CHALLENGES FOR A TRANSITIONAL JUDICIARY IN A POST-CASTRO CUBA

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Perhaps more than any other branch of government, historically the judiciary has played a critical role in protecting the individual from the awesome power of the state. Of course, that protection exists only if the judiciary operates as a legitimate and independent branch of government with sufficient power and authority to overrule legislatures and curb executives who act in violation of constitutional law. Without these characteristics, the judiciary becomes nothing more than a rubber stamp for potentially corrupt and abusive governments; it becomes a conspirator to the abuses that it should be prepared to prevent.

As accomplices to the atrocities of dictatorial governments, the judiciary faces a fundamental challenge to establishing its legitimacy, both in the eyes of the citizens whose laws it would enforce, as well as of the international community, following a transition to democratic rule. In Cuba's case, this challenge will be especially difficult given the extent to which the current regime has, for the past 43 years, decimated Cuba's legal traditions and resources. Unlike Germany, where West German judges and lawyers were able to help rebuild the East German legal system, today there are probably an insufficient number of Cubans who operated within the former legal system to replace Cuba's current judges *en masse*.

Like most Eastern European nations following their emergence from behind the Iron Curtain, Cubans will have to rely on their current judiciary—at least for the immediate term. (How long a transition will last is unknown. Let us not forget that it took Russia until 2002 to reform its criminal code.) This means, of course, that a post-Castro transitional government will have to legitimize a judiciary that will undoubtedly continue to be operated by some of the same people that were there under the Communist regime.

In this discussion, we explore how other nations, particularly those of Eastern Europe and Latin America, went about establishing the legitimacy of their judiciary following their transitions to democracy. From their experience, we consider how a post-Castro Cuba might undertake the task of establishing the legitimacy of its judiciary.

THE CUBAN JUDICIARY: PAST AND PRESENT

Let us first review the history of Cuba's judiciary, as well as the status of the system in place today. Prior to the Revolution, Cubans lived under one of Latin America's most effective judiciaries. The island's judiciary was composed of well-educated and highly trained lawyers, judges, and law professors who enjoyed and benefited from Cuba's rich legal traditions. Most of these traditions were based on Spanish Law, which was in turn grounded on Roman legal principles and the Napoleonic Code of France, but also incorporating concepts from other systems, namely that of the U.S. In addition to this strong cultural and historical foundation, pre-Castro Cuba operated under the auspices of Cuba's 1940 Constitution, which was widely regarded as one of the most modern of its time in Latin America. In addition to international human rights concepts such as free speech, women's rights and checks and balances of governmental branches, the 1940 Constitution incorporat-

ed concepts such as *habeas corpus*, from which Fidel and many of his followers directly benefited during the pre-Castro years.

I do not, of course, mean to idealize the pre-Castro Cuban judicial system. There were no doubt faults in Cuba's pre-1959 judiciary. Like the old American cars roaming the streets of Havana, the former judicial system in Cuba was, perhaps, exemplary for its time, but it ceased to progress beyond 1959 and should most certainly not be adopted in a post-Castro Cuba without updating.

As for the current legal system, it is, of course, representative of any other communist system. The goal of the judiciary is not to act as a check on the powers of the other branches of government. Instead, its role is to preserve communism and the Revolution at the expense of individual human rights. As a most basic example, today the Cuban prosecutor and the Cuban defense attorney work together toward the common goal of preserving the Revolution and not, as you might expect, as adversaries, with one representing the might of the state and the other the rights of the individual. Needless to say, neither Cubans nor the international community are likely to attribute much legitimacy to the judiciary conceived, trained and operating in Cuba today.

ESTABLISHING THE LEGITIMACY OF POST-DICTATORIAL GOVERNMENTS

Steps taken to legitimize the governments of post-communist Eastern European and dictatorial Latin American nations can generally be divided, in order of severity, into three categories:

1. the establishment of truth commissions;
2. the establishment of laws designed to prevent former communists from holding public office in new governments. The process by which these persons are excluded from participation in a post-dictatorial government is commonly known as "lustration," from the Latin word *lustrare* meaning ceremonial purification; and
3. the criminal prosecution of former *apparatchiks*.

Truth Commissions

Truth commissions have been used in countries like Chile, Argentina, El Salvador and South Africa, where the new democratically elected governments viewed it as necessary to address the criminal allegations made against the former authoritarian governments. The purpose of these commissions is to expose the alleged crimes of the government in a public forum so that a proper investigation may be conducted and, perhaps most importantly, legitimize the claims made by the accusers. For example, the truth commissions in El Salvador, Chile, Argentina and South Africa while not having much authority to punish alleged wrongdoers, provided the victims in those countries with official recognition of their pain and anguish.

Lustration

Exclusion of former communists from participation in post-communist governments has most often been seen in the former Eastern Bloc countries, particularly in the former Czechoslovakia and in Poland.[1] Generally, the lustration laws set forth a set of standards that, if met, would exclude a person from participating in public life. The trouble with such laws, of course, is that they are subject to manipulation for political purposes. As an example, many in Poland complained that, prior to Poland's first democratically held elections, lustration was being used as a political tool to exclude political foes from office and/or tarnish their reputations. (Interestingly, claims for lustration in Poland fell precipitously following these first elections, which suggests that lustration had, in fact, been used for mere political gain.) Because of this high potential for abuse, lustration laws should be carefully implemented, with clear limitation on their powers. As with any other legal proceeding, procedures also have to be put in place to ensure that those alleged of complicity with the former government have a forum in which to proclaim their innocence, as well as a procedure for appealing any determination that they should be excluded by effect of a lustration law.

1. Lustration laws have also been adopted in Germany, Bulgaria, Hungary, Albania, Romania and certain former Soviet republics.

Criminal Prosecution

The method that may seem the most logical is also perhaps the most controversial. Except in extreme cases, new governments have been reluctant to pursue the criminal prosecution of former dictators, *apparatchiks* or their henchmen, especially high ranking members of the judiciary. As an example, in El Salvador, truth commissions were established to deal with the alleged misdeeds of the prior government, but criminal trials were never held. Other countries like Chile and Argentina are still struggling with their past. In Chile, it was not until very recently that General Augusto Pinochet was charged, but found to be physically unfit for prosecution. In Argentina, those accused of taking part in the "dirty war" were just recently arrested, and only after the amnesty initially granted to them was held to be unconstitutional. In some cases, nascent democracies are obviously concerned that aggressive prosecution of former leaders will encourage these former leaders and the organizations they represented to take action against the still weak civil government. Alternatively, many of these former leaders ensured that they would retain sufficient power in the new governments so as to make criminal prosecutions unlikely (*e.g.,* Gen. Pinochet was appointed a Senator-for-Life following his abdication of power, which resulted in a continuing constitutional immunity from prosecution). Either way, it is obviously difficult for newly established governments to pursue criminal prosecutions, except in connection with the most egregious examples of criminality.

ESTABLISHING THE LEGITIMACY OF A POST-CASTRO JUDICIARY

Given the precedents set forth above, let us try to determine how a post-Castro government might establish legitimacy for the judiciary.

While truth commissions are an often necessary step in national reconciliation, they serve a limited role in helping to legitimize the judiciary. Simply put, exposing the crimes of those who were part of the communist judiciary would do little to legitimize a post-communist judiciary if these same people are allowed to continue to sit in judgment. If anything, the findings of a truth commission would undermine any remaining legitimacy. Clearly, legitimizing the judiciary will require more than just public acknowledgment of its past failures.

If more than mere symbolic action will be required to establish the legitimacy of the judiciary, why not prosecute all of the former communist judges for their crimes? Simply put, we have already discussed how it is difficult for young democracies to prosecute all but the most virulent former communists. This type of action should perhaps be limited to circumstances where a judge is alleged to have violated human rights by rendering a sentence, or otherwise using his judicial power to cause irreparable injury or death by the state. In addition, there are other problems with criminal trials. First, criminal trials, if conducted properly so as to ensure that the accused is afforded due process of law, are costly and take a long time to complete. Criminal trials, by their nature, focus on the past; a young republic might better serve its people by focusing its limited resources on helping to secure the country's future and those of its people. Second, and perhaps most importantly, criminal trials will not capture all of those *apparatchik* judges who should be excluded from the judiciary, but whose actions may not have necessarily risen to the level of prosecutable criminal conduct.

So, if establishing the legitimacy of a post-Castro judiciary will require more force than what a truth commission can offer, but also a procedure that is more palatable and able to cast a wider net than mass criminal prosecutions, let us consider the alternative used most often in Eastern Europe: lustration. Throughout Eastern Europe, lustration laws have provided these nascent democracies with a formidable mechanism to exclude those who would undermine their democratic efforts. In the case of the Cuban judiciary, I believe lustration would provide an efficient system by which to exclude from the bench those Cuban judges whose actions under communism should absolutely preclude them from legitimate participation in a democratic government. Of course, lustration is not a perfect procedure, and such laws have had their fair share of opponents, most notably Vaclav Havel of the Czech Republic, who has in the past attempted (unsuccessfully) to limit their

extension of the time they remain in effect in that country.

COULD LUSTRATION WORK IN A POST-CASTRO CUBA?

Let us focus on the key components of lustration and attempt to reach a conclusion as to the possible applicability of such laws to the judiciary of a post-Castro Cuba.

Setting a Standard

Lustration requires that the new democratic state establish "standards" to determine whether a former communist should be excluded from participation in the new government. Before establishing these standards, however, we must first define what a post-Castro Cuba is likely to accept as a "legitimate" judiciary.

Neither post-Castro Cubans nor the international community would consider legitimate a judiciary where Castro's chief judges retained their power. In fact, some would argue that all of Cuba's current judges are communist party activist who should be excluded from participation in a post-Castro judiciary. However, would a post-Castro judiciary be deemed illegitimate simply because some of these judges continued to sit on the bench? Should a few former *apparatchiks* spoil the system? Should "bootlickers" be tolerated? Perhaps more importantly, how do you separate who are the high-ranking communist party members from those who are merely "bootlickers"?

In an attempt to answer these questions, some have made the distinction between people living under communist regimes, where every citizen is expected to participate in rallies and show support for the government (*e.g.*, East Germany), and those living in authoritarian regimes, where the ideal citizen was someone who simply stayed out of the way.[2] If we accept this distinction, those under communist rule should not be deemed to be party loyalists simply because they participated in government rallies. In contrast, those living under authoritarian regimes who have participated in pro-government activities are likely to be true government sympathizers. Unfortunately in the case of the Cuban judiciary, such bright-line tests are likely difficult to apply. Undoubtedly, communist rabble-rousers pressure Cubans to participate in pro-government rallies; there is no question of that. At the same time, however, one must consider the fact that a dictatorial regime, like Castro's, is unlikely to make someone a judge if that person is not a proven pro-government supporter.

So, does this mean that every one of Castro's current judges is a dyed-in-the-wool communist, whose participation in a post-Castro judiciary would undermine the legitimacy of the entire system? In other post-dictatorships, the question has not been directly addressed. However, a pragmatic view would suggest that these post-communist governments, as well as their constituents, have had to assume and accept that a judiciary can be legitimized, even if a percentage of its members were judges under the former dictatorial regime. There simply is no way to replace an entire bureaucracy, like the judiciary, overnight, and I suspect that Cuba will most likely be required to make the same assumption that other former communist countries have had to make. Accordingly, chances are that a Cuban lustration law would likely apply its full force only to current members of the judiciary who are also the most ardent, high-ranking members of the communist hierarchy, including those who have had involvement with Cuba's secret police.

In countries like the former Czechoslovakia, the lustration laws applied to all "conscious collaborators." In the case of the Cuban judiciary, this concept might be too broad, as most Cuban judges would probably be deemed to be "conscious collaborators." Even under a slightly narrower definition, the effects on the Cuban judiciary might be extreme. For example, the German lustration law only applied to East Germans with ties to the Stasi secret police, yet the law forced approximately 50% of the East German

2. See, for example, Speech given by Tina Rosenberg at the Democratic Politics and Policy Workshop, New School East & Central Europe Program, February 12, 1996 (transcript on the Internet at: http://www.newschool.edu/centers/ecep/tina.htm.)

judiciary into early retirement. As mentioned earlier in our discussion, the East German slots were filled by West German judges who also helped to educate the remaining East German judges. In Cuba, there will be no such resources. Arguably, expatriates could play a role in helping to shape the development of a post-Castro judiciary, but how likely is it that they would be available in sufficient numbers to man the Cuban judiciary ranks overnight? (As an aside, expatriates who have been naturalized in other countries may be ineligible to serve in a Cuban judiciary, unless they are willing to lose their citizenship elsewhere. For example, under U.S. law a citizen may lose his or her U.S. nationality by taking an oath or making a declaration of allegiance to, or by accepting employment in the government of, a foreign state.)

Another tool used to determine which former communists should be excluded from government has been the examination of secret police files. Presumably, if the secret police files list a person as a collaborator, this person should be considered an apparatchik and subject to exclusion under the lustrations laws. Although a seemingly reasonable approach, the procedures enacted to examine these secret files has varied widely from country to country. In Germany, citizens can apply to review the files kept on them by the Stasi (which are reputedly, in the best of German traditions, extremely detailed and voluminous). In Germany, government agencies can even run checks on their employees to make sure that they are not former Stasi agents or collaborators. According to one source, "these checks have resulted in the dismissal of thousands of judges, police officers, schoolteachers and other public employees in eastern Germany who once informed for the Stasi."[3] In the Czech Republic, access to the StB files is restricted to those who have been accused of being former collaborators, and even then, the access is restricted to relevant information only. The Romanians, by contrast, have sealed their secret police records for 40 years.

Whether post-Castro Cuba will immediately open the secret files of the Ministerio del Interior to its citizens is an obviously intriguing question. For purposes of our discussion, however, it should be made clear that if such files were to be made available for purposes of lustration, they should serve only as evidence and not as definitive proof of someone's ineligibility to participate in democratic government. The problem, as stated by the editor of a Polish newspaper asked to comment on his country's decision to open up the files of the Polish secret police, is obvious:

> I don't think it's a great idea. When you look to the past through the window of the ex-special police, you don't really look into the past, you look into the past as produced by them. They were not honest people. They were inventing people trying to use the files for their own purposes.[4]

How long should the exclusion last?

At first glance, lustration laws seem perfectly suited for short-term use during the transition from communism to democracy, while the institutions of democracy are being established and reinforced. The fear during these transitional periods is that former communists are able to undermine democratic initiatives if allowed to frustrate the efforts of nascent democratic governments to establish the laws and institutions that protect pluralism (*i.e.*, adoption of a constitution, establishment of a constitutional court and free and fair elections).

The reasoning is perhaps best summarized by the Constitutional Court of the Czech and Slovak Federal Republic in a 1992 decision upholding lustration:

> In a democratic society, it is necessary for employees of state and public bodies. . . to meet certain criteria of a civic nature, which we can characterize as loyalty to the democratic principles upon which the state is built. Such restrictions may also concern specific groups of persons without those persons being individually judged, a situation which can be found, without a great deal of difficulty, in other legal systems as

3. "Germans Anguish over Police Files," *The New York Times*, February 20, 1992.

4. "Poles queue for secret police files," by Douglas Herbert, *CNN.com*, posted February 15, 2001, http://europe.cnn.com/2001/WORLD/Europe/02/15/poland.files.

> well (for example, in the Federal Republic of Germany, persons from the former German Democratic Republic or the east bloc may not be engaged by firms producing highly developed technology for the weapons industry).[5]

Noting that the exclusionary provisions would be in effect only during "a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished," the court then stated in language that seems to me appropriate for a post-Castro Cuba, that:

> Each state or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by a totalitarian regime has the right to enthrone democratic leadership and to apply such legal measures as are apt to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.

However, in December 2001, 44 deputies from the lower house of the Czech parliament[6] asked the Constitutional Court of the now Czech Republic to review the constitutionality of the lustration laws.[7] The deputies argued that the court's predecessor, the Constitutional Court of the Czech and Slovak Federal Republic, had held the lustration laws to be constitutional only because (1) at the time of the decision, the state had a legitimate interest in establishing the institutions of democracy without interference from former *apparatchiks*, and (2) such laws would have a limited duration (*i.e.,* only until the establishment of the institutions of democracy). The deputies argued that such institutions had been established and the lustration laws had been set to expire prior to 2001, so that an amendment indefinitely extending the validity of the lustration laws was unconstitutional.

Despite the ruling of its predecessor, which the court determined to be non-binding, and the deputies' arguments, the Constitutional Court ruled that the state had a legitimate and constitutionally valid interest in continuing to exclude from government those who would undermine the institutions of democracy. The court noted that those who had consciously suppressed the rights of citizens were a danger to democratic society. Since there was no legal right to hold a position in state administration, the court upheld the state's right to exclude such people from government. The court did note, however, that lustration laws did not "restrict anyone in entering into a political office," such as becoming an elected member of parliament.

Therefore, according to precedent, particularly that of the Czech Republic, we may conclude that lustration laws may apply for an indefinite period of time. Accordingly, a post-Castro Cuba government would have discretion as to when such laws should expire, if ever.

From What Positions Should Former Communists be Excluded

Generally, lustration laws have been implemented to exclude former communists from most top level positions, such that a former communist wishing to become a bus driver would not necessarily face exclusion but one wishing to become a police officer might. For purposes of our discussion, however, it is clear that lustration laws should apply to those in every level of the judiciary, from chief appellate judges down to local magistrates. As discussed above, the difficulty for the new government will not be in determining who within the judiciary should be made subject to lustration laws, but in determining the standard by which these persons are to be excluded.

Implementation of Proper Lustration Procedures

The last but certainly most important issue to consider is the procedure by which to implement lustration.

In the Czech Republic, for example, if a person is accused of being a communist under the lustration

5. http://www.concourt.cz/angl_verze/doc/p-1-92.html.

6. There are presently 200 deputies in the Chamber of Deputies, as the lower house of the Czech parliament is called, so 44 deputies represented 22% of the members of the Chamber of Deputies.

7. http://www.concourt.cz.angl_verze/doc/p-9-1.html.

laws, he or she has the right to challenge the accusation and have access to any StB files used as evidence against them. The accused then has the right to appeal any such findings, and the Czech Constitutional Court has upheld these procedures as being constitutionally sound.

However, the basis upon which the Czech Constitutional Court found these lustration laws to be substantively and procedurally sound is of particular interest for purposes of our discussion because it illustrates the importance of both substance and procedure in the application of these laws.

In defending its position that lustration is a legitimate state right, the Czech court relied, in part, on the laws and judicial decisions of other European countries, as well as those of the United States. In referencing the United States, the court cited to *Adler v. Board of Education*,[8] a 1952 U.S. Supreme Court case upholding the constitutionality of a New York State law that made any person advocating, or belonging to organizations advocating, the overthrow of government by force, violence or unlawful means ineligible for employment in the New York State education system. While the *Adler* decision did uphold the New York State law, the U.S. Supreme Court did so based solely on its finding that government has the right to exclude subversives from employment. The Court did not consider the question of whether the law was constitutionally vague. In fact, the Court specifically noted that the vagueness argument had not been raised by the petitioners in the lower courts and that the Court would not "pass upon the constitutionality of a state statute before the state courts [had] an opportunity to do so."

Fifteen years later, in *Keyishian v. Board of Regents*,[9] the U.S. Supreme Court again revisited the New York statute. This time, however, the Court found the law to be unconstitutionally vague because its terms were not "susceptible of objective measurement" and because "men of common intelligence must necessarily guess at its meaning and differ as to its application." In addition, the Court noted that "pertinent constitutional doctrines have since rejected the premises upon which [the *Adler*] conclusion rested." Specifically, the *Adler* court's premise that "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action" had been rejected by later decisions as being unconstitutionally unsound. In other words, the Court found that (1) the procedures enacted to enforce the New York law were vague and incapable of being applied in a constitutionally objective manner and (2) the state could not establish criteria for exclusion from employment which necessarily infringed upon basic the constitutional rights of individuals, such as the right of free speech and association. The latter of these points directly contradicts the premise of the Czech court's argument (*i.e.,* that governments have a right to exclude subversives from employment).

Of course, our discussion of the U.S. cases and the Czech case is for illustrative purposes only. There are obvious differences between an established democracy, where democracy is entrenched in the people and their government, and a young democracy, where the fear that government will revert to a dictatorship is a real possibility. The point is that any laws enacted to legitimize a post-Castro government, particularly its judiciary, will need to ensure that that the criteria being established to exclude people from public life meet stringent constitutional scrutiny, and that the procedures established for their enforcement are also constitutionally sound. Otherwise, the process of legitimization could itself become corrupt, and we have done nothing more than replace one ill-devised system with another one.

CONCLUSION

As we have said, there is no doubt that a post-Castro government will find it difficult to establish the legitimacy of its judiciary. Based on the precedents established by other countries and given Cuba's unique

8. *Adler v. Board of Education,* 342 U.S. 485, 72 S.Ct. 380 (1952)

9. *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675 (1967)

history and present-day situation, we can conclude that this difficult task could perhaps be made easier if a post-Castro government enacted a lustration law similar to those of Eastern Europe. The goal of this "Ley de Incapacitación para el Ejercicio de Cargos Judiciales Públicos" should be to exclude from the judiciary the highest level Communist officials, members or henchmen of the Ministerio del Interior and others who were accomplices to severe violations of human rights.

Once lustration is effected, the question remains as to what to do with the remaining judges. Clearly, the very fact that they were part of a dictatorial government tarnishes their legitimacy, but as we have noted, it will be impossible to dismiss all of the judiciary, particularly not immediately. Accordingly, the new government could (1) announce that it will dismiss the entire judiciary but not state a specific date for their dismissal, which would allow the new government to dismiss judges at-will, or (2) retain judges on a provisional basis, say, for 12 months, subject to extension for further 12-month periods, for a time. However, if extended for too long, without evolution these procedures would themselves de-legitimize the judiciary, as judges eager to keep their jobs become "bootlickers" to their new bosses and forfeit their independence.

Finally, the new government might establish an independent commission to review claims arising from the process of lustration and then establish a process by which to appeal the commission's decisions. Initially, such commission could be established by decree of the new government. Thereafter, however, the functions of such committee should be passed on to the judiciary, with ultimate review by whatever is established to review constitutional issues.