

Improvements in the Cuban Legal System

James H. Manahan

Cuba inherited its legal system from the Spanish conquerors, as did most countries in Central and South America. However, Communist theory from Russia, East Germany, and China has had a great influence on Cuban practices since 1959.

Cuban lawmakers perceive law and the lawmaking process as educational. All proposed laws are discussed at neighborhood meetings, in an attempt to inform citizens and obtain consensus, and it usually takes several years before new statutes are adopted.

For example, a new criminal code was drafted between 1969 and 1973, but it was not enacted until 1979. This meant that the Code reflected the conditions in Cuba in the '60s, when there was still fighting with the United States (the Bay of Pigs is only one example) and the CIA was trying to kill Fidel Castro. A new Code went into effect in 1989, a more modern approach which uses incarceration as a last resort and encourages alternative sanctions. The repressive criminal justice system was transformed into a system that relies more heavily on education and re-socialization than on incarceration.

The court system was restructured in 1973 and 1977. At that time the private practice of law was eliminated, and all lawyers were integrated into law collectives (*bufetes colectivos*). Further procedural reforms were made in 1990.

All courts have a mixture of lawyer judges and lay judges. Municipal and provincial courts now have two lay judges and one professionally trained judge, and the Supreme Court has two lay judges and three professional judges. The purpose of lay judges, like our juries, is to bring a non-legalistic, popular sense of justice into the proceedings, and to educate citizens about legal proceedings. Most lay judges belong to the Cuban Communist Party (82

percent in the Supreme Court, 57 percent in provincial courts, 77 percent in municipal courts).

As in the rest of Spanish-speaking America, there is a movement toward a more fully oral and adversarial system such as we have in common-law countries. I saw an oral criminal trial last year in which two men were accused of breaking and entering a home. The only witnesses called to testify at the trial were the victim, the defendants, and the wife of one defendant; no police officer testified, and the trial took less than two hours. The lawyers and judges wore black robes. Witnesses stood before the judges, and a typist (using a loud typewriter) summarized the testimony. The presiding judge frequently interrupted the lawyers and witnesses. I did not see any lawyer cross-examine a witness, but the lawyers did give long and powerful closing arguments. However, I believe Cuban lawyers would benefit from training in direct and cross-examination skills and the techniques of persuasion in oral trials.

Trials (such as the one I saw) which carry penalties of less than eight years in prison have one professional judge and two lay judges; more serious crimes have three professional judges and two lay judges. Lay judges are nominated by fellow workers and elected by the municipal or provincial assemblies. They serve one month per year for five years, and work at their regular jobs the rest of the time.

Last July I spent 10 days in Cuba interviewing a number of people about the functioning of their legal system. In general, law professors and older lawyers seem satisfied with the present procedures, whereas younger lawyers are more interested in reform.

Cuba was actually the first country in Latin America to start using oral, adversarial trials in criminal cases. This reform occurred in 1889 when Cuba was still a Spanish colony. Prior to that they used the Inquisition system of written, secret trials, and only in the past 10 years have the other countries of Latin America begun changing their system to an adversarial model.

On July 21 I spoke at an International Criminal Law Seminar which was held at the Summer School of the University of Havana Law School, and was given an award for being a "Founding Professor" of the Summer School. My topic was "The Role of Advocacy in the Procedural Reforms of Latin America," and I criticized the fact that vestiges of the Inquisition system still persist in the Cuban courts (as in the courts of many other Latin American countries that have reformed their procedures).

In the Inquisition system, the judge's role is to investigate the case and determine the "truth" about what happened, while the lawyers simply file written arguments and motions. In an oral, adversarial system, the judge should have a very different role, that of referee, and the job of the lawyers is to produce evidence and prove their contentions through accreditation and

contradiction of witnesses. The judge should be passive, limiting his or her role to guarantying the rights of the parties and deciding the issues. The judge is simply an arbiter.

There are three vestiges of the old system that still persist in Cuba and elsewhere:

(1) When witnesses are called to testify, they first give a spontaneous statement telling what they know about the matter, rather than answering questions of the lawyer who called them. This may seem like a quick and easy way to get their stories told, but more often than not there is a lot of irrelevant and incomplete testimony. Even worse, this practice does not allow the lawyer to develop the testimony in a coherent manner which is consistent with the lawyer's theory of the case. The adversary system is supposed to be contradictory and dialectic, and the lawyers should be in charge of the presentation of the evidence.

(2) After the lawyers have questioned the witnesses, the judges can (and do) question them further. This also may seem to be a good way to make sure that the witnesses tell everything they may know, but the judge's role should be passive, simply listening to the evidence and not trying to "produce" it. However impartial the judge's questions may be, it might have the effect of destroying what one of the parties has accomplished during direct or cross examination. The judge thus loses his neutrality and appears to be just another cross-examiner. If the judges have doubts after hearing the testimony, they are supposed to resolve those doubts in favor of the accused.

(3) Finally, the court rules prohibit the use of leading questions, even during cross-examination. The theory is that leading questions may put words in the witness' mouth, thereby preventing the witness from giving his or her own testimony. Since the witness is normally affiliated with the lawyer who called the witness to testify, this rule makes sense on direct examination. However, the witness will be hostile to the other lawyer, whose job is to show that the witness is mistaken or is lying.

In common-law countries, lawyers try to show that by using leading questions on cross-examination. John Henry Wigmore, the great legal scholar in the United States, said that "without doubt, cross-examination is the best machine invented by man for the discovery of the truth." Another expert, Charles McCormick, said "For two centuries, common law judges and lawyers have considered the opportunity to cross-examine as an essential safeguard of truth...and have insisted that the opportunity be more than a privilege, that it be a right." The Supreme Court of Canada ruled that cross-examination "is essential in determining if a witness is credible."

An Italian scholar, Francesco Carnelutti, said that "Everyone knows that testimonial proof is the most false of all proofs." For that very reason, court

rules ought to permit the most effective methods to demonstrate that the witness may be mistaken or even lying.

In El Salvador, the law on oral adversarial trials was changed in 1998 to permit leading questions on cross-examination, and to prohibit judges from questioning witnesses except to clarify their testimony. The same is now true in Chile, which adopted the oral, adversarial system in criminal cases for the entire country just this past summer.

Despite this fact, several members of my audience spoke out rather strongly against my views. They asked how I could come to Cuba for a few weeks and think that I understood their system. They pointed out that in the United States only about 10 percent of criminal cases actually go to trial and the rest are resolved by plea bargains, whereas in Cuba every single case goes to trial. Defendants cannot plead guilty even if they want to do so! Because of this, they said, the courts do not have time for long cross examinations and lengthy procedures, usually having to hold several trials every day. My response to this was that a lawyer's job is to advocate strenuously for the client, and to use every technique legally available to persuade the judges that the client's version is true; if this takes time, then time must be taken to do the job right. That's what we mean by the adversarial system, and Cuba cannot expect to achieve justice in its criminal cases by continuing to keep vestiges of the old Inquisition system.

Dissent

Many people to whom I spoke felt completely free to tell me how dissatisfied they are with the Cuban legal system. A young lawyer, Fidel Rivero Villasol, told me at length that the court system does not deliver justice in Cuba. The police control the prosecution, suspects don't (in practice) have a right to a lawyer (though they do have that right on paper), officials are corrupt and accept money under the table, and political cases are decided even before trial.

Comments of this type, whether true or not, reveal a perception among many Cubans that the legal system needs to be reformed. In my opinion, a stronger commitment to the adversarial system and more training in trial skills and effective oral trial techniques would go a long way to improve the Cuban system of justice.

The University of Havana

The University of Havana has 15 schools with 29 separate career paths, as well as several Centers of Study. It has some 20,000 undergraduate students, 19,000 post-graduate students, and 4,000 master's candidates. Some 600 workers take night courses, and there are 20,000 "distant learners" who study at home and take tests at the University. Thirty-two percent of the professors

have their Ph.D. The University has 19 branches in Havana. Higher education is free.

The law school is a five-year course, starting at age 18, and 80 percent of the students are women. Forty-three percent of the graduates pass the national bar exam on their first try. Students must do three years of public service to repay their free education. Graduates work for three years as assistant prosecutors, in a law collective, in tourism, or prepare to become law professors. Under the *descalifón* system, a job is offered to every student who passes the bar exam, with the top student getting first choice, down to the last student.

The students and young lawyers with whom I spoke are very interested in learning more about the common law system used in the United States, England, Australia, and Canada, and specifically about our system of oral, adversarial trials. Once the United States embargo is repealed, law professors, lawyers, and judges should make a concerted effort to go to Cuba to talk and teach about our trial system and to assist in the effort to improve the Cuban legal system. We can also learn a lot from studying the Cuban system, including the use of lay judges, which we might be able to incorporate into our court system in the United States.

