

Why does Cuba need a new Constitution?

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Summary: A process of constitutional reform has been announced in Cuba, but this has not yet signified the opening of public debate regarding the future of the law of Cuban laws. There are different positions on the island regarding the possibilities of reform; some think that it should be a total reform, while others think that it should be a partial reform. We start from the belief that we have a promising opportunity to propose a new Constitution for Cuba, provided we take advantage of the opportunity to carry out a transformative democratic exercise in discussing and approving a new Constitution. For this reason we defend the necessity of a Constituent Assembly, which serves as a point of departure for a change in Cuba that goes beyond the act of creating a new constitution itself.

I

The Cuban Constitution has been in force since February 1976. It represents the institutional birth of the *Poder Popular* (the People's Power) and the proclamation that we legally lived in a Socialist state.

In 2015, many of us wondered how the socialist mystique that permits the resistance of a non-capitalist core in the Cuban economy and politics could be safeguarded, aspiring from that center to propose a model of democratic participatory socialism, popular sovereignty, and a redefinition of the values of the republic, with the state and beyond it, from civil society, so that it can overcome the trauma of so many years of excessive centralism, political schematism, and ideological dogmatism, none of which are socialist values to which some Cuban citizens aspire.¹

¹ In its 2010 Annual, the Center for Psychological and Sociological Research took important steps: The theoretical and methodological referents of a series of proposed transformations in Cuban society with which I was affiliated are those of republican democratic socialism, through the complex theoretical base that sustains it in its principles of popular power, popular control of politics, citizenship as a political protagonist, popular creation of the law, popular control of public administration and application of law. Mayra P Espina Prieto, Juan P Triana Cordoví y Julio Antonio Fernández Estrada "Las ciencias sociales cubanas de cara a la transformación social. Transformación de la sociedad cubana: contribuciones a un debate actual", en *Cuadernos del CIPS 2010. Experiencias de investigación social en Cuba*, ed. Ileana Ricardo (La Habana: Publicaciones Acuario, 2011), 33.

Essayist Julio César Guanche put it this way: “While the ‘real socialism’ could exist without democracy, the democracy of the future cannot exist without a new socialism. Thus, the democratic future of Cuba must be, if such a future is sought, more socialist.”²

At the same time, 15 years after the beginning of the 21st century, the *Poder Popular* in Cuba has failed to establish itself as the ideal form of our state, despite the clear advantages of this form of organization compared to the panorama of forms of alienation from politics and power in which most peoples of the world live.³

The advantages referred to do not exceed the legal constitutional design that, in general, sustains and governs these advantages, meaning that the *Poder Popular* is unobjectionable inasmuch as an expression of popular sovereignty. Yet the Constitution has not sufficiently empowered the people in Cuban social life.

At the time of this essay’s writing, two new provinces of our political administrative division, Artemisa and Mayabeque, are experimenting with a new manner of structuring the *Poder Popular*. This exercise is based on Decree 301 of the *Consejo de Ministros* (the council of national ministries), which regulates the nature and essence of the experiment, characterized above all by the purification of governmental departments at a local level, to separate them from the respective Assemblies, as well as to liberate their administration from the suffocating bonds with the Central State Administration’s Organs in each province.

² Julio César Guanche, “La verdad no se ensaya. Revolución, Ideología y Política en Cuba” en *La verdad no se ensaya. Cuba: el socialismo y la democracia*, ed. Elizabet Rodríguez Hernández (La Habana: Editorial Caminos, 2012), 50.

³ Guanche views it in this manner: The institutional system has been supported by the quality of citizens involved in it, despite its contradictions and disincentives. The basis of that support has been eroded, since the institutional system does not exercise all of its prerogatives, limits delegate responsibilities, and operates in a context that reduces the possibility of performing the functions it establishes Julio César Guanche, “La participación ciudadana en el Estado cubano” en *La verdad no se ensaya. Cuba: el socialismo y la democracia*, ed. Elizabet Rodríguez Hernández (La Habana: Editorial Caminos, 2012), 149.

So far, however, the experiment has left intact the manner in which the municipalities make budgetary decisions, thus remaining distant from the interesting initiatives for participatory budgeting, social control of public services, and other forms used to renew popular participation currently practiced, not in utterly foreign settings, but in neighboring Latin American countries.

II

In 1992, the Socialist Constitution of Cuba experienced its most profound reform. During those years, the reform was debated from law school classrooms to the streets. Opinions differed on whether it constituted a superficial modification or a reform of the Cuban economic and political system.

The argument that it was not a profound reform rested on a legal consequence: as established in the Constitution's reform clause, this reform could be enacted without popular referendum because it altered neither the rights, duties, and constitutional guarantees nor the powers of the principal organs of the Cuban state.

From that period until now, many of us have thought that this reform required the moral backing of the people that witnessed the government's reversal of socialist ownership by the citizenry through governmental decision, an exception that led to the birth of property owned by mixed companies.

The constituent power of the people should not rely solely on the constitutional provision involved in a legal proceeding but rather should derive from the legitimacy of general interests.

In a socialist political context like that of Cuba, it was straightforward to overwhelm the constitutional reform clause of Fundamental Charter of 1976, in order to obtain a majority result, as the proposed changes did not result from form but rather of background.

Moreover, in the most difficult years for the maintenance of popular consensus alongside revolutionary values, the 1992 reform introduced Martí's ideas as an ideological paradigm for the political project of national unity and preservation of independence and sovereignty. In this way, Martí's imprint changed our constitutional conception of the Republic and joined the Communist Party's Marxism-Leninism, the ideology of the apostle.

Other important reforms were made in the electoral system, which resulted in a new and more democratic way to elect delegates and deputies, directly within the two Cuban electoral processes. The *Consejo Popular* (People's Council) also appeared, which was intended to reconnect the people with their local assemblies, but unfortunately it was implemented during the difficult *Período Especial* (the Special Period), the result of which was its conversion into yet another organ for social survival.

To date, we think that the *Consejos Populares* have provided sporadic but genuine demonstration of the impromptu, rich, and vital political imagination of the people. The most politicized areas and neighborhoods have managed to escape centralism and establish themselves as the anti-establishment movement that they believed they could be, as the highest authority in their area, according to the Constitution of the Republic.⁴

⁴ In the 1990s, jurist and university professor Julio Fernandez Bulte defended the idea that the *Consejos Populares* could be the democratic expression of the negative power of the people. This thesis came from the consideration that

III

If the 1992 Constitutional Reform Act was intended to comply with the guidelines of the Fourth Congress of the Party and achieve economic, financial, and political survival, our state remained secular and not atheist in order to support this goal. In reality, Article 8 of the Constitution emphasized religious freedom. In 2002, the situation had changed sufficiently so that the State could fortify this Article as it did.

The last constitutional reform was carried out by the initiative of the national coordination of the main organizations of Cuban masses, above all the *Comité de Defensa de la Revolución* (Committee for the Defense of the Revolution), who consulted the people by non-electoral means (i.e. not as a referendum or plebiscite) on the irreversibility of socialism in Cuba.

Given that the majority of the people wished to remain a Socialist state, it was proposed that the Constitution reintegrate, now as an intangibility clause, the irrevocable nature of socialism in Cuba, equally political and economic.

Interestingly, this last reform was a reaction to the attempt by some segments of the Cuban political opposition to present a project of constitutional modification that considered

there exists two forms of popular sovereignty, one which is positive and constructive, and one of negative character, of containment. The negative power does not act but rather impedes, which would complete the full picture of the people's power. The negative power has in turn two aspects. There is a direct aspect, in which the people exercise the right of resistance, rebellion, exile, and political strike. In addition, there is an indirect aspect, with direct antecedents in the tribunes of the plebeians of the ancient Roman Republic, which were based on an elected representative of the people that exercised the power of veto against unpopular decisions. The *Consejos Populares*, according to Bulte's interpretation, could become the manifestation of negative power lacking in the *Poder Popular* in Cuba. In the first decade of the 21st century, Luis Mario Coto completed a master's thesis in Constitutional Law at the University of Havana, which added additional arguments to this interpretation.

dismantling of the socialist system as a whole. The Félix Varela Project, as it was known, was introduced through popular legislative initiative but was never considered by the Cuban legislative body.

In my opinion, the most beneficial result of all these events for Cuban democracy was that the people-directed institution of legislative initiative was never called into question.

IV

Our current Constitution, or what has remained of it after the complicated reforms it has endured, would be defined as rigid. This definition comes from a common classification system, which considers the legal requirements for total or partial modification of the fundamental text to be a required parameter.⁵

The only constituent body in Cuba is the *Asamblea Nacional del Poder Popular* (National Assembly of People's Power). In addition, this *Asamblea* is the only legislative body, one that retains the highly powerful ability to declare the unconstitutionality of laws, legal decrees, decrees and other regulations. However, in its 39 years of existence as the supreme organ of the state, this body has never exercised this power.

⁵ Article 137 of Chapter 15 of the Cuban Constitution, titled Constitutional Reform, states: "This Constitution can only be amended by the *Asamblea Nacional del Poder Popular* by resolution adopted by a roll-call vote of a majority of not less than two-thirds of the total number of its members, except regarding the political, social and economic system whose irrevocable character is required by Article 3 of Chapter I, and the ban on negotiating under aggression, threat or coercion of foreign power, as provided in Article 11. If the reform concerns the composition and powers of the *Asamblea Nacional del Poder Popular*, its *Consejo del Estado*, or the rights and duties enshrined in the Constitution, it also requires ratification through a favorable vote in a majority referendum, convened by the Assembly." *Constitución de la República de Cuba* (La Habana: Editorial My. Gral. Ignacio Agramonte y Loynaz, 2013)82-83.

The crisis of the *Asamblea Nacional* has not only manifested itself through the few non-unanimous votes in its legislative history or the deputies' disuse of their right to submit bills as individual members of the *Asamblea*. The *Asamblea Nacional* crisis is demonstrated above all because the *Decretos Leyes del Consejo de Estado* (Decree Laws of the State Council), an organ of the *Asamblea* that represents it between session periods, triples the laws of the *Asamblea Nacional*, alongside the *Decretos del Consejo de Ministros* (Decrees of the Council of Ministers), which is the government of the Republic.

Since 1976, this panorama has tilted Cuban legislative work in favor of small bodies of indirect representation, like the *Consejo de Estado* (State Council), or no representation, like the *Consejo de Ministros* (Council of Ministers), which together with the *Asamblea Nacional* meets twice a year for just a week in total, breaking the constitutional logic which places it in the political system as the highest organ of state and ultimate reserve of democracy.

V

Any major change to the current constitution in Cuba would entail a transformation of the political and economic system, which in my understanding, would affect the intangibility clause that has been in force since 2002.

If our current political system is socialist, a change in its structure, nature, form, and content, would be contrary to the third paragraph of Article 3 of the Constitution, given that an abstract socialist political system does not exist without concrete experiences that implement it. This signifies, according to my assessment, that an introduction of a new form of property or a new body of the State in the Constitution is today prohibited by the 2002 reform.

Before considering the problems of total constitutional reform, we should ask whether it is possible to do so while fulfilling the duties held by the State and the People, from the same date, to respect constitutional principles as a civic guide, as both a measure of what was achieved in the 1959 revolution and a method of administrative management.

To what extent would it be a restorative adventure as a people, to observe and enforce several articles of the socialist Constitution that are currently flouted by institutions, bureaucrats, and citizens?

Is there a political program that by itself makes the State ultimately of the workers? In ensuring that the Republic is built with all and for the good of all, through direct sovereignty and not solely through political representation? In practicing resistance before those attempting to overthrow the Constitution, in revoking the elected who have not performed as expected, in nominating candidates who think that they can make significant improvements, in guaranteeing that Assemblies, from the national to the municipal, legislate for us and by us, in proposing as a people the content of laws that we believe most urgent, in demanding that the referendum and consultation be used and not relegated to being an extraordinary measure?

This and much more remains to be done before contemplating a new constitution, but there are also unresolved holes in our institutionalism, in law, politics, and economics, to cite a few serious gaps.

There are distinct opinions on these gaps. For example, one of the first public spaces of discussion on this topic opened in Cuba in 2009, led by the *Revista Espacio Laical*, titled

“Dossier on the Constitutional Challenges of the Republic of Cuba” and with the participation of Jorge Ignacio Domínguez, Dimitri Prieto, Roberto Veiga and the author of this article.

This dossier published proposals ranging from the multiparty system and the repeal of the ironclad clause stating the irreversibility of socialism to the introduction of the ombudsman, the constitutional court, freedom of association, municipal autonomy, the return of court guarantees the separation between the head of state and government, the direct election of all public authorities, the elimination of a dominant ideology in the constitutional text, and the acceptance of dual citizenship and consecration in the great law of habeas corpus, among others.

The Constitution that we adopt must modernize its legal definitions, in the ideological sense of democratic decision-making. I prefer the more inclusive, horizontal and ecumenical definitions. Given the level of real consensus that exists in this situation, these can be achieved.

This means, to give some examples, considering certain principles as fixed. These include the rule of law, political pluralism, an identification and recognition of civil society, public administration, and human rights, as well as an elevation of the legal protection of the environment and disadvantaged sectors of society.

It is urgent to consider the progressive nature of fundamental rights, incorporating the struggles that our people, even after the Revolution, have continued adding to our history of social demands, such as rights related to the freedom of individual sexual orientation.⁶

⁶ To date, the progressiveness of human rights has been considered mainly as a principle that prevents a reversal of the regulation and consideration of human rights and their legal protection from within the Constitution. But I dare suggest a more radical proposal: we defend a species of civilizing natural law that permits us to revindicate rights from a level above legal regulation, due to the historic fact of cultural accumulation of thousands of years of popular struggle. Similarly, we could also defend the thesis that the regulation and consecration of human rights in a

It is imperative that we consecrate the widest possible system of legal, political, and material guarantees of human rights, which give constitutional significance to this kind of protection. This has been acknowledged in recent American charters, which recognize individual and collective exercise in order to protect specific rights. This recognition gives *Habeas Corpus* or *Habeas Data*, to name two famous guarantees that do not exist in the Cuban constitution, the place they deserve.

Our Constitution needs – as does our public – an Ombudsperson, who is not tied to any recognized state body, so that he or she can perform their functions and aid victims of human rights violations. It is the time to have an independent institution and procedure that performs the sacred task of protecting the Constitution and declaring violatory norms and acts unconstitutional.

As the prominent Cuban economist Pedro Monreal has stated: It is not enough that rights are recognized by the Constitution and laws and defended in speeches. It is essential that the realization of economic and social rights be justiciable and enforceable, that is to say, there needs to be specific legislation that ensures compliance with the obligations of a given right and contemplates the existence of legal remedies in the case of noncompliance and violations.⁷

constitution achieved by any citizenry is sufficient reason that these rights be considered progressively achieved by any other citizenry, given the universal character of human rights.

⁷ Pedro Monreal “Poniendo nuevas preguntas sobre la mesa. Apuntes para una introducción a un volumen de Cuba Posible”, en *Desafíos Económicos de Cuba. Apuntes para un debate*, ed. Roberto Veiga y Lenier González (La Habana: Proyecto Cuba Posible, 2014), 12.

The Constitution is a good place to clarify the scope of the law in a country, i.e. who can create law in a State and how far the law can go. These are called secondary rules, much missed by those of us that desire a sound and harmonious legal system, who have not been able to find unpublished or classified resolutions, decrees that distort laws, or simple charters that create rights, duties, and procedures.

It would be a good time to consider the obsession with private property, which when exclusive and exclusionary, is contrary to socialism and democracy. Other arrangements, especially that of common property, may achieve an end much closer to what we unsuccessfully attempted to achieve with the socialization of goods that did not exceed nationalization.

Contrary to what has been repeated ad nauseam about the limitations of public policy regarding personal property in the Cuban Constitution, we must say that these limitations have at least been consistent with a property regime that did not consider the existence of private property and prohibited the exploitation of man by man.

At the same time, other intellectuals in Cuba have theorized that private property appeared with the 1992 reform and the introduction of the property of joint ventures. But from my perspective, that is not sufficient to understand that property right in Cuban law. Solely from a legal perspective, a private property right requires a mechanism for the owner to defend his/her right, which should do everything possible to assail the assets of the defaulting debtor.

The aforementioned has always been impossible in Cuban law, which has neither allowed the seizure of state property nor has regulated (until very recently and limitedly) forms of credit guarantees like mortgage, without which private property cannot survive.

It is very interesting that some defenders of liberal reforms in Cuba do not view the 1976 Constitution as an obstacle to change. While maintaining guarantees of state presence like the right of first refusal if a small farmer attempts to sell his land or the regulation of the right of inheritance of land for workers, the Constitution does not employ other more popular, less state-oriented clauses, which ensure the preservation of the sovereignty of resources and work in the hands of the workers.

VI

But what disillusions those of us that study these themes is how to make these reforms. Should they be done with the present and active public or with the mobilized public, which opines but does not decide?

A Constituent Assembly is outside the realm of constitutional possibilities because the text only accounts for the constituent power of the National Assembly, which would have to realize its last sovereign act in creating a new Constitution. But this constituent power would then not be new, not the result of a special election for the process of creating a new text, but rather the continuation of the highest state organ.

This alternative, nevertheless, could still have could perform different functions, because the *Asamblea Nacional del Poder Popular* is capable of leading a process of partial or total constitutional reform, through the convening of referenda or proposing a special commission, created outside the institutional environment, which would drive constitutional modification (which would be almost certainly partial)

However, other possible options are neglected, such as merely changing the reform clause of the Constitution and introducing the possibility of holding elections for a Constituent Assembly to draft and approve a new constitution that, in any case, must be made available for popular confirmation by referendum.

This same form can manifest in two ways. First, a draft constitutional reform can be submitted through the traditional means of the past forty years, by which a law is proposed to the National Assembly. Or second, a bill can be driven by popular legislative initiative, which is the only way in which the new constitutional reform clause would remain drafted.

In this case the bill would be an indirect popular way of opening a constituent process.

Another possibility is that social movements or the Cuban civil society in general propose a constituent process that begins with the determination of institutional exceptionality that would govern until the existence of a new fundamental text. This text would defend both the republican transition and peace, as well as organize the process of proposal and approval of a new constitution.

The choices of democracy are always intimidating but also just. Therefore, I am confident that a Constituent Assembly is the best way to set forth profound change in Cuba, despite the state of political culture of the Cuban people. We say this knowing that, since we have not discussed these issues for many years, we now may frighten some and excite many others.

However, if the alternative is to once again be asked to ratify a finished bill (if there is a referendum), with both expected and unexpected content, and with disappointing agreements between unrepresentative parties, then we prefer to take the sublime risk of deciding our future amongst all of us, which in the end is the only space where no one is excluded.

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