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Judicial Institutionalization of the Revolution: The Legal Systems of the People's Republic of China and the Republic of Cuba

I. INTRODUCTION

A revolution is defined as "a violent rejection of the legal order of the past,"¹ and is characterized by a fervor of judicial iconoclasm in the new regime.² However, if the new regime is to survive beyond the life of its founders without resorting to tyranny, it must promulgate a new and stable legal order.³ When a revolution is led by a highly visible, charismatic leader, it often results in legal instability and inconsistency because the leader tends to rule by improvisation.⁴ So long as the leader retains the prestige and admiration of the population, the regime is secure.⁵ In contrast, when the leader dies, or no longer enjoys popular support, the new regime will not survive unless it has established a predictable, pragmatic, and stable legal system.⁶

1. Harold J. Berman & Van R. Whiting, *Impressions of Cuban Law*, 28 AM. J. COMP. L. 475, 485 (1980). Cuban President Fidel Castro said, "[R]evolution signifies the destruction of the old social order and all the old laws that regulate the life of a society, and replaces them all with new laws." Nelson P. Valdés, *Revolution and Institutionalization in Cuba*, 6 CUBAN STUD./ESTUDIOS CUBANOS 1, 16 (1976).

2. In a 1971 speech, Fidel Castro noted that the first phase of Cuban revolutionary institutionalization was marked by "iconoclasticism [sic] in relation to laws; we have to destroy the system, destroy its laws, destroy everything." Luis Salas, *The Judicial System of Postrevolutionary Cuba*, 8 NOVA L. J. 43, 44 (1983). Following the successful overthrow of the Guomindang government in 1949, "the Chinese Communist regime . . . repealed all the laws of the nationalist government because such laws stressed the interests of the bourgeois class and the feudal society." Chin Kim, *The Modern Chinese Legal System*, 61 TUL. L. REV. 1413 (1987). In the Soviet Union, "Lenin's regime dissolved the courts, dismissed government attorneys, and disbanded the organized bar." JOHN S. RESHETAR JR., *THE SOVIET POLITY: GOVERNMENT AND POLITICS IN THE USSR* 254 (3d ed. 1989).

3. Berman & Whiting, *supra* note 1, at 485. See also Max Weber, *The Genesis and Transformation of Charismatic Authority*, in 2 ECONOMY AND SOCIETY, 1121, 1123 (Geunther Roth & Claus Wittich eds., 1978) (arguing that if charismatic regimes wish to transform themselves into perennial institutions, they must move in the direction of legal regulation).

4. See Edward Gonzalez, *Cuba's Political Structure: Institutional Development of a Revolutionary State 1* (May 16-17, 1983) (unpublished paper presented at the International Conference held in Bonn, Germany, on "Cuba in the Eighties").

5. See Valdés, *supra* note 1, at 8 (explaining that charismatic authority is unstable because there are no firm rules).

6. Berman & Whiting, *supra* note 1, at 485. See also Weber, *supra* note 3, at 1121.

Revolutionary regimes face unique problems when they attempt to convert themselves into legitimate governments.⁷ Foremost, the regimes are forced upon a country too quickly to be accepted by a large majority of the population.⁸ Initially, a lack of majority support is not problematic because the regime's right to govern has not been granted by democratic principles, but rather by military superiority.⁹ While such tyranny may be tolerated for a brief period of time, it does not provide for a stable and lasting government.¹⁰

The most significant weakness of a government that both attains and maintains its power through force is that it is defenseless against the use of force by others.¹¹ The government cannot morally oppose the violent tactics of its opposition since the government itself used such tactics against its predecessor.¹² Thus, the only way a revolutionary government can justify the use of force against its opposition is by passing itself off as the free expression of the people's will.¹³ But, in so doing, the revolutionary government inevitably "camouflage[s] its despotism by a parody of freedom which renders its despotism even more intolerable and against which the human intellect . . . will always revolt."¹⁴ The ruling class, apprehensive about public opposition, ultimately becomes the victim of its own oppression.¹⁵

"When the tide that lifted a charismatically led group out of everyday life flows back into the channels of workday routines, . . . the 'pure' form of charismatic domination will wane and turn into an 'institution'." *Id.* See also Valdés, *supra* note 1, at 13; JUAN M. DEL AGUILA, CUBA: DILEMMAS OF A REVOLUTION 163-65 (1988).

7. A legitimate government is one in which "power is conferred and exercised according to principles and rules accepted without discussion by those who must obey." GUGLIELMO FERRERO, THE PRINCIPLES OF POWER: THE GREAT POLITICAL CRISES OF HISTORY 135 (1942). Jeane Kirkpatrick, the former United States Ambassador to the United Nations, maintains that a government's legitimacy depends on "its capacity to govern, to secure obedience, to punish those who disobey—in sum, to maintain order." JEANE J. KIRKPATRICK, DICTATORSHIPS AND DOUBLE STANDARDS: RATIONALISM AND REASON IN POLITICS 83 (1982).

8. FERRERO, *supra* note 7, at 187.

9. *Id.* at 22. Ferrero states that "[t]he right to govern can only be justified by superiority A majority proves nothing: neither the ability of a man or a party, nor the truth of a doctrine, nor the wisdom of a decision, nor the justice of a verdict." *Id.* at 23.

10. *See id.*

11. KIRKPATRICK, *supra* note 7, at 83.

12. *Id.*

13. FERRERO, *supra* note 7, at 205.

14. *Id.*

15. *Id.* at 197-201. For example, the prohibition of anti-government activities is mentioned four times in the Cuban Constitution and three times in the Constitution of the People's Republic of China. CUBAN CONST. arts. 32, 54, 61, 64; P.R.C. CONST. arts. 1, 28, 54, translated in RALPH H. FOLSOM & JOHN H. MINAN, LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READINGS, AND MATERIALS app. A (1989).

In order to lessen these destabilizing effects, a revolutionary regime may attempt to inject its leadership with charisma.¹⁶ In this way, the population is often blinded by admiration for its leader and will overlook the government's evils.¹⁷ Charismatic regimes, however, are temporary and unstable by nature¹⁸ because the leader will eventually lose his charisma and be abandoned by his followers.¹⁹ Thus, a revolutionary regime must find some other way to attain legitimacy and maintain stability.

Revolutionary governments acquire stability through the process of institutionalization.²⁰ Machiavelli recognized that stability is "conferred on a [regime] by . . . virtue of an institution," and suggested that "the institutions which caused the Roman republic to [remain stable] were the introduction of plebeian tribunes . . . and of all the other laws which put a check on human ambition and arrogance."²¹ In creating new institutions, however, a regime must at least retain the shadow of its former laws and customs, so that the institutions do not appear to have changed.²² This is because institutions represent stabilized patterns of behavior and shared expectations. Little else facilitates the establishment of new institutions more than their congruity with established ways of thinking and acting.²³

The process of creating state institutions out of a revolution involves numerous considerations. At a minimum, a new government requires a military force, a decision-making body, and an infrastructure. However, no state institution is more important than the legal system.²⁴ Law is regarded as the lifeblood of government because

16. See Weber, *supra* note 3, at 1114-15.

17. Despite the murder of 6 million Jews, Adolf Hitler was still beloved by his people. See generally J.P. STERN, *HITLER: THE FUHRER AND THE PEOPLE* (1975). Likewise, the murder of 20 million Soviet citizens did not dampen Joseph Stalin's cult-like following. See generally ADAM B. ULAM, *STALIN: THE MAN AND HIS ERA* (1989).

18. See generally Weber, *supra* note 3, at 1113.

19. *Id.* at 1114.

20. Valdés, *supra* note 1, at 8-13.

21. NICCOLÓ MACHIAVELLI, *THE DISCOURSES* 387 (Bernard Crick ed., Penguin Classics 1987) (circa 1519).

22. *Id.* at 175. It should be noted that Machiavelli would strongly disagree with the iconoclastic character of the Cuban and Chinese revolutions. Regarding the course new regimes should take in establishing their power he wrote that "[i]f the ruler wants to keep hold of his new possessions, he must . . . change neither their laws nor their taxes. In this way, in a very short space of time the new [regime] will be rolled into one with the old." NICCOLÓ MACHIAVELLI, *THE PRINCE* 36 (George Bull trans., Penguin Classics 1986) (circa 1516).

23. KIRKPATRICK, *supra* note 7, at 217.

24. See Richard Thornburgh, *The Soviet Union and the Rule of Law*, FOREIGN AFF., Spring 1990, at 13.

"[i]t shapes social and economic structures and relationships, and provides normative rules for private and public conduct."²⁵ Thus, without a stable legal system, the revolutionary regime will never attain the status of a legitimate government, and will survive only so long as the revolutionary leaders have the energy to subjugate their people.

This Comment will examine and compare the judicial institutionalization of the revolutions in the People's Republic of China ("PRC" or "China") under Mao Zedong, and the Republic of Cuba ("Cuba") under Fidel Castro Ruz. First, it will document the routes the revolutionary governments of China and Cuba followed when they attempted to establish a legal system. Second, it will compare and examine the internal dynamics of the adopted legal systems. Third, it will explain how the legal systems of China and Cuba contributed to the communist regimes' survival in light of the global collapse of communism.²⁶ Although there are several factors that determine a regime's ultimate stability or downfall, such as the militia, culture, ecclesiastic principles, and the political and economic climate, this Comment focuses exclusively on the role of the law and judicial institutions in China and Cuba.

Before embarking on a study of the Chinese and Cuban legal systems one should consider Professor Dolores Donovan's caution:

Members of the American legal profession share with the rest of the human race a tendency to generalize from their own experience. This tendency results in the expectation . . . that the formal . . . legal system[s] [of other societies] will be similar to the system that exists in the United States. This expectation is unfounded.²⁷

Thus, in examining the Chinese and Cuban judicial institutionalization, one must bear in mind that these laws are the product of different legal traditions, and may not always comport with the American concept of justice.

25. *Id.* For a comprehensive analysis of the role of law in society, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). See also Alejandro Serrano Caldera, *The Rule of Law in the Nicaraguan Revolution*, 12 LOY. L.A. INT'L & COMP. L.J. 341 (1990).

26. See generally PROBLEMS OF COMMUNISM, Jan.-Apr. 1992.

27. Dolores A. Donovan, *The Structure of the Chinese Criminal Justice System: A Comparative Perspective*, 21 U.S.F. L. REV. 229 (1987).

II. THE ESTABLISHMENT OF A POST-REVOLUTIONARY LEGAL SYSTEM

A. *The People's Republic of China*

1. Revolutionary Developments (1949-1954)

Following the successful overthrow of the Guomindang government in 1949,²⁸ the revolutionary regime of Mao Zedong established the Chinese People's Political Consultative Conference ("Conference"), and adopted a new legal system on September 29.²⁹ The Conference issued two documents: (1) the Common Program, which abolished all the laws and legal institutions of the former government and declared that all new laws would be established by the new Communist regime;³⁰ and (2) the Organic Law, which gave the new regime the authority to establish a new judicial system.³¹ During this early period, the Communist regime enacted 148 laws and regulations governing areas such as trade unions, land reform, corruption, marriage, and counterrevolutionary activity.³² The Common Program and the Organic Law established a provisional system of government while allowing the Conference to continue laying a foundation for a more permanent system.³³

At first, because of the insufficient number of qualified Communist officials to fill the positions, the Communist regime allowed Guomindang judges, prosecutors, and other legal technicians to remain in office.³⁴ However, in an effort to hasten the conversion to communism, the Legal Reform Campaign of 1952 removed or condemned all remaining jurists from the former government and replaced them with communist officials who were poorly trained, but ideologically correct.³⁵

The Chinese Communist Party ("CCP") viewed both the law

28. The Guomindang government, or Nationalists, headed by Chaing Kai-shek, had been in power since October 10, 1912, when it overthrew the Qing Dynasty. Its notorious corruption caused it to lose the support of the people and facilitated the communist revolution in 1949. See generally JOHN KING FAIRBANK, *THE GREAT CHINESE REVOLUTION: 1800-1985* (1986).

29. Craig B. Simonsen, *Development and Organization of the Governmental and Legal Systems of the People's Republic of China*, 6 CHINA L. REP. 239, 243 (1991).

30. *Id.*

31. *Id.*

32. Tao-tai Hsia & Wendy I. Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249, 251 (1987).

33. Simonsen, *supra* note 29, at 243.

34. Hsia & Zeldin, *supra* note 32, at 252.

35. *Id.*

and legal institutions as tools to support the Party and state power.³⁶ Mao Zedong believed that his regime should reflect a continuous revolution, and opposed a legal system which would restrain it.³⁷ Thus, new Chinese law consisted of general principles and shifting policies, rather than detailed and constant rules.³⁸

2. Initial Legal Reforms (1954-1957)

On September 21, 1954, the National People's Congress ("NPC") adopted the Constitution of the PRC.³⁹ The 1954 Constitution was actually little more than the Soviet legal code translated into Chinese and rewritten to suit Chinese conditions.⁴⁰ However, this Constitution was a genuine attempt at institutionalization by the Mao regime.⁴¹

On September 28, 1954, the PRC supplemented the Constitution with the addition of the Organic Laws of the People's Courts and the People's Procuracies, providing the Chinese judicial system with a permanent structure.⁴² The judicial system was organized into four descending levels. Unlike the dual state and federal court systems found in the United States, the court system in China was established as a single national system.⁴³ The highest level of the judiciary was the Supreme People's Court, followed by the Higher People's Courts, the Intermediate People's Courts, and the Basic Level People's Courts.⁴⁴ The People's Courts were established to administer justice, while the People's Procuratorates were assigned to enforce the laws.⁴⁵

During this phase of Chinese legal development, academic research flourished.⁴⁶ Several law books were written, and two major law journals were published.⁴⁷ Additionally, the government began to draft a civil and criminal code.⁴⁸ This period has been referred to as

36. U.S. GOVERNMENT, FED. RESEARCH DIV., LIBRARY OF CONGRESS, CHINA: A COUNTRY STUDY 509 (1988) [hereinafter CHINA STUDY].

37. *Id.* at 510.

38. *Id.* at 509.

39. Simonsen, *supra* note 29, at 243.

40. CHINA STUDY, *supra* note 36, at 512.

41. SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 13 (1985).

42. *Id.* at 14.

43. Simonsen, *supra* note 29, at 245-46.

44. *Id.* at 246.

45. LENG & CHIU, *supra* note 41, at 14.

46. Hsia & Zeldin, *supra* note 32, at 252.

47. *Id.*

48. *Id.*

the "golden age of legal development" in China.⁴⁹

3. Setbacks in the Legal System (1957-1976)

a. *Anti-Rightist Campaign (1957-1965)*

China's progress toward a stable legal system came to an abrupt halt in the fall of 1957.⁵⁰ It began in 1956 when Mao encouraged people to vent their criticisms of his government saying, "Let one hundred flowers bloom, let the hundred schools of thought contend,"⁵¹ echoing Justice Oliver Wendell Holmes' "marketplace of ideas" metaphor.⁵² However, the Mao government was unprepared for the thorough lashing it received as a result of the movement's open policy. During the Hundred Flowers Movement, intellectuals vociferously criticized the political leadership for being too slow in enacting laws, and for holding themselves above the law.⁵³ Members of the legal profession criticized the lack of judicial independence and equality before the law, and also criticized the "crime by analogy" doctrine, which allowed a person to be convicted for a non-criminal act as long as the court found the act similar to a criminal act.⁵⁴

Rather than accepting the criticism as constructive, Mao labeled his critics class enemies and launched the Anti-Rightist Campaign.⁵⁵ He purged the judiciary of liberal jurists, replacing them with party cadres, closed law schools and legal research institutes, and required most civil disputes to be resolved by informal, non-judicial mediation committees.⁵⁶ Additionally, the Ministry of Justice was eliminated, and attempts to codify a civil and criminal law were halted.⁵⁷ China's formal legal system continued to experience a steady decline in importance, and the Anti-Rightist Campaign put an end to efforts that would have brought about judicial independence.⁵⁸

b. *The Cultural Revolution (1966-1976)*

The Cultural Revolution was initiated by Mao, with the help of

49. *Id.*

50. LENG & CHIU, *supra* note 41, at 16.

51. CHINA STUDY, *supra* note 36, at 513-14.

52. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

53. CHINA STUDY, *supra* note 36, at 514.

54. Hsia & Zeldin, *supra* note 32, at 252.

55. *Id.* at 252-53.

56. *Id.*

57. *Id.*

58. LENG & CHIU, *supra* note 41, at 16-17.

his wife, Jiang Qing, Lin Biao, and others, in order to impose Maoist values and norms on both the population and governmental institutions.⁵⁹ Mao feared that "enemies of the people" had infiltrated the government institutions, and hoped to revive socialist ideology in the country.⁶⁰ This revival was to be accomplished, in part, by mobilizing college and secondary students, called the Red Guards.⁶¹ The Red Guards dropped out of school and spent their days sabotaging state institutions and persecuting school and government officials suspected of being counter-revolutionaries.⁶² In the process of this struggle, all progress made toward judicial institutionalization was nullified.⁶³

It was during this time that Mao began to develop a cult-like following.⁶⁴ The "cult of personality" that surrounded Mao made him a virtual deity in China; his word was law. Throughout the Cultural Revolution, "[t]here was no rule of law and no judicial system to mention; although, *on paper*, they continued to exist. The Mao line was in power."⁶⁵ During this period, Mao said, "Depend on the rule of man, not the rule of law."⁶⁶ The era was further characterized by kangaroo courts which convicted many citizens of political, rather than legal, transgressions, and led to the complete breakdown of a formal legal system.⁶⁷

Between 1966 and 1976, very few laws were enacted, and the publication of law books and journals nearly ceased.⁶⁸ Furthermore,

the law and legal institutions were dismembered in a frenzy of hysterical fanaticism. Beginning in 1966, all law schools were closed. Attorneys, judges, courtroom personnel and law teachers were forced to work in the countryside The Red Guards . . . freely searched houses without legal process, arrested anyone, investi-

59. *Id.* at 17.

60. See RUTH CHERRINGTON, CHINA'S STUDENTS: THE STRUGGLE FOR DEMOCRACY 41 (1991). See also Simonsen, *supra* note 29, at 252.

61. FOLSOM & MINAN, *supra* note 15, at 11.

62. *Id.*

63. *Id.* at 12.

64. Under Lin Biao's direction, "[s]tatues, busts, and portraits of . . . [Mao] . . . were scattered and plastered over the length and breadth of China, while all the media poured out an unceasing paean of praise and worship." WITOLD RODZINSKI, THE PEOPLE'S REPUBLIC OF CHINA: A CONCISE POLITICAL HISTORY 97 (1989). His writings were compiled in a "little red book" entitled *Quotations from Chairman Mao Zedong*, which was widely read. *Id.*

65. Simonsen, *supra* note 29, at 253.

66. LENG & CHIU, *supra* note 41, at 18.

67. See Chin Kim & Michael M. Tsai, *Some Legal Problems Concerning Political Crime Under the Chinese Socialist Legal System*, 17 KOREAN J. COMP. L. 179 (1989).

68. Hsia & Zeldin, *supra* note 32, at 253.

gated anything, and sentenced, imprisoned, and frequently executed.⁶⁹

The Red Guards were unrestrained by procedure, and often resorted to torture and rape to achieve their political ends.⁷⁰ High level Chinese Communist Party leaders (later referred to as the "Gang of Four"⁷¹) openly praised the Red Guards for breaking the law, and urged them to "smash the police organs, procuracies, and courts."⁷²

Ultimately, the Cultural Revolution did not accomplish Mao's goals.⁷³ Rather, it left an entire generation of young people disillusioned by their country's leadership.⁷⁴ The experiences of the Cultural Revolution caused former Red Guards, as well as their victims, to question CCP leadership and desire an organized legal system.⁷⁵

4. Post-Mao Legal Reforms: Socialist Legality (1976-1989)

Following the January 1976 death of Prime Minister Zhou Enlai, a power struggle ensued between the Gang of Four and a group of reform-minded party leaders headed by Deng Xiaoping.⁷⁶ Neither side was able to secure the appointment of their candidate as Prime Minister.⁷⁷ Instead, a compromise candidate, Hua Guofeng, an obscure party official from Mao's province, was appointed.⁷⁸

On April 5, 1976, the day of the annual Qingming festival, where the Chinese pay tribute to their ancestors at Tian An Men Square, a spontaneous tribute to Zhou Enlai erupted.⁷⁹ This tribute mocked the Gang of Four and praised Deng Xiaoping.⁸⁰ Angered, the Gang of Four convinced Mao, debilitated by Parkinson's disease, to expel Deng Xiaoping from his position as First Vice-Chairman of the PCC.⁸¹ Deng, second in power only to Mao, was now replaced by

69. FOLSOM & MINAN, *supra* note 15, at 12.

70. *Id.*

71. The Gang of Four was composed of Mao's wife, Jiang Qing, Wang Hongwen, Yao Wenyuan, and Zhang Chunqiao. RODZINSKI, *supra* note 64, at 202.

72. Hsia & Zeldin, *supra* note 32, at 253-54.

73. FOLSOM & MINAN, *supra* note 15, at 12.

74. *Id.*

75. *Id.*

76. HARRY HARDING, *CHINA'S SECOND REVOLUTION: REFORM AFTER MAO* 50 (1987).

77. *Id.*

78. *Id.*

79. *Id.* at 51.

80. *Id.*

81. *Id.*

Hua.⁸² Following Mao's death on September 9, 1976, the Gang of Four produced a document, purportedly written by Mao, calling on the people of China to follow the Gang of Four and the principles espoused during the Cultural Revolution.⁸³ Further, they attempted to appoint Jiang Qing, Mao's widow and leader of the Gang of Four, as Mao's successor as Chairman of the Party.⁸⁴ Sensing an imminent coup, moderates in the Politburo launched a "preemptive strike" against the Gang of Four.⁸⁵ The Gang of Four was arrested for forging the document of Mao's last wishes, and then accused of motivating the excesses of the Cultural Revolution.⁸⁶

Hua Guofeng remained in power throughout this turmoil. In 1977, he ordered the creation of a new Constitution that incorporated many of the 1954 Constitution's legal institutions.⁸⁷ The new Constitution codified the criminal and civil law and reopened law schools.⁸⁸ Although Mao had frustrated previous efforts to adopt a legal code,⁸⁹ his name was frequently invoked as authority for codifying the legal system, rebuffing those who viewed the process as counter-revolutionary.⁹⁰ Despite Hua Guofeng's victory over the Gang of Four, he was undistinguished as the Party head. In late autumn 1978, Deng Xiaoping, who had regained his prestige in the Party, replaced Hua.⁹¹

Under Deng Xiaoping's leadership, substantial legal reforms were made in an attempt to strengthen and formalize China's legal system.⁹² There were several reasons for the reforms. First, many members of the post-Mao leadership, including Deng, had been victimized by the lawlessness of the Cultural Revolution.⁹³ Second, to encourage the population's enthusiastic participation in the process of

82. *Id.* at 51-52.

83. *Id.*

84. *Id.*

85. *Id.* at 52.

86. *Id.*

87. CHINA STUDY, *supra* note 36, at 516.

88. *Id.* at 517.

89. See Andrew Mayer, *The Rocky Road to Democracy: A Few Comments on Legal Development in China Since the Cultural Revolution*, 6 CHINA L. REP. 1 (1989).

90. CHINA STUDY, *supra* note 36, at 518.

91. RODZINSKI, *supra* note 64, at 226.

92. *Id.*

93. LENG & CHIU, *supra* note 41, at 36. After a period of house arrest, Deng Xiaoping was exiled to Jiangxi province between 1969 and 1973. RODZINSKI, *supra* note 64, at 174, 190. During the Cultural Revolution, Deng's eldest son, Pufang, a physics student, was thrown from a third floor window by the Red Guards and, as a result, was permanently paralyzed. *Id.* at 128.

modernizing China,⁹⁴ a stable legal system was needed to help overcome the atmosphere of fear and insecurity.⁹⁵ Third, after the Cultural Revolution, China needed a reliable legal order to maintain the stable environment required for economic growth⁹⁶ and foreign investment.⁹⁷

The most recent Constitution was completed on December 4, 1982.⁹⁸ The numerous laws enacted since the promulgation of the 1978 Constitution made a new constitution necessary.⁹⁹ The Constitution contains twenty-four articles pertaining to individual rights and duties.¹⁰⁰ Among these rights are guarantees that citizens will be free from unlawful searches,¹⁰¹ illegal or secret arrests,¹⁰² and “[i]nsult, libel, false charge or frame-up.”¹⁰³

Further, the Constitution guarantees that citizens’ homes and correspondence will not be searched, except in cases where public security is at risk.¹⁰⁴ The most significant provision in the 1982 Constitution is directed at the Party and government leadership and states that “[n]o organization or individual may enjoy the privilege of being above the Constitution and the law.”¹⁰⁵ Additionally, the new Constitution limits members of the National People’s Congress (“NPC”) to a five-year term.¹⁰⁶ The President of the Supreme People’s Court¹⁰⁷

94. *Id.* at 36. This was promoted through a program known as the “Four Modernizations,” which was designed to modernize China’s industry, military, science and technology, and agriculture.

95. *See id.*

96. LENG & CHIU, *supra* note 41, at 36.

97. Mayer, *supra* note 89, at 2.

98. Simonsen, *supra* note 29, at 259.

99. These laws include the Act on Arrest and Detention (1979), Environmental Protection Law (1979), Organic Law of the Local People’s Congresses and Local People’s Governments (1979), Organic Laws of the People’s Courts (1979), Organic Law on the People’s Procuratorates (1979), Electoral Law (1979), Criminal Law and Criminal Procedure Law (1979), Forestry Law (1979), Law on Joint Ventures Using Chinese and Foreign Investment (1979), Marriage Law (1980), Nationality Law (1980), Joint Venture Income Tax Law (1980), Individual Income Tax Law (1980), the Act on Academic Degrees (1980), and the Provisional Act on Lawyers (1980). FOLSOM & MINAN, *supra* note 61, at 15. *See also* LENG & CHIU, *supra* note 41, at 45.

100. P.R.C. CONST., translated in FOLSOM & MINAN, *supra* note 15, app. A.

101. *Id.* art. 37.

102. *Id.*

103. *Id.* art. 38.

104. *Id.* arts. 39, 40.

105. *Id.* art. 5.

106. *Id.* art. 60.

107. *Id.* art. 124.

and the Chief Procurator of the Supreme People's Procuratorate¹⁰⁸ are each limited to two consecutive five-year terms.

At the time of its completion, it was uncertain whether the 1982 Constitution would be followed, or whether it would even provide a standard by which all citizens and organizations would abide.¹⁰⁹ On its face, it provides that all "state organs, the armed forces, all political parties and public organizations . . . must abide by the Constitution and the law."¹¹⁰ However, the effect of this provision ultimately turns on which government organ interprets and enforces the Constitution. Article 67 empowers the Standing Committee of the NPC to interpret the Constitution and supervise its enforcement.¹¹¹ Article 67, however, also empowers the Standing Committee to enact and annul the law.¹¹² It further gives the Standing Committee the power to appoint and remove the judges of the Supreme People's Court and members of the Supreme People's Procuratorate.¹¹³

However, since the NPC has the power to amend the Constitution, it is not likely that it will find any of the laws it enacts unconstitutional.¹¹⁴ Therefore, while it is true that the Supreme People's Court is not subject to interference from the NPC,¹¹⁵ the Court cannot hold a law or statute unconstitutional because it has no authority to do so.¹¹⁶ The function of the Supreme People's Court is thus to adjudicate whether a written law has been violated, not whether that law violates the Constitution.¹¹⁷

Despite its flaws, the 1982 Constitution signifies a move toward pragmatism and legal stability through the promotion of the jural model of law.¹¹⁸ It has proved to be a strong document and, prior to the demonstrations in Tian An Men Square in May 1989, it had not undergone major changes.¹¹⁹

108. *Id.* art. 130.

109. See Owen M. Fiss, *Two Constitutions*, 11 YALE J. INT'L L. 492, 502 (1986).

110. P.R.C. CONST. art. 5, translated in FOLSON & MINAN, *supra* note 15, app. A.

111. *Id.* art. 67, § 1.

112. *Id.* art. 67, §§ 2, 7.

113. *Id.* art. 67, §§ 11, 12.

114. *Id.* art. 62, § 1.

115. *Id.* art. 126.

116. See LENG & CHIU, *supra* note 41, at 63.

117. *Id.*

118. *Id.* at 44. Jural law is law that is considered necessary to govern, and is generally devoid of moralistic judgments. *Id.*

119. CHINA STUDY, *supra* note 36, at 521.

5. Tian An Men Square and its Aftermath (1989-Present)

The crushing of the pro-democracy movement in June 1989 at Tian An Men Square was a major setback to the establishment of a formal legal system.¹²⁰ Although the NPC has continued to enact laws and regulations,¹²¹ there has been increased political influence over the judiciary,¹²² and thus many of these laws are aimed at curbing individual liberties.¹²³ Further, in prosecuting pro-democracy demonstrators, the government has failed to abide by the provisions contained in the 1979 Criminal Procedure Code.¹²⁴

Four months after the demonstrations, the NPC passed the Law Governing Assemblies, Parades, and Demonstrations.¹²⁵ This law requires those seeking to hold a demonstration to apply for a permit from the local governing body at least five days before the scheduled event.¹²⁶ Within two days, the local government must either deny or allow the demonstration to take place, depending on whether the gathering promotes government-held ideals.¹²⁷ An appeal may be made to the same body if a permit is denied.¹²⁸ Those who participate in the demonstration may not be employed by the state, and must live in the city where the demonstration will take place.¹²⁹ Theoretically, this prevents agitators from coming to a city to stir up protest, and ensures that the demonstration does not reach the size of the Tian An Men Square protest.¹³⁰ A violation of this law can result in a five-year prison sentence.¹³¹ If a foreigner wishes to participate in the demonstration, permission must be obtained from the local governing body.¹³² This requirement typifies the government's unfounded belief that "the pro-democracy movement was fuelled [sic] in part by the

120. Simonsen, *supra* note 29, at 258.

121. Margaret Y. K. Woo, *Legal Reforms in the Aftermath of Tiananmen Square*, 17 REV. SOCIALIST L. 51, 52 (1991).

122. *Id.* at 69-70.

123. *Id.* at 53.

124. *Id.* at 51. This has resulted in "arbitrary arrests, warrantless arrests and searches, secret trials, and the imposition of administrative rather than criminal sanctions." *Id.*

125. *Id.* at 62. The text of the law may be found in *The PRC Law Governing Assemblies, Parades, and Demonstrations*, RENMIN RIBAO (People's Daily), Nov. 1, 1989, at 2.

126. Woo, *supra* note 121, at 62.

127. *Id.*

128. *Id.* However, "the final decision on appeal does not need to come down until a day after the event is scheduled." *Id.*

129. *Id.* at 63.

130. *Id.*

131. *Id.* at 64.

132. *Id.* at 63.

participation and encouragement of foreigners in the country."¹³³

Since the June massacre, the government has declared an "anti-crime campaign" designed to arrest persons who oppose the government, and silence critics through fear.¹³⁴ It requires the police to be more aggressive in finding criminals, and the courts to be harsher in sentencing.¹³⁵ This campaign has resulted in 6,129 arrests, 5,650 "re-educations" at labor camps, and 568,000 administrative sanctions.¹³⁶

Perhaps the most detrimental effect the massacre had on the legal system is that the government has turned away from its efforts toward judicial independence.¹³⁷ The NPC has enacted laws which have increased political influence in the courts¹³⁸ and reestablished CCP superiority over the law.¹³⁹ Further, "Chinese leaders have also begun to talk about law as a counter-balance to democracy."¹⁴⁰

The events of June 1989 have undoubtedly hurt the legal reforms made between 1976 and 1988. It is a sad development in the personal history of Deng Xiaoping,¹⁴¹ especially considering the progress that had been made in legal reforms. Although some scholars believe the current hard line will be reversed,¹⁴² it is unlikely to happen in the near future.¹⁴³ Although this new era cannot be compared with the lawlessness of the Cultural Revolution, the laws that have been enacted are more restrictive than previous laws.¹⁴⁴

133. *Id.* Blaming the unrest at Tian An Men Square on foreigners suggests that the government implicitly maintains that such a movement would not have been instigated by its own citizens. This implication presumes that the Chinese people are satisfied with the status quo, and that the current government is the free and sincere expression of their wishes. *See supra* text accompanying note 13.

134. *Id.* at 65.

135. *Id.*

136. Woo, *supra* note 121, at 66 n.73.

137. *Id.* at 67-68.

138. *Id.* at 69.

139. *Id.* at 72.

140. *Id.* at 71.

141. Professor Richard Baum of the University of California at Los Angeles notes, "What is so tragically ironic . . . is that now it is Deng Xiaoping himself who is playing the role of autocrat antihero previously performed by the Gang of Four . . . Deng has instinctively opted to clamp down on the perceived sources of dissent and disorder—China's liberal intelligentsia. Like countless Chinese emperors before him, Deng has opted for order over equity, obedience over authenticity."

Richard Baum, *Deng Didn't Learn Lesson: Takes Wrong Tack in Attacking Messengers, Not the Problem*, L.A. TIMES, May 31, 1989, pt. II, at 7.

142. Mayer, *supra* note 89, at 1.

143. Baum, *supra* note 141, at 7.

144. *See* Woo, *supra* note 121, at 73.

B. The Republic of Cuba

1. Revolutionary Developments (1959-1969)

On January 1, 1959, the Communist revolution led by Fidel Castro triumphed, and seven years of brutal dictatorship by Fulgencio Batista came to an end.¹⁴⁵ The ease with which Batista's regime was overthrown has been attributed to its "political illegitimacy, disrespect for the people's legitimate expectations, and indiscriminate use of repression against political dissidents."¹⁴⁶ Ironically, Castro had to overcome these same problems when institutionalizing his revolution.

The fall of the Batista government left Cuba without any established leadership.¹⁴⁷ Since the new Cuban regime was created by a violent revolution, there was no transitional government, and nothing was left of the old regime.¹⁴⁸ Cuba's political structure during this period was characterized as an institutional vacuum.¹⁴⁹ John Dunn observed of the era:

[N]o Cubans had much idea of the character of Castro's revolutionary projects in December of 1958. He could hardly be said to have had much idea of its character himself in any detail at that point, except insofar as it was simply to create a very different order from that which currently existed.¹⁵⁰

The Castro regime eliminated the former military, political parties, and labor unions, and replaced them with new bodies such as the Rebel Army, the Committees for the Defense of the Revolution, and other revolutionary groups.¹⁵¹ The figurehead of each of these groups was Fidel Castro, whose oratory skills and charisma were used to justify all government action.¹⁵²

145. Valdés, *supra* note 1, at 1.

146. U.S. GOVERNMENT, FED. RESEARCH DIV., LIBRARY OF CONGRESS, CUBA: A COUNTRY STUDY, 38 (4th ed. 1st prtg. 1988) [hereinafter CUBAN STUDY].

147. Valdés, *supra* note 1, at 1.

148. *Id.* at 2. Fidel Castro remarked, "On January 1, with the military downfall of the Batista regime, nothing was left. There was no legislative power in the classic sense, no judicial power, nothing. Then we established a *de facto* revolutionary government and in that context laws were established by decree." *Id.*

149. Valdés, *supra* note 1, at 3.

150. Gonzalez, *supra* note 4, at 1 (quoting JOHN DUNN, MODERN REVOLUTIONS 236 (1972)).

151. CUBAN STUDY, *supra* note 146, at 39.

152. *Id.* at 42.

a. *The Fundamental Law of 1959*

Throughout the revolution against the Batista regime, Castro proclaimed that one of the goals was to restore the Constitution of 1940 which had been suspended by Batista.¹⁵³ Rather than restore the 1940 Constitution, however, Castro introduced the Fundamental Law of 1959 ("Fundamental Law").¹⁵⁴ Despite the government's claims, the Fundamental Law was not a revision of the 1940 Constitution.¹⁵⁵

Although similar to the 1940 Constitution in social and economic matters,¹⁵⁶ the Fundamental Law changed the government of Cuba into a constitutional dictatorship.¹⁵⁷ It replaced the former Chamber of Representatives and Senate with the president's cabinet, the Council of Ministers.¹⁵⁸ Under the Fundamental Law, the president's power was unrestricted.¹⁵⁹ It allowed the president to appoint and dismiss members of the Council of Ministers at will.¹⁶⁰ The Council of Ministers was empowered to pass ordinary legislation by a simple majority vote, and could amend the Fundamental Law by a two-thirds majority vote.¹⁶¹ Thus, the president could order the Council of Ministers to enact any legislation he desired, because he could dismiss ministers who would not obey and replace them with those who would.¹⁶² Fidel Castro was not reluctant to use this power, and between 1959 and 1963, the Fundamental Law was amended nineteen times.¹⁶³

Ironically, in his 1953 speech, "History Will Absolve Me," Castro criticized an identical provision in Batista's Constitutional Act of 1952.¹⁶⁴ At that time, Castro said that since constitutional amendments "can be brought about by a vote of two-thirds of the Cabinet and the Cabinet is named by the President, then the right to make and break Cuba is in the hands of one man Such a power recognizes

153. William D'Zurilla, Comment, *Cuba's 1976 Socialist Constitution and Fidelista Interpretation of Cuban Constitutional History*, 55 TUL. L. REV. 1223, 1239 (1981).

154. *Id.*

155. CUBAN STUDY, *supra* note 146, at 161.

156. *Id.*

157. D'Zurilla, *supra* note 153, at 1239.

158. *Id.*

159. *Id.*

160. *Id.*

161. CUBAN STUDY, *supra* note 146, at 161.

162. *Id.*

163. *Id.*

164. D'Zurilla, *supra* note 153, at 1240.

no limits.”¹⁶⁵ Castro’s supporters defend this duplicity, contending that “Batista assumed absolute power in order to loot the country, while Castro did so out of necessity, to carry out the mandate of the people to institute the revolutionary program.”¹⁶⁶

b. The Revolutionary Courts

The Revolutionary Tribunals, established for those who committed crimes against the state, played a major role in the early years of the Castro regime.¹⁶⁷ The tribunals are reported to have sentenced thousands of Cubans for counter-revolutionary activity.¹⁶⁸ The most noted case before the Revolutionary Tribunals was the February 1959 trial of forty-five members of Batista’s air force.¹⁶⁹ The defendants were acquitted of genocide charges stemming from Batista’s resistance to the revolution.¹⁷⁰ However, Castro was displeased with the verdict and ordered that they be tried a second time.¹⁷¹ Despite protests from the legal community, this time the defendants were convicted and executed.¹⁷² In effect, two legal systems appeared: one for ordinary civil and criminal cases, and another for politically sensitive cases.¹⁷³ By 1974, the Revolutionary Tribunals had been formally abandoned.¹⁷⁴ However, as of 1979, many prisoners convicted by the Revolutionary Tribunals were still in custody.¹⁷⁵

c. The Popular Tribunals

One of the most significant innovations in the judiciary was the creation of the popular tribunals.¹⁷⁶ First established in 1963, the number of popular tribunals reached 2,121 by the end of the decade, and they were staffed by nearly 8,000 judges.¹⁷⁷ However, their jurisdiction was ill-defined, and thus they not only attempted to resolve criminal and civil cases, but also personal quarrels and family dis-

165. *Id.*

166. *Id.*

167. See Berman & Whiting, *supra* note 1, at 477.

168. *Id.*

169. Salas, *supra* note 2, at 45.

170. *Id.*

171. *Id.*

172. *Id.*

173. Luis Salas, *The Emergence and Decline of the Cuban Popular Tribunals*, 17 LAW & SOC’Y REV. 587, 597 (1983).

174. Berman & Whiting, *supra* note 1, at 478.

175. *Id.* at 477 n.6.

176. LUIS SALAS, SOCIAL CONTROL AND DEVIANCE IN CUBA 211 (1979).

177. *Id.*

putes.¹⁷⁸ The purpose of these courts, according to Fidel Castro, was "to recognize and resolve these problems, not with sanctions, as in the traditional style, but rather with measures that would have a profound educational spirit."¹⁷⁹

Consistent with this objective, judges were selected based on moral fitness and revolutionary commitment, rather than legal ability.¹⁸⁰ Because lawyers were regarded as remnants of capitalism,¹⁸¹ a legal education acted as a barrier, rather than an asset, to serving on a popular tribunal.¹⁸² Judges had few legal codes to guide them and were left to use their discretion.¹⁸³ Thus, the offender could be charged with violating a socialist norm of conduct without being accused of violating any criminal law.¹⁸⁴ Furthermore, judges frequently inquired into the background of the accused to aid in reaching decisions, and often based their judgments on their own experiences with the accused.¹⁸⁵

For example, in one case a woman accused another of stealing her trousers.¹⁸⁶ The accused claimed she purchased the trousers, and showed her ration book which indicated their purchase in May of 1968.¹⁸⁷ One judge on the panel interrupted the testimony, to say that he worked in the clothing industry and the pants at issue were not available at the time of the alleged incident. The judge then accused the defendant of lying and forging her ration booklet. She was given a public admonition and was sentenced to sixty days confinement.¹⁸⁸ While this may be an example of how the system worked in pursuit of the truth, the case was not over. The judge also pointed out that the accused's daughter was not in school and ordered her to attend school, despite the fact that she had never been charged with any formal offense.¹⁸⁹

Ultimately, however, there were too many conflicts with the

178. *Id.*

179. Salas, *supra* note 2, at 48.

180. *Id.* at 49.

181. SALAS, *supra* note 176, at 212.

182. Salas, *supra* note 2, at 49.

183. *Id.*

184. *Id.* at 50.

185. See Jesse Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317, 1319 (1969).

186. *Id.* at 1319.

187. *Id.* at 1320.

188. *Id.*

189. *Id.*

traditional court system. The major complaints concerned jurisdictional clashes, diversity of sanctions, lack of uniformity among the courts, informality leading to incorrect notions of socialist legality, insufficient institutional control over judicial functions in popular tribunals, and incorrect use of lay judges.¹⁹⁰ Criticism became so severe that by August 1970, Castro declared that future decisions would be based on pragmatic rather than ideological considerations, and stated that “[w]e . . . need more jurists, better prepared and specializing in different branches of law.”¹⁹¹

2. The Limits of Charisma

Unlike a government based on legal power¹⁹² or traditional power,¹⁹³ a government based on charisma such as Cuba’s can only survive if the leadership is in touch with the masses.¹⁹⁴ Throughout the 1960s, Castro successfully governed by charisma because he had overthrown Batista, humiliated the United States in the Bay of Pigs invasion, and defied the Soviet Union by disregarding the Soviet model of communism.¹⁹⁵ However, Castro’s charismatic authority could not be sustained.¹⁹⁶ In order to retain its power, the Cuban leadership had to institutionalize the revolution, which required “the transference of power from a charismatic authority . . . to a legal-bureaucratic authority.”¹⁹⁷

However, the major contributing factor to the need for institutionalization in Cuba was the failure of the ten-million-ton sugar harvest of 1970.¹⁹⁸ Castro pledged to Cubans that the country would harvest ten million tons (9.07 million metric tons) of sugar. Castro regarded the harvest as the measure of his regime’s success or fail-

190. SALAS, *supra* note 176, at 215.

191. Salas, *supra* note 2, at 51.

192. Legal power “presupposes the existence of a juridical order prior to the agent exercising authority, as well as a system of laws and regulations which are the foundation and the norm of conduct that authority must follow.” Valdés, *supra* note 1, at 7.

193. Traditional power is based on “an authority pattern arising from a legitimacy that supposedly always existed,” such as a ruling monarchy. *Id.*

194. *Id.* at 10.

195. CUBAN STUDY, *supra* note 146, at 53.

196. Gonzalez, *supra* note 4, at 2.

197. Valdés, *supra* note 1, at 13. Valdés notes that the process of institutionalization involved much more than the mere creation of institutions. It involved the transference of authority from a small nucleus of individuals to institutions, the creation of new, or the restructuring of existing institutions, and the bureaucratization of authority. *Id.* at 14-18.

198. EDWARD GONZALEZ, CUBA UNDER CASTRO: THE LIMITS OF CHARISMA 206 (1974).

ure¹⁹⁹ and believed that it could be achieved through the exclusive use of moral, rather than economic, incentives.²⁰⁰

However, because of poor planning, incompetence, improvisation in setting production quotas, and rampant absenteeism, the harvest was doomed to fail.²⁰¹ Although Cuba produced a remarkable 8.5 tons of sugar that year,²⁰² it had fallen short of Castro's goal. Cuba paid a great price for the sugar harvest in terms of lost opportunities to develop other crops²⁰³ and uses of labor.²⁰⁴ This economic failure demonstrated that charismatic authority alone could not remedy the economic malaise of the country.²⁰⁵ Castro acknowledged that "errors had been committed, that zealotness and goodwill were no substitutes for competence, that ignorance and idealism were costly, and that future expectations needed some rethinking."²⁰⁶ This new approach led to the "institutionalization of the revolution," an attempt to create a more ordered, pragmatic, and predictable political system.²⁰⁷

3. The Constitution of 1976: Socialism Institutionalized

Judicial institutionalization began in 1973 with Law 1250, which reorganized the Cuban legal system.²⁰⁸ The revolutionary, military, ordinary, and people's courts, previously under separate administration, were now united into a single body.²⁰⁹ Additionally, Article 2 of Law 1250 established a four-tiered judicial system consisting of the People's Supreme Court, the People's Provincial Courts, the People's Regional Courts, and the People's Courts at the Base.²¹⁰ These courts operated under the jurisdiction of the Council of Ministers.²¹¹

199. Castro said that even a harvest of 9,999,999 tons would constitute moral defeat. AGUILA, *supra* note 6, at 102.

200. CUBAN STUDY, *supra* note 146, at 50. Castro's view was based on his adoption of Sino-Guevarism, Cuban revolutionary leader Che Guevara's interpretation of the Chinese socialist model. *Id.*

201. *Id.* at 51.

202. *Id.* at 52.

203. *Frontline: The Last Communist* (PBS television broadcast, Feb. 11, 1992).

204. AGUILA, *supra* note 6, at 103.

205. Valdés, *supra* note 1, at 21.

206. AGUILA, *supra* note 6, at 104.

207. Gonzalez, *supra* note 4, at 2.

208. Max Azicri, *Change & Institutionalization in the Revolutionary Process: The Cuban Legal System in the 1970s*, 6 REV. SOCIALIST L. 164, 175 (1980).

209. *Id.* at 176.

210. *Id.*

211. *Id.*

The next step in the institutionalization of the revolution was the creation of a constitution. In 1975, the Commission on Juridical Structures submitted a draft of the new Constitution to Castro, and by 1976 it was ready for ratification.²¹² On February 15, 1976, in a national referendum, nearly 98% of the voters approved the new Cuban Constitution.²¹³ The Constitution consists of 12 chapters and 141 articles, and provides a comprehensive socialist framework for the country.²¹⁴

In 1977, the judicial system was again reorganized.²¹⁵ The four-tiered system was simplified to a three-tiered national hierarchy, consisting of a single People's Supreme Court, fourteen People's Provincial Courts, and 169 People's Municipal Courts.²¹⁶ In contrast to Law 1250 which defined the courts as subordinate to the "revolutionary socialist power," the people of Cuba were now officially recognized as "the sovereign source of any power exercised by the judiciary."²¹⁷ More significantly, however, a balance of powers was created by giving the courts exclusive domain over the administration of justice, while reserving control of the judiciary's administrative functions to the Ministry of Justice.²¹⁸

III. INTERNAL DYNAMICS OF THE ADOPTED LEGAL SYSTEMS

A. Judicial Independence

1. China

Chinese courts have never been independent from political oversight.²¹⁹ From the time the Communists seized power in 1949 until the adoption of the Constitution in 1954, government control of the

212. Leonel-Antonio de la Cuesta, *The Cuban Socialist Constitution: Its Originality and Role in Institutionalization*, 6 CUBAN STUDIES/ESTUDIOS CUBANOS 15 (1976). The Commission on Juridical Structures was created in 1965 for the purpose of drafting a new constitution. *Id.*

213. CUBAN STUDY, *supra* note 146, at 162.

214. Chapter I addresses political, social and economic principles of the state; Chapter II, citizenship; Chapter III, the family; Chapter IV, education and culture; Chapter V, equality; Chapter VI, fundamental rights, duties, and guarantees; Chapters VII-X, government institutions; Chapter XI, elections; Chapter XII, amending the Constitution. CUBAN CONST. ch. I-XII.

215. Azicri, *supra* note 208, at 176.

216. *Id.*

217. *Id.*

218. *Id.* at 176-77. The administration of justice involves matters such as sentencing convicted criminals, while the administrative functions of the judiciary include charging suspects with crimes and providing legal counsel. *Id.* at 175.

219. During the Chinese Soviet Republic (1931-1934) and the Yen'an era (1935-1945),

judiciary continued in much the same manner it had for the previous two decades.²²⁰ The 1954 Constitution was unique because it provided that the "[p]eople's courts shall conduct adjudication independently and shall be subject only to the law."²²¹

The 1982 Constitution iterates this provision in Article 126, stating that the courts shall "exercise judicial power independently and are not subject to interference by administrative organs."²²² However, the Supreme People's Court is made responsible to the NPC and its Standing Committee, while the judges of the local people's courts are responsible to the assemblies which elect them.²²³ This structure is similar to the Cuban court system, which holds judges accountable to the organ which elected them.

2. Cuba

The Cuban judiciary is not an independent branch of government that can check abuses of executive, legislative, or PCC authority. Furthermore, the courts are not charged with protecting individual rights and freedoms against the potential tyranny of government. Article 123 of the Constitution lists as the courts' main objectives "to maintain and strengthen socialist legality" and to safeguard the economic, social, and political regime established by the Constitution.²²⁴ Thus, it is not surprising that Justices of the Supreme Court are elected by the National Assembly.²²⁵ The Justices are accountable to the governmental body that elected them and are required to report, and submit an account of their work to the National Assembly.²²⁶ The Supreme Court is accountable to the Council of Ministers.²²⁷

Additionally, since only the National Assembly can interpret the Cuban Constitution, there is no judicial review of legislation.²²⁸ Although the Constitution indicates that "judges . . . are independent and owe obedience only to the law,"²²⁹ it also requires the courts to

judges were subordinate to the political authorities. Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967, 976 (1969).

220. *Id.*

221. *Id.* at 979.

222. P.R.C. CONST. art. 126, translated in FOLSOM & MINAN, *supra* note 15, app. A.

223. *Id.* art. 128.

224. CUBAN CONST. art. 123.

225. *Id.* art. 128.

226. CUBAN STUDY, *supra* note 146, at 170.

227. *Id.* at 161.

228. *Id.* at 170.

229. CUBAN CONST. art. 125.

“render an account of their work at least once a year to the Assembly that elected them.”²³⁰ Further, it allows a judge to “be recalled . . . by the organ which elected him.”²³¹

The court system in Cuba consists of 169 municipal courts, fourteen provincial courts (appellate courts), various military courts, and quasi-judicial labor courts, with one supreme court overseeing the entire system.²³² This system replaced the Popular Courts of the 1960s and 1970s which were often little more than public forums to vent personal and political vendettas.²³³ Today, judicial selection is a two-step process. First, the Ministry of Justice nominates candidates for the Supreme Court and the lower courts.²³⁴ The President and Vice-President of the Supreme Court are nominated by the Cuban President, Fidel Castro.²³⁵ Second, the National Assembly appoints the Supreme Court justices,²³⁶ and the local assemblies elect their respective lower court justices.²³⁷

B. Political Crime

1. China

The treatment of political crime in China is based on traditional Chinese law, which is designed to protect the ruling class from its subjects.²³⁸ In fact, the Chinese government does not recognize individual political rights as inalienable, but rather treats them as privileges that may be regulated or eliminated entirely.²³⁹ Therefore, those who dissent from governmental policy often are labeled as counter-revolutionaries.²⁴⁰ These “traitors” are then prosecuted without legal justification or procedural due process.²⁴¹

Political privileges in China are class-oriented.²⁴² To enjoy them, one must be a member of the favored classes, known collectively as

230. *Id.* art. 128.

231. *Id.* art. 129.

232. *See* Azicri, *supra* note 208, at 176. *See also* AGUILA, *supra* note 6, at 173.

233. *See* SALAS, *supra* note 176, at 211-13.

234. Salas, *supra* note 2, at 54-55.

235. *Id.* at 55.

236. *Id.*

237. *Id.* at 54.

238. *See* Kim & Tsai, *supra* note 67, at 179.

239. *Id.* at 185-86.

240. Shao-Chuan Leng, *Crime and Punishment in Post-Mao China*, 2 CHINA L. REP. 5, 22 (1982).

241. Kim & Tsai, *supra* note 67, at 179.

242. *Id.* at 186.

"the people."²⁴³ Those who are not members of the favored classes are subject to a different standard of due process. Although Article 33 of the Constitution states that "[a]ll citizens of the People's Republic of China are equal before the law,"²⁴⁴ this does not apply to the "five black elements," who are considered "enemies of the people."²⁴⁵ In fact, during the Cultural Revolution, one of the CCP's leaders said that "the concept of equality before the law, as a bourgeois concept, has no place in the people's justice."²⁴⁶ This sentiment was felt so strongly that Peng Chan, the Mayor of Beijing, was ousted during the Cultural Revolution because he advocated the policy that "all people must be equal before the law"²⁴⁷

In China, the standard to determine whether a political crime has been committed contains both a subjective and an objective element.²⁴⁸ Not only must the accused intend to overthrow the government, but he or she must actually endanger or jeopardize the regime or society.²⁴⁹ Because the Chinese legal tradition presumes guilt, however, this standard is easily met.²⁵⁰

Furthermore, the Chinese Criminal Code defines political crime as "all acts which inflict harm on the People's Republic of China for the purposes of overthrowing the regime of the proletarian dictatorship and the socialist system."²⁵¹ A counter-revolutionary is defined by the Code as one who "incites the masses to resist and sabotages the enforcement of state law or decree," or "propagandizes and incites others to overthrow the regime . . . by means of counter-revolutionary slogans, leaflets, or other measures."²⁵² The Code also contains a catch-all "analogy clause," which states that any "crime not specifically proscribed . . . may be confirmed . . . in light of the most analogous article under the special provision of the present law; provided that the case shall be submitted to the Supreme People's Court for its approval."²⁵³ Thus, even if the Code does not specifically prohibit a

243. *Id.*

244. *Id.* at 180-81.

245. *Id.* at 181.

246. Kim & Tsai, *supra* note 67, at 181.

247. *Id.*

248. *Id.* at 187.

249. *Id.*

250. *Id.* at 180.

251. P.R.C. CRIM. CODE art. 90.

252. *Id.* art. 102.

253. *Id.* art. 79. The analogy clause is not unique to the Communist regime. It existed in the Tang (619-906), Ming (1368-1644), and the Qing (1644-1912) dynasties. Thus, Mao's re-

given activity, if it is similar to a defined crime, the accused may be convicted for that crime.

Leaders after Mao have attempted to rectify the past. In June 1978, the Chinese government released 111,000 people who were wrongly convicted as "rightists" since 1958.²⁵⁴ In 1979, the government restored political and civil rights to members of the "five black elements." Finally, in 1980, the government released 175,000 counter-revolutionaries.²⁵⁵ However, these releases were out of 1.13 million cases the courts reviewed.²⁵⁶

Around the time of the student demonstrations at Tian An Men Square, government efforts to curb political dissent were renewed because party leadership feared that continuing demonstrations would lead to dire consequences.²⁵⁷ When President Gorbachev of the Soviet Union visited Beijing in mid-May 1989, student protesters could be heard in the Great Hall of the People where he was meeting with Deng Xiaoping.²⁵⁸ Embarrassed by the disruptions, the government declared martial law on May 20, 1989,²⁵⁹ a condition imposed until early 1990.²⁶⁰ On June 4, 1989, tanks and armed vehicles moved in to clear the Square of protestors.²⁶¹ When it was over, approximately 3,000 people had been killed.²⁶² In addition, hundreds of soldiers, including one full colonel, reportedly were executed for refusing to shoot at the unarmed demonstrators.²⁶³ On June 9, while addressing the People's Liberation Army, Deng said, "If we had not suppressed them, they would have brought about our collapse . . . I myself, and all of you commanding officers present, would have been shoved under the guillotine."²⁶⁴ Thus, while Deng acknowledged that the re-

gime appears to have followed Machiavelli's advice that new regimes not completely abandon the laws of its predecessors. See generally Machiavelli, *supra* note 22.

254. Shao Chuan Leng, *supra* note 240, at 22.

255. *Id.* at 23.

256. *Id.*

257. Ta-Ling Lee & John F. Copper, *Failure of Democracy Movement: Human Rights in the People's Republic of China, 1988/89*, 103 OCCASIONAL PAPERS IN CONTEMP. ASIAN STUD. 18 (1991).

258. *Id.* at 13.

259. *Id.*

260. *Id.* at 55.

261. *Id.* at 13.

262. Lee & Copper, *supra* note 257, at 16-17. Immediately following the massacre, Chinese officials claimed that close to 300 people had died. Two months later, the number was lowered to 270; by February of 1990, Ambassador Li Luye maintained that "[t]he so-called Tian An Men massacre is purely a fabrication." *Id.* at 28.

263. *Id.* at 16.

264. *Us-or-Them Talk by Deng Reported*, S.F. CHRON., June 17, 1989, at A12.

gime faced a genuine threat, he was unwilling to attribute it to a popular uprising, blaming it instead on international sabotage.²⁶⁵ The demonstrators, however, openly called the regime a "pseudo-government," arguing that the government had lost its legitimacy because it lacked popular support.²⁶⁶

In the days that followed the massacre, a "most-wanted" list circulated throughout China, naming over twenty individuals who had purportedly led the demonstration.²⁶⁷ Asia Watch, a New York-based human rights organization, estimated that 30,000 people were arrested following the massacre.²⁶⁸ Punishment included reeducation, solitary confinement, torture, and execution.²⁶⁹

In an effort to avoid future problems with public demonstrations, the CCP was purged of anyone with "rightist" tendencies;²⁷⁰ the importance of ideology was reaffirmed, and power was centralized.²⁷¹ Subsequent changes in the legal system reflected the new emphasis on these values.²⁷² Prior to the crackdown, China was slowly moving toward a system of law in order to facilitate the Four Modernizations. Under martial law, it appeared to many observers that China was reverting to the lawlessness that pervaded during the Cultural Revolution.²⁷³

The 1989 crisis at Tian An Men Square marked the first time in the history of the PRC that both the demonstrators and the government invoked law to justify their positions.²⁷⁴ The students argued that the declaration of martial law violated Article 29 of the Constitution, which provides that the armed forces belong to the people.²⁷⁵ Furthermore, the quashing of the demonstration violated Article 35, which guarantees the people's right to demonstrate.²⁷⁶ In turn, the

265. Lee & Copper, *supra* note 257, at 19.

266. Tao Dehai, *China Democracy and Legal Crises*, 8 UCLA PAC. BASIN L.J. 390, 397 (1990).

267. Lee & Copper, *supra* note 257, at 21.

268. *Id.* at 25.

269. *Id.* at 25-26.

270. *Id.* at 50. A "rightist" was anyone who had advocated a free market economy, capitalism, or democratic reform. *Id.* at 51.

271. Lee & Copper, *supra* note 257, at 50.

272. *Id.* at 50-51.

273. *Id.* at 55.

274. Dehai, *supra* note 266, at 393.

275. *Id.* at 396; P.R.C. CONST. art. 29, *translated in FOLSOM & MINAN, supra* note 15, app. A.

276. Dehai, *supra* note 266, at 394. Article 35 reads, "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of

government argued that because the demonstrators did not submit written applications for permission to demonstrate in Beijing, the students were in violation of the law.²⁷⁷ However, the fact that law was the basis of the debate between the demonstrators and the government provides hope that the PRC will turn toward a legitimate legal system, and away from an ad hoc administration of justice according to political necessity.

2. Cuba

Marxist socialists defend the Castro regime's treatment of political dissent with two arguments. First, the regime's oppression is not a permanent threat because of the communist theory that those holding power will not monopolize it indefinitely.²⁷⁸ Second, even if some freedoms are sacrificed, those freedoms are not as important as providing everyone with food, education, and employment.²⁷⁹ However, as one scholar argues, "freedom of thought, conscience, and expression are consubstantial with humanness itself," and denial of these rights constitutes an assault on the human spirit.²⁸⁰ Further, there is no evidence that communist dictatorships relinquish their power once a certain level of material comfort is achieved.²⁸¹ In fact, in times of crisis, such as the Bay of Pigs invasion in 1961, arrests for political offenses increase.²⁸²

In 1963, still fearful of threats to the regime, the government enacted Law 1098, part of an "anti-crime" campaign which reclassified ordinary crimes such as burglary as political crimes.²⁸³ By 1965, Castro claimed to hold 20,000 political prisoners.²⁸⁴ Following the economic crisis that resulted from the failure of the ten-million-ton sugar harvest in 1970, the figure was estimated between 80,000 to 200,000 political prisoners.²⁸⁵

demonstration." P.R.C. CONST. art. 35, translated in FOLSOM & MINAN, *supra* note 15, app. A.

277. Dehai, *supra* note 266, at 393. The law the government referred to was the *Provisional Regulations Governing Demonstrations in Beijing Municipality*, printed in BEIJING RIBAO (Beijing Daily), Dec. 27, 1986.

278. AGUILA, *supra* note 6, at 205.

279. *Id.* at 206.

280. *Id.*

281. *Id.*

282. *Id.* at 211.

283. SALAS, *supra* note 176, at 210.

284. AGUILA, *supra* note 6, at 211.

285. *Id.*

Progress toward a legitimate legal system began in 1973 with the general restructuring of the court system whereby the revolutionary courts were absorbed into the ordinary court system.²⁸⁶ And in 1979, Cuba adopted a new criminal code which reclassified common crimes such as burglary, impersonation of public officials, and use of a minor during a crime as non-political offenses.²⁸⁷ These reforms decreased the number of political prisoners in Cuba to between four and five thousand.²⁸⁸ During the 1980s, hundreds more political prisoners were released.²⁸⁹

Although the Castro government claims it is willing to release thousands more prisoners,²⁹⁰ threats to Castro's regime, in light of the global collapse of communism, are likely to cause an increase. These threats include economic difficulties, as well as the possibility of a coup or assassination.²⁹¹ Even before the demise of the Soviet Union, subsidies to Cuba had been steadily declining, from \$4.1 billion in 1989, to \$3.5 billion in 1990.²⁹²

In fact, Jorge Mas Canosa, chairman of the Cuban American National Foundation, a powerful Washington lobbying group, traveled to Moscow in December, 1991, to persuade Russian President Yeltsin to cut off all aid to Cuba.²⁹³ Given Russia's dismal economic state, this seems likely. The economic situation in Cuba is currently such that most citizens must line up each day to receive one loaf of bread.²⁹⁴ The threat to Castro's regime is not just economic; some predict that the angry mood on Cuban food lines will explode into riots.²⁹⁵ Miami Mayor Xavier Suarez believes that the demise of Castro's regime "could happen tomorrow."²⁹⁶ Others assert that it is only a matter of time before the Castro regime crumbles.²⁹⁷ However, such expressions underestimate Castro's ability to overcome great ob-

286. SALAS, *supra* note 176, at 209-10.

287. AGUILA, *supra* note 6, at 209.

288. *Id.* at 211.

289. *Id.* at 212. Despite these claims, Americas Watch estimates that Cuba continues to hold between 10,000 to 15,000 political prisoners. MARY JANE CAMEJO, HUMAN RIGHTS IN CUBA: THE NEED TO SUSTAIN PRESSURE, AN AMERICAS WATCH REPORT 4 (1989).

290. AGUILA, *supra* note 6, at 211.

291. Mike Clary, *Cuba Entices Eager Entrepreneurs*, L.A. TIMES, Jan. 23, 1992, at A5.

292. Paul Katel, *One Man is an Island*, NEWSWEEK, Sept. 9, 1991, at 39.

293. Clary, *supra* note 291.

294. Katel, *supra* note 292.

295. *Id.*

296. Clary, *supra* note 291, at A5.

297. See Richard Boudreaux, *Some Cracks Appear in Castro's Fortress Cuba*, L.A. TIMES, Nov. 17, 1991, at A1.

stacles, and are reminiscent of the CIA's underestimation of Castro's popularity prior to the ill-fated Bay of Pigs invasion when the United States believed that the invasion would spark a nation-wide revolt against the regime.²⁹⁸ Fidel Castro is still very much in charge of Cuba, and faithful in his commitment to socialism and anti-Americanism.²⁹⁹

In January 1992, General Raul Castro, Fidel Castro's brother and second in command,³⁰⁰ threatened to reinstate the Revolutionary Courts.³⁰¹ This threat was issued after the arrest of 60 pro-democracy activists in the few months following the unraveling of the Soviet Union.³⁰² Because Castro believes that recent waves of dissent are the result of foreign interference,³⁰³ dissidents were accused of conspiring with the United States to overthrow the Castro regime.³⁰⁴

In January 1992, Cuba executed a Cuban exile who was convicted of planning a terrorist attack against Castro's regime.³⁰⁵ At sentencing, the Council of State, headed by Fidel Castro, warned that "revolutionary justice will show increasingly less clemency" toward Castro's opposition.³⁰⁶ Ricardo Bofill, President of the Cuban Committee for Human Rights, said that this statement "sends a clear message to his internal opposition that whoever tries to take power from Fidel Castro better be prepared to pay with his life."³⁰⁷

C. *Rights of the Accused*

1. China

The early years of the PRC were characterized by two comple-

298. AGUILA, *supra* note 6, at 63.

299. Clary, *supra* note 291, at A5.

300. THE ECONOMIST INTELLIGENCE UNIT, CUBA, DOMINICAN REPUBLIC, HAITI, PUERTO RICO: COUNTRY REPORT 2 (1991).

301. Richard Boudreaux, *Cuba Strikes Democracy Movement*, L.A. TIMES, Jan. 19, 1992, at A1.

302. *Id.*

303. *Id.* In an open letter to Fidel Castro just before her arrest, the activist/poet Maria Elena Cruz wrote, "No, Señor Fidel Castro, the Cuban opposition isn't from or in the United States, regardless of that country's questionable positions. Your opposition is yourself and your own contradictions . . . the economic, political and social failure of 32 years of revolution." Boudreaux, *supra* note 301, at A1.

304. *Id.*

305. *Cuban Firing Squad Executes Condemned Exile From Miami*, L.A. TIMES, Jan. 21, 1992, at A8.

306. Richard Boudreaux, *Castro Ignores Appeals for Clemency, Upholds Death Sentence for Cuban Exile*, L.A. TIMES, Jan. 20, 1992, at A4.

307. *Id.*

mentary models of law: jural and societal.³⁰⁸ Jural law is what Western jurists would call a rule of law, and includes the use of legal institutions and procedure.³⁰⁹ Legalists consider jural law essential to running a government.³¹⁰ In contrast, societal law is based on Confucian principles which support the view that societal harmony can be achieved through education and by following the example of virtuous leaders.³¹¹ Societal law relies on the use of uncodified moral law and extrajudicial organs and procedures.³¹² Generally, jural law is utilized to deal with class enemies;³¹³ societal law, "the people." Unlike Cuba, China defines segments of its own population as enemies of the people, relegates them to a condemned social status, and subjects them to unequal treatment before the law.³¹⁴

Although the Confucian concept of model behavior was preferred over written law, traditional Chinese political rights and law are influenced by both jural and societal models.³¹⁵ Both models agree that laws are designed to protect rulers, not citizens.³¹⁶ In fact, individual political rights are derived from the state, and are not based on theories of natural law or inalienable human rights.³¹⁷ As a result, the rights that are conferred are not absolute and may be limited or withdrawn at the pleasure of the state.³¹⁸ The Criminal Procedure Law of the People's Republic of China³¹⁹ reflects this philosophy.

The Criminal Procedure Law covers such areas as evidence, jurisdiction, search and seizure, expert witnesses, and interrogation of the accused.³²⁰ Missing from the Criminal Procedure Law is the principle of *res judicata*.³²¹ However, this has always been the case in

308. LENG & CHIU, *supra* note 41, at 11.

309. *Id.* at 10-11.

310. FOLSOM & MINAN, *supra* note 15, at 4.

311. *Id.* at 3-4.

312. LENG & CHIU, *supra* note 41, at 11.

313. Class enemies are counter-revolutionaries, landlords, rightists, rich peasants, and other criminals. Kim & Tsai, *supra* note 67, at 181.

314. Kim, *supra* note 2, at 1420.

315. Kim & Tsai, *supra* note 67, at 185.

316. *Id.*

317. *Id.*

318. *Id.*

319. CRIM. PROC. LAW (P.R.C.), reprinted in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 120 (Foreign Languages Press 1987) [hereinafter P.R.C. CRIM. PROC. LAW]. The Criminal Procedure Law was adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and became effective on January 1, 1980. *Id.*

320. *Id.* pt. One, ch. II and IV, pt. Two, ch. II, §§ 1, 2, 4-6.

321. Kim, *supra* note 2, at 1441-42.

Chinese legal history because of the notion that true justice may remain forever unsolved, and thus there should be no hard rules.³²² Some of the more significant provisions in the Criminal Procedure Law include: the right to an attorney,³²³ the right to present a defense,³²⁴ prohibitions on torture,³²⁵ the requirement of a warrant to make an arrest,³²⁶ automatic appeal when the death penalty has been imposed,³²⁷ and approval by the Supreme People's Court before a convict is executed.³²⁸

2. Cuba

In the early years of the regime, political necessity determined the criminal laws.³²⁹ There was no concept of double jeopardy, no right of habeas corpus, and laws were often enforced retroactively.³³⁰ However, in 1979, when Cuba began institutionalizing the judiciary, a new Penal Code was enacted.³³¹ Under the 1979 Code, theoretically, no one could be punished for mere thoughts; however, the 1979 Code criminalized circulating, reading aloud, writing, or possessing anti-socialist propaganda.³³² The Penal Code was supplemented in 1987.³³³ The new Penal Code mitigates the punishments of the old Code, and offers more lenient sanctions, but preserves the death penalty for murder, pedophilia, and political crime.³³⁴ However, in areas other than punishment, the 1987 Code remains essentially the same as the 1979 Code.³³⁵

Additionally, Cuba promulgated a new Code of Criminal Procedure, which established several principles, including the right to confront witnesses, the right to counsel, the right to a public trial, the presumption of innocence, the right to prevent family members from testifying against the accused, and the right against self-incrimina-

322. *Id.* at 1442.

323. P.R.C. CRIM. PROC. LAW pt. One, ch. IV, art. 26.

324. *Id.*

325. *Id.* pt. One, ch. IV.

326. *Id.* pt. One, ch. VI, art. 50.

327. *Id.* pt. Two, ch. IV, art. 145.

328. P.R.C. CRIM. PROC. LAW pt. Two, ch. IV, art. 144.

329. Salas, *supra* note 2, at 60.

330. *Id.*

331. Michael Bogdan, *Thirty Years of Cuban Revolutionary Law*, 15 REV. SOCIALIST L. 319, 330 (1989). See also Berman & Whiting, *supra* note 1, at 476, 482.

332. *Id.* at 482-83. CUBAN PENAL CODE, art. 108.

333. Bogdan, *supra* note 331, at 330.

334. *Id.*

335. *Id.*

tion.³³⁶ Appellate courts often reverse convictions which were obtained in violation of the law.³³⁷ All laws are required to be published, and one could not be convicted for violating an unpublished law.³³⁸ Further, one accused of a crime can be detained in jail during the preliminary investigation for a period of time equivalent to the minimum sentence for the alleged crime.³³⁹

The Code of Criminal Procedure also contains many exceptions, particularly for those accused of crimes against the regime.³⁴⁰ In such instances, the trial may be closed to the public and conducted without the defendant present.³⁴¹ Additionally, the criminal procedure laws may be suspended in exceptional circumstances with the consent of the President of the Supreme Court.³⁴²

D. *The Legal Profession*

1. Legal Education

a. *China*

Although China did begin to institutionalize a Western-style legal system for a brief period in the mid-1950s, the ideological excesses of Mao Zedong abruptly ended all progress.³⁴³ Specifically, the Anti-Rightist Movement effectively abolished the Chinese legal profession and law schools, and the Cultural Revolution destroyed the remainder of the legal system.³⁴⁴ After the death of Mao in 1976, and the conviction of the Gang of Four in 1979, the legal system began to revive.³⁴⁵ The revival is largely attributed to the rise of Deng Xiaoping, who believed that a formal legal system is a prerequisite to a highly developed economy.³⁴⁶

In 1980, Chinese law schools were in a dismal state.³⁴⁷ Zhong-

336. SALAS, *supra* note 176, at 235.

337. *Id.* at 236.

338. Berman & Whiting, *supra* note 1, at 482.

339. *Id.*

340. SALAS, *supra* note 176, at 236.

341. *Id.* See also CUBAN CODE OF CRIM. PROC. art. 305.

342. See SALAS, *supra* note 176, at 236; CUBAN CODE OF CRIM. PROC. art. 479.

343. John F. Murphy, *Legal Education in China: Some Impressions*, 1 CHINA L. REP. 50, 51 (1982).

344. *Id.* at 50.

345. See *Id.*

346. *Id.* at 50-51.

347. James C. Tuttle, *Developments in China's Legal System: Introduction and Delegation Overview*, 2 CHINA L. REP. 36, 40 (1982).

shan University Law Faculty had not acquired any new law books since 1953.³⁴⁸ As of the fall of 1980, there were between eight and ten law schools with an entering class of 1,250.³⁴⁹ In 1982, there were only sixteen law schools.³⁵⁰

In order to practice law, one must complete four years of study after secondary school.³⁵¹ This study includes ten weeks of practice training in actual courtroom experiences.³⁵² At Nanjing University, students are required to take course work in philosophy, economics, history of Chinese Communism, language, civil law, criminal law, criminal procedure, marriage law, private and public law, and international law.³⁵³ Constant throughout the entire legal curriculum is a heavy ideological emphasis on Marxism-Leninism-Mao Zedong Thought.³⁵⁴

Currently, the Ministries of Justice and Education are attempting to "organize uniform law teaching methods and materials" for all Chinese law schools.³⁵⁵ In fact, in order to win a faculty appointment, professors must be approved by the Ministry of Justice.³⁵⁶ In September 1986, the Ministry of Justice created the National Lawyers Qualification Examination.³⁵⁷ Upon successful completion of the exam, the examinee is issued a lawyer's certificate.³⁵⁸ However, the incentive to sit for the exam is weak, because with or without the certificate, one may practice law.³⁵⁹ Currently, the Ministry of Justice is attempting to correlate passing the exam with increased salaries.³⁶⁰ Despite these recent reforms in legal education, however, most lawyers in China still possess no legal education.³⁶¹

348. *Id.* at 49.

349. Murphy, *supra* note 343, at 57.

350. Law schools have been established in Anhui University, Yunnan University, Nanjing University, Shamen University, Wuhan University, and Zhongshan University. R. St. J. Macdonald, *Legal Education in China Today*, 6 DALHOUSIE L. J. 313, 314 (1980).

351. Tuttle, *supra* note 347, at 42.

352. *Id.*

353. *Id.*

354. Bing Ho, *Chinese Legal Education: A First-hand Account by a Canadian Law Student*, 8 DALHOUSIE L. J. 32, 43 (1984).

355. *Id.*

356. *Id.*

357. Henry Pitney, *The Role of Legal Practitioners in the People's Republic of China*, 24 STAN. J. INT'L. L. 323, 358 (1988).

358. *Id.*

359. *Id.* at 359.

360. *Id.*

361. *Id.*

b. Cuba

Following the 1959 Communist revolution, approximately 70% of Cuban law graduates fled the country, and the two existing law schools suspended classes when law professors left their posts.³⁶² Between 1964 and 1965, Cuba graduated no law students; and between 1965 and 1973, Cuban law schools graduated only 188 students.³⁶³ Troubled by these figures, admissions standards were lowered, allowing "good revolutionary comrades" to enter law school after passing a simple entrance exam.³⁶⁴ Coupled with poor teachers and outdated textbooks, there was a serious deterioration in the quality of legal education.³⁶⁵

In the beginning of the 1980s, the Cuban Communist Party realized that many of Cuba's problems could not be solved without the creation of a more efficient legal system and, of course, better law schools.³⁶⁶ The Cuban leadership admitted that lowering law school admission standards was a mistake.³⁶⁷ The lack of prestige in the legal profession was exemplified by the fact that in 1982 there were only about 5,600 lawyers in a population of ten million.³⁶⁸ Today, there are three law schools in Cuba, including the Faculty of Law at the University of Havana where Fidel Castro graduated before the revolution.³⁶⁹ The Faculty of Law at the University of Havana now has four departments: Basic Principles of Law, Civil and Family Law, Criminal Law, and International Law.³⁷⁰ In addition, Constitutional Law is part of the curriculum.³⁷¹ Cuban law professors are well paid, and must have ten years of legal experience, fluency in at least two languages, and legal publications to their credit.³⁷² The government still retains an element of control, however, by requiring law professors to be appointed by a special tribunal, to have mastered Marxism, and to be supportive of the communist revolution.³⁷³

362. Bogdan, *supra* note 331, at 321.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.* at 312.

368. *Id.* at 322.

369. EDWARD GONZALEZ & DAVID RONFELDT, *CASTRO, CUBA, AND THE WORLD* 36 (1986).

370. Berman & Whiting, *supra* note 1, at 483-85.

371. *Id.*

372. *Id.*

373. *Id.*

2. Lawyers

a. China

Between 1959 and 1966, there were only four lawyers in China.³⁷⁴ Today, there are two organizations for lawyers in China: the Legal Advisers Offices and the Lawyers' Associations.³⁷⁵ The Legal Advisers Offices are the work organs, and are funded by the state.³⁷⁶ The Lawyers' Associations are the disciplinary bodies which educate, reeducate, caution, and even disbar lawyers.³⁷⁷

In 1982, the Standing Committee of the NPC passed the Provisional Act on Lawyers.³⁷⁸ Before this, there were only 1300 legal advisory offices and 4800 attorneys in China.³⁷⁹ In 1983, the number of Legal Advisers Offices jumped to 2300, and the number of attorneys increased to 12,500.³⁸⁰ By 1989, China had 30,000 lawyers in a population of 1.1 billion.³⁸¹

b. Cuba

Since the revolution, there have been serious conflicts between the government and the legal profession.³⁸² By 1961, most of the lawyers in Cuba had fled the island.³⁸³ Because lawyers were associated with the Batista regime, the Castro regime had always viewed the legal profession with distrust.³⁸⁴ A Cuban law professor told a group of visiting American law professors that when he was in law school, he was embarrassed to tell people what he was studying.³⁸⁵ "Why in the world do you want to become a lawyer?" his friends would ask.³⁸⁶

Private attorneys were tolerated for almost nine years until they were forced into Lawyer's Collectives in 1974.³⁸⁷ The Lawyer's Collectives, a national governmental law firm similar to the Legal Advis-

374. LENG & CHIU, *supra* note 41, at 5 n.1.

375. *Id.* at 74.

376. *Id.* at 74-75.

377. *Id.*

378. CHINA STUDY, *supra* note 36, at 522.

379. *Id.*

380. *Id.*

381. Mayer, *supra* note 89, at 2. Compare this with one million lawyers in the United States for a population one-fourth that of China. *Id.*

382. Salas, *supra* note 2, at 66-69.

383. *Id.*

384. *Id.*

385. Berman & Whiting, *supra* note 1, at 477.

386. *Id.*

387. Bogdan, *supra* note 331, at 324.

ers Offices in China, were first established in 1965.³⁸⁸ They serve 150,000 paying clients and 500,000 non-paying clients every year.³⁸⁹ Attorneys in the Lawyer's Collectives are paid a fixed fee by the state and are the best paid lawyers in Cuba, earning more than law professors, judges, prosecutors, and defense attorneys.³⁹⁰ Their practice is primarily criminal and family law.³⁹¹ By 1980, there were over 500 full-time law students, and a National Union of Jurists comprised of nearly 3000 members.³⁹²

Despite these advancements, Cuban lawyers are not expected to defend the interests of their client, as in the United States.³⁹³ Rather, they are required to determine the guilt or innocence of the client, and if guilty, to seek sanctions which will best rehabilitate the client.³⁹⁴ In other words, the attorney must subordinate the interests of the client to those of the state.³⁹⁵

3. The Attorney General's Office

a. China

In China, the Procuracy, or Attorney General's Office, is the state organ for legal supervision, and is established in Section VII, Article 129 of the Constitution.³⁹⁶ The duties of the Procuracy are defined in Article 5 of the Organic law of the People's Procuracies and include: the administration of criminal justice, investigation into criminal behavior among both ordinary citizens and government officials, oversight of police activity, scrutinization of trial activities, and supervision of prisons.³⁹⁷ Procurators are supposed to be independent and not subject to interference by individuals or administrative organs.³⁹⁸ However, at the same time, procurators are responsible to the corresponding level of government.³⁹⁹ Although there is a consensus that all the procurators are incorruptible, Party interference

388. *Id.*

389. *Id.* at 324-325.

390. *Id.*

391. *Id.*

392. Bogdan, *supra* note 331, at 322.

393. Camejo, *supra* note 289, at 72-73.

394. Salas, *supra* note 2, at 68.

395. Camejo, *supra* note 289, at 73.

396. P.R.C. CONST. art. 129, translated in FOLSOM & MINAN, *supra* note 15, app. A.

397. Shao-Chuan Leng, *supra* note 240, at 69.

398. P.R.C. CONST. art. 131, translated in FOLSOM & MINAN, *supra* note 15, app. A.

399. *Id.* art. 133.

continues to be a problem.⁴⁰⁰

b. Cuba

The Cuban Procuracy was established by Chapter X of the Cuban Constitution, and is elaborated upon in Articles 129 through 133.⁴⁰¹ Unlike the procurates in China, who are appointed by the corresponding level of government, the Cuban procurates are appointed by the highest level of government, and are not subject to local assemblies.⁴⁰² The Cuban Procuracy supervises pretrial investigation, has the power to arrest suspects, and is charged with supervising the prison system.⁴⁰³

On the other hand, the Attorney General is appointed by the National Assembly of People's Power and the Council of State⁴⁰⁴ and is given the authority to draft new legislation it feels necessary to fulfill its mission.⁴⁰⁵ Violations of the law by police, and appeals regarding police decisions, are handled exclusively by the Attorney General.⁴⁰⁶ There is no predecessor to this office in Cuban history.⁴⁰⁷

IV. MAINTAINING STABILITY WITH A DOUBLE-EDGED SWORD

The symbolic beginning of the global collapse of communism occurred when the Berlin Wall was torn down in 1989,⁴⁰⁸ and culminated when the Communist flag was lowered over the Kremlin in the Soviet Union.⁴⁰⁹ Today, very few communist nations remain. Among the most prominent survivors are the People's Republic of China and the Republic of Cuba.⁴¹⁰

There are many possible reasons these two regimes continue to survive. Significant among the explanations is the revolutionary regimes' use of the law. A revolutionary regime's use of law can be analogized as two double-edged swords. The first sword symbolizes

400. LENG & CHIU, *supra* note 41, at 71.

401. CUBA CONST. arts. 130-33.

402. SALAS, *supra* note 176, at 246.

403. *Id.*

404. CUBA CONST. art. 131.

405. SALAS, *supra* note 176, at 246.

406. *Id.*

407. *Id.*

408. THE WORLD ALMANAC AND BOOK OF FACTS 516 (1992).

409. Michael Parks, *Russia Taking Painful Steps to a Free Market*, L.A. TIMES, Jan. 2, 1992, at A1. The Soviet Union was officially dismantled on January 1, 1992. *Id.*

410. Other remaining communist nations include Vietnam, North Korea, and Laos. See Katel, *supra* note 292, at 39.

the new regime's relationship with the old regime: on one side, the law is used to *distinguish* it from the former one; on the other side, the law is used to *merge* the new regime with the legitimate elements of the prior regime. The second sword symbolizes the new regime's relationship with its people: one side is used to *liberalize* the political system and encourage participation; the other side is used to *oppress* dissent. Although the functions of each sword appear diametric, they allow the regimes to enjoy the legitimacy of a democratically elected government, while maintaining the absolute power of a dictatorship. The successful use of these two "swords" has contributed to the survival of the revolutionary regimes in the People's Republic of China and the Republic of Cuba.

A. *Legitimizing the Regime with New Laws*

The first step toward legitimacy is to distinguish the new regime from the corrupt elements of the former government. The Castro and Mao regimes began with the abolition of former laws. In China, Mao proclaimed that law was a tool of oppression used by the corrupt Guomintang government.⁴¹¹ The Mao regime promulgated the Common Program, which abolished all laws and legal institutions of the Guomintang government, and enacted 148 new laws almost immediately.⁴¹²

To maintain the semblance of congruity with the old regime, traditional Chinese principles such as Confucianism, reeducation, rehabilitation of criminals, the analogy clause,⁴¹³ the idea that law is for the protection of the rulers rather than the ruled,⁴¹⁴ and the absence of *res judicata*, remained as the basis of law under Mao's regime.⁴¹⁵ Additionally, the Mao regime permitted Guomintang judges, prosecutors, and other legal technicians to remain in office until 1952.⁴¹⁶

In Cuba, Castro declared, "we have to destroy the system, destroy its laws, destroy everything,"⁴¹⁷ in order to disassociate and distinguish his regime from the brutality of the corrupt Batista regime. Castro's regime introduced a new court system, which included the

411. Kim, *supra* note 2, at 413.

412. See *supra* text accompanying notes 28-38.

413. See *supra* note 253.

414. See *supra* text accompanying note 316.

415. See *supra* text accompanying note 321.

416. See *supra* text accompanying notes 34-35.

417. Salas, *supra* note 2, at 44.

Popular and Revolutionary Tribunals.⁴¹⁸ Additionally, the regime created the Attorney General's Office, which had no counterpart in Cuban history.⁴¹⁹

Old laws were apparently destroyed in order to distinguish the new regime from the old, and to ordain the new regime with legitimacy. However, as the revolution was institutionalized, regiments of the old regime either remained, or crept back in. This was a necessary development because, as human beings are creatures of habit, a citizenry will comply with familiar methods of governing.⁴²⁰ By retaining the shadow of former laws and customs, a revolutionary regime assures its success.⁴²¹

In Cuba, the Fundamental Law established the same governmental framework as the Batista dictatorship, giving the president unlimited powers.⁴²² Further, the private practice of law was tolerated until 1974.⁴²³ Thus, the laws of the old regime were incorporated with the new regime, creating the illusion of congruity with established ways of thinking and acting. In doing this, both regimes were able to ride out the storm of instability that immediately follows the revolutionary transformation of a government.

B. Maintaining Stability with the Law

The governments of China and Cuba have used the law to encourage the masses to participate in running the country. In China, the Constitution iterates the notion that all laws are written for the benefit of the people;⁴²⁴ Mao's regime encouraged students to participate in purging counter-revolutionaries from the country through the Red Guards;⁴²⁵ the law schools and legal community were opened to all by relaxing admission standards, thereby emphasizing political correctness over competence.⁴²⁶

In Cuba, the new regime created the Popular Tribunals, a court system in which ordinary citizens could serve as judges, with little or no legal training.⁴²⁷ As in China, law schools were open to anyone

418. *See supra* text accompanying notes 167-91.

419. *See supra* text accompanying notes 404-07.

420. *See supra* text accompanying notes 20-23.

421. *See supra* text accompanying notes 22-23.

422. *See supra* text accompanying notes 153-66.

423. *See supra* text accompanying note 387.

424. *See supra* text accompanying notes 101-05.

425. *See supra* text accompanying notes 61-72.

426. *See supra* text accompanying note 354.

427. *See supra* text accompanying notes 180-83.

who wished to attend.⁴²⁸ Thus, by integrating the legal system with the population, the people feel a part of the decision-making process and are less likely to oppose the regime.

However, the law is also used to justify crushing the opposition. In China, the regime labeled its opponents as "counter-revolutionaries" and as the "five black elements;"⁴²⁹ potential opponents were weeded out during the Hundred Flowers Campaign;⁴³⁰ laws prohibiting demonstrations were issued and enforced;⁴³¹ the Criminal Code provided the death penalty for the regime's critics, as well as the "crime by analogy" clause.⁴³² In China, there is no notion of judicial independence, and the CCP exerts tremendous influence over the legal system.

In Cuba, the regime created the Revolutionary Courts in order to deal exclusively with political crime;⁴³³ trials dealing with political crime are held in secret;⁴³⁴ prisons are full of political prisoners, and the death penalty is used frequently.⁴³⁵ Additionally, there is no notion of judicial independence; all judges are appointed by, and are accountable to, the National Assembly.⁴³⁶ All lawyers are employed by the state and are required to subordinate the interests of their clients to those of the state.⁴³⁷ In order to teach law, Cuban law professors must have mastered Marxism, be sympathetic to the communist revolution, and be appointed by a special tribunal.⁴³⁸ Thus, the legal system is more a tool for governmental control than a restraint on government abuses.

V. CONCLUSION

The governments of both Cuba and China were created through violent revolutions, and were led by charismatic leaders whose personalities dominate their nations' governments to this day. Both regimes were characterized by numerous constitutions and ad hoc systems of justice. However, unlike Mao, Castro foresaw the need to

428. See *supra* text accompanying note 364.

429. See *supra* text accompanying notes 242-45.

430. See *supra* text accompanying notes 50-58.

431. See *supra* text accompanying notes 125-33.

432. See *supra* text accompanying note 54.

433. See *supra* text accompanying note 167.

434. See *supra* text accompanying notes 340-41.

435. See *supra* text accompanying notes 282-90.

436. See *supra* text accompanying notes 228-231.

437. See *supra* text accompanying note 395.

438. See *supra* text accompanying note 373.

institutionalize a formal legal system. For Castro, this realization did not arise from an idealistic desire to broaden participation by the masses, but rather from the pragmatic realization that, without it, his regime would fail. Mao did not have to institutionalize the legal system during his lifetime because he was a virtual deity in China, and in no danger of losing his prestige. Chinese leaders after Mao realized they could no longer rule by charisma, and therefore were compelled to establish a rule of law. However, the legal systems adopted by both regimes have done little to provide for judicial independence or democratization of the law. In Cuba and China the judiciary does not restrain the conduct of the policy-makers, but rather serves to blindly enforce government decisions. The legal systems of Cuba and China have been designed to ensure the continued survival of the revolutionary regimes by providing only symbolic public participation, while concurrently quashing dissent. Many have proclaimed that the day of the dictator is over, and that the downfall of the communist regimes of Cuba and China is only a matter of time.⁴³⁹ Such declarations are unfounded. So long as the regimes maintain the hard line, they will continue to survive.

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439. For example, in his Inaugural Address, United States President George Bush declared, "In man's heart, if not in fact, the day of the dictator is over." Raymond Bonner, *African Dictators, American Silence*, N.Y. TIMES, June 30, 1989, at A29. Speaking of Cuba, he wrote, "The day of the dictator is over, and I am convinced that Castro's days are numbered." George Bush, *Castro's Days numbered, Keep the Pressure On*, HOUS. CHRON., Mar. 1, 1992, at Outlook § 1. Former Pakistan Prime Minister Benazir Bhutto, whose election ended ten years of military dictatorship said, "Everywhere the sun is setting on the day of the dictator." Mark Fineman, *She Hails U.S. Support for Pakistani Democracy; Bhutto Wins Ovation in Congress*, L.A. TIMES, June 8, 1989, at A6. *But see* Tim Golden, 'Down with Fidel!' Is Heard in Cuba but There Is No Sign Yet of His Fall, N.Y. TIMES, Jan. 13, 1993, at A10.

