

The Cuban Constitution: Democratic, Socialist and Republican?

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1 Introduction

The current Constitution of Cuba—adopted in 1976 and updated in 1992 and again in 2002—is claimed as the foundation of a republican, socialist and democratic national order. It gathers, as does its Stalinist-inspired predecessor (the Soviet Constitution of 1936), a wide array of citizen rights—civil, political, social, economic and cultural—which it invokes from the objectives of constructing socialism, and alluding to mechanisms—vote-and-assembly structures—of republican lineage. However, for structural reasons linked to its current model and modes of operation, the constitutional text reflects precious little of the Island’s political reality. More than guide, the text obfuscates and confounds with respect to the loci and framework from which constituted power operates in Cuba.

We consider, therefore, that to understand the current Constitution, it is necessary to define, even in a concise way, the nature of the political regime in force in the Island. It corresponds to an initial post-totalitarianism, in which various totalitarian nuclei (sole party, political and policing control, state ideology) continue to be central in the constitution, reproduction and daily function of the political order. Belonging to the ancient, extensive and diverse family of autocraciesⁱⁱⁱ, Cuba’s is not a traditional dictatorship, a military authoritarianism, nor much less a hybrid regime. Neither is it a mature post-totalitarianism. Its regime is still in an early phase—and hard, subject to relapses—of post-totalitarian evolution. And, in the case of its Constitution, it does not break with the elements of that model. That is, Cuba’s is the (still) totalitarian Constitution of a (precariously) post-totalitarian order.^{iv} And it is as such that it should be analyzed.

In that sense, Peter Bernholz identifies as fundamental traits of totalitarian constitutionalism the search for—and realization of—supreme values, which transcend the individual and autonomous values and preferences, and subordinate any loyalty to another person, idea or organization; the suppression of all separation of powers; the maximum leadership’s exclusive

role as the source of the law and of the authority to (re-)interpret, at its discretion, the law's true meaning, and to establish severe penalties in the penal code and in other (sometimes unwritten) regulations in the face of any transgression against it.v

Any regulation, by its very nature, keeps some distance from the reality that it pretends to regulate. The differences between the formal Constitution—the written text—and the material Constitution—the principles of organization and exercise of public power, and the system of relations between them and the citizenry within the frame of the nation-state—are recognized by the community of constitutionalists, including the Cubans. The 1917 Constitution of Mexico, for example, recognized a catalogue of social rights and a political pluralism that were, for decades, systematically and profoundly violated by the hegemonic party which occupied most of the political and administrative offices of the Mexican State, and established corporatism far removed from a whole and integral citizenry. This is normal, for in every Constitution—as a codification of an emerging social order, born of revolutionary changes and/or deep reforms—exalted references to the history of the nation, the origin of the human community that comprises it, the great principles that govern the functioning of the State, etc. Every constitution mythologizes, to some degree, the nation and the State that it regulates. Thus, the distance between the formal and the actual Constitution constitutes a normality since the worldwide spread of such texts beginning in the 19th century.vi

However, in the case of Soviet-type constitutions, what occurs is not a separation, more or less plausible, between the norm and reality; but a mystification wherein the latter is unrecognizable in the former, which feigns a republican order there where none exists.vii And the law—Constitution, at the forefront—serves as a veil to the exercise of a power lacking in counterbalances and regulations, beyond the self-contained will of power itself. This encompasses both the Party, which guides and directs, and the State.

As in all constitutions of Stalinist lineage, the 1976 Cuban Constitution mystifies the nature and exercise of the established power. At most, there is something (centrality of the Party) stated within the law that is later mystified (rights of the people) so that the possibility of explaining and comprehending the real factors and processes of power is weakened. Or, references to central elements of totalitarian order (the charismatic leader, the political police) are excluded, while notions appear such as that of Revolution—ahistorical and asociological—which refer, indistinctly, to the political process, the State apparatus, and its leaders.

2 It's republican?

The very genesis of the Law of Laws reflects its scant republican nature. Cuban constitutionalists recognize that its composition was the work of an ad hoc body subordinated to State and Party direction, from which it received specific indications as to contents and basic principles.^{viii} That, unlike its predecessors—those in 1901 and 1940—it did not emanate from a convened and elected Constitutional Assembly or Convention.^{ix} And that it owes its inspiration and composition to Soviet-style constitutionalism, which makes it—so far and despite sustained reforms—a “survivor” of “socialist constitutionalism.”

The Cuban Constitution recognizes the centrality of the (single) party, its defenders will say, so that there is no contradiction whatsoever in what is inscribed in the supreme Law and the Island's real political order and function. And, to reinforce their claim, they point out that the documents that govern its structure, internal life and ideology are clear in ratifying its primacy in national political life, while at the (self-appointed and irrevocable) vanguard of the nation. But in reality is the Politburo—and, for half a century, its maximum leader Fidel Castro—who has made major decisions in political, socio-economic and cultural matters. Democratic centralism, which formally assumes a wide discussion of/by the bases and subsequent approval and compliance of the decision agreed-upon by militants in their bodies (committees and conferences) has not been the pattern of the functioning of the Party. The hierarchical subordination of the inferior to the superior organ has been converted into the permanent override—by effect of bureaucratization, little dialogue and the logic of command and control—of the skills and motivations of the first to develop the political initiative of their militants, even within the limits of the model. In addition, the very hybrid (state-party) nature of the existing power has generated confusion in academic discussion and attempts at administrative reform.

For its part, the National Assembly—formal substitute for a Parliament—has abdicated its constitutional deliberative, legislative, financial control and custodial/reform functions in favor of the Council of State and, often, of Ministers.ⁱ Both are, to date, presided by the first Secretary of the Communist Party. As colleagues on the Island have exhaustively shown, the National Assembly meets rarely, lacks professionalism and its members demonstrate no initiative greater than that of issuing mandates. Thus, the hyper-centralization and personalization in the decision-making process, with scant or null political deliberation (even within the limits set by a regime that is a stranger to pluralism) structurally violates any idea of active participation versus inequalities of income, knowledge and power, as well as the rights-based (and linked to their protection) inherent in the

republican matrix.

3 What about socialism

With regard to the socialist content of the Constitution, mystification is again present with regard to the contents of class social structure and Cuban organs of power, as well as the ownership regime.^{xi} In terms of first, the Law of laws is consonant with the Soviet model, does not recognize the existence of a State bureaucracy (currently in process of alliance and parental fusion with the emerging capitalist class linked to the reforms) which holds a dominant position in the economy, politics and culture of the Island. This guarantees a huge advantage in the individual and collective development of its members, given the asymmetry of power and resources at their disposal relative to the working classes formally recognized as ruling classes of Cuban socialism.

Likewise, it confuses state ownership with social property or property of the people, ignoring distinctions which, on that point, were made decades ago by the most advanced minds of Marxism in the former socialist countries. ^{xii} This confusion persists in the so-called Conceptualization of the Cuban economic and social model of socialist development, approved by the delegates attending the VII Congress of the CCP, held in April 2016, that should serve as a guideline for the announced constitutional reform. It declares: "the Socialist ownership by all the people over the fundamental means of production, a principal form of the national economy and socio-economic system, basis of the real power of the workers (p. 6)," only to later clarify that this "assumes the form of State-owned property, emanating from the State acting as a representative of the owner, who is the people (p. 8)".^{xiii}

My perspective on this text matches readings of the Cuban Constitution made previously by Cuban and foreign jurists. For a colleague from the University of Havana, the creation of a new socialist legality in Cuba went in hand with the need to centralize power, fulfill (and not argue against) political decisions, and remove any impediment to the action of the Executive and limits on the Government. It recognizes, implicitly, state-centric political centralization when it points out that civil and political rights are not enforceable against the State—citing important omissions in their regulation, exercise and defense—and that the right to popular control, accountability, and revocation of mandates are conceived as principles of the State's organization and functioning, and not as citizen rights. No less important is the recognition that existing procedures for constitutional reform

do not allow political concertation and stop the formation of parliamentary minorities.xiv

Another author from the Island recognizes the persistence of the unit of power in such unifying principles as the organization and functioning of a centralized, concentrated State and the pre-eminence of the central level over the local planes; the PCC as "top leading force of society and the State"; the non-recognition of the principle of effective judicial protection and full access to Justice regarding the actions of public authorities; the absences of constitutional control. And, in particular, he recognizes the nature of the Constitution as a statement of principles rather than as fully operative.

4 Where's democracy?

On the other hand, several foreign experts highlight the Cuba's exceptionality within the constitutional evolution of Latin America.xv They call attention to the charismatic and military centralization of power, because of the state/party/society fusion and its institutional deficits—which impinge on administrative effectiveness— as well as the fusion of constituent, legislative and judicial powers in the hands of the executive.xvi They insist that the elements of the Soviet legacy—units of powers, the effective absence of rule of law and constitutional control, primacy of the purposes of the State over the rights of citizens—present in the Constitution of 1976 are located on the polar opposite of the republican model.xvii

All of the above leads us to conclude that the Cuban Constitution, despite its socialist and republican rhetoric, is not one or the other. Subject to the interpretation and uses of power (with the citizenry prevented from invoking it effectively via specific mechanisms in the case of actions or omissions by state and partisan leaders), it does not serve as the basis of a republican pact, founded on the equality, protection and active participation of the citizens. Nor is it socialist, in that it conceals the asymmetries in income, information and power existing among the sectors that form society, subverting the real distribution of power by labeling as "popular" a bureaucratized and vertical order, and "socialist" the social relations of production wherein the state-owned company (administered by the bureaucracy) and, from a distance and gradually, small and medium-sized capitalist enterprises, both native and foreign-financed, concentrate the wealth and workforce of the country.

The Cuban Constitution, adopted in 1976 and updated in 1992 and

2002, belongs to the Stalinist constitutional matrix. Its text is intersected by a set of rights (political, social, cultural) that are generously stated but later restricted in a confusing manner within the boundaries of their application. It is confusing because, while outlining the organizational and ideological limits of this restriction (the party and mass organizations, socialism), these are still ambiguous enough to confound any citizen who tries to participate creatively and autonomously, in a democratic, republican and socialist fashion, in national political life. And that is just when principles (absolute control over all social initiative), mechanisms (work pressure, neighborhood watch, police threat) and bodies (apparatus and bureaucracies of the PCC, State Security)—concealed in the revolutionary constitution and discourse—operate, restricting the rights of citizens and draining the sense out of the democratizing rhetoric contained in the Law of Laws.

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ii By democratic is meant a political order wherein the leaders are elected by through competitive, pluralistic, free and just mechanisms by the citizens; these last retaining the capacity to express themselves, organize and demonstrate—before the state and other citizens—in an autonomous and protected manner. The republican aspect alludes to the formation of a political community wherein the people—politically plural and socially diverse—wherein the people are the repository of sovereignty, and the leadership of the state is not passed hereditarily within a familial elite or closed political class. Socialism denotes, in a lax sense, the complement of ideas, struggles and political movements addressing the fight against poverty and inequality, and fomenting the organization and rights of workers within the frames of a market economy and the modern nation-state. As can be seen, we do not exhaust here the dissimilar forms—at times partial and contradictory—that these phenomena have adopted within the frames of modernity; we merely point to those features we deem central to any basic definition of them.

iii By autocracy we mean a regime where power is concentrated and/or personalized, is exercised in a vertical manner and with diverse levels of arbitrariness, and the inhabitants of the nation are in a subordinate relationship to the state that impedes their (true) exercise of citizen rights. Autocracies historically adopt diverse garbs, in modernity that of the military dictatorship, the one-party regime, the sultanate, and hybrid modalities of these being the types most recognized by political science. By the same token, as a result of the 20th century experience, autocracies are subdivided between a majority of authoritarian regimes (with limited pluralism, conservative character, and official mentalities) and certain totalitarianisms (monist, revolutionary and ideological)—in both cases opposed to liberal

mass republics commonly called democracies.

iv I utilize here the notions of totalitarianism and post-totalitarianism which, from the standpoint of political science, have been developed by authors such as Juan Linz (*Totalitarian and authoritarian regimes*, Lynne Rienne, Boulder, 2000), Juan Linz and Alfred Stephan (*Problems of Democratic transition and consolidation: Southern Europe, South America and Post-communist Europe*, The Johns Hopkins University Press, Baltimore, 1997), Gianfranco Pasquino (*Nuevo curso de ciencia política*, FCE, México, 2014) and, for the Cuban case, Claudia Hilb (*Silencio Cuba: La izquierda democrática ante el régimen de la Revolución cubana*, Edhasa, Buenos Aires, 2012).

v Pp. 425-440, “The Constitution of Totalitarianism,” *Journal of Institutional and Theoretical Economics*, No. 47, 1991.

vi See: Andry Matilla, “Unas líneas (preliminares para un libro) con motivo de los cuarenta años de vigencia de la Constitución cubana de 1976” in Matilla (ed.) *La Constitución cubana de 1976: cuarenta años de vigencia*, Unión Nacional de Juristas de Cuba, 2016. Another author recognizes, in a study of the Cuban case, that the material Constitution is imposed over the formal one. See: Martha Prieto “Reflexiones en torno al carácter normativo de la constitución” in Martha Prieto y Lissette Pérez (eds.) *Temas de Derecho Constitucional Cubano*, Editorial Félix Varela, la Habana , 2005.

vii To that mystification, they contribute who maintain that in Cuba there reigns a democracy different from the “liberal bourgeois representative” type—identified with multi-party systems and the tri-partition of powers—characterized by the “direct exercise of power within the frame of a socialist paradigm,” whose problems would be more of design than implementation (Lissette Pérez, “Algunas consideraciones en torno a la democracia,” p. 110, in Martha Prieto y Lissette Pérez, eds., *Temas de Derecho Constitucional Cubano*, Editorial Félix Varela, la Habana , 2005.)

viii P. 32, Martha Prieto, “Reflexiones en torno al carácter normativo de la constitución,” in Martha Prieto y Lissette Pérez (eds.) *Temas de Derecho Constitucional Cubano*, editorial Félix Varela, la Habana, 2005.

ix See: Andry Matilla Correa “Unas líneas (preliminares para un libro) con motivo de los cuarenta años de vigencia de la Constitución cubana de 1976”, in A. Matilla (edd.) *La Constitución cubana de 1976: cuarenta años de vigencia*, Unión Nacional de Juristas de Cuba, 2016.

x The AN’s meager performance in the above-mentioned functions has been recognized by authors in a recent volume of the journal, *Cuban Studies* (Vol. 45, Pittsburgh University, 2016. Jorge I Domínguez (*Constitución y constitucionalismo en Cuba: introducción al dossier y reflexiones*) points to the lack of professionalism in its function and the abdication of its responsibilities; Julio Antonio Fernández (*Una Constitución para Cuba*. La

necesidad de una nueva constituyente. El enfoque técnico y el enfoque político) underscores the collectivistic and scant initiative of its members, while Amalia Martín (*El lugar del derecho en el orden político de la reforma en Cuba. Entre la república y el reino*) emphasizes the non-permanent carácter, composition and function of its commissions, and the supplanting of the legislative role by the Councils of State and Ministers as expressions of the AN's deficient functioning.

xi The mystification can be seen when one considers the Constitution as “a juridical expression of the social relations of production and of the interests and will of the people,” (José Peraza “El Derecho constitucional y la Constitución”, p. 23, in Martha Prieto y Lissette Pérez (eds.), “Temas de Derecho Constitucional Cubano”, Editorial Félix Varela, La Habana, 2005).

xii I refer, simply to mention two examples of an Eastern European country, to the work of philosophers and sociologists of the Praxis group, and the texts of the Yugoslavian leaders of state and the communist party, such as Eduard Kardelj.

xiii [1] PCC. *Conceptualización del modelo económico y social cubano de desarrollo socialista*, 2016. Archivo PDF. xiv Pp. 30-32, Martha Prieto, “Reflexiones en torno al carácter normativo de la constitución,” in Martha Prieto y Lissette Pérez (eds.), *Temas de Derecho Constitucional Cubano*, Editorial Félix Varela, la Habana , 2005.

xiv Pp. 30-32, Martha Prieto, “Reflexiones en torno al carácter normativo de la constitución,” in Martha Prieto y Lissette Pérez (eds.), *Temas de Derecho Constitucional Cubano*, Editorial Félix Varela, la Habana , 2005.

xv Even when Roberto Gargarella (“The engine room of the Constitution. With some particular attention to the Cuban case,” in *Cuban Studies*, vol. 45, 2016, Pittsburgh University Press) finds coincidences between the Cuban Constitution and mentioned “Latin American tradition” within the populist wave of the 20th century (relative to the expansion of the executive's reinforced role and role as the guarantor of the exercise of effective social rights), it becomes evident that Constitutions such as that of Mexico (1917) and Cuba (1976) are—because of their principles and the regimes built around them, radically different.

xvi Pp. 235-240, José M Portillo Valdés, *Historia mínima del constitucionalismo en América Latina*, COLMEX, México DF, 2016.

xvii See in this regard the analyses of Beatriz Bernal (*Constituciones Iberoamericanas: Cuba*, IIJ, UNAM, México DF, 2008), Ricardo Manuel Rojas (*Los derechos fundamentales y el orden jurídico institucional de Cuba*, CADAL/KAS, Buenos Aires, 2005) and Paulo Biscaretti (Pág. 447-451, *Introducción al derecho constitucional comparado*, Fondo de Cultura Económica, México DF, 2006)