with enumerated powers or functions, and by granting courts, or at least a constitutional court, the power of judicial review.

**Separation of Powers.** The concept of separation of powers should be adopted by a democratic Cuba. If the judiciary is given structural independence a greater possibility exists that judicial independence will grow and that the administration of justice will not be subordinated to

political power.

**Judicial Review.** The adoption of judicial review, that is, the right of courts to review government acts to determine their lawfulness, is the next step in developing a rule of law and empowering an independent judiciary. The majority of countries that have begun or made transitions to democracy have adopted some form of judicial review. Most have adopted the centralized version of judicial review and have created constitutional courts to review the legality of government acts.

The reinstatement of the power of judicial review in Cuba is a key element of future judicial reform in Cuba. Judicial review could play an important role in furthering democracy in Cuba and would go a long way toward eliminating the traditional subordination of the courts to the political process.

After these initial goals are met institutional mechanisms that further support the development of an independent judiciary must be made. These mechanisms include 1) organizing the courts effectively, 2) adopting open, transparent and effective methods of judicial selection, 3) establishing methods to guaranteeing judicial tenure and the payment of adequate salaries to judges, 4) ensuring rules for the fair evaluation and, if necessary, discipline of judges, and 5) providing the judiciary with fiscal autonomy.

**Court Organization.** The organization of the ordinary courts in Cuba is similar to the organization of courts in civil law countries. This model divides courts at all levels into departments or chambers such as civil, criminal, administrative commercial, or labor. This structure itself, as a model of court organization, is workable and functions to good effect in many civil law countries. However, the judiciary in Cuba must be provided with the institutional capability needed to develop and assume the role of an independent check on abuse of government power.

The court system in Cuba could continue the use of special chambers to address specific substantive areas of law, especially at the trial court level in cases where the complexity of the legal issues or facts is such that a specialized court is better able to resolve the issues efficiently and expertly. These include tax, bankruptcy, patents and trademarks, labor and employment, international trade and, if appropriate, restitution claims. However, the state security and military chambers should be eliminated.



**Selection and Qualification of Judges.** Judges may be selected through various processes including designation or appointment by a select body or a judicial council, appointment by the judiciary, popular election, appointment through contests, the judicial career or combinations of these. However the most important element of any system of appointment is that the process be open and transparent and adhere to certain objective standards accepted not just by the actors in the court system but also by the public.

Cuba may opt for a career judiciary with candidates for judicial positions coming from the judicial school or have a judicial council appoint judges to the ordinary courts. Judges would then rise through the ranks of the judiciary.

Alternatively, the executive could make judicial appointments with approval by the legislature. Candidates could be either 1) proposed by the judiciary, 2) come from the judicial school, or 3) be selected from respected practicing attorneys. Irrespective of the method of appointment, prospective judges may be required to pass an exam or be approved prior to appointment by a nominating council. Finally, judges could be elected. Election of judges eliminates political patronage by removing the executive or the legislature from the equation.

Special efforts must be made to appoint qualified judges to judicial positions in a post Castro Cuba. While qualified judicial candidates may be immediately available to address certain types of cases, such as family law matters, it will be difficult, in the preliminary stages of transition, to find judges qualified to address the many issues raised by new laws that will likely accompany the transition to a democratic market economy. Cuba, like other transition countries that have faced this issue, will be required to develop educational and training programs for both judges and lawyers. These training programs may form part of a larger judicial reform project that attempts to restructure the laws of the country to address the many changes needed to foster economic and social change.

**Judicial Terms and Salaries.** In restructuring the judicial system, the question of judicial terms should be addressed at the outset. Cuba will have to determine whether to provide judges with life tenure or provide shorter judicial terms. If Cuba restores its civil law tradition, the court system will maintain the character of most civil law systems with one system of courts divided into several tiers. Judges at the Supreme Court

level could be appointed or elected for life (until a mandatory retirement age) or be given a fairly long tenure, with the possibility of reappointment or re-election. Judges in the lower courts could similarly be appointed or elected for a specific term, with the possibility of serving additional terms, or be given life tenure.

Establishing fair and adequate salaries is an important aspect of judicial independence and plays a role in the ability of government to attract qualified professionals. Cuba should recognize the importance of an independent judiciary and make a commitment to creating a system of fair compensation for judges or the quality of judicial candidates and their commitment to the fair administration of justice will suffer.

**Evaluation and Discipline.** Cuban law currently provides a system whereby judges are evaluated by the Ministry of Justice and may be disciplined or removed for misconduct, including negligence in the performance of his or her duties. Some forms of misconduct, however, do not lend themselves to objective evaluation. Moreover, Cuban law appears to allow for the removal of a judge at any time by the National Assembly on its own initiative.

A code of judicial conduct should be developed detailing the standards of judicial conduct and permitting discipline or removal only for misconduct or incompetence. Judicial review boards should be created to evaluate and discipline judges based on the code of conduct and all proceedings should be open. The criteria for evaluations should focus on how well the judge performs his or her functions and include issues regarding the administration of cases, such as whether the judge's individual courtroom procedures facilitate the presentation of cases or improve litigants' access to justice. The results of cases should not be reviewed to avoid creating a system where a judge's decisions may be affected by pressures from the judicial review board.

**Fiscal Autonomy.** Judicial reform in Cuba should include the creation of mechanisms to ensure that the judiciary's budget is not dependent on another government authority and that it is sufficient to allow for the orderly administration of justice.

In order to ensure fiscal autonomy, Cuba should follow the recent trend towards unitary budgeting. This entails the creation of a judicial governing board, made up of members of the judiciary, to address all budgeting issues, including forecasting, allocating and auditing all

expenses associated with court administration, except salaries, which should be determined by the legislature. In order to perform budgetary and administrative functions, the courts should be provided with technical, accounting and auditing assistance. The use of administrators to do the underlying budgetary analysis will prevent the members of the governing board from becoming full time administrators and permit judges to attend to their caseloads.

Judicial reform is an important component in any transition. While ultimately achievable, the reform process will take time as its goal is the systemic reform of the judiciary itself and also the promulgation of many if not all of the laws and standards under which the judiciary will operate.

The reform process must begin in Cuba and involve not just the legislative and executive branches but also the judiciary, interested non-governmental organizations and private citizens. Cuba should make a plan for reform that takes into account specific factors applicable to its situation. It is unlikely that all aspects of reform can be undertaken at once but a timetable could be set and reforms begun in stages.

The ultimate goal of these reform efforts is to create an impartial, well functioning judiciary that will protect both individual human rights and property rights and allow the full and fair administration of the new market system. In supporting the political and legal changes that will occur throughout the transition to democracy, the judiciary will contribute to the political, social and economic stability of a democratic post-Castro Cuba and make an important contribution to the development of Cuba.

# **The Role of the Judiciary in a Post-Castro Cuba: Recommendations for Change**

## **Introduction**

In order for the transition from totalitarian rule to democracy to succeed in Cuba or any other country, the rule of law must be established and preserved.<sup>1</sup> Without the creation of a constitutional culture that limits state actors and prevents them from overstepping the legal boundaries of the new system, true democratization cannot occur.<sup>2</sup> Courts usually provide the most credible means of challenging a government's abuse of power. Consequently, the role of the courts in countries making a transition to democracy is significant since the judicial branch is responsible for enforcing not only the constitution, but also the rights of all individuals in the system.<sup>3</sup>

Economic development similarly requires a comprehensive legal framework, enforced by the judiciary, which first and foremost protects human rights generally and property rights specifically.<sup>4</sup> The right to own property, exchange rights in property, and enter and exit the market freely is a key factor in the creation of a market economy. The role of a well-functioning, impartial judiciary in administering a new market system fairly and efficiently, and thereby attracting foreign investment, should not be underestimated.<sup>5</sup> The creation of a well-functioning judiciary is necessary, not only to support the political and legal changes leading to a transition to democracy by protecting individual rights, but also to allow optimal market functioning. Judicial reform therefore should be addressed at the outset of any transition, along with the institution of other important market and legal reforms.

The judicial system in any given country depends on the country's political context, the substantive content of its laws, and the ability of existing institutions to enforce those laws.<sup>6</sup> The key question in determining the effectiveness of a judicial system in encouraging development and respect for the rule of law is whether it operates fairly and predictably under the law and protects individual and property rights while encour-

aging private-sector growth.<sup>7</sup> In analyzing the role of the judiciary in Cuba today and in making recommendations for reform that will ensure the judiciary's ultimate support for a market-oriented democracy in Cuba, these factors must be kept in mind.

## **An Independent Judiciary**

An independent judiciary plays a key role in protecting human and civil rights and is absolutely essential in establishing and maintaining the rule of law.<sup>8</sup> Judges are the ultimate arbiters of the freedoms, rights, and duties of citizens.<sup>9</sup> These rights can be adjudicated fairly only by a "competent, independent, and impartial tribunal established by law...."<sup>10</sup> Without an efficient and competent judiciary, a government is unable to enforce the rules it has set out in its constitution and laws. An ideal judiciary applies the laws fairly and efficiently, ensuring predictability in the outcome of cases; provides equal access to the courts; and provides adequate remedies within a reasonable time.<sup>11</sup> In order for the judiciary to achieve these goals, the judiciary must be independent; staffed with competent, unbiased judges; properly funded; and effectively administered and organized.<sup>12</sup>

### ***Judicial Independence Defined***

At its most basic level, judicial independence is the idea that impartial or neutral third parties who are insulated from the political process should decide conflicts.<sup>13</sup> The emphasis on impartiality and "political insularity"<sup>14</sup> has resulted in a fairly uniform definition of judicial independence as "the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law, and justice, free from coercion, blandishments, interference, or threats of governmental authorities or private citizens."<sup>15</sup> Consistent with this definition, substantive judicial independence, also referred to in U.S. jurisprudence as decisional independence, means the ability to make judicial decisions and exercise official duties free from the influence of other political branches and subject to no other authority but the law.<sup>16</sup>

## *The Requirements for Creating Judicial Independence*

Judicial independence is created first by enacting laws that 1) establish the judiciary as an independent branch of government, both organizationally and in its administration (e.g., separation of powers), 2) create certain types of judicial review, and 3) provide for fiscal autonomy (structural independence).<sup>17</sup> Courts also should be insulated from interference by sister courts or by judicial superiors and colleagues individually or other actors within the judicial system (internal independence).<sup>18</sup> In addition, judges should be provided with set terms of office and adequate pay and be protected from arbitrary, adverse employment action ranging from demotion and forced reassignment to removal (personal independence).<sup>19</sup> In essence, the judiciary must operate as a separate body within government, with a distinct role in regulating the legality of state acts and with a broadly defined institutional scope of authority.<sup>20</sup>

Finally, institutionalized mechanisms must be put in place to assure that the appointment processes and evaluation systems promote the appointment and retention of competent, highly qualified judges. To that end, the appointment process must be open, transparent, and merit based.<sup>21</sup>

As a practical matter, the requirements necessary for judicial independence can be distilled into six key elements.<sup>22</sup> They are

- 1) guaranteed terms,<sup>23</sup>
- 2) finality of decisions,<sup>24</sup>
- 3) exclusive authority to decide their own competence,<sup>25</sup>
- 4) fiscal autonomy,<sup>26</sup>
- 5) separation of powers,<sup>27</sup> and
- 6) enumerated qualifications.<sup>28</sup>

These requirements are generally accepted and can be found in the Universal Declaration of Human Rights, the European Convention of Human Rights, and the Inter-American Convention of Human Rights. Before analyzing the extent to which the judiciary in Cuba meets these criteria and how the judiciary might be reformed to be more consistent with these ideals, this paper will discuss the current structure of government in Cuba, the role of the courts in Cuba, and the formal structure and organization of the courts.

## **The Current Structure of Government in Cuba**

The constitution of revolutionary Cuba, first promulgated in 1976 and amended in 1992, establishes the structure of government in Cuba. The Cuban Constitution was modeled after the 1936 Soviet Constitution and follows its Marxist-Leninist approach.<sup>29</sup> The government is structured under the “unity of power” principle.<sup>30</sup> Under this theory, all legislative and executive powers of a state are assigned or delegated to one representative democratic body. “This representative political organ is the supreme organ of state power and the only one able to create law and control the activities of all other state organs.”<sup>31</sup> Under the concept of unity of power, a pyramidal structure is created whereby “actual decision-making is concentrated in a few hands while, in theory, all power... is ultimately traced back to the election of the municipal assemblies.”<sup>32</sup> As seen below, the Cuban Constitution achieves this result and ultimately places all legislative and executive power in the hands of dictator and President Fidel Castro. In keeping with the concept of the unity of power doctrine, judges in Cuba do not have the power of judicial review.<sup>33</sup> Instead, the National Assembly has the right to determine the constitutionality of all laws.<sup>34</sup>

The Cuban Constitution of 1992 continues to designate three branches of government: the executive, consisting of the Council of State and the Council of Ministers; the legislative, consisting of the National Assembly; and the judicial, consisting of the Supreme Court, the provincial courts and the municipal courts.

The Cuban Communist Party is the driving force of the Cuban state. It “organizes and guides all common efforts towards the creation of socialism and the advancement of communist society.”<sup>35</sup> Citizens may not exercise their rights in opposition to the constitution or laws of Cuba, nor against the “decision” of the Cuban people to establish socialism.<sup>36</sup> All branches of government operate against this ideological backdrop.

### ***Legislative Branch***

Under the Cuban Constitution of 1992, the supreme organ of state power is the National Assembly of the People’s Power. The National Assembly exercises all legislative and executive power, in theory, on behalf of the populace. It has the authority, among other things, to make and repeal all laws, declare any law unconstitutional, make and approve

budgets, appoint all judges, make all decisions regarding currency and credit for the country, and approve all social and economic development plans.<sup>37</sup> The 601 members are elected directly from slates approved by special candidacy commissions, and members serve five-year terms.<sup>38</sup> Delegates to the National Assembly are elected by provincial assemblies. Provincial assemblies, in turn, are elected by municipal assemblies.<sup>39</sup>

The National Assembly elects a 31-member Council of State. The National Assembly also chooses the president and vice president of the Council of State.<sup>40</sup> The president of the Council of State is the head of state and the head of government.<sup>41</sup> The Council of State is authorized to act on behalf of the National Assembly and exercise all powers held by the National Assembly when the National Assembly is not in session.<sup>42</sup> Therefore, when the National Assembly is not in session, the Council of State has supreme authority in Cuba. Because the National Assembly meets only twice a year for a few days, in effect the 31-member Council of State, through its president, Fidel Castro, wields all power.<sup>43</sup>

### ***Executive Branch***

The executive branch consists of the Council of Ministers, whose members are selected by the president of the Council of State.<sup>44</sup> The Council of Ministers is meant to operate like a cabinet.<sup>45</sup> The Council of Ministers is responsible for, among other things, directing all political, economic, social, scientific, and defense matters for the country; handling the administration of the state-controlled economy; directing foreign policy and foreign trade issues; and supporting the currency and credit of the country.<sup>46</sup> Under the Cuban Constitution, the president of the Council of State (the head of state) acts as the president of the Council of Ministers (the head of government).<sup>47</sup> The head of government, therefore, is also the head of state.<sup>48</sup> The constitution establishes an executive committee for the Council of Ministers that is authorized to act for the Council of Ministers between regular meetings of the Council of State.<sup>49</sup>

### ***Judicial Branch***

The role of the judiciary in Cuba today should be viewed in the context of the society in which it has evolved and in light of the professed goals of the Cuban Revolution to develop a “revolutionary theory of law.”<sup>50</sup> The judiciary, along with the entire legal system in Cuba, was



deliberately dismantled after the Cuban Revolution, and the practice of law was allowed to atrophy.<sup>51</sup> Later, the regime attempted to “institutionalize” the revolution by creating “an elaborate juridical basis for the revolution that would both reflect its principles and direct the evolution of socialism in Cuba.”<sup>52</sup> In Cuba, therefore, the judiciary, and the entire legal system of which it forms a part, is not meant to settle disputes in an orderly fashion, in keeping with the rule of law. It is instead meant to resolve legal issues and settle disputes in a way that furthers the goals of socialism and assists in the transformation of the society as it evolves toward socialism.<sup>53</sup> This concept of “socialist legality” drives all laws, and it is the role of judges to apply laws in such a way that the sought-after socialist goals are achieved.<sup>54</sup> Moreover, the goals of socialism and the method of achieving those goals within the legal system or otherwise come down to one man – Fidel Castro.<sup>55</sup>

Pursuant to the constitution, in Cuba the judiciary theoretically is established as an independent branch of government, but is under the jurisdiction of and specifically subordinated to the National Assembly and the Council of State presided over by Fidel Castro, neither of which can be considered impartial.<sup>56</sup> Judges are required to report to the National Assembly as to the execution of their duties, and the National Assembly has the power to both appoint and remove judges from office.<sup>57</sup> Despite the assertion that the judiciary is an independent branch, the reality is that the Council of Ministers stripped the judiciary of even minimal independence very early on in the revolution.<sup>58</sup> Judges were removed at will, and new judges were required to be “integrated” to the revolution.<sup>59</sup> Even today, after the government has removed the formal requirements of party membership and “integration” to the revolution to hold judicial office, the judiciary remains slavishly faithful to the regime.<sup>60</sup> It consistently enforces laws against the crime of “dangerousness,” allowing imprisonment if a person simply is deemed antisocial and thus predisposed to crime or capable of committing a crime, prohibiting persons from emigrating, and punishing persons who are self-employed or do not work for the government. Moreover, Cuba’s legal system supports Cuba’s repressive human rights practices.<sup>61</sup> The government-controlled courts undermine the right to a fair trial in criminal cases by restricting the right to a defense and often fail to observe the few due process rights available under current Cuban law.<sup>62</sup>

## **Organization and Administration of Courts in Cuba**

The organization of courts in Cuba today is the result of the evolution of a series of laws related to the judiciary and dating from 1973, when the Castro government first turned its attention to the legal institutionalization of the revolution.<sup>63</sup> The structure and operation of the courts continues to be modified in the government's self-described quest to create the perfect socialist legal system<sup>64</sup> Presently, the organization of the courts is set forth in Law 70 on the Popular Courts, promulgated in 1990; Law 82 on the Popular Courts, promulgated in 1997, which modified, but did not fully abrogate Law 70; and Instruction No. 157, promulgated in 1998.

### ***The Court System***

The more recent laws regarding court organization continue the basic structure of the judiciary established by prior law (Law 70 in 1990). The courts are organized on three levels: the Supreme Court, the provincial courts, and the municipal courts. Each has a president and a governing body charged with addressing numerous organizational and administrative duties. Each is required by law to empanel certain numbers of both professional and lay judges in particular cases and is subject to oversight from the Ministry of Justice.

### ***The Supreme Court***

The Supreme Court (Tribunal Supremo Popular) has six chambers: criminal, civil and administrative, labor,<sup>65</sup> state security, military, and economic.<sup>66</sup> Panels usually consist of two professional judges, of whom one presides, and one lay judge, except in special cases. In those special cases, the panel consists of three professional judges, of whom one presides, and two lay judges.<sup>67</sup> Special cases requiring the larger panel are 1) cases that come up on appeal from the provincial courts on matters for which the law requires the larger number of judges on the panel,<sup>68</sup> 2) cases in which the Supreme Court has original or appellate jurisdiction, 3) cases in which the president of the Supreme Court or the particular chamber deems it necessary, and 4) all cases before the military tribunal.<sup>69</sup>

In addition to the six chambers of the Supreme Court, Law 82 establishes a "special chamber" of the Supreme Court with jurisdiction over 1)

cases seeking to amend or revise or judgments or sentences handed down by the criminal, state security, and military chambers in cases of original jurisdiction and 2) so-called judicial inspection proceedings, begun at the request of “authorities authorized by law” and seeking to revisit judgments or sentences of the military chamber.”<sup>70</sup> The special chamber is made up of the president of the Supreme Court, two presidents of chambers, two professional judges, and two lay judges from any chamber.<sup>71</sup> In “judicial inspection” cases, the special chamber should include one professional and one lay judge from the military chamber.<sup>72</sup>

The Supreme Court has a governing council known as the Consejo de Gobierno (the Governing Council) The Governing Council is made up the president of the Supreme Court, several vice presidents, and the president of each of the six chambers of the court.<sup>73</sup> The minister of justice and the attorney general (*fiscal general*) participate in all meetings as nonvoting members of the council.<sup>74</sup> In addition to exercising administrative and supervisory duties concerning court business and personnel (including that of the lower courts), the council also is responsible for ensuring compliance with instructions or dictates of the Ministry of Justice or the Council of State. For example, among its supervisory and administrative duties, the council is required to monitor the performance of judges and other court personnel in the system,<sup>75</sup> relay instructions to the courts received from the Council of State,<sup>76</sup> promulgate mandatory instructions establishing uniform standards of practice and ensuring uniform interpretation of laws by the courts,<sup>77</sup> oversee the professional development of judges, and establish technical training programs for auxiliary court personnel.<sup>78</sup> The council also is required to request advice when necessary from the Council of State regarding the interpretation of existing laws,<sup>79</sup> provide evaluations of prospective judges to the National Assembly,<sup>80</sup> review and approve judicial performance reports (*rendiciones de cuenta*) before they are forwarded to the National Assembly<sup>81</sup> and, upon request of the National Assembly, provide an opinion on decrees and other general matters.<sup>82</sup>

The president of the Governing Council has specific duties that include preparing the judicial performance reports for review by the council;<sup>83</sup> proposing and, if they are approved, assigning judges to a specific chamber (except for the military chamber – those are proposed and assigned by the army);<sup>84</sup> resolving disputes between judges;<sup>85</sup> disciplining

judges;<sup>86</sup> reporting possible misconduct of judges to the council;<sup>87</sup> and overseeing the court budget.<sup>88</sup>

### *The Provincial Courts*

Provincial courts operate in all provinces. At least one court is found in each province, and a court is located in the Isle of Youth (Isla de la Juventud).<sup>89</sup> The provincial courts are divided into five chambers: criminal, civil and administrative, labor, state security, and economic.<sup>90</sup> Courts are presided over by one professional judge and two lay judges except in certain cases in which the panel, resembling the composition in the Supreme Court, consists of three professional judges, of whom one presides over the case, and two lay judges.<sup>91</sup> The cases for which the special, larger panel is required are the same cases that require the Supreme Court to empanel a larger tribunal.<sup>92</sup>

Each provincial court also has its own governing council, which is responsible for administrative and supervisory duties. The structure and duties of each council are similar to those of the Supreme Court's governing council with respect to the supervision and administration of judges and personnel of the provincial courts, except that the authority of the governing council for each provincial court is limited in some respects and instead of reporting to the National Assembly, it reports directly to the Governing Council of the Supreme Court.<sup>93</sup>

### *The Municipal Courts*

Municipal courts are the trial courts, or courts of first instance, in many criminal and civil matters. They also act as appellate courts in labor and employment matters that in the first instance are decided by the *Organo de Justicia Laboral*.<sup>94</sup> The municipal courts are not divided into chambers, but may be divided into sections at the discretion of the president of the court if a densely populated court district or a large number of cases makes it necessary or appropriate.<sup>95</sup> Trials are conducted by one professional and two lay judges.<sup>96</sup>

## ***Selection, Qualifications, and Removal of Judges***

The majority of judges in Cuba are career civil servants who entered the judiciary after receiving special training or immediately after leaving law school. Law school graduates were not eligible to be judges until 1992, when entry into the judiciary was opened to lawyers in order to alleviate the shortage of judges.<sup>97</sup> After 1992, the top 10 to 15 percent of law school graduates became eligible to serve as general magistrates.

In order to serve, professional judges must be Cuban citizens, have a law degree from an accredited university, be of good moral character, and have a good reputation among the public.<sup>98</sup> Party membership no longer is formally required.<sup>99</sup> Despite the elimination of party membership as a requirement for holding judicial office, it is widely accepted that party membership is necessary for advancement, and members of the judiciary accept that their role is to bolster the regime.<sup>100</sup> Moreover, in order to be accepted to law school, a prerequisite to holding judicial office, prospective law students must demonstrate their support for the revolution through a stringent interview process.

Candidates also must have a clean criminal record.<sup>101</sup> In Cuba, however, crimes include political crimes. Speaking one's mind, criticizing the regime, and talking to a foreign journalist are criminal acts that could lead to arrest.<sup>102</sup> Presumably, if arrested for any of those so-called crimes, a candidate for a judgeship would be rejected on the basis of this so-called criminal record.

Professional judges must have two years' experience as a lawyer, judge, or faculty member at a law school to serve at the municipal level, five years' experience to serve at the provincial level, and 10 years' experience to serve on the Supreme Court.<sup>103</sup> In addition to these requirements, a judge selected to serve in the military chamber of the Supreme Court must be in active military service.<sup>104</sup>

Professional judges are required to take a civil service exam and are screened by the Ministry of Justice, which has devoted considerable effort and attention to the evaluation and training of judicial candidates.<sup>105</sup> The courts themselves also question the candidates on the laws and their qualifications and require them to debate or defend certain positions.<sup>106</sup>

The requirements for serving as a lay judge are age, appropriate educational level, good moral character, good reputation in the community, and a good attitude toward employment or any work done in matters of

social interest.<sup>107</sup>

With the exception of the president and vice president of the Supreme Court and the members of the military chamber of the Supreme Court, the Ministry of Justice presents slates of judicial candidates to the respective legislatures for election.<sup>108</sup> Thus, the members of the Supreme Court, the provincial courts, and the municipal courts are proposed by the Minister of Justice and confirmed by the National Assembly and by the provincial and municipal assemblies, respectively. The president of the Council of State, however, nominates the president and vice president of the Supreme Court. The ministers of justice and defense propose the judges selected to serve on the military chamber to the National Assembly.<sup>109</sup>

Prior to the enactment of Law 82 in 1997, all judges, professional and lay, served five-year terms.<sup>110</sup> Lay judges and temporary professional judges still serve five-year terms, but now no permanent professional judges have a fixed term.<sup>111</sup> They appear to serve indefinitely unless the National Assembly or the local assembly that elected them removes them. Causes for removal include being arrested or convicted of a crime, incompetence, and actions that cause grave harm to the administration of justice.<sup>112</sup>

Judges at all levels must report on their cases to the Ministry of Justice. The reporting is described formally as only administrative reporting, not reporting on individual cases or results. The Ministry of Justice keeps detailed computer databases with respect to court cases.<sup>113</sup>

The extensive involvement of the Ministry of Justice in the selection, training, and evaluation of judges, along with the requirement that judges report to the ministry, calls into serious question the independence of the judiciary and makes it clear that the judiciary as currently organized is intended to operate as a political arm of the state.

## **Judicial Reform in Cuba**

In the years following the Cuban Revolution, the legal system, including law schools, lawyers, judges, prosecutors, and all existing legal institutions, were stripped of their powers and either dismantled or allowed to atrophy.<sup>114</sup> Revolutionary tribunals that followed Castro's mandates, instead of laws, were established. In attempting to institutionalize the revolution, Cuba attempted to rebuild its judicial system; neverthe-

less, the experiences of former socialist countries suggest that Cuba's judicial system and judges will be ill-equipped to handle many legal issues that are relevant to a market economy. Judges in Cuba are not accustomed to handling complex business disputes between parties or private entities on parity with each other. On a broader level, the courts and other court actors are not accustomed to functioning outside the political arena or without regard to the political factors that drive much of Cuban law.<sup>115</sup> In fact, the concept of an independent judiciary is antithetical to the role assigned to the judiciary in Cuba or in any socialist country. The transition to a market economy also will require a transition for the judiciary. The judicial system will have to adapt to the new market/democratic system, and a systematic process will be required to insulate the courts from the influence of other state actors or any political party. That goal may be reached by restructuring the organization of the judiciary, broadening the scope of judicial power, and making sufficient institutional changes to foster the development of an independent judiciary.<sup>116</sup>

### **Powers and Organization of the Judiciary in a Post-Castro Cuba<sup>117</sup>**

In the past 20 to 25 years, the trend has been toward promulgating national constitutions in situations of transition from authoritarian rule to democracy. National constitutions have been promulgated in all of the Central and Eastern European countries, in the former Soviet Union, and in Spain, Nicaragua, and South Africa.

The new national constitutions, among other things, generally reflect a movement toward creating an independent judiciary. This trend is evidenced in the growing practice of establishing judiciaries as separate organs or branches of government with enumerated powers or functions, granting the power of judicial review by constitutional courts, attempting to create mechanisms to ensure the appointment of qualified judges who will be able to maintain their independence from political interference, and generally moving toward the protection of individual and property rights.<sup>118</sup>

In contrast, Cuba rejects traditional notions of justice, such as the concept of judicial review or the idea of separation of powers, on the the-

ory that those are “false formal measures of democracy.”<sup>119</sup> Cuba’s rejection of these concepts goes against the general trend in other parts of the world, where the strength of the judiciary is viewed as an important check against abuse of power. Countries that have established systems of judicial review have greatly increased the independence of the judiciary and have moved, through the use of judicial review, toward greater protection of human and individual rights.

### ***Division of Powers***

Communist constitutionalism rejects the idea of any division of powers among organs of government. All powers are vested in a single representative body that theoretically responds to the will of the masses. The functions of government, on the other hand, are allocated to different organs. Although communist jurisprudence discards the principle of division of powers on the theory that it is inconsistent with the supremacy of parliaments, in actuality, the doctrine is rejected because it is inconsistent with the monopoly of power held by the Communist Party, the guiding force of communist society.<sup>120</sup>

Division of state functions occurs in a system in which the decision-making power is concentrated in a single body, while the mechanism through which that power is exercised is delegated to different organs of government.<sup>121</sup> Division of powers refers to a system in which the decision-making power is itself divided among several organs of government. The basic idea of division of powers is that government should be limited by the diffusing of its powers.<sup>122</sup> The powers do not have to be equally divided.<sup>123</sup> The goal is to create a system in which the branches of government are not organized in such a way that they all are subject to the control of one superior body.<sup>124</sup> The fundamental premise of the concept of division of powers is limited government, a concept not recognized in communist constitutionalism.<sup>125</sup>

Separation of powers is a narrower version of division of powers in which the decision-making powers are divided between or among separate branches of government. As in the concept of division of powers, the powers do not necessarily have to be equally divided. However, if emphasis is placed on the equality of powers, more than merely the division of powers, the result is the U.S. model of separation of powers, which



emphasizes checks and balances.<sup>126</sup>

When it came time for the countries of Central and Eastern Europe and of the former Soviet Union to draft new constitutions, they moved away from the idea of “democratic centralism.” Some apparent confusion over the difference between division of state or governmental functions and division of powers, along with the belief that division of powers cannot be applied to a system that recognizes the superiority of one power (i.e., the parliament) has resulted in some hybrid systems that do not always clearly divide powers, but also do not consolidate them.<sup>127</sup> Nonetheless, when drafting their new constitutions, most countries of the former Soviet bloc adopted some form of division of powers.

Bulgaria’s new constitution, adopted in 1991, rejected the notion of unity of power and created a system of separation or balance of powers among the unicameral parliament, the executive, and the judiciary.<sup>128</sup> Poland’s interim constitution (known as the “Small Constitution”) similarly divided power between the legislative, the executive, and the independent courts. The final version of the Polish constitution, the Constitution of 1997, gave preference to the parliament, but still reserved some powers to a president elected by popular vote and to the courts.<sup>129</sup>

Hungary’s constitution declares the country a democratic constitutional state based on separation of powers among the parliament, the council of ministers, and the judiciary.<sup>130</sup> Slovakia’s constitution similarly establishes what appears to be a division of powers among organs of government.<sup>131</sup> The constitution of the Czech Republic makes reference to the different powers and provides for the independence of the judiciary.<sup>132</sup> The constitutions of Belarus, Estonia, and Kazakhstan all emphasize that, to foster good government, the powers of the executive and the legislative should be balanced against each other.<sup>133</sup>

The pre-transition constitution of Nicaragua, imposed by the Sandinistas in 1987, is closer to a model of democratic centralism.<sup>134</sup> Although the different functions of government were separated, most of the power was concentrated in the National Assembly. The judiciary was not even nominally independent, and while it was given a limited power to review the constitutionality of laws, that power could be exercised only at the request of the legislature.<sup>135</sup> The constitution has been amended twice since the transition began, first in 1995 and later in 2000.

The subsequent amendments to the Nicaraguan Constitution of 1987

have effected changes to almost every section. As in the prior version of the constitution, discrete branches of government were not created, but legislative, executive, and judicial functions are separated. The section on the judiciary reorganizes the courts and creates a Supreme Court divided into four chambers: civil, criminal, constitutional, and administrative. The Supreme Court's decisions are given the force of law. The courts, generally, are given broader powers, and the president is charged with providing the support necessary to enforce all court decisions.<sup>136</sup>

The Spanish Constitution, ratified in 1978 after the death of General Francisco Franco, has been amended on various occasions. The judiciary in Spain is established as an independent power, and the judges are declared independent and subject only to the rule of law.<sup>137</sup> The constitution also provides that the decisions of the judiciary must be given effect and that the courts must be supported throughout any given proceeding and through the time of execution of judgments<sup>138</sup>

### *Recommendations for Cuba*

Even where no clear division of power exists between branches, the trend toward creating judiciaries as independent, separate organs, along with the powers given to courts to limit abuses of government through the exercise of judicial review, creates a more favorable environment for the evolution of independent judiciaries.

In order to begin the process of establishing an independent judiciary in Cuba, the new Cuban government must move away from the concept of democratic centralism and endeavor to establish a legal framework that effectively divides government functions and powers. In so doing, Cuba would answer the call of the Inter-American Commission on Human Rights to "reform the Political Constitution of the State in order to establish the separation of powers, and thus avoid the situation in which the administration of justice is subordinate to political power."<sup>139</sup> If the judiciary is given structural independence, a greater possibility exists that judicial independence will grow. In some countries (Germany, France, Canada, and England), the judiciaries operate with a good deal of decision-making autonomy and generally are respected and viewed as competent even though they do not enjoy structural independence. This is unlikely to occur in Cuba. The judiciaries in Canada, Germany, France,

and England operate effectively without structural independence due to the long history and tradition of respect for the judiciary in those countries.<sup>140</sup> The lack of this tradition in Cuba makes it unlikely that an independent judiciary will develop without first creating a protected sphere in which the judiciary can operate. Within this sphere, the judiciary should be given jurisdiction over all judicial matters and should have exclusive authority to decide whether an issue submitted for its decision is within its competence. Its decisions should be final and not subject to revision or modification by the legislature or the executive.

The experience of Cuba may prove to be similar to that of Central and Eastern Europe or to that of Spain. The Central and Eastern European countries were moving to democracy from communist systems in which, as in Cuba, the judiciary was neither independent nor impartial. These countries elected to create systems in which the different functions or powers of government are separated in an effort to provide limits on government. The judiciaries were given enumerated powers and provided with a sphere in which those powers arguably could be exercised without interference from other government actors.

In Spain, the government moved from the authoritarian rule of Franco to democracy. The Franco government, which had been preceded by a monarchy, provided that after Franco's death the monarchy would be restored. However, the Spanish transition did not constitute a restoration, nor was it possible to use any pre-Franco democratic institutions or any existing institutions to support a democratic transition. After King Juan Carlos returned to Spain, a process of rapid democratic consolidation began, accompanied by the creation of new institutions. Those new institutions and the democratic processes that were instituted during the transition, as set forth in the Spanish constitution, are responsible in large part for the success of the Spanish transition.<sup>141</sup>

In Cuba, it will be necessary to begin a process of rapid democratic consolidation in order to better the chances of a successful transition in Cuba. The slower the process, the more likely it is to stall before any meaningful change is underway. Unfortunately, in Central and Eastern Europe the democratization process has stalled, resulting in the general frustration of the populace, who now are demanding changes that may return them to the failed policies of the past. Thus, democratic reforms in Cuba must be pushed forward quickly, and among those reforms

Cuban courts should be structured with a well-defined institutional scope of authority to better the chances for development of an independent judiciary.

### ***Judicial Review***

One of the greatest strides made by post-communist countries toward developing a rule of law and empowering an independent judiciary is the adoption of judicial review, that is, the right of courts to review government acts to determine their consistency with the constitution.<sup>142</sup> Many developing countries and almost all of the former Soviet republics have adopted some form of judicial review. After the collapse of the Soviet Union, Russia, Bulgaria, the Czech Republic, Slovakia, Hungary, Romania, Slovenia, Estonia, Belarus, Lithuania, Kazakhstan, and Krygyzstan all adopted some form of judicial review. Poland established judicial review in 1985 and later expanded the scope of the court's power in the 1997 Constitution.<sup>143</sup> All of these countries instituted a centralized version of judicial review by establishing constitutional courts to review the legality of government acts. Spain also established a constitutional court as part of its transition to democracy. Nicaragua opted for the creation of a constitutional chamber within the Supreme Court to handle constitutional questions.

Cuba's rejection of judicial review goes against the general trend in other parts of the world, where the strength of the judiciary is viewed as an important check against abuse of power. Countries that have established systems of judicial review have greatly increased the independence of the judiciary and have moved, through the use of judicial review, toward greater protection of human and individual rights.

The power to exercise judicial review possessed by many of the newly created constitutional courts of the former Soviet Union and Central and Eastern Europe has proved to be one of the most significant developments in those countries' transitions toward democracy.<sup>144</sup> While some of the countries have created narrower powers of judicial review, many have created powerful constitutional courts with broad powers, which have steadily increased their power and independence and are providing important checks on government.<sup>145</sup> Some examples of the latter are Bulgaria, Russia, the Czech Republic, Hungary, and Poland. The pos-

itive effect of the constitutional courts in establishing a government of laws merits a closer look at the organization and powers of those courts.<sup>146</sup>

### *Countries of the Former Soviet Bloc*

*Bulgaria.* The Bulgarian Constitutional Court is one of the great success stories of Eastern Europe. The new constitutional court has broad jurisdiction over constitutional matters and is charged with 1) providing binding interpretations of the constitution, 2) ruling on the constitutionality of laws,<sup>147</sup> 3) ruling on the constitutionality of international agreements and their consistency with prior agreements, prior to their ratification, and 4) ruling on challenges to the legality of elections and to the constitutionality of political parties.<sup>148</sup> The powers of the court can be changed only by an amendment to the constitution.<sup>149</sup> In the exercise of these functions over the last 10 years, the court has steadily increased its power and prestige and effectively protected the judiciary from legislative and executive encroachments.<sup>150</sup>

The Bulgarian Constitutional Court was tested and began to develop as a strong independent court after 1994, when the voters elected a government of the (Bulgarian Socialist Party (BSP), headed by a hard-line, neo-communist wing of the party. The new socialist government immediately embarked on a legislative agenda aimed at reversing the economic and political liberalization of the prior years and including the amendment of land and restitution laws and the reintroduction of collective farming.<sup>151</sup> The country's democratic party, the Union of Democratic Forces (UDF) resorted to the constitutional court in its efforts to challenge the legality of the new government's agenda as unconstitutional. The constitutional court held that the amendments were unconstitutional because they violated the right to own private property established by the 1992 Constitution. Thus began a three-year battle between the Socialist Party and the court, which ended with the election of a UDF government in 1997 and the establishment of the constitutional court as a powerful instrument of constitutional review and an effective check on government<sup>152</sup>

Of equal significance, the constitutional court prevented the implementation of a court-packing scheme concocted by the ruling BSP (which would have resulted in a purge of the judiciary, including ordinary

courts<sup>153</sup>) and an attempt to block the functioning of the courts by failing to appropriate funds for their operation and administration.<sup>154</sup> In blocking the Socialist Party's agenda on these issues, the constitutional court set the stage for the continued independence of the entire judiciary.

*The Russian Federation.* The Russian Constitutional Court exercises powers of review similar to those enjoyed by Bulgaria's court. The constitutional court is authorized, among other things, to 1) review the compatibility of international agreements with the constitution and laws of the country, 2) participate in impeachment proceedings, 3) resolve disputes between federal and state organs of power,<sup>155</sup> and 4) hear citizen complaints alleging violations of constitutional rights or freedoms.<sup>156</sup>

The constitutional court has developed a creditable record over the past few years. It has taken the position that the constitution provides a legal remedy for every wrong and has upheld the right of aviation workers to strike and struck down legislation providing penalties for leaving the country and denying credit to criminal defendants for time served in pretrial detention while the defense prepares its case.<sup>157</sup> The constitutional court's reliance on the constitution as a basis for upholding rights and limiting government action has resulted, in turn, in the recent exercise of a form of judicial review by the ordinary courts. Both the Supreme Court and the commercial courts have begun to apply the constitution in cases pending before them without referring the cases to the constitutional court, and have found numerous laws unconstitutional.<sup>158</sup>

### *Central and Eastern European Nations*

*The Czech and Slovak Republics.* Both the Czech and Slovak republics created constitutional courts as part of the reorganization of the judiciary. Those courts review, in the abstract, the legality of government acts submitted to them for consideration. Neither constitutional court has the authority to review laws or acts prior to their enactment.<sup>159</sup> Individual constitutional complaints are permitted in both countries, thus providing citizens with direct access to the constitutional court.<sup>160</sup> Both constitutional courts may participate in impeachment procedures and can delegalize political groupings and rule on the legality of elections.<sup>161</sup>

An important difference between the constitutional courts of the Czech and Slovak republics relates to the effect of a ruling of unconstitu-

tionality. A ruling by the constitutional court in the Czech Republic that a law is unconstitutional automatically voids the law. In Slovakia, the court's finding that the law does not conform to the constitution renders the law voidable. The legislature is then given six months to amend the law or act so that it conforms to the constitution. If the legislature does not act within that time period, the law then becomes void.<sup>162</sup>

*Hungary.* While Hungary did not adopt a completely new constitution after the collapse of the Soviet Union, it revised approximately 80 percent of its constitution in 1989. The constitution was revised again in 1990. The constitution created Hungary's first constitutional court, whose purpose is to interpret the constitutionality of legal rules, including international agreements, and to annul parliamentary acts and other regulations it finds unconstitutional.<sup>163</sup> The power of the constitutional court to annul laws it deems unconstitutional is broader than that of other constitutional courts in the region; at times, the court even makes judgments regarding the constitutionality of draft laws.<sup>164</sup>

The jurisdiction of the constitutional court and access to the court are similarly broad. The court may not only pass on the constitutionality of existing and draft laws, but also may decide that the parliament should have passed a particular law and instruct parliament to pass the needed legislation. In addition, any citizen may present a complaint to the court seeking relief.<sup>165</sup> This broad jurisdiction has led to the filing of cases in which the original compensation act, which addressed issues relating to the payment of compensation to former owners of expropriated property, was declared unconstitutional because it discriminated in favor of former landowners and against owners of assets other than real property. The prohibition against foreign ownership of land also was declared unconstitutional.<sup>166</sup>

In addition to the constitutional oversight functions of the constitutional court, within Hungary's courts of ordinary jurisdiction the Supreme Court plays a constitutionally required advisory role for the lower courts, issuing advisory opinions when required.<sup>167</sup>

*Poland.* In the 1980s, Poland began adopting some political and economic reforms, including the right of judicial review by certain courts.<sup>168</sup> In the 1990s, more revisions were made to the constitution, eliminating the traditional communist hierarchy of property and the dominant role of the Communist Party in government. A constitutional commission estab-

lished in 1989 was unable immediately to produce a new constitution.<sup>169</sup> In 1997, after years of debate and experimentation with various models of governance, Poland promulgated a new constitution.

The new constitution of Poland continued the practice of judicial review by a constitutional court. The constitutional court is authorized to 1) make a prospective determination of the constitutionality of laws, upon request of the president, 2) rule on the conformity of international agreements with the constitution, and 3) decide on the compatibility of laws with the constitution.<sup>170</sup> The constitutional court also has the right to hear individual complaints from private citizens regarding the constitutionality of government acts.<sup>171</sup> Decisions on the constitutionality of the laws are final and binding, and the laws are deemed void from the date of any adverse ruling.<sup>172</sup> While other courts may not declare a statute or law unconstitutional, if a question regarding constitutionality arises in a case or controversy, those courts may stay the proceeding and refer the matter to the constitutional court for adjudication.<sup>173</sup>

*Slovenia.* Slovenia also adopted a new constitution in 1991 and reformed the judiciary. A constitutional court was also established in the new constitution. Its role is to review the constitutionality of laws, regulations, and individual acts of the state or political parties. It also determines whether laws conform to international treaties and decides disputes regarding the competency of the various branches of the state and local administrative apparatus. Any person with a legal interest may bring a constitutional complaint before the court. A law found to be unconstitutional automatically is deemed void.<sup>174</sup>

### *Nicaragua*

The judiciary in Nicaragua has never been well respected and historically has not acted in the interest of protecting individual rights. Despite amendments to the constitution attempting to strengthen the judiciary and provide the courts with greater independence, judges were not replaced during the transition, and the judiciary is still populated with many judges sympathetic to the Sandinistas. Nonetheless, the change in political climate, along with the elimination of the monopoly of power of the Sandinistas, has resulted in slow movement toward restoration of human rights protections and fundamental democratic principles.<sup>175</sup>



## *Spain*

The power of judicial review is vested in the Spanish Constitutional Court. The constitutional court in Spain is an independent body subject only to the constitution.<sup>176</sup> It has the authority to decide on the constitutionality of all laws and handles all cases of *amparo* seeking redress for violations of individual constitutional rights.<sup>177</sup> The constitutional court is made up of 12 members appointed by the king after upon the recommendation of the legislature, the executive, and a special court council.<sup>178</sup>

## *Recommendations for Cuba*

Under the Cuban Constitution of 1940, the power of judicial review was specifically created and vested in the Court of Constitutional and Social Guarantees, a chamber of the Supreme Court. The constitutional court had broad powers to declare unconstitutional “laws, decree-laws, decrees, regulations, resolutions, orders, provisions, and other acts of any body, authority, or officer.”<sup>179</sup> The constitutional court could hear habeas corpus proceedings on appeal and, whenever no other recourse was available, could also rule on the validity of constitutional modification.<sup>180</sup> Moreover, anyone affected by a law that he or she believed to be unconstitutional had standing to bring a claim before the constitutional court.<sup>181</sup>

The reinstatement of the power of judicial review in Cuba is a key element of future judicial reform in Cuba. Judicial review could play an important role in furthering democracy in Cuba and would go a long way toward eliminating the traditional subordination of the courts to the political process. The power of the judiciary to determine whether laws are consistent with a new Cuban constitution is absolutely necessary for the protection of individual rights in Cuba. By vesting this power in an appropriate court, Cuba will create a mechanism for checking government abuses in a constitutional government.

This is particularly important in Cuba because of the current inability of individual citizens to obtain any relief from government abuses of power. If a constitutional court with the power of judicial review is created and that court establishes, through its protection of individual or other constitutional rights, a respect for the judiciary, this will go a long way toward establishing a government of laws. Moreover, a court

exercising this power may play a pivotal role in protecting a nascent democracy in Cuba, as did the constitutional court in Bulgaria, where power has been transferred consistently between the Democratic and Socialist parties of Bulgaria.

If Cuba's transition involves, as it must to be successful, rapid democratic consolidation, then courts with the power of judicial review may assist in the process of democratic consolidation by protecting newly created institutions necessary for transition.

### ***Court Organization***

Most civil law countries follow court organization models that establish either specialized courts or specialized chambers within the courts. In Europe, France, Germany, Belgium, Austria, and Finland, courts are highly specialized, handling specific substantive matters.<sup>182</sup> Similarly, in Latin America, (e.g., Costa Rica, Nicaragua) courts are divided into specialized chambers that handle specific types of cases. This practice is found at all levels of courts: trial courts, appellate courts, and the Supreme Court. In this model, attorneys are for the most part generalists who rely on the expertise of judges. The system of specialized judges within distinct chambers of the courts allows judges to develop expertise in legal subspecialties, which most attorneys in civil law countries do not have.<sup>183</sup> This is in contrast to common law countries like the United States, where attorneys in the courts of general jurisdiction (most state and federal courts) develop specialized knowledge in subspecialties of the law and generalist judges rely on attorneys' legal knowledge in a given case.<sup>184</sup>

Court organization in transition countries is rather uniform. Prior to their being cast as socialist law countries, all were civil law countries. When judicial reforms were begun, those countries returned to their civil law roots and followed the model of specialized courts used in Europe and Latin America. Thus, in addition to creating centralized constitutional courts, most transition countries have reorganized the ordinary courts to create different court levels (e.g., Supreme Court, regional courts, local or municipal courts) with either original or appellate jurisdiction.<sup>185</sup> In addition, the courts are divided into separate departments (e.g., civil, criminal, administrative, commercial, labor), a common practice in civil

law countries. This court structure has been adopted in the Czech Republic, Hungary, and Poland.<sup>186</sup>

Nicaragua and Spain also have organized their courts in a similar fashion. The Spanish ordinary courts at the lowest level are divided into labor and the judicial administrative court, a court of general jurisdiction. Appeals are made to provincial courts, superior courts, the National Court of Justice, and the Supreme Court. Each of those is divided into civil, criminal, labor, and administrative chambers.

In Nicaragua also, the Supreme Court is divided into chambers that include civil, criminal, administrative, and constitutional chambers. At the lower levels, the courts similarly are divided into chambers. The appellate courts are divided into at least two chambers that address civil, criminal, and labor matters.<sup>187</sup> All district and local courts are divided into chambers for civil, criminal, labor, and family divisions. The Supreme Court makes the determination as to what chambers should be created at each level and in each court.<sup>188</sup>

The American Bar Association (ABA) has studied the use of specialized courts and has found that the creation of specialized courts or divisions within courts to address specific substantive areas is an effective method of enhancing the efficiency of the legal system as a whole.<sup>189</sup> Judges who have developed an expertise in a specific subspecialty will be able to adjudicate disputes more quickly than a general jurisdiction judge who may have to be educated on the specific area of law before making a fair decision. Moreover, the lawyers appearing before a judge will likely spend less time detailing elements of the law or facts that bear only tangential relevance to the case if the judge's expertise is such that he or she does not need a primer on the law relevant to the case. This translates not only into time savings, but also into cost savings that, in turn, improve access to justice.<sup>190</sup>

Specialized courts also increase the opportunity for uniform, high-quality decisions from which no appeal can or need be taken, thus increasing the element of predictability in the law. Case management also is improved because a judge versed in the specific area of the law at issue is better able to impose pretrial preparation deadlines, supervise disclosure of evidentiary materials, rule on dispositive motions, oversee settlement proceedings, conduct the trial, and address other case management issues.<sup>191</sup>

## *Recommendations for Cuba*

Except for the lack of existence of a separate constitutional court, the organization of the judiciary in Cuba resembles the organization of courts in civil law countries. The structure itself, as a model of court organization, is workable and functions to good effect in many civil law countries. The difference lies in the limited scope of the judiciary's power and the specific role assigned to the courts in Cuban society. The problem is the lack of independence and the consequent inability of the courts to function as a check on executive or legislative power. The courts must be provided with the institutional capability needed to develop and assume the role of an independent check on abuse of government power.

Any new court system in Cuba should continue the use of special chambers to address specific substantive areas of law, particularly if a civil law system is restored. The use of specialized courts should be considered to address areas of law in which the complexity of the legal issues or facts is such that a specialized court is better able to resolve the issues efficiently and with the necessary expertise. Generally, these specialized courts should be established at the trial-court level, as that is where the specialized courts will operate most efficiently.

Areas of law that lend themselves to the creation of specialized courts include tax, bankruptcy, patents and trademarks, labor and employment, and international trade. Property claims also may constitute an area of law that lends itself to being addressed by special courts. If legislation allowing for the restitution of expropriated property is adopted in Cuba, it is fairly certain that a large number of restitution claims will be filed. In some transition countries, such as the Czech Republic, property restitution claims were addressed in the civil department of the regular courts. This for a time caused a backlog of cases in the courts and affected the administration of justice generally.<sup>192</sup> The creation of a specialized court or commission to deal with restitution claims may alleviate some of the problems associated with these claims when a large number are filed.

Specialized courts should not deal with areas of law that are so narrow that a court is "captured by its clientele." If the same groups always appear on a very narrow range of issues, the courts may begin to assume the goals of the parties appearing before them, losing their independence. Moreover, if the area of law is so narrow that the judges end up mechanically applying a very small number of laws, the prestige of the court will suffer.<sup>193</sup>

## *Selection and Qualifications of Judges*

In order for a judicial system to function properly, individual judges must be qualified and competent. A judiciary that is staffed by competent individuals who are viewed as acting in the interests of justice, as opposed to their own self interest, will come to be respected and will go far in establishing a rule of law. Government, therefore, should establish effective mechanisms for selecting qualified persons to serve in the judiciary<sup>194</sup>

Judges may be selected through various processes, including designation or appointment by a select body or a judicial council,<sup>195</sup> appointment by the judiciary,<sup>196</sup> popular election, appointment through contests, the judicial career, or a combination of these.<sup>197</sup> In many countries (Peru, Chile, Germany, United States), appointment is made by the executive after input from a nominating body. In some cases, the nominating body is a specially created council (Germany); in others, the members of the Supreme Court nominate candidates (Chile, Peru, El Salvador), while in yet others the nominations come from the judicial school (France, Uruguay).<sup>198</sup> In Spain, judges attend the judicial school after graduation from law school and must pass qualifying exams to serve as a judge. Some countries require judges to pass an exam (Brazil, Venezuela) or take special courses in order to be appointed to the bench.<sup>199</sup>

In the United States, a variety of these systems of appointment exist. At the state level, judges often are elected. At present, thirty-nine states use some form of judicial elections for either trial courts or appellate courts, or both.<sup>200</sup> Vacancies due to retirement, promotion, or any other reason usually are filled by appointment of the executive after nomination by a judicial nominating committee. Some judicial positions are filled through appointment by a designated high elected official from a list of nominees received from a nonpartisan nominating committee.<sup>201</sup> Once appointed, judges stand for unopposed retention in elections in which voters decide whether or not to retain the judges. In yet other states, the executive nominates judges, and the legislature confirms them. At the federal level, judges are appointed by the executive after input from various sources, including bar organizations and state representatives and senators, and are confirmed by the Senate.

The executive branch appoints Canadian judges with little or no input from other branches of government. The federal cabinet, upon recom-

mentation of the minister of justice, makes all appointments to federal courts and to provincial superior courts.<sup>202</sup> Only Supreme Court judges, including the chief judge, are appointed differently, with the prime minister recommending them to the federal cabinet.<sup>203</sup>

In many countries of Central and Eastern Europe, the judicial council is the method used for appointment of ordinary court judges. Judicial councils also participate in all major decisions relating to the courts, including court administration and budgeting discipline and other court policies and procedures.

In Bulgaria, the 25-member Supreme Judicial Council selects ordinary court judges. Eleven are members of parliament; eleven are judicial authorities, and the other three are the chairman of the Supreme Cassation (appellate) Court, the chairman of the Supreme Administrative Court, and the attorney general.<sup>204</sup>

In Hungary, self-governing judicial councils appoint ordinary court officials and handle disciplinary matters within the court system. The judicial councils also participate in financial decisions relating to court budgets and in the selection and appointment of judges.<sup>205</sup> In Slovenia, ordinary court judges are proposed by a court council and appointed for life terms by the State Assembly.<sup>206</sup>

While the use of judicial councils can provide an effective method of staffing, administering, and governing the courts, the composition of the judicial council should be carefully considered. Most judicial councils have non-judicial members from other branches of government. Those members may have other interests or priorities that conflict with those of the judiciary.<sup>207</sup> Thus, if a judicial council includes non-judicial members, the influence of those non-judicial members should be minimized. Non-judicial members should act only in an advisory capacity and should not be given voting rights.<sup>208</sup>

The method of selection of judges of the constitutional courts is somewhat different and relies less on the use of judicial councils. In Hungary and Poland, the members of the constitutional court are appointed by the legislatures.<sup>209</sup> The 12-member Bulgarian constitutional court is appointed by the National Assembly, the president, and the judges of the Supreme Court. Each appoints four members to the constitutional court.<sup>210</sup> The Russian constitutional court is appointed by the federal component of parliament after receiving nominations from the presi-

dent.<sup>211</sup> Romania, following the French model, divides the power to appoint the judges of the constitutional court between the president and the two chambers of parliament, with each given the right to choose one-third of the members.<sup>212</sup>

### *Recommendations for Cuba*

The method of making judicial appointments has a great impact on the independence and impartiality of the judiciary. The judiciary in Cuba, if it is to become an effective, independent branch of government, should be removed from the jurisdiction of the Ministry of Justice. The control of the Ministry of Justice over the entire court system is such that true independence cannot be achieved as long as judges are subject only to the ministry's influence or control.

If the new legal system created in Cuba is a civil law system, with a similar organization of the courts, Cuba may opt for a career judiciary, with candidates for judicial positions coming from the judicial school as in France or Nicaragua. A judicial council could make the appointment of judges for the ordinary courts. Judges would then rise through the ranks of the judiciary. This system existed in Cuba prior to the revolution and may present an attractive option.

It should be noted, however, that the use of a career judiciary in which judges rise through the ranks ARGUABLY may result in a judiciary whose judges are less likely to exercise independence than those appointed under systems similar to that of the United States.<sup>213</sup> In the United States, judges are appointed to serve on particular courts, and appointment to a higher court is rare and not determined by peer review. Career judges who hope to advance to a higher court usually must be elevated by their peers and may therefore be more likely to react to external pressures.<sup>214</sup> In order to militate against that type of external pressure, the composition of any judicial council should include not only members of the judiciary, but also members of the bar, private citizens, and possibly representatives of the legislature or the executive. The input of the judges and the bar should be given considerable weight, and that of the executive or legislature less weight. The executive could make the final decisions on appointments, but the ruling party or another branch of the government should not operate the judicial council. If deemed appropri-

ate, prospective judges could be required to pass an exam or otherwise be “qualified” by the judiciary prior to service.

Alternatively, judges could enter the judicial school after law school as in Spain. Spanish judicial candidates are trained specifically to serve as judges in particular courts including commercial, civil, or criminal courts. The qualifications to serve on each differ somewhat and the candidates receive in depth training and education in both procedural and substantive laws that are regularly addressed in those courts. The extensive training and education received by Spanish judges is well known in Spain and as a result, Spanish judges, unlike some other judges coming from judicial schools, are fairly well respected.

Another alternative, is to authorize the executive branch to make Judicial appointments with approval by the legislature. Candidates could 1) be proposed by the judiciary, 2) come from judicial schools, or 3) be selected from respected practicing attorneys. In order to hold office as a judge, irrespective of the method of appointment, prospective judges could be required to pass an exam or be approved prior to appointment by a nominating council.

Election of judges is not recommended. Popularly elected judges run the risk of losing their impartiality if their decisions are subject to attack in an election campaign. Elected judges may feel that if the public is not satisfied with the results in a given case, it may hurt their election prospects. Moreover, elected judges must campaign, and campaigning requires money<sup>215</sup> The potential for corruption and improper influencing of judges is therefore increased. This is particularly true when judicial institutions are in the nascent stage and are potentially more vulnerable.

The most important element of any system of appointment is to ensure openness, transparency, and adherence to certain objective standards that are accepted not just by the actors in the court system, but also by the public. When the institutions are in the process of being created, an appointment process with certain safeguards, as described above, likely is best.

An issue sure to arise is the availability of qualified judges to fill judicial positions in a post-Castro Cuba. While qualified judicial candidates may be available immediately to deal with certain cases, for example in family law, the preliminary stages of the transition will confront difficulties in finding judges qualified to address the many new laws that



likely will be passed in order to establish a market economy. Most transition countries have faced this issue and have addressed it by instituting educational and training programs for lawyers and judges. These training programs are part of larger judicial reform projects that attempt to restructure the laws of the country to address the many changes needed to foster economic and social change. Examples of these programs are the judicial reform initiatives in Bulgaria sponsored by the Center for the Study of Democracy and the many judicial reform projects sponsored by the World Bank.<sup>216</sup>

### ***Judicial Terms and Salaries***

Judicial terms are very important in creating an independent judiciary. Without a guaranteed tenure until either retirement age or the expiration of their terms, judges may not feel free to act independently. The lack of tenure may also provide incentives for judges to act in their personal interests, given their eventual, but certain, return to the private sector. Some court systems provide life terms for appointed judges (federal judges in the United States, Slovenia, the Czech Republic, Bulgaria after three years of service, Romania after a probationary period, and the lower courts in Poland).<sup>217</sup> Germany permits judges to apply for life tenure after an initial three-year probationary period. In addition to giving judges life tenure, the new Bulgarian Constitution grants them the same immunity from suit as members of parliament. The government of the Czech Republic removed judges who had been compromised by the socialist regime.<sup>218</sup> Another important element in establishing an independent judiciary is providing adequate compensation for judges. Without adequate compensation, including fair retirement programs or pensions, court systems will be unable to attract and retain quality judges. The problem of inadequate compensation of judges is widespread. Salaries for the judiciary remain fairly low in Central and Eastern Europe because of the dire economic situation. Other countries, including the United States, France, Uruguay, and Paraguay, compensate judges at levels that are either the highest or among the highest for the public sector in those countries.<sup>219</sup> Even so, most judges are compensated at a level far lower than that they would receive in the private sector.<sup>220</sup>

## *Recommendations for Cuba*

In restructuring the judicial system, the question of judicial terms should be addressed at the outset. In Cuba, one court system exists at the national level, with the Supreme Court being the highest court and provincial and municipal courts handling matters at the local level as the courts of first instance. There is no state system such as that of the United States, with its own system of selection of judges and judicial terms. If Cuba restores its civil law tradition, the court system will maintain the character of most civil law systems, with one system of courts divided into several tiers. Judges at the Supreme Court level could be appointed for life (until a mandatory retirement age) or be given a fairly long tenure, for example, 9 to 12 years. If judges are not appointed for life, the term could be renewed only once. Judges in the lower courts would be appointed for shorter terms. For example, judges in the provincial courts could be appointed for 5 to 6 years, while judges at the municipal court level could be appointed for 3 to 4 years. The term of a judge could be renewed at the lower levels, or the judge could be promoted.

If judicial candidates are to be drawn from graduates of judicial schools, as in the case of a career judiciary, all judges would likely be appointed for life or for an extended term. Thereafter, judges may serve at various levels within the court system when and if they are promoted through the ranks.

Alternatively, judges could be elected, as they are in some other countries. Election of judges eliminates political patronage by removing the executive or the legislature from the equation. However, as mentioned previously, election of judges is not without its own problems and is not recommended. The electorate does not always have the information necessary to evaluate properly the qualifications of prospective judges. This even includes other actors in the legal profession. In the United States, where state judges are elected, voters often know little to nothing about judicial candidates. This problem is magnified by restrictions states place on campaigning by judges in an effort to reduce the influence of politics on judicial selection.<sup>221</sup>

Establishment of fair and adequate salaries is an important aspect of judicial independence and plays a role in the ability of government to attract qualified professionals. Unfortunately, this is easier said than done. Issues regarding adequate compensation exist even in developed coun-

tries whose economic resources far exceed those of countries like Cuba. Governments in transition countries generally lack the resources to fund the many changes necessary for a successful transition. Development of a qualified judiciary is only one of many challenges facing transition governments and is one that cannot be accomplished overnight. Cuba will be required to allocate its scant resources among numerous programs. The important thing is that Cuba recognizes the importance of an independent judiciary and, in allocating its resources, makes a commitment to creating a system of fair compensation for judges. If Cuba fails to do so, judges, whether appointed or elected, will step down from the bench in order to seek the financial benefits available in private practice. They will take with them the training and experience that the government has provided, resulting in the necessity of expending already scant resources to train new judges.

### ***Evaluation and Discipline***

Judges should be evaluated periodically to ensure that their performance is up to the standards required for members of the judiciary. Evaluation of judges will help to ensure that qualified, competent judges remain on the bench and that those who fail to meet the standards required for the fair administration of justice are disciplined or removed. Programs to evaluate judges, when open and transparent, generally raise the public's perception of judges and the judiciary<sup>222</sup> This is an important factor when considering how the evaluation of judges should be structured. To the extent that the process reflects that the system is merit based, it inspires greater confidence in the judiciary as an institution, an element that should not be overlooked. Respect for and trust in the judiciary is crucial in establishing a law-based state.

While performance evaluations are important in maintaining a competent judiciary, care should be taken in determining the extent to which the evaluations will be used in making promotion decisions or salary increases.<sup>223</sup> Overreliance on judicial evaluations for promotion or salary decisions may infringe on a judge's independence. This is particularly true if the evaluation criteria include items such as the time it takes a judge to dispose of a case or if the evaluation takes into account substantive results of decisions. Because of the potential negative effects of eval-

uation systems on judicial independence, evaluations should be conducted by other members of the judiciary, not by another body such as the Ministry of Justice.<sup>224</sup>

An appropriate disciplinary system must also be established to address charges of judicial misconduct against judges. Judges, lawyers, and members of the public should be permitted to bring charges against judges, and the complaints should be addressed and resolved by a disciplinary body that has no stake in the decisions. Ideally, the judiciary should be involved in the disciplinary process in some way, while at the same time ensuring that all complaints be fully investigated.<sup>225</sup>

Allegations of misconduct can be addressed by special councils (as in the United States and Canada), by the judiciary itself (as in Belgium), by a disciplinary court (as in Germany), or by the Ministry of Justice (as in Argentina).<sup>226</sup> Interestingly, England, where the judiciary is generally viewed as independent and competent and is viewed positively by the public, does not have clearly defined disciplinary procedures.<sup>227</sup> In the United Kingdom, judges may be removed only by the sovereign, and in instances of alleged misconduct, they usually are pressured into resigning in lieu of submitting to formal disciplinary proceedings.<sup>228</sup>

Disciplinary measures should be appropriate to the misconduct, and removal or suspension should be used only in cases of severe or repeated misconduct. Moreover, during the course of misconduct proceedings, judges should not be suspended nor have their salaries suspended before a final determination of misconduct. Any interference with judicial duties prior to a determination of misconduct is likely an impermissible interference with judicial independence.<sup>229</sup>

### *Recommendations for Cuba*

Currently, the Ministry of Justice evaluates judges in Cuba under standards that are unclear. Cuban law currently provides a system whereby judges may be disciplined or removed for numerous transgressions. Judges may be disciplined not only as a result of negligence in the performance of their duties, but also if they show disrespect to superiors in the court hierarchy or fail to treat colleagues or persons below them in the court hierarchy with courtesy.<sup>230</sup> Similarly, judges may be removed not only for involvement in a criminal matter or for incompetence, but also

when their actions are deemed “prejudicial to the administration of justice.”<sup>231</sup> In Cuba, this could mean speaking out against a law or refusing to act in accordance with the dictates of the government. Moreover, Cuban law appears to allow for the removal of a judge at any time by the National Assembly on its own initiative. Thus, no fair system of discipline exists in Cuba, where judges serve at the pleasure of the government.

Judicial review boards should be created for evaluation and discipline of judges. The criteria for evaluations should focus on how well a judge performs his or her functions and should include issues regarding the administration of cases, the time it takes for cases to move through the system, and whether the judge’s individual courtroom procedures facilitate the presentation of cases and the litigants’ access to justice. Little attention should be paid to the results of cases, in order to avoid the possibility of creating a system in which judges will respond to pressures from the judicial review board in actually deciding cases. To establish a fair system of discipline, a code of judicial conduct should detail the basic requirements for the judiciary and permit discipline or removal only for misconduct or incompetence. Proceedings against judges could be instituted by a review board, by other judges, or by parties or attorneys in a given case. The proceedings should ensure that all complaints will be addressed openly and that any judge accused of improper conduct will be given the right to challenge the proceedings.

While judicial review boards are sometimes accused of failure adequately to address judicial misconduct, the alternative of giving the right to discipline judges to the legislature or executive is undesirable. If the judiciary may be disciplined or removed by the legislature or the executive, judges may be moved to act for purely political reasons, thus adversely affecting their ability to act independently.

### ***Fiscal Autonomy***

The judiciary’s participation in the central administration of the courts is another important element of judicial independence. In order to perform this function, courts should be given fiscal autonomy and the ability to administer their own budgets. Without fiscal autonomy, courts are subject to numerous political forces that may compromise their inde-

pendence. Inadequate budgets prevent courts from functioning properly and providing the services they are meant to provide. Moreover, if courts are not properly funded, the judiciary is prevented from attracting competent judges and other personnel.<sup>232</sup>

Some countries, such as Uruguay and Honduras, allot a specific amount of the national budget to fund the courts, but the courts never receive the full amount allotted.<sup>233</sup> Providing courts with the ability to represent themselves before the appropriate legislative agencies in matters of funding is a more effective method to ensure judicial independence through fiscal autonomy. Otherwise, court budgets are dependent on the decisions of other government agencies, such as the Ministry of Justice. In that instance, the needs and priorities of the court system may conflict with those of the Ministry of Justice and then may be ignored or passed over in favor of ministry policies.<sup>234</sup> In such a case, the ministry also would administer the courts' budget and monitor expenses. This monitoring function can be exercised overzealously, preventing the courts from funding necessary purchases and providing services until a lengthy bureaucratic process has run its course.<sup>235</sup>

In order to administer their own budgets effectively, courts must be provided with technical, accounting, and auditing capabilities. These capabilities will allow them to forecast budgetary needs and properly and fairly allocate the budget among various courts and court functions in order best to provide judicial services.<sup>236</sup>

In a concept paper on judicial independence prepared by the Central and Eastern European Law Initiative of the ABA to address judicial reform issues in Central and Eastern Europe, the ABA recommended the creation of formulas relating caseloads to work units and providing statistical models that allow the judiciary to associate costs to services and create a rational budget.<sup>237</sup> After budgetary requirements have been established, a special committee or standing group of judicial officers with knowledge of financial matters should administer the budget.<sup>238</sup> Finally, an auditing function should be created to ensure that all funds allocated to the judiciary are appropriately spent.<sup>239</sup> These recommendations are equally applicable to Cuba.

Most countries do not have centralized administrative court procedures.<sup>240</sup> In the United States, a growing trend toward unitary budgeting appears to provide an effective way of addressing court budgets and their

administration. In unitary budgeting, a central authority, usually the judiciary, is responsible for forecasting, allocating, and auditing judicial expenditures. This method of budgeting arguably results in better judicial administration and more equitable distribution of judicial services and provides a mechanism through which the judiciary itself can be effectively administered.<sup>241</sup>

In Hungary, the Supreme Court's budget and administration have been removed from the jurisdiction of the Ministry of Justice.<sup>242</sup> With the courts removed from the jurisdiction of the ministry, the Supreme Court presumably is freed from the political constraints that might be placed on the courts by government.

### *Recommendations for Cuba*

To ensure the independence of the courts and the proper functioning of the courts, the judiciary should be given fiscal autonomy from the political branches of government. The potential consequences of an inadequate budget are many. First and foremost, if the courts are dependent on other branches of government for their funding, their independence may be compromised. Beyond that, if the judiciary does not have the funds to properly staff the courts with an adequate number of judges and/or support personnel, a backlog of cases is likely to occur. If litigants cannot have their cases heard and obtain results within a reasonable time, the concept of justice will be eroded. If training cannot be funded, cases may be improperly decided on either substantive or procedural grounds, straining the resources of the appellate courts and further undermining the legitimacy of the court system.

In order to ensure the judiciary's fiscal autonomy, Cuba should follow the recent trend towards unitary budgeting. This entails the creation of a judicial governing board, made up of members of the judiciary, that will address all budgeting issues, including forecasting, allocating, and auditing of all expenses associated with court administration except salaries. Salaries should be determined by the legislature. Preferably, the judiciary should present its budget directly to the legislature. If presented on behalf of the judiciary by a designated ministry, the budget should nonetheless be prepared by the judicial governing council and presented to the legislature without revision. The amount ultimately allocated to the

judiciary should be provided directly to and administered completely by the judiciary.

In order to perform budgetary and administrative functions, the courts should be provided with the necessary technical, accounting, and auditing assistance. While the governing board will make all decisions on budgeting, the use of administrators to perform the underlying budgetary analysis will prevent members of the governing board from becoming full-time administrators and will permit the judges to attend to their caseloads.

## **General Recommendations**

The institutional changes detailed in this paper are required to provide the framework needed to transform the Cuban judiciary into an independent body capable of protecting individual and property rights and resolving legal disputes fairly and impartially. Without these institutional changes, the judiciary will not have the tools needed to evolve into a stabilizing force in Cuban society and to assist in the process of democratic consolidation. Without social and political change, however, these institutional changes alone will not transform the judiciary nor make for a long-term impartial and independent judicial system. Numerous societal and political factors will play a role in the evolution of the judiciary and must be addressed.

First, the new Cuban government must desire and initiate the reforms. The reasons for the reforms, as well as the expected benefits, must be articulated clearly and be communicated to the citizenry. Citizens should understand that the reforms will assist in strengthening the country's budding democracy and that the changes will result in better protection of human and individual rights and will increase the possibility of successful development of the economy.

Cubans also should understand that the reforms cannot occur overnight and may require many years before the full effects are seen or appreciated. This is important because unrealistically high expectations may lead to disillusionment and provide an opportunity for opponents of democratic reform to gain popular and political support. Failure to communicate the need for and positive effects of change and to provide realistic expectations for institutional changes proposed by government



has contributed to numerous problems in some transition countries, such as Hungary and the Czech Republic. Recently, the prime minister of the Czech Republic, widely viewed as a reformer, was ousted in favor of a candidate of the left-wing Czech Social Democratic Party (CSSD). The outgoing prime minister's ineffectiveness in communicating the need for change to the citizenry, along with frustrated expectations, contributed to his defeat.<sup>243</sup>

Accordingly, for the desired institutional reforms to be successful, an educational component is required. Government actors should be educated about the government's reforms so that they not only understand the nature and benefits of the reforms, but also can communicate the need for the reforms, if required. The media should report the reforms so as to disseminate information about them as widely as possible. In addition, the reforms should be discussed at public meetings in order to allow citizens to hear firsthand from their governmental officials.

Besides disseminating information about reforms to voters, the government should educate school-age children through the high-school level on democratic values. These values include the importance of the rule of law and an independent and impartial judiciary, the role of government in a democracy, the value of citizen participation in government, the notion that individuals have rights that governments cannot abrogate, and the role of government institutions in the protection of democratic values and the rights of citizens.

University students, who will eventually shape policy for Cuba, should have enough information to make educated decisions regarding the future of their country. At the university level, the full panoply of courses should provide students in all disciplines with the opportunity to learn about social, political, and economic systems to which they were never exposed in their earlier education. Educators should offer special courses regarding the reforms underway during the transition period and possible future reforms. Moreover, universities should sponsor exchange programs in an effort to provide students with the opportunity to understand firsthand how other countries operate. Visiting professors should be encouraged for the same reason. The ultimate goal is to broaden the perspectives of students and instill a respect for democratic values and a desire to incorporate those values into their lives.

Another important social issue that must be addressed is corruption.

Corruption has always been a problem in the region, and Cuba is no exception. Corruption is widespread and is seen as a legitimate method of influencing actors in any given arena. Although some of the proposed institutional changes, including adequate compensation for judges, are designed to reduce the possibility of corruption, the institutional changes will fail and the courts will be unable to fulfill their new responsibilities unless the citizenry as a whole changes its attitudes towards corruption. Laws against corruption may be passed, but corruption will be eliminated only if citizens come to believe that they are better served by a system that operates within the parameters of the law because it will result in greater benefits to them. The benefits are both tangible and intangible and include not only improved economic opportunities and increased protection of individual rights, but also the prospect of true participation in the life of the nation.

Drug trafficking, intimidation, and the corruption associated with them also present a challenge to democratic consolidation in Cuba. Again, while laws against drug trafficking and coercion exist and can be expanded, strict enforcement also is required. Enforcement becomes a problem when a government is fearful or looks away in exchange for substantial payoffs and when money available from drug traffickers for bribes completely overwhelms the ability of low-paid government employees to reject bribes. The elimination of drug trafficking, intimidation, and coercion must be a priority of the new Cuban government unless it accepts the real possibility that Cuba will become like Colombia, where a country and a people are hostages to drug cartels and paramilitary groups. Cuban citizens must be educated on the dangers of involvement with drug cartels that use Cuba as a sphere of operations. Cuba's government should also be aware that cooperation agreements with governments like that of the United States could assist in eliminating the drug cartels and their corrupting influence.

## **Conclusion**

Judicial reform is an important component in any transition from communism to democracy. While ultimately achievable, the reform process will take time since its goal is the systemic reform of the judiciary itself and also the promulgation of many, if not all, of the laws and

standards under which the judiciary will operate. These reforms should include the creation of an institutional sphere of operation for the courts, in which the courts have exclusive jurisdiction; the reform of court structure, court procedures, court administration; and the selection, training, evaluation, and discipline of judges.

An indispensable element of the reform process is education. For successful implementation of the reforms, judges, court personnel, court administrators, and all other court actors will require extensive training. Members of government and citizens also will need instruction on the reasons for and desired effects of the reforms in order to ensure a broad base of support for the reforms and for the legitimacy of the courts. The media can play an important role in this area by providing coverage of proposed reforms.

The nascent reform process in Cuba must be initiated by Cuba and should involve not just the legislative and executive branches, but also the judiciary and interested nongovernmental organizations. Cuba should attempt to come up with a plan for reform that takes into account specific factors applicable to its situation. Although it is unlikely that all aspects of reform could be undertaken at once, a timetable could be set and reforms could begin in stages.

While Cuba should drive the reforms, it should employ all the resources available to facilitate the needed reforms. Numerous organizations assist countries that are attempting judicial reform. Assistance comes from foreign lawyers, court administrators, businesspeople, and training specialists, who provide relevant, up-to-date information on matters relating to reforms and often to funding as well. The U.S. Agency for International Development (USAID) has participated in numerous programs relating to the administration of justice and legal reform, particularly in Latin America and the Caribbean. The World Bank is involved in numerous judicial reform projects throughout the world, including projects throughout Latin America, Asia, Africa, and the Middle East. The Inter-American Development Bank also has played a role in legal reform throughout the Latin American region. The ABA's Central and Eastern European Law Initiative has provided and continues to provide assistance to transition countries in Central and Eastern Europe in the area of legal reform. The Center for the Study of Democracy recently has become involved in a Judicial Reform Initiative in Bulgaria that addresses all

aspects of judicial reform. Any one or more of these organizations could and should be tapped to assist Cuba in its reform efforts.

The ultimate goal of these reform efforts is to create an impartial, well-functioning judiciary that will protect both individual human rights and property rights and will allow the full and fair administration of the new market system. In supporting the political and legal changes that will occur during the transition to democracy, the judiciary will contribute to the political, social, and economic stability of a democratic post-Castro Cuba and will make an important contribution to the development of Cuba.

## END NOTES

<sup>1</sup> At its most basic level, the rule of law refers to the “submission of the state to law,” which is the recognition that government must adhere to laws and that the laws cannot be ignored or violated for the achievement of partisan political gains. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM J. COMP. LAW 605, 606 (1996).

<sup>2</sup> *Id.* at 606.

<sup>3</sup> *Id.*

<sup>4</sup> Maria Dakolias, *Court Performance around the World: A Comparative Perspective 1* (The World Bank, Technical Paper No. 430) (1999) [hereinafter Dakolias I]. It is a generally accepted premise that development cannot be achieved or sustained without respect for the rule of law, democratic consolidation, and effective protection of human rights as they are most broadly defined. *Id.* at 1, n.1. The author notes that “the European Union (EU) includes human rights, democracy, and rule of law clauses in its development cooperation agreements” and has the right to suspend such agreements for violations of human rights. *Id.* (citing Portuguese Republic v. Council of the European Union, Case C-268/94, 1996 E.C.J. I-6207; Juliane Kokott and Frank Hoffmeister, *Portuguese Republic v. Council*, 92 AM. J. INT’L L. 292, 295 (1998)). See also Jennifer L. Windsor, *Better Development through Democracy*, THE NEW YORK TIMES, June 19, 2002.

<sup>5</sup> Countries that attempt economic liberalization under a weak judicial system suffer “at least a fifteen percent penalty in their growth momentum.” Dakolias I, *supra* note 4, 1, n.2, (citing Robert M. Sherwood et al., *Judicial Systems and Economic Performance*, 34 Q. REV. ECON. & FIN. 101, 113 (1994)). Moreover, because a country’s legal system reflects government policy, the legal system can affect the incentives of foreign investors. Firms investing in transition economies require some legal certainty before making a direct investment. Cheryl Gray & William Jarosz, *Law and Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 1, at 11, 18. An important element of legal certainty is the effectiveness and competence of the judiciary. This presents a unique challenge to developing countries in that while they are most in need of foreign investment, they also may encounter more problems in establishing a well-functioning judiciary. Michael Knox, *Continuing Evolution of the Costa Rican Judiciary*, 32 CAL. W. INT’L L.J. 133 (2001).

<sup>6</sup> Dakolias I, *supra* note 4, at v.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> American Bar Association, Central and Eastern European Law Initiative (CEELI), *Concept Paper on Judicial Independence*, 3, <http://www.abanet.org/ceeli/conceptpapers/judicialindependence.html> (“Judicial independence is essential for the protec-

tion of individual rights, of constitutional rights, of human rights, whatever phrase might be attached to those groups of rights that each individual in society has or should have.”) See also Linda Camp Keith, *Judicial Independence and Human Rights around the World*, JUDICATURE 85, (Jan.-Feb. 2002), at 195 (International organizations, human rights activists, legal scholars, and political scientists alike all accept the premise that an independent judiciary is the “indispensable link in the machinery for securing individual protection against states’ human rights abuses”).

<sup>9</sup> High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985 [hereinafter *Basic Principles*], <http://www1.umn.edu/humanrts/instree/i5bpj.htm>.

<sup>10</sup> *Id.*, citing Universal Declaration of Human Rights.

<sup>11</sup> Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform*, 4 (The World Bank, Technical Paper No. 319) (1996) [hereinafter Dakolias II].

<sup>12</sup> *Id.*

<sup>13</sup> Larkins, *supra* note 1, at 608.

<sup>14</sup> “Political insularity” is defined as the notion that judges should not be used as tools to further political aims, nor be punished for preventing their realization. Larkins, *supra* note 1, at 609 (citing Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 58, 59-60 (1993)).

<sup>15</sup> Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 UNIV. OF MIAMI INTER-AMERICAN LAW REV. 7 (1987). See also Larkins, *supra* note 1, at 609–610 (citing THEODORE BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF COURTS* (1970), at 144) (“Judicial independence is (a) the degree to which judges ... decide [cases] consistent with...their interpretation of the law, (b) in opposition to what others, who are perceived to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision averse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court”).

<sup>16</sup> Dakolias II, *supra* note 11, at 10. See also *Basic Principles*, *supra* note 9, at 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”).

<sup>17</sup> See *Basic Principles*, *supra* note 9. But see Dakolias II, *supra* note 11, at 8 n. 31, where the author, referring to the judicial systems in Canada, Great Britain, France, and Germany, states that it is possible to develop substantive or decisional independence as a way of ensuring uniformity in the interpretation of the law, without

having structural independence (fiscal autonomy).

<sup>18</sup> Judges should be free from “any inappropriate or unwarranted interference with the judicial process,” and court decisions should not “be subject to revision” unless the revision results from judicial review or is a commutation or mitigation by a competent authority in accordance with law. *Basic Principles*, *supra* note 9, at 2. In her study on judicial reform in Latin America, Dakolias notes that in many countries, the laws relating to the structure of the judiciary, as well as laws establishing subject matter jurisdiction for the courts, are not clearly defined. This permits other courts, particularly the Supreme Court or some other court in a superior position in the hierarchy, to interfere in the decisions of the lower courts. For example, in much of Latin America, federal review of state cases is common even where no federal issues are involved. A classic example of this is the Mexican *amparo de la legalidad* or the *amparo-casación*. That procedure results in federal court of review of “state court decisions in which the only federal question is whether the state court correctly interpreted or applied state law.” This practice severely undercuts a judge’s internal independence and affects the ability of a judge to achieve decisional independence. Dakolias II, *supra* note 11, at 9-10 (citing Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 THE UNIV. OF MIAMI INTER-AM L. REV. 1, 26-27 (1994)).

<sup>19</sup> See *Basic Principles*, *supra* note 9; Dakolias II, *supra* note 11, at 7-10.

<sup>20</sup> Larkins, *supra* note 1, at 611.

<sup>21</sup> Dakolias, II, *supra* note 11, at 11.

<sup>22</sup> Arguably, a seventh factor, which is especially important in the area of human rights protection, can be added. That is the ban on exceptional and military courts. Keith, *supra* note 8, at 196. This element is related to the notion that courts have exclusive authority to decide matters of a judicial nature and that special courts should not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. *Basic Principles*, *supra* note 9.

<sup>23</sup> “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.” *Basic Principles*, *supra* note 9, at 3.

<sup>24</sup> “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.” *Basic Principles*, *supra* note 9, at 2.

<sup>25</sup> “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.” *Basic Principles*, *supra* note 9, at 2.

<sup>26</sup> “It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.” *Basic Principles*, *supra* note 9, at 2.

<sup>27</sup> “The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country.” *Basic Principles*, *supra* note 9, at 2.

<sup>28</sup> “Persons selected for judicial office shall be persons of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against appointment of judges for improper motives.” *Basic Principles*, *supra* note 9, at 3. “Promotion of judges...should be based on objective factors, in particular ability, integrity, and experience.” *Id.*

<sup>29</sup> Michael B. Wise, *Cuba and Judicial Review*, 7 *SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS*, 247, 258 (2000) [hereinafter Wise]. Prior to the enactment of the communist constitution, Cuba was governed by what was in effect a constitution called the Fundamental Law of 1959. The Fundamental Law began the consolidation of power in the hands of Castro and placed all legislative and executive powers in the Council of Ministers, which served at the direction of a figurehead president. The president was subservient to the prime minister – the position held under the Fundamental Law by Castro. *Id.* at 256. The practical effect of the Fundamental Law was that Castro began ruling by decree, a circumstance that remains essentially unchanged today despite the government’s protestations to the contrary.

<sup>30</sup> Article 66 of the Cuban Constitution of 1976 specifically provided that the state organs in Cuba are based on principles of “socialist democracy, unity of power, and democratic centralism.” The 1992 amendments to the Cuban Constitution deleted the specific reference to unity of power, stating instead that state organs are based on the “principles of socialist democracy.” Nonetheless, the basic structure of government remained unaltered. Wise, *supra* note 29, at 261-62.

<sup>31</sup> *Id.* at 259.

<sup>32</sup> *Id.* The socialist system of government is also referred to as “democratic centralism.” While in theory decision-making power was reserved for elected representatives who responded to initiatives of the masses, in actual practice, the representatives act in accordance with the recommendations of the Communist Party, the leading and guiding force of socialist society. Rett R. Ludwikowski, “*Mixed*” *Constitutions – Product of an East Central European Constitutional Melting Pot*, 16 *B.U. INT’L L.J.* 1, 8 (1998) [hereinafter Ludwikowski].

<sup>33</sup> Wise, *supra* note 29, at 261.

<sup>34</sup> CONSTITUCIÓN DE CUBA DE 1992, art 75.

<sup>35</sup> *Id.*, art. 5.

<sup>36</sup> *Id.*, art. 62.



<sup>37</sup> *Id.*, art. 75.

<sup>38</sup> *Id.*, art. 72. The last election was held on January 11, 1998. The Cuban Communist Party (Partido Comunista Cubano – PCC) garnered 94.39 percent of the vote and all 601 seats. The next election will take place in 2003. CIA WORLD FACTBOOK 2001.

<sup>39</sup> CONSTITUCIÓN DE CUBA DE 1992, arts. 106, 111, 69.

<sup>40</sup> *Id.*, art. 74. The last election was held on Feb. 24, 1998. President Fidel Castro and First Vice President Raul Castro were selected by 100 percent of the legislative vote. The next election has not yet been scheduled. United States Department of State, *Background Notes, Cuba* (9/01).

<sup>41</sup> CONSTITUCIÓN DE CUBA DE 1992, art. 74.

<sup>42</sup> *Id.*, art. 89.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, art 95.

<sup>45</sup> *Id.*, art. 90(g).

<sup>46</sup> *Id.*, art. 98.

<sup>47</sup> *Id.*, art. 96.

<sup>48</sup> *Id.*, art. 74.

<sup>49</sup> *Id.*, art. 97.

<sup>50</sup> DEBRA EVENSON, *REVOLUTION IN THE BALANCE, LAW AND SOCIETY IN CONTEMPORARY CUBA* 8 (Westview Press 1994) [hereinafter EVENSON].

<sup>51</sup> MATIAS F. TRAVIESO-DIAZ, *THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA: A PROSPECTUS FOR BUSINESS* 3 (Quorum Books 1997).

<sup>52</sup> EVENSON, *supra* note 50, at 2, 14, 71. *See also* William Baerg, *Judicial Institutionalization of the Revolution: The Legal System of the People's Republic of China and the Republic of Cuba*, 15 *LOYOLA L.A. INT'L & COMP. L.J.* 233 (1992).

<sup>53</sup> EVENSON, *supra* note 50, at 14, 65-68. This is exemplified by the appointment of Enrique Hart Ramirez as president of the Supreme Court in 1961. Hart, who served as president of the court for 20 years, opened the 1961 session with a statement embracing the task of helping in the construction of the socialist state and declaring his loyalty to the revolutionary government. *Id.* at 68-69.

<sup>54</sup> EVENSON, *supra* note 50, at 14; CONSTITUCIÓN DE CUBA DE 1992, art. 10.

<sup>55</sup> See Berta Esperanza Hernandez Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15, 72 (1994), in which the author notes that in 1985, after Castro questioned several provisions of a housing law in a speech, the law was "tolled" and subsequently amended. Similarly, emigration laws are ignored or suspended whenever the government deems it expedient to do so.

<sup>56</sup> CONSTITUCIÓN DE CUBA DE 1992, arts. 121, 122. The lack of independence of the judiciary has been seen many times throughout Castro's rule. For example, in February and March of 1959, approximately 43 military pilots, artillery personnel, and mechanics were arrested and accused of genocide. All of the accused were tried by a revolutionary tribunal and acquitted. Castro rejected the verdict and ordered that they be retried with another military officer presiding. Upon the same evidence, all of the accused were tried and convicted in absentia. More recently, the show trials and subsequent executions in 1989 of two former top aides of Castro, General Arnaldo Ochoa Sanchez and Antonio De La Guardia, which were staged to cover up the Cuban government's involvement in drug trafficking, demonstrate that the judiciary is a tool of the state. See Truyol, *supra* note 55, at 75 n.308.

<sup>57</sup> CONSTITUCIÓN DE CUBA DE 1992, arts. 125, 126.

<sup>58</sup> Wise, *supra* note 29, at 257. Under the 1940 constitution, judges could not be removed from office, but immediately after Castro took power, on January 13, 1959, he suspended that provision of the constitution and granted himself the authority to suspend judges for periods of 30 to 45 days at a time. This authority was renewed "whenever necessary," and new judges sympathetic to the revolution were named by the Council of Ministers. EVENSON, *supra* note 50, at 67-68. "Between November 1960 and February 1961, twenty-one of thirty-two justices of the Supreme Court resigned, often under duress, or were dismissed." Wise, *supra* note at 257.

<sup>59</sup> Truyol, *supra* note 55, at 74.

<sup>60</sup> Although these requirements have been eliminated, the role of judges is still very much viewed as one that by definition supports and furthers the causes of the revolution. In a 1991 address to the National Assembly, Castro stated: "It is necessary to make lawyers, prosecutors, and judges aware of the Special Period and the necessity to be harsher, because this is a fundamental issue. They have to understand that we need revolutionaries in these positions, revolutionaries who are told 'this is your combat post.'" *Asamblea Nacional: Continuación sobre el Debate sobre el Informe de la Actividad Delictiva*, GRANMA, Vol. 27, No. 276, at 2-3, Dec. 28, 1991.

<sup>61</sup> HUMAN RIGHTS WATCH, 2001 REPORT ON CUBA.

<sup>62</sup> *Id.*

<sup>63</sup> These prior enactments include Law 1250 on the Organization of the Judiciary, promulgated in 1973, and Law 4 on the Organization of the Judicial System, promulgated in 1977.

<sup>64</sup> Evenson, *supra* note 50, at 60-68.

<sup>65</sup> All three courts, the supreme, provincial, and municipal, have labor chambers. However, employment matters are addressed in the first instance by special administrative courts known as the Organos de Justicia Laboral de Base (labor/employment courts of first instance). Law 176 (August 16, 1997). Appeals from these decisions may be taken to the municipal courts, which are the usual courts of first instance in other matters. Instruction 157. A further right of appeal to the Supreme Court exists in cases that uphold employee termination or adjudicate definitively any other employment right, or when new evidence is adduced. Moreover, the losing party may also request discretionary review of any employment case. Instruction 157, Parts 8-10, 13.

<sup>66</sup> Law 82 (Ley de los Tribunales Populares), art. 23.1. The economic chambers of the Supreme Court and the provincial courts were created to replace state arbitration boards that served, prior to 1991 when they were eliminated, to resolve contract and economic disputes between state enterprises. EVENSON, *supra* note 50, at 73 (citing Decreto-Ley No. 129, GACETA OFICIAL, August 19, 1991).

<sup>67</sup> Law 82, art. 23.3, 23.4.

<sup>68</sup> These cases are identified as 1) criminal cases carrying a sentence of more than eight years, 2) cases in which either the amount in controversy exceeds 10,000 Cuban pesos or is unliquidated, or in which the issue of forcible expropriation of property is addressed, 3) cases dealing with the termination of parental rights, 4) cases in which the amount in controversy exceeds 100,000 Cuban pesos or US\$50,000 or the equivalent in foreign currency under the exchange rate established by the Banco Central de Cuba, and 5) cases in which the president of the provincial court or the president of the particular chamber deems it necessary. Instruction 157, art. 39.

<sup>69</sup> *Id.*, art. 18.

<sup>70</sup> Law 82, art. 24.1

<sup>71</sup> *Id.*, art 24.2.

<sup>72</sup> *Id.*, art 24.3.

<sup>73</sup> *Id.*, art. 18.1.

<sup>74</sup> *Id.*, art.18.2. Other government officials may be invited to meetings of the council and participate in the meetings without voting. Law 82, art. 18.3.

<sup>75</sup> *Id.*, art. 19.1(e), (o), (p).

<sup>76</sup> *Id.*, art. 19.1(a).

<sup>77</sup> *Id.*, art. 19.1(h).

<sup>78</sup> *Id.*, art. 19.1(n), (ñ).

<sup>79</sup> *Id.*, art. 19.1(i).

<sup>80</sup> *Id.*, art. 19.1(l).

<sup>81</sup> *Id.*, art. 19.1(d).

<sup>82</sup> *Id.*, art. 19.1(b)

<sup>83</sup> *Id.*, art. 20(d).

<sup>84</sup> *Id.*, art. 20(k), (n).

<sup>85</sup> *Id.*, art. 20(j).

<sup>86</sup> *Id.*, art. 20(i).

<sup>87</sup> *Id.*, art. 20(ñ).

<sup>88</sup> *Id.*, art. 20(m).

<sup>89</sup> *Id.*, art. 25.

<sup>90</sup> *Id.*, art. 32.

<sup>91</sup> *Id.*, art. 35; Instruction 157, art. 39.

<sup>92</sup> Instruction 157, art. 39.

<sup>93</sup> Law 82, art. 28.1.

<sup>94</sup> Law 176, Instruction 157.

<sup>95</sup> Law 82, art. 37.

<sup>96</sup> *Id.*, art. 38.

<sup>97</sup> EVENSON, *supra* note 50, at 75.

<sup>98</sup> Law 82, art. 42.

<sup>99</sup> EVENSON, *supra* note 50, at 75.

<sup>100</sup> See Larkins, *supra* note 1, at 613, where the author notes that a time may come when the judiciary experiences little political interference, not because it is allowed to operate independently from other branches of government, but because 1) the regime knows that judges will habitually incline toward its concerns, or 2) the

courts' scope of authority is so limited that judges simply are not permitted to address issues or reach decisions that contradict the political will of the regime. For example, during the rule of dictator General Augusto Pinochet in Chile, little interference with court cases took place, more because the courts supported the regime than because courts were acting independently. Similarly, in Spain under dictator General Francisco Franco, judges routinely disagreed personally with the government's official positions on issues, but their scope of authority was so limited that they were unable to affect constitutional or legal values to any significant degree. *Id.* at 612.

<sup>101</sup> Law 82, art. 44.

<sup>102</sup> For example, Law 88, titled "Law for the Protection of National Independence and the Economy," provides severe sentences for "collaboration" with enemies of the revolution and for any "counterrevolutionary" activity.

<sup>103</sup> Law 82, art. 42.2.

<sup>104</sup> *Id.*, art. 42.4.

<sup>105</sup> EVENSON, *supra* note 50, at 74-75.

<sup>106</sup> Instruction 157, arts. 94, 95.

<sup>107</sup> Law 82, art. 43.

<sup>108</sup> EVENSON, *supra* note 50, p. 75.

<sup>109</sup> Law 70, art. 44-42.

<sup>110</sup> *Id.*, art. 47.

<sup>111</sup> Law 82, art. 52.1, 52.2.

<sup>112</sup> *Id.*, art. 67.1.

<sup>113</sup> EVENSON, *supra* note 50, at 74.

<sup>114</sup> *Id.* at 75.

<sup>115</sup> Prosecutors, too, are required to operate within this framework. In a recent interview published in *Granma*, the *fiscal general* (the equivalent of the state attorney general) of Camagüey province stated that all prosecutors are performing a state function that requires "an extreme revolutionary sensibility." GRANMA, June 9, 2002, available at <http://www.granma.cubaweb.cu/2002/06/09/nacional/articulo11.htm>.

<sup>116</sup> In most socialist countries, socialist law was little more than a superstructure of socialist concepts imposed on a civil law foundation. After the collapse of the Soviet

Union, the communist superstructure began to be dismantled. Jeffrey Waggoner, *Comment: Discretion and Valor at the Russian Constitutional Court: Adjudicating the Russian Constitutions in the Civil Law Tradition*, 8 IND. INT'L & COMP. L.R. 189, 197-98 (1997) [hereinafter Waggoner]. In Cuba's case, it remains to be seen how deeply the socialist superstructure penetrated government institutions. The deliberate effort to dismantle the judiciary before building the socialist superstructure may create greater difficulty in resuscitating the civil law tradition in Cuba.

<sup>117</sup> This section does not purport to describe in detail the complete structure, organization, and operation of the judiciary in transition countries, nor does it address the many specific cultural factors that affect the role of the judiciary in any given country. Such a complete discussion is beyond the scope of this paper. Instead, this section focuses on elements that generally foster the independence of the judiciary. The exact manner in which those elements evolve and are exercised always depends on country-specific factors. Similarly, in Cuba, the exercise and ultimate evolution of those rights or powers will be affected by country-specific factors.

<sup>118</sup> Empirical data shows that the simultaneous implementation of provisions that require guaranteed terms, separation of powers, and a ban on exceptional and military courts and allow fiscal autonomy substantially helps to improve human rights protections. See Keith, *supra* note 8.

<sup>119</sup> EVENSON, *supra* note 50, at 79. Evenson quotes former University of Havana Law School Dean Julio Fernandez Bulté as stating that anything inconsistent with the theories of Karl Marx and Friedrich Engels must be rejected as a formality of bourgeois representative democracy. Although Bulté purportedly concedes "that the 'Rule of Law' requires mechanisms to assure absolute guarantees against arbitrariness and the 'abuse of power'," he rejects the notion that this may be achieved by separation of powers or by strengthening the judiciary by providing it with broader powers such as judicial review. *Id.* at 79-80.

<sup>120</sup> Ludwikowski, *supra* note 32, at 8.

<sup>121</sup> *Id.* at 8-9.

<sup>122</sup> *Id.*

<sup>123</sup> Examples are the French and English models. The French model, however, actually separates political organs and functions although powers are not equally divided. In England, while powers are diffused, the powers of the various branches of government have never been equal or well separated. Ludwikowski, *supra* note 32, at 7.

<sup>124</sup> *Id.*, *supra* note 32, at 8-9.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 7.

<sup>127</sup> *Id.* at 8-9.

<sup>128</sup> *Id.* at 12. See also Cheryl W. Gray et al., *Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe* 24, (The World Bank Discussion Paper No. 209, 1993) [hereinafter Gray et al.].

<sup>129</sup> Ludwikowski, *supra* note 32, at 37.

<sup>130</sup> Gray et al., *supra* note 128, at 66.

<sup>131</sup> Ludwikowski, *supra* note 32, at 12.

<sup>132</sup> Gray et al., *supra* note 128, at 48.

<sup>133</sup> Ludwikowski, *supra* note 32, at 12.

<sup>134</sup> The 1987 constitution specifically defines itself as the legal framework to protect and preserve the Sandinista Revolution. Christopher P. Barton, *The Paradox of a Revolutionary Constitution: A Reading of the Nicaraguan Constitution*, 12 HASTINGS INT'L AND COMPARATIVE LAW REV. 49, 59 (1988). Under the 1987 constitution, although there appeared to be a separation of the functions of government, no real separation of powers or branches existed. All "branches" were required to "coordinate harmoniously" to achieve the goals of the revolution. *Id.* at 65, 88.

<sup>135</sup> *Id.* at 89, where the author notes that such a request likely would not be forthcoming if the majority of the representatives favored an initiative.

<sup>136</sup> CONSTITUCIÓN DE NICARAGUA DE 1987 CON REFORMAS DE 1995, art. 167, art 150.16.

<sup>137</sup> CONSTITUCIÓN DE ESPAÑA DE 1978, as amended, art. 117(1).

<sup>138</sup> CONSTITUCIÓN DE ESPAÑA DE 1978, art. 118.

<sup>139</sup> Wise, *supra* note 29, at 264 (citing Inter-American Commission on Human Rights, *Human Rights Developments in the Region*, 1996 INTER-AM Y.B. ON H.R. 2, 1374).

<sup>140</sup> Dakolias II, *supra* note 11, at 10. Martin L. Friedland, *Judicial Independence and Accountability in Canada*, 59 ADVOC. 859 (2001).

<sup>141</sup> See Michael Rosenfeld, *Constitution Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 16 CARDOZO L.R. 1891, 1904-1907 (1998).

<sup>142</sup> Various types of judicial review exist. The centralized, or Austrian, model of judi-

cial review vests the power to review legislation in a specially created court and allows review to be initiated through an independent action raising an abstract issue of constitutionality. The decentralized, or U.S., model is rooted in the idea of constitutional supremacy and permits any court to nullify any law that conflicts with the Constitution if the issue is raised in an actual case or controversy between discrete parties. A third version of judicial review is known as the preventive, or French, model of review. In the French model, a special constitutional court reviews laws or legislation prior to enactment. Finally, the German mixed-review model permits review of both abstract and real controversies regarding constitutionality by a federal constitutional court. Ludwikowski, *supra* note 32, at 48-50.

<sup>143</sup> *Id.* at 51-59.

<sup>144</sup> Hristo Dimitrov, *The Bulgarian Constitutional Court and Its Interpretive Jurisdiction*, 37 COLUMBIA J. TRANSNAT'L L. 459 (1999) [hereinafter Dimitrov].

<sup>145</sup> See Ludwikowski, *supra* note 32. Examples of more limited powers of review are found in Romania, Lithuania, and Slovenia. Romania adopted a new constitution in 1991, establishing a separate constitutional court empowered to review the constitutionality of laws both before and after they are passed. However, a ruling by the court that a law is unconstitutional can be overruled if the law is adopted in the same form by a two-thirds vote of parliament. In Lithuania, the constitutional court may decide actions on the compatibility of international agreements with the constitution and actions regarding violations of election laws; in impeachment proceedings, the parliament has the final decision. In Slovenia, a ruling of unconstitutionality renders the subject law voidable, not void, and gives the parliament an opportunity to revise the law before it becomes a nullity. *Id.* at 54. See also Gray et al., *supra* note 128, at 116.

<sup>146</sup> In a civil law country, the establishment of a constitutional court charged with interpreting the constitution and passing on questions of the legality of government acts generally creates a much more effective check on government than would vesting that power in ordinary judges. “[T]he ordinary judge in civil law countries is viewed as ‘a civil servant... a kind of expert clerk [whose]... function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union’.” Waggoner, *supra* note 116, at 239 (citing JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 50 (1<sup>st</sup> ed. 1969)). Thus, ordinary judges, because of their perceived role within the civil law system, often are seen as little more than tools to enforce the legislative will. *Id.*

<sup>147</sup> Cases can be brought upon request of one-fifth of the members of parliament, the president, the council of ministers, the supreme cassation court, the supreme administrative court, or the attorney general. Gray et al., *supra* note 128, at 26.

<sup>148</sup> *Id.* See also Dimitrov, *supra* note 144, at 466-67.

<sup>149</sup> Dimitrov, *supra* note 144, at 466-67.



<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 471. After this ruling, the Socialist Party labeled the court “the new enemy” and sought ways to discredit it. The Socialist Party routinely criticized the court for acting like a parliament and tried to gain support to amend the constitution to restrict the court’s powers. The Socialist government’s efforts resulted in a statement by all 12 justices of the court “rejecting political attempts to influence the court’s decisions and to encroach on its independence and powers and emphasizing that such attempts are directed against the Constitution and the rule of law in a democratic state.” *Id.* at 472.

<sup>152</sup> *Id.* at 473. During this period, the court repealed laws attempting to prevent journalists from expressing opinions on political matters, ended the right of government to approve the national media’s structure and regulations, and provided a binding interpretation of the free speech provisions of the constitution that led to the invalidation of a keystone of the BSP’s media policy, the National Radio and Television Act of 1996, which had imposed significant restrictions on the media. *Id.*

<sup>153</sup> *Id.* at 473-74. The Bulgarian Constitution established a Supreme Judicial Council (SJC), which was envisioned as a guarantor of judicial independence. The SJC appoints, promotes, and dismisses judges based on specific criteria. The BSP attempted to subordinate the SJC to the government by imposing experience-related qualifications that would have disqualified anyone who had not served under the prior communist regime from serving on the SJC. In addition, other provisions of the law would have imposed the same requirements on ordinary judges and prosecutors and required the resignation of anyone who did not meet the qualifications. *Id.*

<sup>154</sup> *Id.* at 474-75. First, in 1995, the BSP government failed to appropriate funds for the operation of the SJC and the courts. After that effort was struck down by the constitutional court, the BSP government in the following year tied appropriations for the courts to the receipt of certain tax proceeds, rather than directly providing the needed funds through the budget. This also was invalidated by the constitutional court. *Id.*

<sup>155</sup> The Russian Constitutional Court is the only one with the authority to exercise this function. Ludwikowski, *supra* note 32, at 58.

<sup>156</sup> *Id.* at 56. The constitution does not explain who can file these complaints and does not list the right to hear these complaints among the court’s powers. *Id.* However, the courts apparently are exercising this power.

<sup>157</sup> Peter B. Maggs, *The Russian Courts and the Russian Constitution*, 8 *IND. INT’L & COMP. L. REV.* 99, 105, 106 (1997)

<sup>158</sup> *Id.* See also Waggoner, *supra* note 116, for a more complete discussion of the history and the current role of Russian courts in applying and interpreting the constitution; and Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in*

*Austria, Germany, and Russia*, 12 TUL. EUR. & CIV. L.F. 25, with regard to the specific question of the manner in which constitutional questions reach the court.

<sup>159</sup> Ludwikowski, *supra* note 32, at 52.

<sup>160</sup> *Id.* at 55.

<sup>161</sup> *Id.* at 57.

<sup>162</sup> *Id.* at 54.

<sup>163</sup> Gray et al., *supra* note 128, at 66. The constitutional court is composed of 15 judges elected by Parliament. Each sits for a nine-year term that can be renewed once. These judges are prohibited from party membership and from engaging in political activity. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Ludwikowski, *supra* note 32, at 54. A constitutional court was established in 1985 to advise parliament on the constitutionality of laws and to review government regulations to ensure they comply with parliamentary acts. Only high-ranking officials were permitted to bring cases before the constitutional court. The constitutional court's ruling that a law was void or unconstitutional was not final or binding. The parliament had the final say in determining whether the constitutional court's decision regarding the constitutionality of a law would be permitted to stand. To that end, parliament could overrule the court's determination of unconstitutionality by a two-thirds vote of the legislature. The constitutional court's decisions on whether government regulations conformed to parliamentary acts were, by contrast, final and binding. *Id.*

<sup>169</sup> Gray et al., *supra* note 128, at 95. The process was stalled by debates over balance-of-power issues and by the fact that until 1992 the Sejm (Polish parliament) officially set aside two-thirds of its seats for the Communist Party, calling into question the ability of the this body to pass on fundamental constitutional decisions. In October 1992, the first fully democratic election was held, and the Sejm subsequently adopted guidelines for drafting a new constitution. *Id.* at 95. In 1992, Poland passed its interim constitution, known as the "Small Constitution," which was in effect until the final constitution was approved. Ludwikowski, *supra* note 32, at 37.

<sup>170</sup> Ludwikowski, *supra* note 32, at 51-55.

<sup>171</sup> *Id.* at 55.

<sup>172</sup> *Id.* at 54.

<sup>173</sup> *Id.*

<sup>174</sup> Gray et al., *supra* note 128, at 135-36.

<sup>175</sup> Alvaro Taboada Teran, *Nicaragua: Procesos Politicos y Transición Democrática (Posibles Lecciones Para el Futuro De Cuba)*, Cuba Transition Project, Institute for Cuban and Cuban-American Studies (2001).

<sup>176</sup> SPANISH CONST., art. 161 (1978).

<sup>177</sup> *Id.*

<sup>178</sup> Tribunal Constitucional de España, *Composición y Estructura Organizativa*, 1, at <http://www.tribunalconstitucional.es/magistrados.htm>.

<sup>179</sup> CONSTITUCIÓN DE CUBA DE 1940, art. 174. *Id.*

<sup>180</sup> *Id.*, art. 182.

<sup>181</sup> *Id.*, art. 183.

<sup>182</sup> American Bar Association, Central and Eastern European Law Initiative (CEELI), *Concept Paper on Specialized Courts*, Part IB at 1, (June 26, 1996), available at <http://www.aba.net.org/ceeli/conceptpapers/speccourts/spc.html>. Finland has a number of specialized courts, including the military court, the Bishop's Council (ecclesiastical matters), the Court of the Realm, the Land Division Court, the Insurance Court, the Marketing Court, and the General Court of Revision in matters of government. Belgium, Austria, and Germany all have special labor and administrative courts. Belgium and Austria also have a separate commercial court. France divides its courts into administrative and judicial courts. The administrative courts usually handle disputes between citizens and government, including administrative agencies, as well as disputes between administrative agencies. The judicial courts generally hear cases involving indirect taxes, land condemnation, and municipal liability in matters involving public disturbances. *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* This does not apply to specialized federal courts such as the bankruptcy court, the tax court, the court of military appeals, the court of veteran's appeals, and the court of claims; in these, as a rule, both judges and attorneys are specialized in the area. Similarly, in state court divisions such as the family court or the juvenile court, both lawyers and judges develop expertise in the subspecialty.

<sup>185</sup> For example, in the Czech Republic, the courts were divided into three levels: the Supreme Court, 12 regional courts, and 120 local courts. The local courts usually are the courts of first instance, with district courts hearing appeals from local courts and

the Supreme Court hearing appeals from district courts. Gray et al., *supra* note 128, at 58.

The Hungarian court system is divided into four categories: the Supreme Court, county courts, local courts, and special courts. The local courts are courts of general jurisdiction, hearing criminal, civil, and commercial cases in the first instance. *Id.* at 85.

The Slovene court system is divided into three levels, with eight basic courts, four appellate courts, and one Supreme Court. In contrast to Romania, Slovenia has not abolished the use of lay judges. Both lay and professional judges staff cases in basic courts. Matters in higher courts are handled exclusively by professional judges. *Id.* at 148.

The highest court in Poland is the Supreme Court. Beneath the Supreme Court in the court hierarchy are the courts of appeal, and below them, the courts of general jurisdiction and the courts of special jurisdiction. The courts of general jurisdiction handle all civil, commercial, social, and criminal cases in the first instance. Appeal may be taken of both factual and legal issues from the courts of either general or special jurisdiction to an appropriate appellate court. *Id.* at 108.

<sup>186</sup> In the Czech Republic, the Supreme Court and district courts each have four departments: criminal, civil, administrative, and commercial. The civil department handles property and restitution cases, while the commercial department handles company and contract cases under the new commercial code. The administration department handles citizen complaints against civil servants once internal avenues of redress have been exhausted. *Id.* at 58.

In Hungary, the local courts are not formally divided into chambers, but in practice, cases tend to be assigned to judges with experience in dealing with the particular area. In addition, special courts such as the labor court, the court of registration, the court of arbitration (part of the Chamber of Commerce), and the military court act in those specialized areas. *Id.* at 85. The county courts hear appeals from the local courts and are divided into three branches: civil, criminal, and commercial. In addition, they act as the court of first instance in cases where the amount in controversy exceeds HUF3 million and in cases related to intellectual property, libel, slander, or damages caused by state officials. Appeal from those cases is made to the Supreme Court. *Id.*

The Supreme Court in Poland is divided into the civil, administrative, social (labor and social insurance), criminal, and military chambers. Each chamber is further divided into specialized sections. The civil chamber deals with all private matters, commercial or otherwise, including property law, company law, bankruptcy, and family law. The Supreme Court reviews only cases brought before it by the president of the Supreme Court, the minister of justice, the general prosecutor, and other high government officials, and it decides questions of law in final decisions of the appellate courts and the High Administrative Court. The parties to litigation cannot bring cases to the Supreme Court, but may petition one of the officials authorized to bring such appeals to appeal on behalf of the petitioning party. *Id.* at 108.

<sup>187</sup> Ley Orgánica del Poder Judicial de la República de Nicaragua, Ley No. 260 del 7 de Julio 1998, art. 40, GACETA No. 137, July 23, 1998.

<sup>188</sup> *Id.* at 44-54.

<sup>189</sup> American Bar Association, Central and Eastern European Law Initiative, *Concept Paper on Specialized Courts*, *supra* note 182, at Part IC, 1.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2. The report also enumerates a number of other advantages to specialized courts, such as increased system flexibility and elimination of conflicts and forum shopping. *Id.* at 3.

<sup>192</sup> Gray et al., *supra* note 128, at 49. The claims period expired in 1999, and, presumably, the cases filed have moved or ultimately will move through the courts. See Michael Mainville, *Couple Awaits Ruling on Lost Home*, THE PRAGUE POST, June 19-25, 2002, at A10.

<sup>193</sup> American Bar Association Central and Eastern European Law Initiative, *Concept Paper on Specialized Courts*, *supra* note 182, at Part ID, 2.

<sup>194</sup> Dakolias II, *supra* note 11, at 11.

<sup>195</sup> The judicial council, used in many European civil law court systems, is an administrative body established to balance the power of the ministry of justice. The organization of judicial councils varies from country to country, but generally they nominate and select judges and oversee judicial functions, including promotions and transfers of judges, and disciplinary processes. Dakolias II, *supra* note 11, at 12.

<sup>196</sup> Some commentators have criticized this method because it creates “judicial nepotism.” In Chile, where this system is used, some judges have as many as 28 relatives in the judiciary. Dakolias II, *supra* note 11, at 14 (citing Gisela von Muhlenbrock, *Discretionality and Corruption: the Chilean Judiciary*, presented at the Corruption and Democracy Workshop, Dante B. Fascell North-South Center of the University of Miami, May 9, 1995).

<sup>197</sup> Dakolias II, *supra* note 11, at 45 (citing Fernando Flores Garcia, *Sistemas de Acceso a la Judicatura en Mexico*, JUSTICIA Y SOCIEDAD 217 (1994)).

<sup>198</sup> Dakolias II, *supra* note 11, at 12-13.

<sup>199</sup> *Id.* at 13. See also American Bar Association, Central and Eastern European Law Initiative, *Concept Paper on Judicial Independence*, *supra* note 8, at 4. Two types of judiciaries exist: the career judiciary and the recognition judiciary. In the career judiciary, judges are selected from pools of candidates who have graduated from judicial schools and then rise through the ranks of the judiciary (as in France and Nicaragua). The recognition judiciary is typified by appointment of judges from among candidates who have first made their careers as practicing lawyers (as in the United States and Canada).

- <sup>200</sup> Republican Party of Minnesota v. White, 536 U.S. \_\_\_\_ (2002), 122 S.Ct. 2528, 2543, (2002).
- <sup>201</sup> This method of appointment, known as the “Missouri Plan,” is used by 15 states to fill at least some judicial offices. *Id.*
- <sup>202</sup> American Bar Association, Central and Eastern European Law Initiative, *Concept Paper on Judicial Independence*, *supra* note 8, at 5.
- <sup>203</sup> *Id.*
- <sup>204</sup> Gray et al., *supra* note 128, at 25.
- <sup>205</sup> *Id.* at 85.
- <sup>206</sup> *Id.* at 135.
- <sup>207</sup> American Bar Association, Central and Eastern European Law Initiative, *Concept Paper on Judicial Independence*, *supra* note 8, at 15-16.
- <sup>208</sup> *Id.*
- <sup>209</sup> Ludwikowski, *supra* note 32, at 51-52.
- <sup>210</sup> Gray et al., *supra* note 128, at 26; Ludwikowski, *supra* note 32, at 52.
- <sup>211</sup> Ludwikowski, *supra* note 32, at 52.
- <sup>212</sup> *Id.* at 52.
- <sup>213</sup> American Bar Association, Central and Eastern European Law Initiative, *Concept Paper on Judicial Independence*, *supra* note 8, at 5.
- <sup>214</sup> *Id.*
- <sup>215</sup> Republican Party of Minnesota v. White, *supra* note 200.
- <sup>216</sup> See Center for the Study of Democracy, Judicial Reform Initiative: Program for Judicial Reform in Bulgaria (2000), at [www.csd.bg/news/law/RROGRAM\\_april\\_E.html](http://www.csd.bg/news/law/RROGRAM_april_E.html), and legal and judicial reform projects for Croatia, Cambodia, Mongolia, the West Bank and Gaza, and others sponsored by the World Bank, at [www.world-bank.org](http://www.world-bank.org).
- <sup>217</sup> Dakolias II, *supra* note 11, at 13-14; Gray et al., *supra* note 128, at 25, 58, 108 n. 27, 126, 135.
- <sup>218</sup> Gray et al., *supra* note 128, at 25, 58.

<sup>219</sup> *Dakolias II*, *supra* note 11, at 14. In France, members of the judiciary receive the highest salary in the civil service. In Chile, the chief justice of the Supreme Court receives a higher salary than the president of the republic, and other members of the judiciary have salaries that exceed those paid to persons holding other public-sector positions with the same requirements. *Id.* at 14, n. 65.

<sup>220</sup> In the United States, the American Bar Association, in conjunction with the Federal Bar Association, has published a study highlighting the growing disparity between judicial salaries and salaries of lawyers in the private sector. According to the study, mounting evidence suggests that this disparity is adversely affecting government's ability to attract and retain competent, experienced judges. Moreover, this disparity, by discouraging judicial candidates who are not independently wealthy from accepting judicial positions, is skewing the socioeconomic diversity of the courts. See American Bar Association and The Federal Bar Association, *Federal Judicial Pay Erosion: A Report on the Need for Reform*, 15-17 (2001), at [www.abanet.org/poladv/2001judicialpayreport.html](http://www.abanet.org/poladv/2001judicialpayreport.html).

<sup>221</sup> A recent Supreme Court decision has found that these restrictions violate a judicial candidate's constitutional right to free speech. *Republican Party of Minnesota v. White*, *supra* note 200. The effect of this ruling remains to be seen, and it is entirely possible that judicial elections could become so political that judges will be elected based on political views and not on their qualifications. Moreover, judges may be inspired to activism or may be unduly influenced by the effect they believe their decisions will have in the next election if all decisions are allowed to campaign and criticize the records of other judges in a judicial campaign. *Id.* at 2542.

<sup>222</sup> For example, the Supreme Courts of Chile, El Salvador, Bolivia, and Peru have established evaluation systems. These evaluation systems are generally believed to have improved public perception of the judiciary. *Dakolias II*, *supra* note 11, at 16.

<sup>223</sup> *Id.* Performance evaluations are used in many countries, but not all countries use them to make promotion decisions. France and Germany do rely on them to make promotion decisions, but the United States does not. In the United States, the performance evaluation systems are used as a method of making judges aware of potential problems or inappropriate behavior and of establishing greater accountability. *Id.* at 16, n.73.

<sup>224</sup> *Dakolias II*, *supra* note 11, at 17.

<sup>225</sup> *Id.* at 17-19.

<sup>226</sup> *Id.* at 18-19.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> In Canada, a judge's salary cannot be suspended as part of a removal proceeding

because that would be an unconstitutional interference with judicial independence. Dakolias II, *supra* note 11, at 19.

<sup>230</sup> Law 82, art. 72.

<sup>231</sup> *Id.*, art. 67.

<sup>232</sup> Dakolias II, *supra* note 11, at 25-27.

<sup>233</sup> *Id.* at 27. Honduras requires that 3 percent of the national budget be provided to the courts, while Ecuador requires that the courts receive funds equivalent to 2.5 percent of the national budget. Neither court system receives the amount allotted to the courts. *Id.*

<sup>234</sup> American Bar Association, Central and Eastern European Law Initiative, *Concept Paper on Judicial Independence*, *supra* note 8, at 16.

<sup>235</sup> *Id.* at 19.

<sup>236</sup> *Id.* at 19-20.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Dakolias II, *supra* note 11, at 26.

<sup>241</sup> *Id.* at 26, n. 113.

<sup>242</sup> Gray et al., *supra* note 128, at 85. Local and county courts, however, are still under the jurisdiction of the Ministry of Justice. *Id.*

<sup>243</sup> Michael Mainville, *Defeated Klaus Admits Failure*, THE PRAGUE POST, June 19-25, 2002, at A1.



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**Laura Patallo Sánchez** is currently a Research Associate at the Institute for Cuban and Cuban-American Studies, University of Miami, Coral Gables, Florida. A graduate of the University of Miami School of Law, she previously was in private practice at Hughes Hubbard & Reed, Miami, Florida, and most recently with Morgan Lewis & Bockius LLP, Miami, Florida.

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