

Rights and Guarantees in Cuba: Background and a Proposal

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The degree to which an institutional system diverges from the normative order that creates it is a measure of the legitimacy of the system as a whole, as it defines the coherence between the system's means and its ends. Like the constitutionalism of other countries, that of Cuba tells the story of its particular divergence, the centuries-old tradition summarized by the phrase: "The law is respected, but not followed."¹

The Cuban Revolution, victorious in 1959, displays a persistent feature of the political culture of revolutions: "Revolution is made not through law but through politics." The temptation to look for freedom outside of the law reappeared in the form of nihilism towards juridical approaches and in the devaluation of the role of law and of legal culture, even to the point that the Revolution was thought of as being *beyond* the law. If material guarantees of rights were the essential thing, their formal coverage was superfluous, and indeed law as a whole may have been superfluous given the rhythm and scale of the social transformations.² There was no shortage of voices in the desert: "It is a very serious error to argue that, for the same reason that law is a form of expression and a politically applicable tool, it is right to move away from its normative precepts on

¹ Transl. note: The original expression, widely used in the Spanish-speaking world to convey the idea of paying lip service to the law, is "*La ley se acata, pero no se cumple.*"

² See Hugo Azcuy, «Revolución y derechos», *Cuadernos de Nuestra América*, Vol. XII No. 23, enero-junio 1995, pp. 145-155

account of considerations of a political nature” that do not help resolve the problem.³ For the citizenry, this fact took the following form: The citizenry could not enjoy the legal abstraction of citizenship. Political rights would not be granted to a person according to his or her legal status as a citizen, but rather according to his or her political status as a revolutionary.

The power established in 1976: “The people’s state”

With the promulgation of the Socialist Constitution on February 24, 1976 via the free, direct, and secret vote of 97.7% of the electorate, the Cuban state organized the institutional system that the people had demanded. It advanced toward a socialist legal state that facilitated legitimate procedures for the creation of the norms by which the system would function, and the state proclaimed its willingness to be subject to those norms.⁴

Passed at the peak of the period in which the Cuban Revolution was rebuilding the profile of socialism under the influence of the USSR, as the ideology of a “state of the whole people,” or of the “People’s State,” the 1976 text established the following principles, among others: A republican, democratic, and unitary form of government, organized as a system of people’s power at the national and local level, in provinces and municipalities – the latter with very little autonomy; an assembly-based institutional design, with a great concentration of legal prerogatives in the highest body of state power – a model that was neither presidential nor parliamentarian – integrated with the

³ Fernando Álvarez Tabío, *Comentarios a la Constitución Socialista*, Editorial Pueblo y Educación, La Habana, 1989, p 56.

⁴ See Julio Fernández Bulté, «Tras las pistas de la Revolución en cuarenta años de Derecho», *Temas*, No. 16-17, octubre 1998-junio 1999, pp 104-119.

institutions of “real socialism”; the fundamental prominence of the state in society’s political system and a centralized system of management; express constitutional recognition of the Cuban Communist Party⁵ as the driving force in society and in the state; limited constitutional enumeration of political and mass organizations; enshrinement of state socialist ownership of all property other than property falling into one of the four categories of property recognized by the Constitution – that of small agricultural landowners, personal property, property of cooperatives, and property of social and mass organizations; principles of unity of power and democratic centralism as the functional core of the state apparatus; special regulation of political, civil, economic, and cultural rights, and rights relating to the family; recognition of international proletarianism and the right of political asylum for those fighting colonialism and other forms of exploitation; creation of an institutional system of people’s power – including authentic creations that did not exist either in the socialist world or in the liberal tradition – coordinated with a system of “authoritative command” (direct nomination of candidates by the people, and their subsequent direct election in municipal assemblies, an end to delegates and deputies, in favor of a participatory regime at the local level with accountability to the voters), as well as collegiality and the “renewability”⁶ of state bodies.

The constitutional reform of 1992: Reestablishing socialism

The fall of the Eastern European socialist bloc propelled Cuba into one of the deepest crises of its history. The Cuban institutional model and its normative order

⁵ Transl. note: In Spanish, *PCC* or *Partido Comunista de Cuba*.

⁶ Transl. note: In Spanish, *renovabilidad*. It is not clear what the intended meaning is here even after consultation with native Spanish speakers. Quotation marks added.

resembled the smile of the Cheshire Cat. The cat was already gone, but one could still see its smile. Without its ideological reference point, and without the material project that sustained it, a good part of the ideologemes expressed in the 1976 Constitution were left hanging in the air.

The performance of the model of political organization during 1986-1996 period raised fundamental questions about its design. The new design – promoted “from above” and forced “from below” – positioned “political opening” as the key to governance. “Opening” was understood as a willingness to do the following: charting a socialist course that different from the reforms adopted in the Eastern Bloc countries, given their consequences; distributing the costs of the crisis widely in society; capitalizing on the values of social justice and national independence; letting go of the burdensome politics of the “official doctrine”; recovering traditions of thought about the nation; advancing the distinction between the state – now secular *and then some* – and the party; reevaluating the role of the market in socialism; making progress in avoiding an excessive role for the state in the social sphere; finding spaces to resolve problems in ways that were self-directed and initiated by individuals, groups, and families; expanding the possibility of less state-dependent relationships, given their ineffectiveness; taking a national approach on reducing the classist nature of the state;⁷ allowing social thought and the exploration of alternatives; facilitating alternatives to the state form of property; promoting citizen participation in the debate about the agenda for change; decentralizing certain aspects of the management of people’s power; reducing the state defense budget through new forms

⁷ Transl. note: The phrase in Spanish here is “*nacionalizar*” *el Estado sobre su carácter “clasista”* (quotations marks in original). The meaning remains unclear even after consultation with several native Spanish speakers, so a best guess has been offered here on the basis of context. The curious might consult with the authors.

of financing within the military sector. These were some of the key measures that achieved the essential goal: Stopping the country's descent and re-launching a project of survival and development starting in the second half of the 1990s.

The constitutional reform not only stripped the text of florid ideological prose of the 1976 version, but also achieved several other things: 1) It modified the property regime by permitting foreign investment, resolving the constitutional problem created by a 1983 law – Decree 50 – which permitted foreign investment despite the lack of constitutional authority for it, and which had rarely been applied; it also limited state property to the *fundamental* means of production, and indirectly, by technically permitting private property in the constitutional text, made it possible for natural persons to own the means of production;⁸ 2) It changed the social base as well as the religious orientation of the state by eliminating its classist character and making a commitment “to all people and to the good of all people” and by coming out against religious discrimination; 3) It redefined the ideological character of the Cuban Communist Party, which shed its status as the “organized vanguard of the working class” in favor of a view – in the tradition of Jose Martí – of a party of a republican nation in communion with Marxism; 4) It eliminated references to the “unity of authority” and to “democratic centralism” as functional organizational principles for the state; 5) It required direct elections for the provincial and national assemblies; 6) It eschewed recognition of particular social and mass organizations, making it possible to create new political groupings; and 7) It abandoned the idea that international trade was the *exclusively* a state prerogative and decentralized the management of such trade; it also outlined the “state of

⁸ Hugo Azcuy, «Cuba: reforma constitucional o nueva Constitución», *Cuadernos de Nuestra América*, Vol.XI, No. 22, julio-diciembre, 1994, p. 51.

emergency” – to this day never declared – regulated by the National Defense Act, which does not specify the circumstances in which a state of emergency is to be declared.

However, twenty years later, the reform has not led to even a significant portion of the possibilities that the law contained. Indeed, the constitutional field is not even seen as an issue in Cuba. There is virtually no use of the Constitution among state functionaries and the citizenry: There are no systematic or published reflections in intellectual sources about the law and the possibilities opened up by the 1992 reform – nor about Cuban constitutionalism in general – nor does the subject show up in official discourse. It is highly likely that the citizenry is actually unaware of the constitutional text. In a survey carried out in 1987 in twelve provinces in the country, which included eleven groups representing the population as a whole, it was revealed that two-thirds of those surveyed were unaware of the Constitution as the country’s most important law; and that included 44.5% of all political leaders.⁹ The information existing today is not accessible to the public, but the public perception is that the situation is as least as serious now as it was then.

In the situation since February 24, 2008, with the election of a new president of the Council of State and Ministers, Raúl Castro Ruz, strengthening institutions has been declared a government priority, along with food production.¹⁰ New commissions have been created within the National Assembly; decisions have been decentralized to municipal governments – for instance municipal agricultural departments; the 6th Congress of the Cuban Communist Party has taken place, producing the Guidelines on

⁹ Citada en Hugo Azcuay, «Revolución y derechos», *Cuadernos de Nuestra América*, Vol. XII No. 23, enero-junio 1995, pp. 145-155, cita en p. 150. Transl. note: The original Spanish of what is rendered here as “political leaders” is *dirigentes*. It is not clear whether the term refers to a particular class leaders in the Cuban political system or to leaders in general.

¹⁰ See Raúl Castro Ruz’ speech of February 24, 2008.

the Political and Social Economy of the State for the next five years; there have been advances in changing regulations that were hindering judicial business, namely sales of homes and vehicles; agrarian reform in which cultivated land is turned over to small-scale farmers; experimentation with state reforms at the local level in the provinces of Artemisa and Mayabeque; an increase in the number of work activities that people may do on their own account; approval of a new Tax Law; and the declaration that the Constitution should be reformed when it is “appropriate”¹¹ to do so.

More power for the people: Completing the constitutional order, starting with the people

In 2002, a new constitutional reform, the latest one so far, established the socialist system as permanent and irrevocable.¹²

The argument outlined in the new text is that only political practice can *produce* socialist realities, while enshrinement in the constitution helps *reproduce* them: Law without politics is not enough, just as politics without law is not enough. The Constitution does not have demiurgic powers. A project of fundamental social transformation occurs in the realm of juridical and legal culture, as well as in that of material politics, which,

¹¹ Transl. note: The Spanish word rendered here as “appropriate” is *pertinente*. Quotation marks in original.

¹² The actual text of the reform established, via a Special Order, the process that led to the reform: “The people of Cuba – almost all – between June 15-18, 2002, expressed their decided support for the project of constitutional reform proposed by the mass organizations in an extraordinary assembly of their national leaders that took place on the 10th of that same month of June, in which all parts of the Constitution of the Republic were ratified and in which it was declared that the Constitution’s socialist character and the political and social system it contains are irrevocable, as a dignified and categorical response to the demands and threats of the imperialist United State government on May 20, 2002.” The reform modified Articles 3, 11, and 137 of the constitutional text. The meaning of the reform is explained in this paragraph of the new Article 3: “Socialism and the political and social revolutionary system established in this Constitution and proved by years of heroic resistance to the aggressive acts and economic warfare of the strongest imperialist power that has ever existed, and having demonstrated its capacity to transform the country and create an entirely new and fair society, is irrevocable, and Cuba will never again return to capitalism.” (Granma, June 27, 2002)

with the Constitution as support and institutional guarantor, this change strengthens the exercise of the people's power.

In this regard, we argue that the main challenge, in a strict legal sense, that the 1976 Constitution and the 1992 and 2002 reforms have for reproducing socialist realities is a challenge that it has had since its beginning: the lack of defensive mechanisms for protecting both the institutional system and for achieving more effectively the huge list of individual rights that it enshrines. In other words, the challenge is the impossibility, *from the citizen's point of view*, of achieving what the law requires regardless of the willingness of the state to achieve it.

The absence of these mechanisms can be explained by understanding what the state inherited from the 1976 Constitution, "the victorious doctrine of Marxism-Leninism," as its preamble declared. If the state belongs to everyone, citizen action (whether individual or collective) against state activity is unnecessary from any point of view. The constitutional reforms of 1992 and 2002 maintained the problem created in 1976: the system regulated access *to* power, but not rights *before* power, nor rights *of* power, nor the control *of* power.

The socialist strength of the Cuban state is not guaranteed by the first article of the text as reformed in 1992: "Cuba is a socialist workers' state, independent and sovereign, organized with everyone and for the good of everyone, as a unitary and democratic republic, for the enjoyment of political liberty, social justice, individual and collective wellbeing, and human solidarity." Nor is it guaranteed by the declaration of principles in the 2002 reform. On the other hand, building socialism is not about having the state as the only political agent, but rather is about having a multiplicity of actors

working for that goal. Here what interests us is merely to point out a vital necessity: the institutional organization of the citizens' regime: their political and legal empowerment to carry out their prerogatives effectively. Defending the institutional system and the catalog of rights and duties is not only a duty but is also a political right of the citizen: it is political-legal citizen action.

The Constitution is the juridical statute of a political project.¹³ In addition, if state power has the original legitimacy possessed by the Cuban state, to defend the Constitution is also to defend the political project of socialism. The exercise of fundamental rights – via their constitutional recognition, via the social policies that guarantee them materially, and via the system of legal guarantees that make them meaningful where rights are violated or not fulfilled – becomes the socialization of authority.

The critique of “socialist constitutionalism”

The normative nature of law

The normative nature of law was the great question at issue in “socialist constitutionalism,” indicated by the reduction of law to mere politics under the terms of “revolutionary finalism” and “revolutionary legality.”

The terms originate from a 1925 controversy. Solts, a high functionary in the Communist Party of the USSR, in a dispute with the jurist Krylenko, argued for the

¹³ See Julio Fernández Bulté, «Los desafíos de la justicia constitucional en América Latina en los umbrales del siglo XXI», *Revista Cubana de Derecho*. No11, 1996; Pedro Néstor Sagués, *Crisis de la supremacía constitucional*, *Revista de Derecho y Ciencias Políticas*, Vol 46, números 1, 2 y 3, 1986, Perú; Martha Prieto Valdés, «El Derecho, La Constitución y la interpretación», en Leonardo Pérez Gallardo (comp.), *Perspectiva del Derecho cubano actual*, tomo 1, Editorial Reus, Madrid, 2006.

primacy of revolutionary ends, and as a result, the primacy of politics over law. For Solts, a functionary and a judge were authorized not to apply the law after raising the flag of “revolutionary finalism.”

The issue appears, in another form, in the more sophisticated juridical science that the Russian Revolution produced, in the works of Pashukanis (1976) and Stucka (1969), which made a great effort to distinguish between law and politics, with the former being a voluntary selection of the interests of the ruling class. With that observation, he opened the way for Vyshinskij – the greatest promoter of Stalinist Soviet law and the monitor of goings-on in Moscow – to establish the preeminence of discretion in the political system established by the law.

In this context, defending the normativity of law and the protection of legality could only be part of a rhetoric that could never come to fruition. The defense of normativity tried to open some possibilities. Cerroni (1977) has summarized the arguments that a significant number of jurists within the USSR were discussing with regard to defending legality, reconsidering the problems of direct democracy, and establishing the normative nature of law.

The idea expressed by Solts was in conflict with legal positivism, in particular with the normativism of Hans Kelsen. However, in the version offered by Soviet Marxism, Kelsen is unrecognizable.¹⁴ Everything was treated as a problem of practical

¹⁴ In Cuba, the works of Pashukanis and Stucka became known only through Soviet commentators, as both were victims of Stalinist repression. As happened with them, Kelsen was also criticized without being known first-hand. Thus it became impossible to relate his works – *A General Theory of the State* and *Pure Theory of Law* – to the texts that in this area are essential works – *The Communist Theory of Law and the State* (1957), *Socialism and State* (1982), and *The Idea of Natural Law and Other Essays* (1946). The global criticisms of Kelsen outside Soviet Marxism – like that of Max Adler (1982) and Hermann Heller (1998) are unknown in Cuba.

politics, producing as a corollary an understanding of the Constitution more as a program than as a norm that restricted the action of public authorities and the citizenry.

This point took the form of reducing rights protection to the existence of the material conditions that made the exercise of rights possible. The very nature of the right was called into question in this way, as its exercise was dependent on the ability of the state to satisfy it; the right was not assured as a right per se.

Along the same lines, “socialist constitutionalism” copied precisely what Kelsen had rejected. In both, if the right cannot be vindicated then it is not a right: there are no rights without guarantees. The influence of legal positivism in the intellectual culture of Soviet Marxism would be enormously persistent.

There are also other ways to understand the problem: the right exists, independent of any guarantee, and the state remains obligated, as a result of its normative recognition of the right, to establish policies oriented in that direction; to seek social consensus on the steps towards satisfaction of the right; and to create guarantees for the fulfillment of the right.

Defending the normative nature of the Constitution is not the same as a “legalistic” understanding that “only” prioritizes the norm over the revolutionary purpose. Rather, this defense provides a concrete way to relate the two to each other: translating revolutionary purposes into fundamental rights. The state’s purpose might be seen as to fulfill “revolutionary ends” in the following sense: cataloguing the fundamental rights that it establishes (Ferrajoli 1999).

From this perspective, a functionary or judge would not interpret the “revolutionary ends” according to their particular expression in current political

discourse; rather he or she would vindicate fundamental rights that have been normatively established through political deliberation mediated by law, with the result that if the law contradicts fundamental rights – that is, contradicts revolutionary ends – the judge or functionary could find revolutionarily that the law does not apply, against whatever legal positivism might say in any of its forms – Kelsen or “socialist constitutionalism.”

Today arguments that draw on other bases in the philosophy of law are being renewed that reassert the role of the state in protecting rights, or that see the state as a precondition for the existence of the rights themselves. Thus Juan González Bertomeu, in the prologue to the Spanish edition of Stephen Holmes’ and Cass Sunstein’s book *The Cost of Rights*,¹⁵ highlights the central thesis of the work and explains the view in which the realization of rights – whether civil, political, social, or cultural – depend on the state and on the degree to which the state’s budget provides for their protection. According to this view, the state must be strong rather than weak in its principal role as protector and guarantor of human rights. From a legal-philosophical point of view this is like saying that without the state there are no rights, because it would be impossible to understand rights without the existence of the entity that protects them materially.

This argument helps refute the idea that in a state of nature rights would be at constant risk of violation, because it reveals that prior to the social compact there is no state, and therefore no rights.

However, the foregoing does not mean that all we should be concerned about is knowing the real cost of rights to know practically when and how the state will make

¹⁵ We refer here to the statement of Juan F González Bertomeu, in the prologue to the Spanish edition of Stephen Holmes’ and Cass Sunstein’s *El Costo de los Derechos (The Cost of Rights)*, Siglo Veintiuno Editores, Buenos Aires, 2011.

them real; instead it illuminates for us the idea that without state backing rights would be merely voices in the air, that without guarantees rights are merely legal formulas; but that the moral and civil weight provided by simple constitutional recognition of a right should not be underestimated; and that rights must be defended from both philosophical perspectives – from the most positivist which makes them depend on the state legal norms that define them, to the most natural-law position which enables us to sensitize the political sphere to the vindication of human rights, that is, that there are rights built from people’s accumulated struggles that need not wait for a state to say whether a given right exists or not.

The 1976 Cuban Constitution has always been considered more of a program than a normative text of immediate applicability. In fact the Constitution is only rarely invoked in the country’s courts (Prieto 2008), even though there is no legal principal to prevent it from being invoked.

In recent years some have argued for the possibility of its direct application. Martha Prieto has made the strongest case for the Constitution as a norm or program: “Its effectiveness may diminish as its principles, values, and premises cannot be implemented, and in that case a legislator who does not follow constitutional commands fails to apply the Constitution, or as I prefer to say, he commits ‘unconstitutionality by omission’” (Prieto 1997).

Thus it is possible to defend the necessity for direct application of the Constitution as a daily practice for people, state actors, and courts, as it is from that application that rights and duties directly flow – comparing the use of every norm with

the letter and the spirit of the Constitution such that the Constitution prevails in all circumstances.

Citizenry, socialist state, and citizens' rights

“Socialist constitutionalism” interprets the issue of citizenship and its attendant rights in a peculiar way. It purports to challenge the concept of citizenship, without providing an alternative to the concept other than that of the “proletariat,” when the emancipation of the proletariat necessarily leads to the emancipation of the rest of society. In fact, there does not seem to be any term in Marxist-Leninist socialism that plays the role played by the citizen in the storyline of democratic thought.

The rights of citizens are the key to the democratic relationship between citizen and state. “Socialist constitutionalism” took this issue in a different direction: the supposed existence of “bourgeois rights.”¹⁶

¹⁶ Azcuy offers an example: “The most important constitutional documents in the modern era, rooted in the theories built up since their beginnings, are the product of the great bourgeois revolutions of the 17th and 18th centuries: The Bill of Rights in the English Revolution of 1689; the declarations of rights and of independence in the American Revolution in 1776; and the 1789 and 1793 Declarations of the Rights of Man and of the Citizen in France. Of course, all have points in common that express the same values and the same needs” (p. 37).

The words contained in these documents may be pure bourgeois lies. However, it is necessary to distinguish among them. The Constitution of 1793 marked the historic establishment of democracy as the program of the working classes. That text expresses the triumph of the radical Jacobin wing of the French Revolution, in that it achieves extraordinary victories over the political economy of capital and over state organization of civil life; it establishes the right to subsistence as a fundamental right, enshrining it in the concept of popular political economy; and it destroys the “civil” distinction between passive and active citizens.

The text establishes universal, direct suffrage based on popular sovereignty; it opposes the separation of powers and introduces for the first time in constitutionalism the right to aid, to work, and to education; it prohibits slavery and establishes the right to rebellion as flowing from all the other rights. It also establishes what Robespierre had argued for since 1790 in the concept of *fraternity*: being reciprocally free and equal, that is, universalizing equality and freedom from the inequality (both social and civil) of the *ancient regime*; or in other words, overcoming the subjection, as *passive* citizens, of farmers, day laborers, serfs, small-scale artisans, apprentices, and all those who “made their living with their hands” (Doménech 2004). The defeat of this revolutionary current in 1795 established opposite principles: division of authority, census suffrage, and representation based on *national* sovereignty.

The problem with “bourgeois revolutions” that produce “bourgeois rights” is their logical result: these rights are false and therefore useless. However, Marx never used the term “bourgeois democracy” and the bourgeoisie never carried out a democratic revolution, neither in 1789 nor in 1848 (Doménech 2009) (González Casanova 1987). All of Marx’s doctrine, both that of the “young” Marx and that of the Marx of *Das Kapital*, draws on and elaborates an “anti-bourgeois” heritage: the republican fraternal legacy of the revolutionaries of 1793 and 1848.

There is no such thing as “bourgeois rights,” but instead a bourgeois understanding of rights. Understanding the situation in this way makes it possible to challenge the particular doctrinal use of rights and not the rights themselves, born as they were from a long process of social struggles that effectively tore them from the ruling classes.

“Socialist constitutionalism” created very precisely what Siéyes has written: the Third Estate is the nation (Siéyes 1989, 91). Siéyes described the Third Estate as a broad concept that includes the social whole, when in reality it merely covered the bourgeoisie and completely excluded the “Fourth Estate”: servants, wage-laborers, small-scale artisans, peasants, and women – all those who, as Marx would note, had to ask the permission of others merely to be able to subsist.

Grouping all those members of the “Fourth Estate” with the bourgeoisie, and indiscriminately calling all the thinkers of the various Estates “bourgeois,” achieves different purposes, none of which serves a new socialist constitutionalism, as doing so

The 1776 North American [Transl.: meaning future U.S.A.] text is not comparable with that of 1793: the “founding fathers” repudiated democracy; it was unthinkable to them that slaves might join political life as equals, and as a result they established an ideal of liberty based on the economic independence of small landholders.

has the consequence of giving precedence to social rights over individual rights, material guarantees over legal guarantees, material liberties over formal liberties, and the overvaluation of “material” democracy over so-called “formal” democracy.

“Precedence” does not mean the denial of rights established *afterwards*, but it does mean giving some rights priority over others, which leads to a doctrinal predisposition and a specific institutional organization for the exercise of one or another type of right, with the establishment of corresponding guarantees to this priority.

The idea of the “precedence” of one type of rights over others – political rights over social rights, or vice versa – was characteristic of the political use of the issue of human rights among Cold War powers. The idea was fixed in United Nations agreements on human rights. The International Covenant on Civil and Political Rights is binding on the parties, while the International Covenant on Economic, Social, and Cultural Rights is hortatory, as it understands political and civil rights as more important than economic and social rights – “more costly” and “less vital” (Gordon 2009).

The consequences for the citizenry of the precedence of social rights over individual rights are well-known: It builds a welfare-based pattern of participation and creates a passive citizenry waiting for the public provision of good and services. However, the key feature of a democratic system is not revealed in what the system *grants*, but rather in what the system forms, not in what is provided in the form of goods and social services by the state, but in the quality of the citizen – quality that can be put into practice in this political design.

Nevertheless, today ideas are proposed – with strong theoretical and ethical support – in favor of the protection and differentiated defense of rights, but for another reason and in a different way:

Sueli Carneiro puts forward a different but revealing argument in favor of granting special consideration to the regulation and protection of human rights: It is understood that rights can be and must be protected in a differentiated way without violating the principle of formal equality, that is, the social and personal starting point for the enjoyment of rights must be the state's defense of those rights through granting special benefits that favor the realization of those rights, benefits without which it would be impossible for groups of people, social classes, and individuals to have fair access to rights that are considered universal and inalienable.¹⁷

The new Latin American constitution has established normatively the principle that represents a Copernican revolution with respect to the “prevalence” of one kind of rights or another: “progressivity,” which assumes both the quantitative growth of rights and the qualitative growth of the relationships among them, via principles of irrevocability, indivisibility, and interdependence (1999, Article 19). This contemplates a kind of relationship of citizen and state, the study of which it may be useful to compare to the Cuban practice in this area, which we do in the following section. Here we are not talking about copying institutions created for different contexts, but we do mean to build greater dialogue than what exists now with respect to the experiences of democratic transformation of oligarchical power that has been so dominant in the history of the region, which, as in Cuba, have occurred in the midst of domestic and foreign attacks on

¹⁷ Carneiro Sueli, Human Rights and the Fight Against Inequality: Discrimination and Violence, in *Revista Casa de las Américas*, number 264, July-September 2011, pp. 121-134.

those processes. Starting this dialogue today will bear dividends for the future law of Latin American integration.

Toward a new socialist constitutionalism: proposals for Cuba

Rights and Guarantees

In the Cuban Constitution, among the rights not termed “human rights,” there are no distinctions drawn between, on the one hand, economic, cultural, and social rights and on the other hand, civil and political rights. The text does not use the widely discussed classification that has been present in human rights doctrine since the 1948 Universal Declaration of Human Rights. But nor does the text indicate that all the rights mentioned are of equal status or force.

The text provides a specific chapter on fundamental rights that captures all the rights established in the 1948 Universal Declaration, with the exception of three: the right to life, the right to recognition of legal personhood, and the right to freedom of movement and emigration – all of which are regulated by specific laws (the Penal Code, the Civil Code, and Migration Law 1312 of 1976) as well as by decisions of the state’s central administrative bodies. In addition, the text establishes a group of principles that must be considered rights: equality, participation, and the right to petition the state. Several rights can be identified in the constitutional text that correspond to the so-called “third-generation” rights, like the right to a clean environment, the right to participate in sports, the right to a comfortable home, and the right to national defense, among others (Torrado 2003). Civil, political, economic, social, and cultural rights established in the various UN covenants require updating in the Cuban constitutional order, but are for the most part

recognized (Delgado Sánchez 2009); in fact, in the case of social, economic, and cultural rights, all are recognized.

The Cuban constitutional declaration of rights was not behind the times in 1976, but it is in 2010, if it is compared not only with the aforementioned covenants but also with the rights introduced by the new Latin American constitutionalism.¹⁸

As Professor Martha Prieto puts it:

In 1976 socioeconomic and cultural rights were included as fundamental rights, and thus material guarantees necessary to assure these rights were also constitutionalized. Thus the only provider of the resources needed to assure these rights would be the state, and a judgment was made to prioritize material guarantees over guarantees considered legal or formal.

The constitutional establishment of rights in Venezuela, Ecuador, and Bolivia

Among the principles recognized in Venezuela are: special protection for vulnerable groups and persons; equality in status among all citizens;¹⁹ the normative recognition of rights established by the Constitution even where regulatory law developing those rights is lacking; recognition of human rights treaties, covenants, and conventions as part of the constitutional order and as directly applicable within the country; a guarantee of a constitutional rights proceeding in defense of liberty and security that is oral, public, brief, and available to any person without any hindering formalities.

¹⁸ All of the principles and rights mentioned in what follows are discussed with respect to their presentation in the constitutional text, not with respect to their application in practical politics, an issue that would have to be the subject of another inquiry. Comparing the Constitution and Cuban practice solely with these constitutions is not the best way of carrying out a comparison, which would require comparing the same items, but the point of looking to the constitutional field is not so much to compare as it is to look for ways to update the Cuban constitutional practice.

¹⁹ Transl. note: The principle of equality among citizens is conveyed through a constitutional provision barring titles of nobility or other signifiers of inequality, with an exception for diplomats. The authors of this paper refer to this provision with the following phrase: *el trato oficial y obligatorio de ciudadano o ciudadana*. This might be rendered as something like “the official and compulsory treatment of persons as citizens,” but this literal translation does not capture the concept of equality conveyed by the constitutional provision that it refers to.

The concept of *buen vivir*²⁰ in Ecuador and Bolivia provides for the following with respect to rights: access to information technology and to the frequencies of the radio spectrum for the management of radio and television stations; the right to seek, receive, exchange, and produce truthful information; the right to artistic freedom; access to public space as a place of deliberation; reduced rates for the elderly on public and private transportation and for tickets to shows; conscientious objection to military service or other activities; the right of same-sex couples to marry (only in Ecuador); and the right to emigrate and return voluntarily. There is similar special protection for the rights of people with disabilities, people with serious illnesses, the incarcerated, users and consumers of drugs; and the same rights are granted to families formed by marriage and those formed by monogamous unions. Food sovereignty is also enshrined as a right and local food production is prioritized. Chemical weapons are prohibited; the use of transgenic organisms is subject to the law; and for the first time in history nature is declared a subject of rights.

At the time of its promulgation, the Cuban Constitution did not take into account well-established institutions for defending rights, like the Mexican *amparo*²¹ or the *defensoría del pueblo*.²² In fact, in the Cuban scheme there is a mismatch between the

²⁰ Transl. note: The phrase “buen vivir” has been translated in other academic work as meaning something like “the right to a good life.” The concept evidently draws on indigenous traditions in the region and is akin to the idea of “gross national happiness” adopted in Bhutan; in this document the phrase is left in Spanish to indicate that its meaning is probably not fully captured by a literal translation. For an overview of the concept, see Thomas Fathauer, *Buen Vivir: Latin America’s New Concepts for the Good Life and the Rights of Nature*, Heinrich Boll Foundation, 2011, available at: <http://www.boell.de/publications/publications-buen-vivir-12636.html>

²¹ Transl. note: The *amparo* is a constitutional lawsuit. The word is left in the original Spanish to indicate that a literal translation as “constitutional lawsuit” does not adequately indicate that the *amparo* is a special cause of action specifically created to enable constitutional challenges.

²² Transl. note: The *defensoría del pueblo* is typically an independent government office charged with investigating and prosecuting human rights abuses. The phrase is often rendered as “ombudsman” and the authors of this text later use the two terms as apparent synonyms.

declaration of rights and the corresponding guarantees, as the latter are generic, abstract, and poorly developed, especially with respect to the so-called judicial safeguards.²³

The weakness of the mechanisms for the protection of rights under the Cuban Constitution can be explained by the fact that material guarantees are given ideological precedence over juridical guarantees, which is justified by the social project of the Cuban Revolution – a project that has achieved the UN Millennium Development Goals. However, the completion of the system of rights protection is essential if there is to be a progressive framework for strengthening Cuban institutions – including not only the state but the institutional foundation for citizens’ rights.

The judicial safeguards established by the Cuban Constitution are, among others, due process, limits on confiscation, the non-retroactivity of new laws, the application of criminal law in a way that most advantages the defendant, and the general guarantee that appears in Article 62, which states the following:

None of the freedoms accorded to citizens may be exercised against what is established in the Constitution and the laws, nor against the existence and ends of the socialist state, nor against the Cuban people’s decision to build socialism and communism. The violation of this principle is punishable.

Article 63 establishes the right to lodge complaints and make petitions to the authorities, without any further specification or corresponding procedural means for exercising this right.

The Cuban legal system has special norms that compensate in part for what is missing in the Constitution. The Criminal Procedure Act provides for *habeas corpus* as a guarantee of the right of liberty. The Civil, Administrative, and Labor Procedure Act

²³ Transl. note: In Spanish, *garantías jurisdiccionales*, which is rendered variously in other works as “judicial safeguards,” “due process,” or less elegantly as “jurisdictional guarantees.”

guarantees economic and family rights via ordinary and special proceedings and governs the protection of possession of property as well as administrative and labor procedures. The Penal Code establishes sanctions against forms of discrimination or [the violation of]²⁴ constitutional rights. The Attorney General's Office²⁵ has the constitutional mandate to ensure legality and is charged with providing legal protection for the people's right to petition officials. Nowadays there seems to be consensus that the above-mentioned procedures must be updated and completed (de la Cruz y Cobo 2009)(de la Cruz, Hernández, y otros 2010)(Aguado, y otros 2009)(Delgado Sánchez 2009).

In another area – the specific area of rights guarantees in labor relations, in Cuba we find various special regimes for labor and workplace discipline, indicating that there are conflicts in these areas that are not resolved by courts. An example of this is the System of Customs Bodies,²⁶ the Basic Units of Cooperative Production,²⁷ the leadership of social and mass organizations, and the civil servants of the Interior Ministry and the Armed Forces.²⁸

The system of human rights guarantees in the constitutions of Ecuador and Bolivia

The system of rights guarantees in Ecuador is highly developed, consisting of the following remedies: a constitutional protection proceeding; an action against harmful public or private policies; *habeas corpus* action to counter illegal deprivations of liberty

²⁴ This phrase seems to be missing given the context.

²⁵ Transl. note: The name of this institution in Spanish is *Fiscalía General de la Republica*. As is detailed below, it has functions that make it similar to the *defensoría* of other countries in the region.

²⁶ Transl. note: In Spanish, *Sistema de Órganos Aduaneros*.

²⁷ Transl. note: In Spanish, *Unidades Básicas de Producción Cooperativa*.

²⁸ This refers to an idea of Cutié Mustelier, Danelia y Méndez López, Josefina: *Derechos y Garantías judiciales en Cuba*. Notas para una propuesta procesal, en *Escritos sobre Derecho Procesal Constitucional*, coordinado por Matilla Correa y Ferrer Mc- Gregor, editado por Instituto de Investigaciones Jurídicas de la UNAM, Instituto Mexicano de Derecho Procesal, UNAM, Unijuris y Facultad de Derecho de la Universidad de la Habana, La Habana, pág. 357 y 358.

and to protect life and physical integrity; an action for access to public information; a *habeas data* for discovering the existence of documents, genetic information and files containing personal information; an action to address non-compliance in the application of regulations, decisions, or reports of international human rights organizations; and the extraordinary action against decisions or edicts where a constitutional right has been violated.

Bolivia follows the standard of full establishment of rights and guarantees begun in the Venezuelan constitution. All of the rights recognized in Venezuela are directly applicable to Bolivia. Penalties of infamy,²⁹ civil death,³⁰ and confinement³¹ are prohibited; legal remedies for the defense of rights have broad and simple coverage and are called by their names in Spanish, not Latin. In this way the following are provided for: the action for liberty (*habeas corpus*), the constitutional “*amparo*” action,³² the action for privacy protection; the action against unconstitutionality;³³ the “compliance suit”³⁴; and the “people’s action” for defense of collective rights.³⁵ Almost all of these actions may be brought by the simple means of an *amparo*. Among other the other valuable rights in the employment realm, the Bolivian constitution establishes that workers may, in defense of their employment, reactivate businesses that are failing or are closed or abandoned for unjustified reasons and may thereby form communal or social enterprises.

²⁹ Transl. note: The Spanish term here, *infamia*, seems to refer to the sanction, via trial, statute, or some other state action, whose effect is to deprive a person of his or her reputation or good name.

³⁰ Transl. note: The Spanish term here, *muerte civil*, seems to refer to the complete and permanent loss of all civil rights, perhaps analogous to a bill of attainder.

³¹ Transl. note: The Spanish term *confinamiento* refers to a sort of domestic exile, for instance to another region of one’s own country.

³² Transl. note: In Spanish, *acción de amparo constitucional*.

³³ Transl. note: In Spanish, *acción de inconstitucionalidad*.

³⁴ Transl. note: In Spanish, *acción de cumplimiento*.

³⁵ Transl. note: In Spanish, *acción popular para defender derechos colectivos*.

The people's court

In pursuit of institutional defense of rights, the new Latin American constitutionalism has established the *defensoría del pueblo*, an authority that is the heir of the indirect negative power held by the Plebeian Tribune in the Roman Republic, which “could do nothing but could stop anything.”

The *defensoría del pueblo* entered Latin American constitutions from the Spanish constitution of 1978, which in turn had borrowed from the Swedish institution of the *ombudsman*. The *defensoría* in the new Latin American constitutionalism sets a firm foundation for overcoming the classic shortcomings of its past.

The efficacy of the *defensoría* is assured by the combination of its institutional independence and the development of forms of people power that reassert negative direct power.³⁶

Venezuela's *defensoría* is charged with promoting, defending, and guarding the rights and guarantees established in that country's constitution. It enjoys immunity and is guided by principles of gratuity, accessibility, speed, informality, and autonomy.³⁷ The institution has the authority to initiate legislation, and the ability to bring actions of unconstitutionality, *amparo*, *habeas corpus*, *habeas data*, etc.

Ecuador's *defensoría* seems to be the most advanced. It can sponsor any of the above-mentioned actions, issue enforcement orders related to human rights protection, request sanctions for non-compliance with these orders, investigate and address acts and

³⁶ The *direct* forms of negative power consist of the right to resist and the right to strike for political reasons, to name two. The *indirect* forms of negative power are related to the capacity of institutions that protect popular sovereignty to oppose and veto, capacities that had their historical origin in the Plebeian Tribune in the Roman Republic, and which today can and must have other forms of expression.

³⁷ Transl. note: The Spanish here for the last item in this list is *impulso de oficio*, which in the context seems to mean that the institution has the authority to act autonomously to ensure the protection of rights.

omissions related to human rights, and safeguard and promote due process; it can also intervene immediately to prevent torture and treatment that is cruel, inhumane, or degrading.

In Bolivia the *defensoría* does not take instructions from the state and is instead directed by the Multi-Ethnic Legislative Assembly.³⁸ Its characteristics are the same as those of the Ecuadorian *defensoría*.

In Cuba the functions of the *defensoría* are taken on by the Attorney General's Office, a role that descends from the equivalent office³⁹ in the Soviet Union: it represents the public interest in legal processes and monitors legality and violations of citizens' rights.

At the time of its creation the pronouncements of Cuba's Attorney General's Office were not binding. The Attorney General Law⁴⁰ (Number 83, 1997) addressed this shortcoming and enabled it "to act against infringements of constitutional rights and legally established guarantees and against breaches of legality in the acts and decisions of state institutions and their sub-branches, authorities under the control of local bodies, and other economic and social entities, so as to ensure their reestablishment" (Art. 8b), and at the same time empowered it to reestablish legality via a decision of the attorney involved. In addition to the practical problems of making real these declarations, the regulation leaves two problems unresolved: the limitations on access to procedural justice and the

³⁸ Transl. note: The name in Spanish for Bolivia's national-level legislature is *Asamblea Legislativa Plurinacional*. It is translated into English in various ways to convey that the name is intended to recognize the many ethnicities, or nations, within the country of Bolivia. The body was formerly known as the *Congreso Nacional*, or National Congress.

³⁹ Transl. note: This Soviet office is described here by the Spanish word *Procuraduría*, which translates roughly as "state prosecutor's office."

⁴⁰ Transl. note: The name in Spanish of this law is *Ley de la Fiscalía General de la República*.

non-existence of a mechanism for an immediate remedy in cases where citizens' rights have been violated.

The creation and development of the *defensoría* in Latin America has encountered various problems in the past: the great conflict between its geographic spread, its structural development, and its growing scope of responsibility; and the tension between the expectation it creates and the limitations that existing politics actually imposes on the full development of its legal character with respect to its preventive or prohibitive power vis-à-vis state political action.

The *defensoría* has been called a “court of persuasion”⁴¹ because it lacks the capacity to sanction or bind. In the opinion of Lobrano, there is a chance that if the institution maintains its traditional role it may collapse, because:

the greater the expectations that the institution creates among the citizenry, the greater the risk of disappointment and loss of confidence if appropriate legal tools are not supplied to provide satisfaction of these expectations (Lobrano 2002, 258).

However, the institution also has some general advantages over attempts to defend rights in courts:

With regard to discretion in public administration, the *ombudsman* can go beyond what a court may do in assessing a government and its practices. In addition, it may initiate proceedings *ex officio*... In addition, bringing a claim is free, unlike in courts, where the parties have to pay court fees. Furthermore, to bring a claim to the *ombudsman* there is no need to have a lawyer as one's legal representative, which means less expense. Nor are there formalities in *ombudsman* proceedings, in contrast to a case brought to a court. In all cases the *ombudsman* is more accessible than courts, and in the human rights context, accessibility is crucially important (Berg 2009).

⁴¹ Transl. note: The phrase in Spanish is “*magistratura de la persuasion.*”

There is no doctrinal or legal barrier in Cuba that would prevent the establishment of an institutional mechanism for expanding the protection of citizens' rights and interests. What is necessary is to begin a civic debate in the country on rights and mechanisms for citizens to defend them.

If Cuba were to establish it, the new legal institution would have to be governed by principles of collegiality, term limits and the potential for the people to recall its members,⁴² revocability by the people, and binding authority in its decisions. It must have functional independence and must be structured in line with the country's territorial organization. The evils of bureaucratization and corruption in the *defensoría* (within the liberal separation of powers framework) would be prevented via proceedings which would be accelerated but legitimate and sufficient to maintain juridical security and legality, and which would be subject to social control. The organization of the institution must be done in a particular way and should be done via an organic law in line with constitutional principles.

Given that the judicial power has its origin in the Roman Republic, it is useful to return to this source and to look for its descendants today, in the interest of strengthening the *defensoría*. We suggest translating this heritage in the following ways:

- The right to legal assistance: This protection that the plebe has against the *imperium* of the high Roman public officials has today simply become the defense of rights against the state; even so it is the legal activity that remains most preserved. It could be argued that it has the same importance in Cuba as it did in the Roman Republic. It might also be useful to provide for the possibility that a

⁴² Transl. note: This seems to be the meaning of the Spanish terms here, which are *temporalidad* and *revocabilidad popular*.

government official be able to invoke the law against another official who has overstepped his authority.

- The veto power: The tribunes had veto power over the actions of state bodies when it was in the interest of the people to use it. With the *defensoría*, this power became the ability to bring weak (and easily circumvented) challenges to decisions that were harmful to citizens' rights. The veto that we propose would have a "suspensive"⁴³ effect; an official could use it to intervene against decisions of any other public official. The veto would be like the veto that officials have in a collegial body. The veto proposed here for Cuba would have to be extended, like the Roman veto, to cover even proposed laws, military mobilization, and elections.
- The right to call for a plebiscite: The right to call for a plebiscite has been widely promoted today by those who would hope to reestablish the people's defenders. A people's official expressing negative indirect power must have the ability to call for a plebiscite.
- The legislative initiative: The problem of constitutional disruption created by popular legislative initiative would be resolved by the group of people's officials, with broad legislative initiative.
- Protection of officials: The Roman *intercessio* was linked to its ability to personally execute its own decisions. The tribunes could fine or have arrested those who interfered with their activities. The inviolable nature of the Roman Republic's officials should be adopted as a principle for the protection of

⁴³ Transl. note: In Spanish, *suspensivo*. There does not appear to be an English equivalent of this word.

officials. It is also necessary that the officials' decisions be binding, and as such this coercion should be achieved through a judicial proceeding or via direct enforcement by officials.

Constitutional control

It is essential that there be social involvement in the implementation of the Cuban Constitution through citizen-friendly institutional tools that involve all actors in constitutional standard-setting.⁴⁴

The structures of the classic constitutions provided only for a reform clause as a means of constitutional defense, but in later constitutional theory and practice allowance was made for exceptional situations, including so-called states of emergency, curfew situations, situations of “alarm,”⁴⁵ conceived of as a political-juridical mechanism for preserving the Constitution in times of danger caused by some external or internal situation.

The state of emergency was included in Cuba following the constitutional reform in 1992 and is especially provided for in the National Defense Act (Law 75),⁴⁶ which does not comprehensively cover the treatment of fundamental rights in these circumstances.

⁴⁴ Nelson P. Valdés has analyzed the diversity of new actors as a key part of democratic expansion of the Cuban political system: In general, the Cuban state reduces its personnel, reduces state bodies (to fewer ministries), limits and redefines its functions, decentralizes its powers horizontally and vertically, increases the autonomy of the different elements and different levels, promotes new people, permits the appearance of new institutional actors and in its functioning adopts measures that promote giving greater space to the external market (Valdés 1997, 103). If we agree with Valdés here, our emphasis is on the need for an atmosphere of constitutional legality that orders its functioning.

⁴⁵ Transl. note: The text refers to situations *de alarma*. The legal meaning is not clear but it seems to suggest something like a state of emergency.

⁴⁶ Transl. note: In Spanish, *Ley de Defensa Nacional*, no. 75.

In addition to the reform clause and the regulation of exceptional situations, since the early 20th century in practice and later in theory we have also had models of constitutional review.⁴⁷ The new Latin American constitutionalism has experienced important developments in this area.

In Ecuador constitutional norms in this area are interpreted in the way that best fits their overall consideration: in uncertain cases they are interpreted in the most rights-favorable rights (Article 427). Any judge can send a cause of action to the Constitutional Court when he or she perceives a violation of the Constitution. The Court has the authority over constitutional interpretation and administration of justice in this area. It can find unconstitutionality without the parties' request, concerning rules related to the case at hand; rule on public actions on the basis of substantive or procedural unconstitutionality, rule on administrative actions at parties' request, issue binding final judgments that create precedents concerning the aforementioned actions, as well as all of the powers that Venezuela's constitutional court has.

⁴⁷ "The majority of authors refer to two systems of constitutional control: the one known as "diffuse" or as the system of "judicial review," and the one known as "concentrated" or as Austrian-Kelsenian. Other authors refer to these and also add the "mixed" and "multiple" systems. Infesta describes a classification of systems of judicial control and political control." (Fernández Bulté 1994, 16). The model of diffuse review originated in the United States' legal system, beginning with an opinion by Justice Marshall in 1803 that became the precedent for making the Supreme Court the highest authority of constitutional interpretation and put in its hands the ability to determine unconstitutionality. Such determinations would then spread in a diffuse way throughout the justice system, case by case, as courts confronted different questions. Concentrated review was established in the Austrian Constitution of 1920, which created a court dedicated exclusively to constitutional questions. In some cases we have seen mixtures of the two models, with special bodies (almost always part of the highest court itself) dedicated to hearing and resolving suits of unconstitutionality. The models have spread in Latin America, where both diffuse review and concentrated review have been used, taking the form of the Mexican *amparo*, which joins constitutional review with human rights defense. According to the Mexican professor Fix Zamudio, the Mexican *amparo* has evolved as "a tool for defending the rights of liberty, constitutional control of law, annulment proceedings, and the defense of individuals against a given administration" (in Colomer 1990, 108).

Constitutional review in the Venezuelan Constitution is in the hands of the Constitutional Chamber of the Supreme Court,⁴⁸ the highest and final interpreter of the Constitution. The body can annul state constitutions as well as executive-branch acts with law-like status; it also reviews whether international treaties conform to the Constitution and it can review on its own initiative the constitutionality of presidential declarations of a state of emergency. It can declare unconstitutional not only the acts but also the omissions of municipal, state, or federal legislatures; can resolve conflicts of laws, settle disputes between state institutions, and review final judgments of lower courts in *amparo* cases and in constitutional review cases.

In Bolivia, the Multi-Ethnic Constitutional Court⁴⁹ is in charge of constitutional review. Its members are chosen taking ethnicity into account, and the court's characteristics are the same as those already presented in the discussion of Ecuador.

The Cuban Constitution cannot be easily located in the typology fundamental laws that classifies according to the model of constitutional control. In the words of Martha Prieto and Lissette Pérez, in Cuba

Protecting the Constitution of the Republic is the responsibility of the National Assembly of the People's Power, which is the highest representative body of the state, and as such has the authority to determine the constitutionality of laws, law-decrees, and other general decisions. The safeguarding of the Constitution is in the hands of the only body with the authority to create a constitution and make law, that is, the body that represents popular sovereignty. The doctrinal justification for this is that there is no one who can better defend the Constitution than the people themselves, or failing that, their representatives. Seen in this way, *review is political and is concentrated ex post* (Prieto and Pérez, undated).

⁴⁸ Transl. note: In Spanish, the *Sala Constitucional del Tribunal Supremo*.

⁴⁹ Transl. note: In Spanish, the *Tribunal Constitucional Plurinacional*. As noted earlier with respect to Bolivia's national legislative body, the term *plurinacional* apparently indicates the state's recognition that Bolivia is made up of many ethnicities, or nations.

There is review only of the constitutionality of *laws* – those passed by the National Assembly of People’s Power. The Constitution also provides for a kind of *internal* control – the so-called “regularity checks”⁵⁰ – that each state body carries out over each of the other state bodies under its supervision. Thus the Council of State, the Council of Ministers, the Provincial and Municipal Assemblies of People’s Power, and the people’s courts carry out this function in their work of applying law. The responsibility of the Attorney General’s Office to promote legality encompasses the protection of the Constitution, although in practice its focus is on protecting citizens’ rights.

In practice there is no review mechanism that promotes the principle of constitutional supremacy over all regulations and administrative actions, as there is no legal process providing a way for the people to invoke their control authority. The inability the sovereign – the people – to intervene in constitutional review is in conflict with the constitutional principles of people’s power and socialist democracy.

As a result, it is essential that a system of constitutional review be established in Cuba. The Constitution we have today provides various ways of accomplishing this: via the Legal Affairs Committee⁵¹ in the National Assembly of People’s Power, where constitutional review occurs but without procedural development; or through the creation of a chamber within in the Supreme People’s Court⁵² that would deal with constitutional

⁵⁰ Transl. note: In Spanish, *control de regularidad*. The phrase in general is used to refer to physical or institutional “check points.” It is sometimes translated as “judicial review,” although that term is probably inappropriate here as review evidently takes place within the legislative body itself.

⁵¹ Transl. note: In Spanish, the *Comisión de Asuntos Jurídicos*.

⁵² Transl. note: In Spanish, the *Tribunal Supremo Popular*.

questions, either through lawsuits coming up through ordinary jurisdictional channels or through the introduction of the *amparo* and creation of a constitutional court.

A Final Statement

The immediate future of the political and legal organization of Cuban society must be directed toward a renewed appreciation for the rule of law, democracy, and republican values. We believe that that this is the only route to realizing a socialist economic, social, ethical, and political alternative.

Without a constitutionalism that uses and is enriched by the most advanced tools for protecting, defending, and guaranteeing human rights, in Latin America and throughout the world, we cannot begin to build a society that is more free, participatory, involved, and truly sovereign.