

A horizontal banner with a dark green background. On the left side, there is a stylized, semi-transparent image of the Cuban flag, showing the stars and stripes. The text 'ESTABLISHING THE RULE OF LAW IN CUBA' is written in large, white, bold, sans-serif capital letters across the center of the banner.

**ESTABLISHING THE RULE
OF LAW IN CUBA**

By
Laura Patallo Sánchez

INSTITUTE FOR CUBAN AND CUBAN-AMERICAN STUDIES
UNIVERSITY OF MIAMI



**ESTABLISHING THE RULE
OF LAW IN CUBA**

Cuba Transition Project – CTP

The Cuba Transition Project, at the Institute for Cuban and Cuban-American Studies (ICCAS), University of Miami, is an important and timely project to study and make recommendations for the reconstruction of Cuba once the post-Castro transition begins in earnest. The transitions in Central and Eastern Europe, Nicaragua, and Spain are being analyzed and lessons drawn for the future of Cuba. The project began in January 2002 and is funded by a grant from the U.S. Agency for International Development.

Programs and Activities

- The CTP is publishing original research, with practical alternative recommendations on various specific aspects of the transition process, commissioned and written for the CTP by ICCAS Staff and U.S. and foreign scholars with expertise on Cuba.
- The CTP is developing four key databases:
 1. A full-text database of published and unpublished articles written on topics of transition in Cuba, as well as articles on transition in Central and Eastern Europe, Nicaragua, and Spain. It also includes an extensive bibliography of published and unpublished books, theses, and dissertations on the topic.
 2. A full-text database of Cuba's principal laws, in Spanish, its legal system, including the current Cuban Constitution (in English and Spanish), and other legislation relating to the structure of the existing government. Also included are the full-text of law review articles on a variety of topics
 3. A database on joint ventures and foreign investments in Cuba.
 4. Cuba On-Line, a database of historical and current information on Cuba. It includes a chronology from 1492 to the present and a comprehensive bibliography on most Cuba related topics.
- The CTP publishes electronically an information service, *Cuba Focus*, reporting on current issues of importance on Cuba.

All the products of the CTP, including the databases and subscription to *Cuba Focus*, are free and available to the public on the web at <http://ctp.iccas.miami.edu>.

The CTP can also be contacted at P.O. Box 248174, Coral Gables, Florida 33124-3010, Tel: 305-284-CUBA (2822), Fax: 305-284-4875, and e-mail: ctp.iccas@miami.edu.

ESTABLISHING THE RULE OF LAW IN CUBA

Prepared for the Cuba Transition Project (CTP)
Institute for Cuban and Cuban-American Studies
University of Miami

By

Laura Patallo Sánchez

This publication was made possible through support provided by the Bureau for Latin America and the Caribbean, U.S. Agency for International Development, under the terms of Award No. EDG-A-00-02-00007-00. The opinions expressed herein are those of the author and do not necessarily reflect the views of the U.S. Agency for International Development.

The author thanks Professor Alan Swan of the University of Miami School of Law for his valuable insights regarding the rule of law and his comments on this paper.

Executive Summary

A principal goal of many developing countries and countries in transition is the creation of a law-based state. This emphasis arises from the widely held belief that the existence of the rule of law, accompanied by democracy and political freedom, is necessary for growth and economic prosperity.

The rule of law replaces arbitrary will with the requirement that the state articulate reasons to support the use of power, and it promises that citizens may be bound only by commands that are the result of a fair, rational process. In order to achieve its goals, the rule of law requires fairly generalized rule through law, a substantial amount of legal predictability, a legislative function to promulgate the commands and a separate adjudicative process to establish their legitimacy and particular applications, and widespread adherence to the principle that no one is above the law.

The democratic ideal further requires that a genuine law-based state must be legitimized by the consent of the governed. The democratic law-based state is therefore closest to the ideal of the rule of law in that it presupposes accountability to its citizens and an active civil society that respects the basic rights and freedoms of its citizens.

Within this conceptual framework, establishing a law-based state requires the creation of a legal framework both to support and define the operations of the state and to create the parameters within which individuals, businesses, and other legal entities may function. For this framework to assume vitality, democratic institutions must be created, institutions not only capable of producing rules but also capable of providing standards for determining which rules are to be recognized. Finally, a rule of law culture must be developed, and individuals must come to believe that law, in its proper sphere, is supreme.

Today, Cuba does not operate under what can be described, even under the broadest description, as a rule of law. Cuba, of course, is ruled by law in that there is a plethora of laws in Cuba. However, Cuba is not a government constrained by law. The lack of any democratic institutions

and the lack of respect for law and state authority in general will make the transition to democracy and the creation of a law-based state in Cuba a long and arduous process. It will entail not only the creation of new democratic institutions and a completely new legal framework, but also, and perhaps most difficult, the creation of a civil society with respect for law and public institutions — a rule of law culture.

After a transition begins, Cuba will be required to build the rule of law from the ground up. The process should begin with an attempt at building a rule of law culture. Creating a rule of law culture will require that citizens begin to participate in the political life of the nation and create, through and by their consent, a new government, accountable to its citizens. The clearest way to manifest the consent to a new government is through popular adoption of a constitution. The process of promulgating post-communist constitutions has differed in transition countries but all of the countries of East and Central Europe and Russia have taken this important step in their efforts to create democratic law-based states.

Cubans should establish a process for the adoption of a constitution that reflects the values of the society, sets the parameters for the state, and sets forth the basic rights of citizens. Procedures should be established for the creation of some kind of constituent assembly in which representatives would debate and draft a proposed constitution. The constitutional assembly should include either an equal or proportionate number of representatives from all sectors of Cuban society, including opposition groups or dissident groups, whether in Cuba or in exile, members of the Cuban Communist Party (Partido Comunista Cubano – PCC), and members of any other political party or non-governmental organization that exists in Cuba at the time a transition begins. Each representative group would select its delegates. The draft constitution should be adopted by popular vote or by a majority of delegates or representatives to the constituent assembly. Depending on the procedures established, competitive elections could follow or precede the promulgation of a new constitution.

The process of creating the rule of law does not end, however, with the promulgation of a new constitution. The creation of democratic institutions that further support the rule of law must follow. Building democratic institutions, particularly where none have existed, will take years. While the importance and difficulty of creating democratic institutions

cannot be underestimated, efforts must be made to establish such institutions because without them no structure will be available for governance and reforms will stall or fail.

The institutions created to legitimize the use of state power should include institutions that will permit accountability and protect the expectations created by the rule of law. Accordingly, numerous institutions should be created and developed, including a democratic electoral process and a free press. Free elections and a free press will enhance accountability and permit the strengthening of democratic ideals and institutions. Other existing institutions, including the judiciary, the legal profession, the educational system, and law enforcement, must also be reformed or recreated to function in an open society. An independent judiciary, independent lawyers trained to advocate cases on behalf of clients and uphold individual and property rights, an educational system that fosters civic values and seeks to teach citizens about their rights and obligations in a free society, and a police force free of corruption that is no longer used for repressive purposes are all necessary to create a strong, free society.

Another major component of reform is the incorporation of the concepts of separation of powers and judicial review into the constitution. The introduction of these two concepts into a new Cuban Constitution will create institutional constraints on power and operate to control the abuse or misuse of power.

Once transition begins and a legislative body is constituted, the process of creating a legal framework for Cuba can begin in earnest. The newly constituted legislature should have the authority to repeal existing laws and pass the many new laws necessary to foster economic growth and protect the rights of citizens. As part of this process, the legislature should consider creating procedures to review existing laws to determine which require immediate repeal or reform and to determine what areas of legislation require immediate attention. Among the laws requiring immediate repeal are numerous criminal laws that violate individual or human rights, such as the law against “dangerousness,” laws labeling those who speak against Fidel Castro or the government as “counterrevolutionaries” and making them subject to criminal prosecution, and laws limiting free speech or the freedom to assemble. Among the areas of immediate concern for reform or the passage of new laws are laws governing entry into

or exit from the market including laws permitting ownership of private property, establishing contract rights and governing the creation of business entities, such as corporations, partnerships, limited liability companies, etc. and banking and finance laws. Each area of reform will require extensive study and debate, as well as numerous attempts at drafting. Because all reforms cannot be undertaken at once, the process is often incremental. Nonetheless, a big push should be made in the initial stages in an effort to create a basis for immediate economic and political reform and the creation of new institutions to support the reforms.

Finally, new laws must be tailored to Cuba's present circumstances and to create standards of behavior that are consistent with the political, economic, and moral values of the society, as well as its traditions and cultural norms. Laws that fail to accommodate these factors can be rejected, widely disregarded, or fail to operate as intended.

Establishing the rule of law is arguably one of the most important and difficult elements of transition. The task of transforming Cuba from a lawless society to a law-based one will require changes not only in the legal order but also the political, social, and cultural order. Success is not ensured. Reforms likely will be pursued against the opposition of an entrenched bureaucracy and extensive cronyism. Ultimately, the success of democratic reforms will require broad support by all segments of society.

A culture capable of supporting the rule of law will begin to develop if that broad support materializes and the majority of citizens consent to a given form of government, accept a democratic rule of law, and conform their behavior to the norms set forth in the laws. Further strengthening of the rule of law culture will occur over time as citizens begin to see that the government is in fact accountable to them, that their political leaders respect the law and do not hold themselves above it, that the institutions they create operate to protect their individual rights and the rights of others in society, that there are processes and mechanisms for checking state power, and that they are generally benefited by conforming to laws.

Establishing the Rule of Law in Cuba

Introduction

The existence of the rule of law is commonly associated with democracy, freedom, and economic prosperity. It is not surprising, then, that establishing a rule of law is the stated goal of many developing countries and countries undergoing transition. But what is the rule of law? What institutions support it? What does establishing the rule of law entail? What can we expect the process to be like? Can it be hastened?

These questions must be addressed in any discussion regarding the future of Cuba. The process of transition is by its nature somewhat fluid, and the processes or programs implemented at the time a transition begins may have to be adapted to changing or unexpected conditions. Nonetheless, this discussion can serve as a guide in any future efforts to create a law-based state in Cuba by clarifying the nature of the rule of law and identifying and addressing the elements necessary to establish it.

The purposes of this paper are 1) to provide an overview of the concept of the rule of law; 2) to provide an overview of Cuba's current legal and political structure as they relate to the rule of law; and 3) to discuss ways the rule of law can be promoted in Cuba after a transition.

The Rule of Law Defined¹

In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to ... [control] the governed; and in the next place, oblige it to ... [control] itself.²

The rule of law is an ideal that, at its most basic level, seeks to control the use of power. It requires that power be used only if the exercise of that power is authorized or permitted by law or by a legal grant of power from a legitimate, legally constituted authority. The rule of law

incorporates two principal ideas: 1) laws must replace the arbitrary use of power; and 2) all persons are equal before the law and are subject to the law.³ Arbitrary will is replaced by the requirement that the state articulate reasons supporting the use of power.⁴

The rule of law does not promise results so much as it promises an approach, a process, a practice of reason giving, a set of argumentative conventions. The rule of law sets bounds to its discourse. Insofar as the rule of law is itself a rule, it is a rule of inclusion and exclusion of reasons, a rule of pedigree.⁵

Thus, the rule of law promises that citizens may be bound only by lawful commands and that a fair, rational process permits citizens to challenge the state's power. The rule of law also promises individual freedom to pursue prosperity or happiness without undue interference from the state.⁶ In order to fulfill these promises, "the rule of law requires fairly generalized rule through law; a substantial amount of legal predictability...; a significant separation between the legislative and the adjudicative function; and widespread adherence to the principle that no one is above the law."⁷

The rise of constitutionalism has added an additional element to the conception of the rule of law. In order to establish a true rule of law, a government that purports to create a law-based state must be legitimized by the consent of the governed. If there is no consent on the part of the governed, the requirements of the rule of law are not met, as even tyrants and dictators can claim that theirs is a rule by or through law. The democratic law-based state is therefore the closest to the ideal of the rule of law in that it presupposes accountability to its citizens and an active civil society that respects the basic rights and freedoms of its citizens.⁸

James W. Torke, professor of law at the University of Indiana, has described the rule of law as a three-level pyramid.⁹ The uppermost level of the pyramid consists of laws themselves, such as the constitution, statutes, rules, and regulations. These are law's "formal constraints."¹⁰ The middle section of the pyramid consists of institutions such as constitutional government, separation of powers, judicial review by independent courts, a free press, free elections, and open governmental processes.

These are “institutional constraints.”¹¹ The base of the pyramid, the part that supports the whole structure, is the belief in the rule of law — the belief that law, in its proper sphere, is supreme.¹² Without widespread acceptance of this belief, a rule of law cannot be supported.

Within this conceptual framework, establishing a law-based state requires the creation of a legal framework supporting the operation of the state and creating the parameters within which individuals, businesses, and other legal entities may function. In order to create, implement, interpret, and apply those laws, democratic institutions must be created to establish parameters for producing rules and to provide standards for determining which rules will be recognized.¹³ Finally, a rule of law culture must be developed and individuals must come to believe in the promises and accept the obligations of the rule of law.

The Status of the Rule of Law in Cuba

Cuba’s history as an independent nation reflects a less than exemplary regard for the rule of law. Throughout the short life of the Republic, from 1902 to 1959, Cubans pursued the ideal of creating a democracy; indeed, the dream of an independent, democratic, and socially just Cuba had fueled the drive for independence. Though a variety of political parties flourished and attempted to participate in the political life of the nation during the years of the Republic, neither the observance of laws nor respect for institutions was ever very strong. The years between independence and Castro’s rise to power were marked by periods of relative stability followed by political and civil unrest. Corruption and venality were serious obstacles to the political and economic development of the country and the creation of a democratic state. On numerous occasions, elections were marked by fraud or were suspended due to civil unrest, and, as a result, Cuba suffered several military occupations by the United States pursuant to the infamous Platt Amendment.¹⁴

A high point in Cuban political history was the promulgation of the 1940 Cuban Constitution by a Constitutional Assembly made up of representatives of all of Cuba’s political parties. The 1940 constitution was viewed as a breakthrough in Cuba’s political life and was intended to establish the parameters of a democratic state with an emphasis on the promotion of social equality. Many hoped that the new constitution,

adopted with such broad support, would herald a new era in Cuban politics. The high hopes were soon dashed. Many of the provisions of the 1940 constitution were never fully implemented, and political instability was not ameliorated. The last free presidential elections in Cuba took place in 1948, as Batista's military coup thwarted the scheduled 1952 election. Soon after Batista's coup, the 1940 constitution was suspended, setting the stage for the emergence of Castro.

Today, Cuba does not operate under even the most liberal definition of the rule of law. Some may describe it as a rule by law in that there is a plethora of laws in Cuba;¹⁵ however, Cuba is not a government constrained by law. Rather it uses "law as an obliging instrument of power."¹⁶ In order to understand what this means, it is necessary to review the structure of government and the legal system in Cuba.

The government is structured under the "unity of power" principle.¹⁷ 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."¹⁸ 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."¹⁹ The Cuban Constitution achieves this result and ultimately places all legislative and executive power in the hands of Castro.

For the last 43 years, Cuba has been ruled by one man, Castro, through one party, the Cuban Communist Party (Partido Comunista Cubano — PCC). The PCC, with Castro at its head, is the driving force of the Cuban state.²⁰ It "organizes and guides all common efforts towards the creation of socialism and the advancement of communist society."²¹ Citizens may not exercise their rights in opposition to the constitution or laws of Cuba nor against the so-called decision of the Cuban people to establish socialism.²²

In every election since 1976, when the Castro regime began institutionalizing the Revolution and promulgated the communist Cuban Constitution, Fidel Castro and his brother Raul have been unanimously elected by the National Assembly as President and First Vice President, respectively, of the Council of State. The National Assembly, itself the

purported repository of the people's power, is elected from preapproved slates of candidates compiled by the PCC. It meets for only a few days each year and only to rubber-stamp the decisions emanating from the Politburo of the PCC. While the National Assembly is out of session, the Council of State and the Council of Ministers have virtually unfettered authority to legislate any matter in any form they choose, usually under the guidance and control of the Politburo and the PCC.

The entire legal system is based on the concept of socialist legality, which defines the legal system as a political instrument to be used to promote socialist values and goals. Laws are interpreted and applied in whatever manner is required to achieve the socialist goals as defined by the PCC. All other interests are subordinated to these goals, and when interpreting and applying laws under the concept of socialist legality, the ends justify the means. The concept of socialist legality provides great flexibility to prosecutors, judges, and other state actors in applying and interpreting the law.²³ This flexibility, based as it is on changing expressions of socialist sensibility, conflicts with the rule of law in that predictability in the application or interpretation of laws is consistently sacrificed in favor of reaching the "right result."

The judiciary is subservient to the political branches of government.²⁴ Independent courts do not exist to adjudicate issues of law and fact or to challenge government acts or the use of government power in any way.²⁵ Judges in Cuba do not have the power of judicial review. Instead, it is the National Assembly that has the right to determine the constitutionality of all laws.²⁶ Courts do not enforce existing laws uniformly. In fact, laws often are not enforced at all, particularly as they relate to what few individual rights are available to Cubans,²⁷ and when laws are enforced, they are often enforced retroactively. Laws, regulations, or administrative rules are not well publicized, and many are unaware of their application until they run afoul of them, as often occurs with foreign companies attempting to do business in Cuba. In addition, laws are changed frequently and without much notice.

Prosecutors are required to have "an extreme revolutionary sensibility" and apply and enforce laws to achieve revolutionary goals.²⁸ The criminal justice system is non-adversarial, with both prosecutors and defense attorneys seeking "the truth." Though a legal system need not necessarily be adversarial, the combination of a non-adversarial system

with the political structure of Cuba and its professed goal of advancing socialism is not conducive to the protection of individual liberties and the control of state power.

The state-controlled economy in Cuba, heavily reliant on the Soviet Union and never independently strong, disintegrated along with the Soviet Union. Since 1990, Cuba has been in a government designated “Special Period” during which Cubans have been asked to make numerous personal sacrifices and accept great financial hardship for the sake of preserving the communist nation. The Special Period is entering its thirteenth year with no apparent end in sight.²⁹ Despite Castro’s efforts to open up the island to foreign investment in 1992, Cuba’s 1998 gross domestic product (GDP) was still 21 percent below the 1989 GDP.³⁰

Against this political, legal, social, and economic backdrop, it is no wonder that many Cubans are coming to regard laws as mere nuisances at best or, at worst, as obstacles in their efforts to live day to day. Antisocial and criminal behavior is increasing as more and more Cubans steal or pilfer from state enterprises, deal in the black market, or turn to prostitution or other means to survive. The circumstances in Cuba today conspire to erode whatever respect might exist for the legitimacy of laws in general as a means of ordering society.

The lack of any democratic institutions or respect for law and state authority in general will make the transition to democracy and the creation of a law-based state in Cuba a long and arduous process. It will entail not only the creation of new democratic institutions and a completely new legal framework, but also, and perhaps most difficult, the creation of a civil society with respect for laws and institutions — a rule of law culture.³¹

Establishing the Rule of Law in Cuba

The entire machinery of the Cuban state today is structured to allow the arbitrary will of Castro and the PCC to be effected without obstacles.³² No procedures exist to check government power or guarantee accountability to citizens, as evidenced in the process through which the Castro government recently quashed the Varela Project.³³ To paraphrase James Madison, Cuba’s government has had considerable success in controlling the governed; it has failed abjectly to control itself. In short, there is no

rule of law.

After a transition begins, Cuba will be required to build the rule of law from the ground up. The process should begin with an attempt to build the base of Torke's pyramid — the creation of a rule of law culture. This will require that citizens begin to participate in the political life of the nation and create, through and by their consent, a new government. Creating a government founded on the consent of the people is the only way to begin to establish a rule of law culture. The first step, therefore, should be the creation of a legitimate government accountable to its citizens in the form of a constitutional democracy. That government must, in turn, begin building new institutions that will support democracy and a rule of law in Cuba. Building democratic institutions, particularly where none have existed, will take years, but the importance of creating those institutions cannot be underestimated. Without them, no structure will be given to government, and reforms will stall or fail.³⁴ At the same time, the process of creating a new framework of laws that will protect human rights, individual rights, and property rights must begin.

The Belief in the Rule of Law: “The Rule of Law Culture”

In order for a law-based society to flourish, citizens must believe in the rule of law. They must develop a legal culture wherein individuals comply with the law, even when it is not in their short-term interests to do so, in exchange for establishing a predictable legal order to govern the relationship of the state and its citizens as well as individual rights and property rights. This component of the rule of law is the most difficult to achieve, yet, in the end, it is the most important one. If such a culture fails to develop, laws will more often than not be observed in the breach, and the ability of the state to establish a functioning legal order will fail, to the detriment of all.

Communism in the post-totalitarian era does not promote or lend itself to a respect for law or a voluntary desire to adhere to law.³⁵ Instead, the torpid system calls for regular ritualistic public acknowledgment or approval of the government by citizens who privately disdain it or are apathetic to it.³⁶ How, then, does the post-totalitarian society begin to create a rule of law culture? It would appear that an important first step is to change attitudes regarding law and the state and to involve citizens, as

much as possible, in the political life of the state. One way to do this is by starting from the premise that a new government in Cuba must be established with the consent of citizens and that this new government must be accountable to its citizens.

If a rule of law culture presupposes democratic accountability and requires the consent of the governed to any government created, then how may that consent be manifested? The clearest way to manifest consent to a new government is through popular adoption of a constitution. The process of promulgating post-communist constitutions has differed in transition countries, but all of the countries of Eastern and Central Europe and Russia have taken this important step in their efforts to create democratic law-based states.

The Czech Republic

In the Czech Republic, popular elections preceded the promulgation of a new constitution. Popular elections were held in June 1992, after which the parliament created a commission for the preparation of a new constitution. This commission included representatives of all political parties, in proportion to the number of persons registered in their respective parties, and it was presided over by the President of the Parliament.³⁷ A draft constitution, based on the 1920 Czech Constitution, was presented to the commission and was debated and approved by the commission within six months.³⁸ The Parliament voted to adopt the constitution by an overwhelming majority.³⁹

Bulgaria

After the Bulgarian Communist Party Secretary and Head of State was ousted in an intra-party coup in 1989, roundtable discussions began between the Bulgarian Communist Party (later renamed the Bulgarian Socialist Party) and the Union of Democratic Forces (UDF), a coalition of trade unions, informal political organizations, religious organizations, and environmentalists. Competitive elections were held in June 1990, and a Grand National Assembly was elected. This Assembly promulgated a new democratic Constitution in July 1991.⁴⁰

Hungary

Hungary followed a different route. The promulgation of a constitution preceded free, competitive popular elections. The Hungarian constitution resulted from a series of meetings between representatives of Parliament, all members of the Hungarian communist party (Hungarian Socialist Worker's Party) and the Opposition Roundtable, composed of representatives of opposition parties, with the purpose of amending the 1949 communist constitution.⁴¹ Approximately 80 percent of the constitution was amended, and the amended version was approved in September 1989. Competitive elections were first held in March 1990.⁴² The constitutional reform process has been subject to some criticism based on its non-republican nature. The members of Parliament who participated in the drafting of the constitution had been elected while Hungary was still a one-party system and, therefore, had not been elected democratically in competitive elections. The Opposition Roundtable consisted of anti-communist organizations that had arisen over the years and, due to the system in place in Hungary prior to the 1990 elections, had never been formally selected to represent the opposition.⁴³ Nonetheless, a workable constitution emerged, and Hungary has held competitive elections since 1990, enjoying considerable success in its transition.

Poland

Poland represents a somewhat hybrid situation with regard to the promulgation of a new constitution. In the 1980s, as a result of the emergence of the Solidarity Party, economic and political reforms were introduced. Solidarity was recognized as a legitimate political party, and two-party elections began to be held. In 1989, a constitutional commission was created to draft a new constitution. At that time, the Polish Parliament (Sejm) officially set aside two-thirds of its seats for the communist party, and, as a result, the process stalled.⁴⁴ In 1992, the first fully democratic election was held, and soon afterward an interim constitution, known as the "Small Constitution" was passed. It was not until 1997 that a final, permanent constitution was promulgated.⁴⁵

Although the path taken by the various transition countries to a new constitution has differed, in the end, acceptable results have been reached. More democratic forms of government have been created that continue to

function today with the apparent consent of a majority of citizens in each country, despite the problems faced by transition countries in the process.

The Case of Cuba

Cubans should establish a process for the adoption of a constitution that reflects the values of their society and sets the parameters for the state. Procedures should be established for the creation of some kind of constitutional assembly in which representatives would debate and draft a proposed constitution. The constitutional assembly should include either an equal or proportionate number of representatives from all sectors of Cuban society, including dissident groups, exiles,⁴⁶ and members of the PCC⁴⁷ or any other non-governmental organizations that exist in Cuba at the time. The draft constitution would then be adopted by popular vote or by a majority of delegates or representatives to the constitutional assembly. Depending on the procedures established, competitive elections could follow or precede the promulgation of a new constitution.

At the request of delegates, international organizations such as the United Nations (UN), the Organization of American States (OAS), and others may play a role in providing technical drafting assistance, research or other support, and the supervision of elections or the referendum. However, it is vital that the process be directed by Cubans and for Cubans. It is unlikely that anything that is imposed by “outsiders” will succeed in the long run because it will fail to address adequately issues that are unique to Cubans and their culture.⁴⁸

The process of creating the rule of law does not end, however, with the promulgation of a new constitution. A new constitution will create the new framework for government and lay the groundwork for the creation of democratic institutions that further support the rule of law.

Institutions Supporting the Rule of Law: Law’s Institutional Constraints

A true rule of law must be legitimized by a system of democratic accountability and procedural fairness (due process).⁴⁹ Without accountability, there is no rule of law. The system created to legitimize the use of state power should include institutions that will permit accountability and

protect the expectations created by the rule of law. These institutions, which Torke calls “institutional constraints” on the rule of law, must be developed.

Some scholars do not view these institutions as components of the rule of law but rather as devices that serve to implement the rule of law.⁵⁰ Irrespective of whether they form part of the rule of law or simply serve to support it, they are necessary components in the creation of a law-based state. Accordingly, the following institutions should be created as part of the process of establishing a rule of law in Cuba.⁵¹

An Electoral Process

The rule of law requires a democratic electoral process through which free, fair, and competitive elections are regularly scheduled and held. Cuba has not held free elections since 1948. Cuba must create an electoral process and make provisions for the orderly transfer of power. The process should take into account at least a two-party, if not a multi-party, system, and a model tailored to accommodate competitive elections under the chosen system must be developed. Electoral models include the plurality system, the cumulative voting system, the double ballot majority system, and the alternative vote system.⁵²

The plurality system is used in the United States, the United Kingdom, Canada, and other countries of the former British Commonwealth. It can be used in two-party and multi-party systems. Legislative seats go to the candidate with the highest number of votes. In a multi-party system, the candidate can win a seat with a mere plurality of the votes.⁵³ The cumulative voting system, used in Luxembourg, is a modification of the plurality system that allows the voter as many votes as there are seats but permits the voter to distribute his votes as he or she deems fit.⁵⁴

The double-ballot majority system is used in France and provides for a run-off election (a second ballot) if no one candidate obtains a majority. The second ballot is limited to candidates who ran on the first ballot and obtained 12.5 percent of the vote. The alternative vote system is a variation on the second-ballot system. Voters cast their votes on the first ballot and indicate their first and second choices on the ballot. If no candidate wins a majority of the vote, the candidate with the least number of

votes has his votes redistributed to the voters' second choices.⁵⁵

In addition, the models should be appropriate for whatever system of representation is created. For example, if a unicameral legislature is created in the context of a multi-party system, some type of proportional representation could be used to ensure as much as possible the representation of all political parties, including minority parties. If a bicameral legislature is created, the type of representation in each chamber may differ.

Once a satisfactory electoral system has been established, an elected legislature must be given the power to guide the country and legislate in accordance with the specific norms. Those legislators will be subject to removal when voters perceive that they are not responding to the will of the citizenry or faithfully performing their duties. In this way, elected officials are motivated to act in the interests of their constituents or risk losing their positions of power.

Separation of Powers and Judicial Review

While democratic accountability is essential to the rule of law, adopting the concepts of separation of powers and judicial review will help control the abuse of power.⁵⁶ By separating the branches of government and providing them with distinct powers vis-à-vis each other, "ambition ... [can be] made to counteract ambition,"⁵⁷ and government can check and control itself.

Almost all the countries of Central and Eastern Europe adopted some form of separation of powers and judicial review when promulgating their new constitutions. Those concepts have proven to be effective in preventing abuses of power.⁵⁸

Cuba currently rejects both separation of powers and judicial review and concentrates virtually all power in the Council of State and the Council of Ministers. The concepts of judicial review and separation of powers should be introduced into a new Cuban constitution. Separate branches of government should be formed consistent with the dictates of the new constitution, and a constitutional court should be given the power of judicial review. The introduction of these two concepts into a new Cuban Constitution will create institutional constraints on power and will operate to control the abuse or misuse of power.

Even if these concepts are adopted, it may be difficult to implement

them for several reasons. Cuban society, both before and after Castro, is accustomed to power being exercised by a strong president or head of state. This historical preference for a strong head of state may create resistance to the concept of diffusion of powers. Moreover, due to the manner in which courts have been used by the Castro regime to further its socialist political goals, there may be resistance to the adoption of judicial review, which provides courts with broader institutional power. Nonetheless, these concepts must be introduced and fostered because they are important elements of democratic government. If appropriate and effective institutions are created, public confidence in government will grow, as will the tendency to trust legislative and judicial exercises of power.

Independent Courts

The rule of law requires that laws be uniformly and fairly applied and interpreted and, when inconsistent with the constitution, struck down. This is the province of the judiciary. The judiciary plays a vital role in establishing the rule of law because in this venue laws will be applied to specific persons, and the consequences of failure to comply with a given law will be determined. The courts will determine whether government acts are valid and will resolve private disputes between parties. The courts may also hear appeals from administrative tribunals established to address grievances or complaints brought by those affected by decisions of government agencies or regulatory bodies. In order to fulfill this role, an independent judiciary staffed with competent, impartial judges must be established and permitted to operate within a broad institutional sphere.

Citizens should have broad access to the judicial system and be given the ability to resort to the courts to resolve legitimate disputes. Court costs should not be excessive, and litigants should be provided with some resources to prosecute their cases, including access to free legal representation if necessary.

The Cuban judiciary has a long way to go before it can begin to operate effectively as an independent judiciary and support a law-based state in Cuba. The institutional powers of the courts must be expanded, and many changes in structure and administration must be effected.⁵⁹ The

creation of an independent judiciary must be a goal of the Cuban state if a true rule of law is to be established.

Law Enforcement

Law enforcement institutions also support the rule of law in that their role is to fulfill the duties imposed on them by law and protect persons against illegal acts while protecting human dignity and upholding human rights.⁶⁰ The visible role of law enforcement in any society requires that officers take the strictest care to avoid misuse or abuse of power.

Reform of law enforcement agencies and the retraining of law enforcement officers is necessary as part of a transition. Law enforcement in Cuba, like all other aspects of the legal system, seeks to enforce socialist goals. Law enforcement is often used as a means of repression of the people, and members of the police or other state enforcement agencies are mistrusted. To the extent that law enforcement can be seen as pursuing legitimate goals and that members of state law enforcement agencies are themselves subject to the laws, the rule of law is supported.

An Independent Legal Profession

An independent legal profession should be created and legal education provided with the view to producing lawyers trained not just in the law, but also in the method of determining whether power is being exercised lawfully. Lawyers should be trained to advocate causes before the courts or other tribunals established by law and should be permitted to press those cases without interference from the government.

The legal profession in Cuba today consists mainly of lawyers who practice in state controlled law firms (*bufetes*), prosecutors (*fiscales*), and appointed judges who operate strictly within the parameters established by the government. Lawyers are not trained to contest the use of power by the state and do not operate independently as advocates. Their roles are to advance the goals of socialism as expressed in the socialist laws enacted by the government. Laws are applied and interpreted in whatever manner is required to ensure that socialist goals are achieved. Because the goals of socialism by definition conflict with the rights of individuals, legal professionals are not able to challenge the use of government power

and advocate on behalf of individuals.

The role of lawyers must change along with the role of the legal system. Lawyers should no longer be considered mere tools in the creation of a socialist state. They must be educated and trained in the values of the new system and understand their role in defending individual, human, and property rights. Lawyers will also assist in the resolution of disputes under the many new laws likely to be promulgated, particularly in the commercial area. This will require restructuring of law schools and their curricula in order to train new lawyers and retrain existing lawyers. It will also require the creation of professional lawyer or legal associations to support those training efforts or the restructuring of the two existing legal professional associations in Cuba, the National Union of Cuban Jurists (Unión Nacional de Juristas Cubanos) and the National Organization of Lawyers' Collectives (Organización Nacional de Bufetes Colectivos).

A Free Press

The existence of a free press is also important to the creation of the rule of law for several reasons. First, the press — comprising all journalistic media, including television, print, radio, and wire services — can assist in the education of citizens by disseminating information regarding the values promoted by the rule of law, the promises made by the rule of law, and its obligations. The press is also in a position to publish and disseminate information regarding the laws themselves to a wide sector of society, thus increasing popular understanding of the content of laws and of citizens' rights under the law.

The press also promotes accountability of public officials. A press that is willing and able to investigate and report government abuses of power can make a difference, not only in public opinion, but also in the behavior of government officials. Politicians and other elected or appointed officials will be unable to act in their own self-interest with impunity if the probability exists that their actions will be discovered and reported and that negative consequences such as recall, impeachment, or loss of power at the next election will follow.

Numerous independent journalists live and work in Cuba today, despite the fact that they are not permitted to operate or report freely on relevant issues. No doubt many would enter the field if opportunities

existed to do so without being subjected to government censure or reprisal for reporting on political events. After a transition, journalists should be freed to report on all issues without government interference. Media outlets should be removed from the control of the state and programs to modernize communication should be implemented. The programs should address ways to provide journalists with the tools of the trade, including fax machines, access to wire services and international news, access to information regarding proposed changes or reforms prior to their taking effect, and even computers with internet access.

Education

The Castro government has used education as a linchpin in its plan to create a socialist state, inculcating not only socialist values, but also the “cult of Fidel” in children as soon as they reach school age. The existing educational system will have to be undone and replaced with a more traditional one. Instead of teaching the virtues of the Revolution, children should be taught general civic values. The focus should be on teaching the attributes of good citizenship in a democratic state, which requires active participation by the citizenry and respect for others’ rights. The value of law as a means of protecting individual and human rights and controlling abuses of government should be taught from the elementary level through high school. Students should be educated about their rights as citizens and understand the importance of respecting the rights of others. The school curricula should contain an age-appropriate course of study promoting a general understanding of the legal system and the benefits inherent in the system. This will require new textbooks, special teaching materials for use in classrooms, teacher training programs, and other structural and substantive reforms.⁶¹

Universities and law schools should emphasize the importance of the rule of law and create an understanding of the institutional role of law in protecting individual rights and developing a market economy.⁶² Law students should also understand their unique role in fostering the rule of law and be trained to advocate causes on behalf of individuals in the courts or before appropriate tribunals.

Finally, citizens should be made aware of their rights through public awareness campaigns. Flyers, pamphlets, radio programs, television seg-

ments, and other public service announcements should be prepared and used to provide information on reforms and the new rights and obligations created by the changes in the system. Government offices or non-government organizations can provide information regarding reforms, business, training, employment, or other opportunities and related laws or regulations to citizens upon request.

In Hungary, a “Street Law Program” initiated by the Foundation for Clinical Legal Education has created a handbook in an effort to raise public awareness of citizens’ rights and to encourage and foster respect for laws within the framework of a democratic society. Different versions of the handbook may be created depending on the expected use, with one version used for high school students, another for university students, and yet another for lay persons and non-students.⁶³

The task of changing a society’s values through education is a difficult one, yet no alternative exists if the goal is the creation of a democratic, law-based state. The use of education as a vehicle for change should be explored and utilized in conjunction with other institutions in any effort to develop a rule of law.

Creating a Legal Framework: Law’s “Formal Constraints”

As previously noted, an important initial step during a transition is the promulgation of a new constitution. The constitution may be drafted by a constitutional assembly, by a constitutional assembly in conjunction with the legislature, or through some other process. In any event, while the exact form and contents of the constitution ultimately promulgated can be debated, at a minimum, it should create the framework for the new democratic government, establishing and defining the parameters of the state’s legislative, executive, and judicial powers.

A legislative body should be constituted as soon as possible. Without a legislative body that can begin creating the country’s new legal framework, the reform process cannot truly begin. In view of creating a legislative body, free and competitive elections should be held as early as practicable. Once elected, the legislature should begin building the new legal framework for the country, the top of Torke’s pyramid. The legislature should have the authority to repeal existing laws and pass the many new laws necessary to foster economic growth and protect the rights of

citizens. As part of this process, the legislature should consider creating procedures to review existing laws to determine which require immediate repeal or reform and to decide which areas of legislation require immediate attention.⁶⁴ Among the laws requiring immediate repeal are numerous criminal laws that violate individual or human rights, such as the law against “dangerousness,” laws labeling those who speak against Castro or the government as “counterrevolutionaries” subject to criminal prosecution, and laws limiting free speech or the freedom to assemble. Among the areas of immediate concern for reform or the passage of new laws are laws governing entry into or exit from the market, including laws permitting ownership of private property; establishing contract rights; governing the creation of business entities such as corporations, partnerships, and limited liability companies; and banking and finance laws. Each area of reform will require extensive study and debate as well as numerous attempts at drafting.

The process of creating a legal framework in Cuba will be as lengthy and complicated as it is for any country embarking on the task. Because all reforms cannot be undertaken at once, the process is often incremental. Usually, however, a big push should be made in the initial stages in an effort to create a basis for immediate economic and political reform and the creation of new institutions to support the reforms. This was done in a number of countries in Central and Eastern Europe after the collapse of the Soviet Union.

In Hungary, the Czech Republic, and Bulgaria new constitutions were promulgated almost immediately. Those constitutions established the powers of government and divided powers among the executive, judicial, and legislative branches. They contained provisions allowing for private ownership of property and the right to contract, paving the way for the creation of a free market. Commercial and corporate laws were drafted permitting the creation of corporations and other legally recognized legal entities capable of doing business within the legal framework.

In Russia, a new government was formed, and eventually a constitution was promulgated in 1993. Although some reforms have been made throughout the past ten years or so, it was not until July 2002 that a new Criminal Procedural Code was adopted. The new code incorporates many criminal justice concepts used in Western Europe and the United States, including the presumption of innocence, independence of judges, and the

right of defense attorneys to challenge the admissibility of evidence, including evidence obtained without a proper warrant.⁶⁵ The American Bar Association's Central and East European Law Initiative (CEELI) supported this effort by providing drafting assistance and organizing a visit to the United States by a Russian working group to observe some of the new concepts adopted in practice in the Maryland courts.⁶⁶ In addition to the reform of the criminal code, numerous other reforms have been initiated including a clinical education program initiated by CEELI. The program seeks to provide standards and networks for creating those programs and to facilitate their creation.

In Bulgaria, legal reform has been an ongoing process since 1990 and has entailed the creation of new civil and criminal codes, procedural codes, new banking and commercial laws, and continuous amendments to those to reflect political, social, or economic changes in the country.⁶⁷ The process is ongoing. In April of 2002, a draft law for amending the Judicial System Act, which governs the organization and administration of the judiciary, was introduced in Parliament by the Council of Ministers. The amendments are being considered, but the debate on the law is expected to be vigorous as the prosecutor's office opposes many of the changes.⁶⁸ The Bulgarian Parliament is also considering implementing laws against money laundering and financial crimes, reforming aspects of the legal profession, and creating more alternative dispute resolution mechanisms.⁶⁹

While a legal framework is necessary to create a law-based state, in order for laws to conform to the rule of law, they must meet certain standards regarding the manner in which those laws are promulgated, implemented, interpreted, applied, and challenged. Those standards must be adopted and incorporated into the processes established for making, applying, and interpreting laws prior to any attempts to enact new legislation. The principles that govern the manner in which laws must be made and implemented in order to conform to the rule of law include the following:⁷⁰

- 1) Laws must be duly authorized by a legitimate body and must conform to an established criteria of validity. A constituent body must pass laws in accordance with procedures adopted for that purpose. Those procedures may be found in the constitution or other principal laws.

2) Laws must be uniformly applicable to all citizens. Similarly situated persons should be treated equally. In addition, specific classes of persons may not be exempted from or made specifically subject to a law.

3) Laws must be clear in meaning and interpreted in accordance with known and uniform standards or a process of specific legal reasoning.

4) Laws should be for the most part prospective and should be promulgated in writing and widely disseminated and accessible in advance of their effective date in order to allow persons subject to laws to have time to conform their behavior to them. In addition, the consequences of a failure to comply with laws should be known in advance.

5) Persons subject to the law should be capable of complying with its dictates.

6) Laws must be interpreted and applied by independent tribunals. These tribunals should have the authority to resolve issues relating to the use of state power or any other dispute arising under the law. These tribunals should also have the power to determine the validity of the law in dispute, resolve factual issues according to law, and apply the law to the case. The mechanisms provided may include the ability to challenge not only government's actions on a broad level in independent courts, but also the decisions or rulings of government officials at an administrative level through appropriate grievance or review procedures.

7) Finally, all those subject to the laws of the state should have access to courts and to representation by lawyers trained and prepared to advocate cases on behalf of persons subject to those laws. In criminal matters at least, persons unable to retain their own lawyer should be provided with representation by the state.⁷¹

Procedural fairness should also be safeguarded throughout the process. Laws should be debated prior to their enactment, and citizens should have a right to make their views known to their elected representatives. After laws are passed and made effective, due process should be observed. Persons subject to sanction for violations of law should receive adequate notices of any violation and a chance to be heard in an appropriate tribunal. Certain studies have suggested that where individuals in

the system receive due process, are treated with respect, and perceive that like situations are treated similarly, voluntary compliance with the law is more likely. If a decision is viewed as procedurally just, it is more likely to be viewed as legitimate.⁷²

Accordingly, procedural methods must be established to ensure: 1) that laws are properly passed and uniformly implemented and enforced, and 2) that citizens or others subject to the law are provided with mechanisms to challenge the application of the law to them and are treated with respect in any such proceeding.

In creating the legal framework of a democratic Cuba, the legislature must establish a process for passing laws that meets the standards necessary to create a rule of law and, in passing any new laws, the legislature must meet those parameters. In order to meet these standards, many reforms will be required, and mechanisms to support this legislative process must be adopted. For example, a legislative record should be kept that documents all proposed legislation and any debate relating to proposed laws. Once passed, laws should be published and widely disseminated. The legislature should avoid frequent changes or revisions to laws to allow persons subject to them time to conform their conduct to laws. Sanctions for failure to comply with the law should be delineated in the law itself or easily determined by reference to another law.

One caveat should be mentioned in connection with the process of creating a new legal framework in Cuba. Laws must be tailored to the reality of a country and must attempt to create standards of behavior that are consistent with the political, economic, and moral values of a society, as well as its traditions and cultural norms.⁷³ Laws that fail to accommodate these factors can be rejected and widely disregarded or fail to operate as intended. In this regard, it is important to understand that the wholesale transplantation of another society's laws will probably fail to bring about the desired results, even if those laws are otherwise fair, sound, and workable. Instead, legal ideas and specific laws, if transplanted to another society, should be modified to address indigenous social and political conditions and institutions to better effect their purposes.⁷⁴ That is not to say that legal concepts and laws cannot be successfully transplanted, merely that some effort should be made to adapt them to a specific country's needs, if necessary.⁷⁵

The Role of Leadership in the Creation of a Law-Based State

Political leaders play an important role in creating a rule of law. The prominence of the political class makes it the best example for citizens seeking a model of behavior in a law-based state. It is they who must first show their willingness to submit themselves to the law in order to begin creating a rule of law culture. Political leaders who do not seek to adapt the law to their political needs or the needs of their party are necessary to create a rule of law culture. Elected and appointed officials who resist using or ignoring the law to favor party elites or obtain personal benefits will begin to create the proper atmosphere for democracy and the rule of law. Elected officials must voluntarily transfer power to other newly elected officials in accordance with the dictates of law. This behavior on the part of the political class raises the expectations of citizens and creates the situation where lawful behavior is not only expected, but also demanded.

At some level, the rule of law is an ideal that may not be capable of being fully realized. If, however, the majority of citizens consent to a given form of government, accept a democratic rule of law, and conform their behavior to the norms set forth in the laws, then a culture capable of supporting the rule of law will begin to develop. Further strengthening of the rule of law culture will occur over time as citizens begin to see that the government is in fact accountable to them, that their political leaders respect the law and do not hold themselves above it, that the institutions they create operate to protect their individual rights and the rights of others in society, that there are processes and mechanisms for checking state power, and that they are generally benefited by conforming to laws.

Conclusion

Creating the rule of law is viewed conceptually by many as the attempt to create “a government of laws, and not of men.”⁷⁶ While the creation of a perfect balance of power between government and citizens is a utopian ideal, a nation may yet create, by means of democratic constitutionalism and the rule of law, a “sensible accommodation of liberty and power.”⁷⁷ This should be the goal of the Cuban government once transition begins. With this goal in mind, and with the understanding that there is no formula for establishing the rule of law, Cubans may begin the process of creating a law-based state.

The construction of a law-based state will require not merely the passage of laws constituting a legal framework for the country, but also the creation of institutions to support the rule of law and, most importantly, the creation of a constitutional culture. Creating the belief in the rule of law and encouraging widespread adherence to the principle that no one is above the law will undoubtedly be the most difficult challenge. It is nonetheless a challenge that must be accepted.

Establishing the rule of law is arguably one of the most important and difficult elements of transition. The task of transforming Cuba from a lawless society to a law-based one will require changes not only in the legal order but also the political, social, and cultural order. Success is not ensured. Reforms likely will be pursued against the opposition of an entrenched bureaucracy and extensive cronyism. Ultimately, the success of democratic reforms will require broad support by all segments of society.

In sum, the rule of law is not about passing laws *per se*. It is a broader concept, requiring the creation of a constitutional democracy where citizens, who have consented to be governed and both participate and believe in their government, nonetheless may hold their government accountable.

END NOTES

¹ Philosophers and legal and political scholars have studied the concept of the rule of law extensively since the time of Aristotle. Consequently, the study of the rule of law has spawned a vast amount of literature and academic discussion throughout the years. This paper does not purport to provide a comprehensive study of the ideal of the rule of law and its evolution in different legal systems. For purposes of this paper, an overview of the concept of the rule of law is sufficient. For a fuller discussion of the ideals embodied in the concept of the rule of law, see H.L.A. Hart, *The Concept of Law*, (Oxford Clarendon 1961); Lon L. Fuller, *The Morality of Law* (1969); Ronald Dworkin, *Law's Empire* (1986); Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, *74 S. Cal. L. Rev.* 1307 (2001).

² James Madison, The Federalist No. 51, The Federalist Papers (Bantam Classic Ed. 1982).

³ Lawrence B. Solum, Equity and the Rule of Law, in *The Rule of Law*, 120, 122 (Ian Shapiro ed. 1994).

⁴ James W. Torke, What is This Thing Called the Rule of Law?, *34 Ind. L. Rev.* 1445, 1447 (2001).

⁵ Id.

⁶ Id.

⁷ Rosenfeld, supra note 1, at 1313. See also, Robert S. Summers, Propter Honoris Respectum: The Principles of the Rule of Law, *74 Notre Dame L. Rev.* 1691 (1999) (The rule of law requires, at a minimum, “that law be rule-like so far as appropriate, that it be clear, that it be public, and that it generally be prospective.)

⁸ See, Rosenfeld, supra note 1, at 1312 ([L]egitimation based on consent, appears to be the optimal, if not the exclusive means of normative justification for both constitutional democracy and the rule of law...” in pluralistic societies.); Dusan Hendrych, Constitutionalism in the Czech Republic, in *The Rule of Law in Central Europe*, 13, 15 (Jiri Priban and James Young eds. 1999).

⁹ Torke, supra note 3, at 1447-48.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Jean Hampton, Democracy and the Rule of Law, in *The Rule of Law*, supra note 2, at 13, 35.

¹⁴ See generally, Jaime Suchlicki, *From Columbus to Castro* (5th ed. 2002).

¹⁵ “[E]ven rule through law amounts to the ‘rule of men’ if the law can be changed unilaterally and arbitrarily, if it is largely ignored, or if the ruler and his or her associates consistently remain above the law.” Rosenfeld supra note 1, at 1313.

¹⁶ Dusan Hendrych, supra note 7, at 26.

¹⁷ Article 66 of the Cuban Constitution of 1976 specifically provided that the state organs in Cuba be 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. Michael B. Wise, *Cuba and Judicial Review*, 7 *Sw. J. L. & Trade Am.* 247, 261-2 (2000).

¹⁸ Id. at 259.

¹⁹ 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).

²⁰ Fidel Castro is the First Secretary of the PCC and his brother, Raul Castro, is the Second Secretary.

²¹ Cuba Const. 1992, Art 5.

²² Cuba Const. 1992, Art. 62.

²³ Jirí Pribán describes socialist legality and communist constitutionalism as a “rhetorical veil” for arbitrariness that permits the state to operate “under the mask of constitutionalism.” Jirí Pribán, *Legitimacy and Legality after the Velvet Revolution*, in *The Rule of Law in Central Europe*, supra note 7, at 30.

²⁴ Cuba Const. 1992, Arts 121, 122.

²⁵ In post-totalitarian regimes, it is the courts and prosecutors who assume the role of “enforcers” and become the “iron fist” of the Communist Party because the exercise of judicial power can create the illusion of state obedience to law. Jirí Pribán, *Legitimacy and Legality after the Velvet Revolution*, in *The Rule of Law in Central Europe*, supra note 7, at 33.

²⁶ Cuba Const. 1992, Art 75.

²⁷ Human Rights Watch 2001 *Report on Cuba*

²⁸ See interview with the Fiscal General of Camaguey Province in *Granma*, June 9, 2002, at <http://www.granma.cubaweb.cu/2002/06/09/nacional/articulo/11.htm>.

²⁹ There is a strong campaign being mounted by an unlikely alliance of agricultural interests, Republican representatives from the farm states, and representatives long sympathetic to the Castro Regime to lift the travel ban to Cuba and numerous other trade restrictions affecting U.S. business interests. Even if the campaign is successful, it is unlikely to bring the needed relief to ordinary Cubans on the island. Although some Cubans, particularly the party elite and those employed in the tourism industry, will benefit, the most dramatic benefits will inure to the Castro government, which will receive much needed capital to continue funding its repressive regime.

³⁰ Jorge Perez-Lopez, *Waiting for Godot: Cuba's Stalled Reforms and Continuing Economic Crisis in Problems of Post Communism*, November-December 2001, 44-45 cited in Edward Gonzalez, *After Castro: Alternative Regimes and U.S. Policy*, (Cuba Transition Project, Institute for Cuban and Cuban American Studies, University of Miami 2002).

³¹ The creation of a civil society organized to replace the authoritarian state is an essential element of long-term democratic stability and of the rule of law. This paper does not address specifically the creation of a civil society. For a detailed discussion of issues relating to the creation of a civil society in Cuba after a transition see Damian Fernandez, *The Greatest Challenge: Civic Values in a Post-Transition Cuba*, (paper to be published by the Cuba Transition Project, Institute for Cuban and Cuban American Studies, University of Miami).

³² Ironically, during Batista's tenure, Castro vehemently objected to the illegal exercise of constituent power to amend the Cuban Constitution by Batista's Council of Ministers. In his "History Will Absolve Me" speech, Castro stated : [Batista's Council of Ministers] assume the most essential attribute of sovereignty—the power to change the basic and supreme law of the land." Castro called Batista's efforts to "impose upon the people a constitution without the people's consent ...[in order to] install a regime which concentrates all power in its own hands" a "mockery". Fidel Castro, "History Will Absolve Me" at http://www.geocities.com/escuelapca/cursoverano2001/t_lahistoriameabsolvera.htm. (Trans. by author.)

³³ The Varela Project refers to an attempt by Cuban dissidents to present a petition to the National Assembly, signed by over 11,000 Cubans, asking the National Assembly to allow a popular plebiscite on the issue of whether or not the Cuban Constitution should be amended to permit free, competitive elections. Leaving aside the issue of whether such an amendment should ever be necessary to a constitution, the response of the Castro government was extreme. The Castro government mobilized itself and with the assistance of the PCC, mass organizations, and other Party and state apparatus, it presented its own petition to the National Assembly. The petition was purportedly signed voluntarily by 11,000,000 Cubans and asked the National Assembly to amend the Cuban Constitution to declare socialism and the political system in Cuba "untouchable." The language was later changed to "irrevocable."

³⁴ See Grzegorz W. Kolodko, *Ten Years of Post-Socialist Transition Lessons for Policy Reform*, 8 (The World Bank, Policy Research Working Paper 2095 1999).

Kolodko notes that if institution building is neglected, economic growth will be affected even if economic fundamentals are for the most part in order.

³⁵ Post-totalitarianism does not suggest that the communist system has ceased to exist. It refers to the fact that the totalitarianism of communism changed over time from a system openly founded on political terror or violence to one founded on the ritualization of public life. P?ibá?, Legitimacy and Legality after the Velvet Revolution, in The Rule of Law in Central Europe, *supra* note 7, at 31.

³⁶ This was described by Czech dissident Milan Simecka as a type of social contract that arose between the ruling communist elite whereby citizens were more or less left alone in exchange for not becoming involved in political affairs. Jirí Pribán, Legitimacy and Legality after the Velvet Revolution, in The Rule of Law in Central Europe, *supra* note 7, at 32.

³⁷ George E. Glos, *The Constitution of the Czech Republic of 1992*, 21 *Hastings Const. L. Q.* 1049, 1058 (1994).

³⁸ *Id.* The commission was created in July 1992, and the final version of the constitution was approved on December 16, 1992. *Id.*

³⁹ *Id.* Approval required a 3/5 majority. The parliament approved the constitution by approximately an 8/10 majority.

⁴⁰ Hristo D. Dimitrov, *The Bulgarian Constitutional Court and its Interpretive Jurisdiction*, 37 *Columbia J. Transnat'l L.* 459, 462-63 (1999).

⁴¹ Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy*, *B.Y.U. L. Rev.* 41, 50 (1992).

⁴² *Id.* at 48-50; Cheryl W. Gray, et al., *Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe*, 66 (The World Bank Discussion Paper No. 209 1993).

⁴³ Klingsberg, *supra* note 40, at 50-51.

⁴⁴ Gray et al., *supra* note 41, at 95.

⁴⁵ Ludwikowski, *supra* note 18, at 37.

⁴⁶ There are approximately 2 million Cubans in exile throughout the world who have been stripped of their citizenship merely for choosing to leave the island and flee the repressive regime. Their involvement in a any process of democratization is not only fair, it would also be beneficial because of the resources they could provide throughout the transition process.

⁴⁷ No other parties currently exist, but any other party formed during transition should participate in the constitutional assembly.

⁴⁸ An obvious example of this is the United States' efforts to establish a government in Cuba based on its own desires or expectations, not those of Cubans, after the

Spanish-American War.

⁴⁹ Rosenfeld, supra note 1, at 1314.

⁵⁰ See, Summers supra note 6, at 1695

⁵¹ Similarly, although not named as elements creating the rule of law, Gonzalez points out that democracy requires a number of elements including 1) a democratic political class, 2) a political class untainted by venality, 3) the military's subordination to civilian rule and 4) the diffusion of democratic values in society. These elements also support and foster the rule of law. Gonzalez , supra note 29.

⁵² See, Ludwikowski, supra note 18, at 19-21 for a detailed discussion of the types of election models available and the various methods of determining the proportional representation of each party in the legislature.

⁵³ Id. at 19-20.

⁵⁴ Id. at 20.

⁵⁵ Id.

⁵⁶ James Madison, The Federalist No. 51, in The Federalist Papers, 261, 262 (Bantam Classic Ed. 1982) "A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

⁵⁷ Id.

⁵⁸ See, Laura Patallo Sánchez , *The Role of the Judiciary in a Post Castro Cuba: Recommendations for Change*, at 16-18, 22-27 (paper to be published by the Cuba Transition Project, Institute for Cuban and Cuban-American Studies, University of Miami).

⁵⁹ See, Id. for a more detailed discussion of the changes needed to create an independent judiciary in Cuba.

⁶⁰ United Nations Code of Conduct for Law Enforcement Officials, General Assembly Resolution 34/169, (1979) at <http://www.yale.edu/lawweb/avalon/diana/undocs/71598-9.html>.

⁶¹ For a detailed discussion of the educational system in Cuba and proposals for reform see, Graciella Cruz-Taura, *Rehabilitating Education in Cuba: Assesment of Conditions and Policy Recommendations*, (paper to be published by the Cuba Transition Project, Institute for Cuban and Cuban-American Studies , University of Miami.) For a comparative study of educational reforms in The Czech Republic, Latvia and Poland and the applicability of those reforms to educational reform in a post-communist Cuba see, Andy Gomez, *The Role of Education in Promoting Cuba's Integration into the International Society: Lessons in Transition from the Post-Communist States of Central and Eastern Europe*, (paper to be published by the Cuba

Transition Project, Institute for Cuban and Cuban-American Studies, University of Miami.)

⁶² See, O. Lee Reed, Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study, *38 Am. Bus. L. J.* 441, (2001)

⁶³ See report at www.joglinika.hu/engl/lawclinic/foundation.htm.

⁶⁴ One part of a Judicial Reform Program begun in 2000, when the Bulgarian Parliament proposed a comprehensive review of all existing legislation in order to repeal all “obsolete or controversial legal provisions” and create a “modern and harmonious” legal framework compatible with European law while at the same time respecting Bulgarian legal traditions. See *Judicial Reform Initiative, Program for Judicial reform in Bulgaria*, (Sofia 2000) at www.csd.bg/news/law/Rrogram_april_E.html. Although not in the same context, a similar review will take place in Afghanistan where the interim government is expected to determine which laws are currently in existence today in Afghanistan and review all existing legislation to determine its consistency with the 1964 Afghan Constitution and the Bonn Agreement, which governs the peace/transition process. See American Bar Association, Asia Law Initiative, International Resources Group, International Foundation for Election System, and International Human Rights Law Group, *Filling the Vacuum: Prerequisites to Security in Afghanistan*, (2002) at www.abanet.org/aba-asia/afghan.pdf.

⁶⁵ Steven Lee Myers, Russia Glances to the West for it’s New Legal Code, *N.Y. Times* on the Web, July 1, 2002 at <http://www.nytimes.com/2002/07/01/international/europe/01RUSS.html>

⁶⁶ American Bar Association, Central and East European Law Initiative, *Russia Program Information* at <http://www.abanet.org/ceeli/home.html>.

⁶⁷ *Judicial Reform Initiative, Program for Judicial reform in Bulgaria*, supra note 53.

⁶⁸ American Bar Association, Central and East European Law Initiative, *Bulgaria Update* Spring 2002 at www.abanet.org/ceeli/home.html.

⁶⁹ Id.

⁷⁰ Summers, supra note 6, at 1693-94. Professor Summers provides what he terms a “comprehensive inventory” of principles governing how laws must be made and implemented if they are to conform to the rule of law. His list includes numerous other elements not mentioned here but which would likely serve to ensure the rule of law. These principles arguably apply at different times throughout the law making, implementation, interpretive, and enforcement processes in every area the state seeks to regulate the conduct of those subject to its jurisdiction.

⁷¹ Id.

⁷² See, Tom Tyler, *Why People Obey the Law*, (New Haven Conn. Yale University Press 1990) cited in Robert Eli Rosen, Symposium Introduction: Law, Democracy

and Society: Complicating Law's Legitimation Processes, *25 Law and Soc. Inquiry* 973, 974-75 (2000).

⁷³ In fact, Professor Summers includes a similar element in his listing of the principles of the rules of law, that is, "that the behavioral requirements of a law be within the capacity of its addressees to comply." Summers, *supra* note 6, at 1693.

⁷⁴ Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, 5 (Working Paper No. 44, Center For International Development, Harvard University 2000). Professor Schauer's paper "offers a series of testable hypotheses about various factors, other than the factors of inherent value, that may influence the pattern of legal migration and legal transplantation..." *Id.* at 2.

⁷⁵ *Id.* at 4. Professor Schauer notes that there is certainly evidence that "the fact of legal transplantation...may be causally related to various measures of legal or economic effectiveness."

⁷⁶ *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (Marshall, C.J.).

⁷⁷ Joseph J. Ellis, *Founding Fathers*, 9 (2001).

About the Author

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.

Institute for Cuban and Cuban-American Studies - ICCAS

The Institute for Cuban and Cuban-American Studies is unique in that ICCAS is a leading Center for Cuban Studies emphasizing the dissemination of Cuban history and culture. ICCAS sponsors academic and outreach programs and helps coordinate Cuban-related activities at the University of Miami including the Casa Bacardi; the Emilio Bacardi Moreau Chair in Cuban Studies; the Cuba Transition Project; the Cuban Heritage Collection at Otto G. Richter Library; the John J. Koubek Memorial Center, and other University components related to Cuban and Cuban-American Studies.

Programs and Activities

The Institute undertakes a variety of programs and activities, including sponsoring and hosting public lectures and seminars. The Institute's Information Center provides current and historical information on Cuba and responds to requests from the academic, business, media and government communities. ICCAS publishes research studies and occasional papers, sponsors original research, and coordinates interdisciplinary courses at the University of Miami. The Institute also organizes art exhibits, musical programs, and an annual film festival.

Recently Published by the CTP

After Castro: Alternative Regimes and U.S. Policy – **Edward Gonzalez**

The Cuban Communist Party and Electoral Politics: Adaptation, Succession, and Transition – **William M. LeoGrande**

Growing Economic and Social Disparities in Cuba: Impact and Recommendations for Change – **Carmelo Mesa Lago**

A Transparency/Accountability Framework for Combating Corruption in Post-Castro Cuba – **Sergio Diaz Briquets and Jorge Perez Lopez**

Socio-Economic Reconstruction: Suggestions and Recommendations for Post-Castro Cuba – **Antonio Jorge**

The Spanish Transition and the Case of Cuba – **Carlos Alberto Montaner**

The Role of the Judiciary: Alternative Recommendations for Change – **Laura Patallo Sanchez**

International Organizations and Post-Castro Cuba – **Ernesto Betancourt**

The Cuban Military and Transition Dynamics – **Brian Latell**

The Role of Education in Promoting Cuba's Integration into the International Society: Lessons in Transition from the Post-Communist States of Central and Eastern Europe – **Andy Gomez**

The Greatest Challenge: Civic Values in Post-Transition Cuba – **Damian J. Fernandez**

Privatization Strategies, Market Efficiency, and Economic Development in Post-Castro Cuba – **Antonio Jorge**

Forthcoming CTP Publications

Confiscated Properties in a Post-Castro Cuba: Two Views – **Matias Travieso**, “*Alternative Recommendations for Dealing with Confiscated Properties in Post-Castro Cuba*” and **Oscar M. Garibaldi**, “*The Treatment of Expropriated Property in a Post-Castro Cuba*” with an introduction by **Laura Patallo Sanchez**

A Constitution for Cuba's Political Transition: The Utility of Retaining (and Amending) the 1992 Constitution – **Jorge I. Dominguez**

Foreign Direct Investment in Post-Castro Cuba: Problems, Opportunities, and Recommendations – **Robert Cruz**

The Role of the Cuban-American Community in the Cuban Transition – **Sergio Diaz Briquets and Jorge Perez Lopez**

What Has Gone Wrong with Transitions in Post Communist Eastern Europe: Lessons for Cuba – **Vendulka Kubalkova**

Nicaragua: Political Processes and Democratic Transition - Possible Lessons for Cuba – **Alvaro Taboada Teran**

Rehabilitating Education in Cuba: Assessment of Conditions and Policy Recommendations – **Graciella Cruz-Taura**

Republic of Cuba Telecommunications Fundamental Plan – **Manuel Cereijo**

Securing the Future: A Blueprint for the Reconstruction of Cuba's Security Services – **Eugene Rothman**

Lessons for Cuba of the Romanian Transition – **Michael Radu**