

In many cases human rights violations do not violate but conform to Cuban law. The law itself is in violation of human rights.

Human Rights and Cuban Law

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The traditional dualism of law and extralegal coercion in the socialist bloc countries is well known. It is also well known that this dualism provides the framework for systematic circumvention of human rights. As it occurs in the Soviet Union, this phenomenon has been the object of scholarly studies,¹ and a similar analysis of its existence in Cuba is long overdue. The point of this article, however, is not the violation of human rights in Cuba that violates its own or international laws but, rather, the limitations on fundamental human rights that are *inherent* in the Cuban legal system.

Constitutional curtailment of and disregard for individual rights are of special importance in Cuba because the nation's charter is not an expression of popular sovereignty. The draft of the Constitution was prepared by a small group of government and Communist party appointees, and, although the draft was submitted to mass discussion, a thorough comparison of it with the final text of the Constitution has shown that "the substantive importance of this mass participation was...slight, for, in fact, the [draft] remained essentially unchanged."² Thus the reality is that "despite vehement declarations [by the Cuban government] throughout the drafting process that the entire citizenry contributed to the text of the Constitution," it was handed down *to* the people.³ The much-publicized mass discussions were, as so often in the Soviet Union and China, window dressing to divert attention from the fact that the people could not freely elect representatives to the drafting commission. And, of course, the right to representation is itself

basic, as the Universal Declaration of Human Rights provides, because on it all other rights hinge. This is particularly so under a constitution like Cuba's, which purports to catalog liberties that the state will acknowledge, subject always to the *caveat* that no freedom may be exercised contrary to the existence and objectives of the socialist state (Article 61)—objectives dictated, according to Article 5 of the Constitution, by the Communist party, a small élite.

The Universal Declaration of Human Rights provides that all are equal before the law, and that no one shall be subjected to arbitrary arrest, detention, or interference with his privacy, home, or correspondence. But the Cuban Constitution of 1976 does not guarantee equality before the law, although every prior Cuban constitution did and most socialist constitutions do. Neither does the current Cuban Constitution prohibit arbitrary arrest, detention, search and seizure; it forbids detention, search of the home, and seizure of correspondence *except pursuant to the laws* (Articles 55-57). Such a prohibition does not ensure that the laws will not be arbitrary, or that they will be consistent with some high standard of human rights.⁴

Article 10 of the Universal Declaration guarantees everyone a fair and public hearing in criminal proceedings; Article 58 of the Cuban Constitution promises a trial, but not a public hearing, and, indeed, the Cuban Code of Criminal Procedure expressly allows the courts to conduct closed trials for a wide variety of reasons.⁵

And what assurance is there that these fundamental rights will be observed or that, if they are violated, the victim, illegally imprisoned, will have the "effective remedy" promised him by Article 8 of the Universal Declaration of Human Rights ("Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law")? There can be no assurance, for neither the Cuban Constitution nor the Code of Criminal Procedure recognizes habeas corpus once final sentence has been pronounced. What security is there, when the Code of Criminal Procedure allows the state to retry those who have been acquitted?⁶ And if the laws pursuant to which an individual is tried are them-

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selves arbitrary or unconstitutional, the individual has no recourse, because the Cuban Constitution does not give the courts the power of judicial review—the authority to consider whether the laws violate the Constitution. The legislature, which itself passes the laws, has that power (Article 73c). So, as Professor Louis Henkin has observed, “the Cuban constitution...promises the rule of law, but the constitution is not a higher law that effectively limits executive and legislative actions....The vindication of constitutional promises is left to political organs, not to an independent judiciary.”⁷

The Universal Declaration of Human Rights also provides that everyone has the right to education and that higher education shall be generally accessible to all on the basis of merit. Yet the Cuban Code on Childhood and Youth, enacted in 1978, conditions access to education, beginning with secondary school, on correct political attitudes.⁸ This, of course, substantially narrows the statement in Article 50 of the Constitution that all have the right to an education. The same is true of the right to physical education and sports, announced in Article 51 of the Constitution.

Freedom of conscience and religion, including the right to manifest religious belief in teaching, practice, worship, and observance, is granted by Article 18 of the Universal Declaration of Human Rights. But in Cuba religious teaching is contrary to the constitutionally defined educational policy, which is based on the scientific conception of the universe established by Marxism-Leninism (Articles 38a and 54), and the constitutional article recognizing freedom of conscience expressly provides that it is illegal and punishable to oppose religious faith or belief to the Revolution or education (Article 54). It also makes punishable the exercise of religious freedom that is contrary to the fulfillment of the constitutional duties to work and respect national symbols (Article 54). The religious have no freedom to observe holy days that fall during the work week or coincide with patriotic celebrations, and refusal to salute the flag on religious grounds is a crime. Under the Cuban Family Code, parents can be deprived of custody of their children if they keep them home from school to observe religious holidays,⁹ and Jehovah's Witnesses have been imprisoned because their children have refused to salute the Cuban flag.¹⁰ Under the new Penal Code, parents will be subject to imprisonment of from three to nine months for such conduct, which is deemed to abuse religious freedom and to be contrary to the normal development of minors.¹¹ In addition, the Cuban Constitution prohibits religious belief contrary to the duty to defend the nation with arms (Article 54); therefore, conscientious objection is a crime. The Cuban Constitution does not provide protection against discrimination on religious grounds, only on grounds of race, color, national origin, or sex. This despite the fact that Article 2 of the Universal Declaration of Human Rights and Article 55 of the U.N. Charter, and indeed most socialist constitutions, expressly refer to the right to equality of treatment irrespective of religion.

Articles 19 and 20 of the Universal Declaration of Human Rights provide that everyone has the right to freedom of peaceful assembly and association and to freedom of opinion and expression, including the right to impart information and ideas through any media. With respect to association and assembly, the Cuban Constitution effectively extends these freedoms only to members of state-approved organizations, since only such entities are promised the means necessary to associate and assemble (Article 53). Article 52 of the Constitution, dealing with speech and the press, expressly limits access to the media, which are exclusively state owned, and it provides that freedom of speech and of the press may be exercised only “in keeping with the objectives of socialist society.” Thus, freedom of expression, as it is defined by the Universal Declaration, is nonexistent. In fact, anyone who disseminates what the government considers “false information” or “malicious predictions” tending “to cause discontent” in the people is subject to four years imprisonment, and anyone who creates, distributes, or merely possesses what the government deems “propaganda against the socialist order or the revolutionary state” may be imprisoned for up to twelve years.¹²

These constitutional and penal provisions are especially important, not only because they curtail the fundamental right of expression, but also because they prevent the international community from learning of other violations of human rights in Cuba. Consider the position of those on the island who might denounce such violations to the world. Assuming they had the means by which to do so, they would join the ranks of Cuba's political prisoners for their efforts. This prospect has an immeasurable impact on potential reporting of human rights violations, for the conditions to which political prisoners have been subjected in Cuba are notorious.¹³ As recently as October 10, 1978, 123 political prisoners serving sentences in a Havana prison signed a declaration denouncing the inhuman treatment they have witnessed and experienced. The declaration, which they managed to smuggle out of the prison and which has been published in the American press,¹⁴ refers to the countless martyrs, invalids, mutilated, and insane produced by the penal system of the present regime. On November 17 last year the Inter-American Commission on Human Rights, one of the most important bodies of the Organization of American States, resolved to prepare a sixth report on the violation of human rights in Cuba. The decision was prompted by information concerning egregious conduct, including the abuse of psychiatry for mental torture, according to data compiled and submitted by the Society of Cuban Psychiatrists in Exile.

There are many unconfirmed reports that numerous political prisoners, including hundreds of Jehovah's Witnesses, are not classified as such but as common delinquents. And those who are now being permitted to emigrate are not, in fact, being released from prison. A recent statement by the U.S. attorney general reveals that “in the process of screening the initial list and

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reviewing subsequent lists, [the Department of Justice was] very disappointed to find that only very few among the names had been in prison at the time or released since August 11, 1978, the approximate date that the first list was furnished [by the Castro government]. The names are those of political prisoners who have resumed a life in Cuba in which their human rights are not in imminent danger. [Those still in prison] are the people whose human rights are being violated because of their allegiance to a democratic system of government.”

Article 13 of the Universal Declaration of Human Rights affirms that everyone has the right to leave any country, including his own, and to return to his country. The Cuban Constitution provides no such right; if the Cuban government now allows some to emigrate, it does so at its sole discretion. And if those who leave denounce the government's human rights violations, they can be deprived of their Cuban citizenship, because, although Article 15 of the Universal Declaration provides that no one shall be arbitrarily deprived of his nationality, the Cuban Constitution allows the Council of State, without judicial hearing, to deprive any citizen of his nationality by decree. The Council has only to decide that; while abroad, such a person has acted contrary to the socialist and revolutionary institutions of Cuba (Article 32c and final paragraph).

In recent years it has been noted that human rights violations in Cuba have received little attention in important sectors of the media and from certain international organizations. The Cuban government has vigorously encouraged this silence. Even the promise to free 80 per cent of the political prisoners—however the government chooses to define that term—is designed to limit denunciations by those who are gradually released. There are reports from diverse sources that an intense campaign is being carried on in the Cuban prisons to impress upon the political prisoners that their freedom depends on their silence and on the attitude and conduct of their relatives abroad. Moreover, those who are released are reluctant to jeopardize the eventual freedom of those who remain behind. Thus, by drawing out the process, the Cuban government insulates itself from the revelations that might otherwise be expected from its political prisoners.

Foreign public opinion must exert pressure to ensure

that abuses in Cuba cease, that at least elementary respect be granted those rights which no government, under any circumstances, should deny its citizens.

NOTES

1. Robert Sharlet, “The New Soviet Constitution,” *Problems of Communism*, September-October, 1977, p. 5; Sharlet, “Stalinism and Soviet Legal Culture,” in *Stalinism*, ed. Robert C. Tucker (Princeton, N.J.: Princeton University Press), pp. 155-79.
2. Linda Klein, “The Socialist Constitution of Cuba (1976),” *Columbia Journal of Transnational Law*, 17, 3 (1978).
3. *Ibid.*
4. Louis Henkin, *The Rights of Man Today* (Boulder, Colo.: Westview Press, 1978), p.66.
5. Ley de Procedimiento Penal, Ley No. 5, 13 August 1977, in *Gaceta Oficial de la Republica de Cuba*, 26 August 1977, art. 305.
6. *Ibid.*, arts. 455-58, 463.
7. Henkin, p. 74.
8. Código de la Niñez y la Juventud, Ley No. 16, 28 June 1978, art. 23.
9. Código de la Familia, Ley No. 1289, 14 February 1975, *Gaceta Oficial*, 15 February 1975, art. 95.
10. See Frank Calzon, “Jehovah's Witnesses Persecuted in Cuba,” *Worldview*, December, 1976.
11. Draft Penal Code, arts. 247 and 365, published in “Resumen del Anteproyecto de Código Penal,” *Juventud Rebelde*, 10 February 1978 (Supp.). The Penal Code was approved on December 29, 1978.
12. Código de Defensa Social (official ed. 1959), art. 140, as amended by Ley No. 1262, 5 January 1974, *Gaceta Oficial*, 5 January 1974.
13. See *Of Human Rights*, a newsletter on the human condition in Cuba, published in Washington, D.C., for recent reports by international organizations on the mistreatment of political prisoners in Cuba; and see “The Yellow Uniforms of Cuba,” by Theodore Jacqueney, *Worldview*, January-February, 1977.
14. “138 Cuban Prisoners Blast Exile Talks With Castro,” *Miami News*, 12 December 1978; “138 Cuban Prisoners Reject Castro Dialogue,” *Washington Post*, 15 December 1978.

