

CUBAN CONSTITUTIONALISM AND RIGHTS: AN OVERVIEW OF THE CONSTITUTIONS OF 1901 AND 1940

Rebeca Sánchez-Roig

CONSTITUTIONALISM

Definition

Generally, questions of constitutionalism—ideas, institutions, rights, review and limitations on governmental powers—are addressed in terms of the United States Constitution (the “U.S. Constitution”) and the American idea of rights. A constitution serves to protect human rights by establishing the necessary implementation and review procedures. A constitution, fundamental or supreme law, is a written document promulgated by an elected governing body, establishing the structure of the state, fundamental rights, limitations on the scope of governmental powers, and amendment procedures.¹ The term “constitution” can be traced back to ancient Greece and Rome with approximately the same meaning employed today.² A constitution is considered the law of the land, and no other dispositions or norms, can contravene the privileges, liberties and rights it guarantees its citizens.³

American Constitutionalism

The main focus of the U.S. Constitution and American constitutionalism is in the area of human rights.⁴ In the American idea of rights, “[r]ights are not gifts from government.”⁵ This theory places the fundamental rights of the individual beyond the government’s reach.⁶ Fundamental rights are protected against legitimate authority and elected representatives of the people, even when these act in good faith and in the public interest.⁷ As antecedent to government, fundamental rights are not granted to individuals by a constitution. Rather, a constitution protects fundamental rights from infringement by government.⁸

The structure necessary for protection of fundamental rights is a key element in constitutionalism. In the U.S. Constitution, the most important means provided for protection of human rights is judicial review.⁹

1. Leonel-Antonio de la Cuesta, *Constituciones Cubanas*. New York: Ediciones Exilio, 1976, p. 15.

2. De la Cuesta, *Constituciones Cubanas*, p. 15.

3. De la Cuesta, *Constituciones Cubanas*, p. 15.

4. Louis Henkin and Albert J. Rosenthal, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1990), p. 3.

5. Henkin and Rosenthal, *Constitutionalism and Rights*.

6. *American Journal of International Law*, vol. 86 (1992), pp. 192, 194.

7. Henkin and Rosenthal, *Constitutionalism and Rights*, p. 1.

8. Henkin and Rosenthal, *Constitutionalism and Rights*, p. 1.

9. Henkin and Rosenthal, *Constitutionalism and Rights*, p. 1.

The American idea of rights denotes a distinctive relationship between the individual and society.¹⁰ The rights themselves, and the way these are granted, reveal a philosophy of individualism connected to a guarantee of restricted government intervention.¹¹ This concept of rights is an aspect of a broader political idea.¹² Specifically, the idea of a liberal state and a free economy.¹³

Despite the protection of rights encompassed in the U.S. Constitution, many aspects are not constitutionally recognized or protected in the United States. For example, the U.S. Constitution does not directly, and in many instances, indirectly protect or affect economic, social and/or cultural rights. The U.S. Constitution's silence on social rights (considered traditional rights in most western and non-western societies outside of the U. S.), and its failure to render protection in this area, suggests a marked difference between the American perception of rights and the importance of economic, social and/or cultural rights in Europe and Latin America.

Clearly, cultural, social and economic differences are indicators of the fact that American constitutionalism and its idea of rights, may not be comprehensively adaptable to other countries.¹⁴ While many constitutionally protected American rights have been incorporated into the constitutions of other countries, the scope of the American idea of rights must be tailored to the particular society.¹⁵

The American idea of rights as fundamental and beyond the government's reach, is achieving recogni-

tion in other nations. Scholarly opinions differ, however, on which rights are truly fundamental and the scope thereof. The discrepancy in the variations and perception of rights considered fundamental, is not as noticeable between the United States and Cuba as it is between the United States and other western and non-western countries.

Divergence in attitude as to the breadth and character of fundamental rights, is secondary to the rapidly increasing universal acknowledgment that human rights are fundamental and not gifts from one sector of society to the other. Consequently, human fundamental rights are entitled to constitutional protection through legislative constraints and judicial review.

CUBAN CONSTITUTIONALISM

Generally

Prior to the Constitution of 1940, Cuba was "governed"¹⁶ by eight constitutions and four sets of amendments, reforms, statutes, constitutional laws and dispositions, in its attempt to forge a document amply reflecting the will of the Cuban people and guaranteeing them certain rights and liberties.

Cuban constitutionalism was born with the constitutions of "Joaquín Infante," also known as the Constitution of 1812, and "El Ave María," the Constitution of 1858.¹⁷ Both the Infante and the Ave María constitutions clearly evidenced Spanish, French and North American liberal thoughts and doctrines of the 19th century.¹⁸ Cuba's constitutional history, however, cannot be neatly separated from its turbulent political history.

10. *American Journal of International Law*, p. 193.

11. *American Journal of International Law*, p. 193.

12. Henkin and Rosenthal, *Constitutionalism and Rights*, p. 4.

13. Henkin and Rosenthal, *Constitutionalism and Rights*, p. 4.

14. *American Journal of International Law*, p. 194.

15. *American Journal of International Law*, p. 194.

16. It is important to note that all Cuban constitutions promulgated prior to the Constitution of 1940, were born out of the various revolutionary movements advocating Cuba's separation from Spain. De la Cuesta, *Constituciones Cubanas*, p. 13. Despite the Cuban liberators' dauntless attempts at self-governance, constitutions of the Kingdom of Spain, later the Republic of Spain, actually reaped and dictated over the Cuban people until December 10, 1898 when the United States and Spain signed the Treaty of Paris (see below).

17. De la Cuesta, *Constituciones Cubanas*, p. 14.

18. De la Cuesta, *Constituciones Cubanas*, p. 14.

Overview of Cuban Political History

The “War of ‘68” erupted on October 10, 1868, with Carlos Manuel de Céspedes, an attorney, and his liberation army, proclaiming freedom and liberty for de Céspedes’ slaves and the island of Cuba from Spanish rule, at his plantation “La Demajagua.”¹⁹ The War of ‘68 raged on for 10 years with a significant number of casualties to become known as the “Ten Year War.”²⁰ On April 10, 1869, de Céspedes, along with other supporters, assembled a constitutional convention known as the “Asamblea de Guáimaro” which gave birth to the Constitution of Guáimaro.²¹ The Constitution of Guáimaro, which called for a republican type of government, precariously governed Cuba until February 8, 1878, when it was dissolved.²² The Cuban liberators had lost their battle against Spain ending the Ten Year War.

A new struggle against Spain was launched in the early 1890’s with the Cuban Revolutionary Party led by José Martí, Máximo Gómez and Antonio Maceo.²³ The War of Independence of 1895, also known as the “War of ‘95,” officially commenced on March 25, 1895 with Martí proclaiming the Party’s revolutionary causes in the now famous Montecristi Manifesto.²⁴ Two constitutions were promulgated during the War of Independence, specifically the Constitu-

tion of Jimaguayú²⁵ and the Constitution of La Yaya.²⁶

On February 15, 1898, the United States joined the Cuban struggle against Spain when the warship *Maine* exploded in Havana harbor. On April 20, 1898, the United States Congress passed a joint resolution proclaiming Cuba’s independence from Spain.²⁷ The United States gave the Spanish an ultimatum “inviting” them to immediately abandon Cuba.²⁸ Spain, however, refused to peacefully depart the island. Thus, on April 25, 1898, the United States declared war on Spain.²⁹

On July 3, 1898, the Hispano-Cuban-American war culminated with the destruction of the Spanish fleet in the port of Santiago de Cuba. The Spanish surrendered on July 16, 1898, and on October 30, 1898, the “Constitution of Santiago”—or of “Leonard Wood”—was implemented.³⁰ The Constitution of Leonard Wood governed Cuba until December 31, 1898.³¹

On December 10, 1898, the United States and Spain signed the Treaty of Paris, formally terminating the oppressive Spanish rule. Unfortunately, Cuba, and the liberators who had steadfastly battled for its independence, were excluded from representation at the

19. Carlos Márquez Sterling and Manuel Márquez Sterling, *Historia de la Isla de Cuba* (1975), p. 90.

20. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, pp. 102-114.

21. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, pp. 97-100.

22. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, pp. 97-101. The Zanjón Pact, signed on February 28, 1878, officially terminated the Ten Year War. Antonio Maceo rebelled against the Pact, briefly continuing his struggle against Spain. Maceo’s enduring battle against Spain, gave rise to the promulgation of a new constitution on March 15, 1878, the Constitution of Baraguá. The Constitution of Baraguá is characterized by two prominent features: (a) the document is comprised of only 6 very short articles; and (b) its determinative intent is liberation of Cuba. De la Cuesta, *Constituciones Cubanas*, p. 38.

23. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, pp. 120-130.

24. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 130.

25. Promulgated on September 16, 1895 and consisted of 24 articles. De la Cuesta, *Constituciones Cubanas*, pp. 42 and 129.

26. Promulgated on October 29, 1897, consisted of 48 articles, and like its predecessors, was named after its place of promulgation. De la Cuesta, *Constituciones Cubanas*, p. 44.

27. De la Cuesta, *Constituciones Cubanas*, p. 44.

28. De la Cuesta, *Constituciones Cubanas*, p. 44.

29. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 44.

30. De la Cuesta, *Constituciones Cubanas*, p. 45. The Constitution of Santiago was more of a declaration than a constitution. On this point see also De la Cuesta, *Constituciones Cubanas*, p. 45.

31. De la Cuesta, *Constituciones Cubanas*, p. 45.

signing of the Treaty of Paris.³² Though now free from Spanish rule, Cuba was once again in the hands of a foreign power, this time, the United States.

The desire to be governed by a document evidencing the will of the people through democratically elected officials, thus, has been demonstrated in Cuba since 1812, only 36 years after promulgation of the U.S. Constitution. Notwithstanding the various constitutions and amendments which governed Cubans between 1812 and 1940, the two fundamental constitutions of Cuba, both modeled after the U.S. Constitution, were the Constitution of 1901 and the Constitution of 1940.

The Constitution of 1901

Cuba's first constitution, labeled as the "constitución individualista" or the individualist constitution, was directly inspired by the U.S. Constitution. This "inspiration" was not necessarily a result of the American occupation of the island at the time of the Constitutional Convention of 1901, but rather a result of the "intelligencia's" captivating fascination with the American document; and because unlike any other constitutional document, the U.S. Constitution has enjoyed the singular privilege of ubiquitous celebrity status in Latin America and Europe.³³

The Constitution of 1901 consisted of 115 articles, 7 dispositions and was appended with the nefarious Platt Amendment.³⁴ Title IV of the Constitution of 1901 embraced all fundamental rights,³⁵ the struc-

ture for protection thereof, and the mechanism limiting the scope of governmental powers.

Article 32 of Title IV protected private ownership of property. Specifically, Article 32 provided that no one could be deprived of property without competent authority, just cause determined with respect to public need, and indemnification for those whose property had been expropriated.³⁶

The Constitution of 1901 established a democratic, presidential and representative form of government.³⁷ It divided governmental powers into the three traditional branches, to wit, (a) executive, (b) legislative and (c) judicial.³⁸ Under the Constitution of 1901, the executive powers were identical to those found in the U.S. Constitution.³⁹ Like the U.S. Constitution, the Constitution of 1901 limited the president's term to four years, and authorized re-election for a second four-year term.⁴⁰

The judiciary was elected by the executive branch based on recommendations from the legislature.⁴¹ Under the Constitution of 1901, Congress was bicameral and the judiciary was comprised of a Supreme Court, provincial courts, and various other lower courts.⁴²

Senators served an initial eight-year term, and could seek re-election for another four years; house representatives were elected to serve for a four-year term and could seek reelection for a two-year term.⁴³ The Constitution of 1901 provided for election of gover-

32. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 156.

33. De la Cuesta, *Constituciones Cubanas*, p. 48.

34. See Cuban Constitution of 1901, articles 1-115.

35. Cuban Constitution of 1901, title IV, section 1, articles 11-37.

36. Cuban Constitution of 1901, title IV, section 1, article 32.

37. Cuban Constitution of 1901, titles I, V-X.

38. Cuban Constitution of 1901, titles VI-X.

39. Cuban Constitution of 1901, titles VI-X.

40. Cuban Constitution of 1901, title VII, sections 1-2, articles 64-71.

41. Cuban Constitution of 1901, title X, sections 1-3, articles 81-90.

42. Cuban Constitution of 1901, title X, sections 1-3, articles 81-90.

43. Cuban Constitution of 1901, title VI, sections 1-6, articles 44-63.

nors⁴⁴ and mayors⁴⁵ from all of Cuba's provinces, with each serving four-year terms.⁴⁶

Like the U.S. Constitution, the Constitution of 1901 could not be amended without congressional participation and convening a constitutional assembly to ratify or reject proposed modifications.⁴⁷

The Platt Amendment: The infamous Platt Amendment, imposed on Cuba during William McKinley's presidency,⁴⁸ originated as an amendment to a United States budgeting law. The Platt Amendment was introduced by Senator Orville H. Platt of Connecticut and quickly approved by the United States Congress. Immediately after receiving congressional approval, the United States demanded that the Cuban Constitutional Convention of 1901, appendix the Amendment to the Constitution. After a long and onerous battle, the Platt Amendment passed by only one vote.⁴⁹ The Platt Amendment provided as follows:

The President of the United States is hereby authorized to *leave the government in control of the Island of Cuba to its people* so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

1. That the Government of Cuba shall never enter into any treaty or other pact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgement in or control over any portion of said island.

2. That said government shall not assume or contract any public debt to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which the ordinary revenues of the island, after defraying the current expenses of government, shall be inadequate.
3. That the Government of Cuba can sense that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.
4. That all acts of the United States and Cuba during its military occupancy thereof, are ratified invalidated and all lawful rights acquired thereunder shall be maintained and protected.
5. That the Government of Cuba will execute, and, as far as necessary, extend the plans already devised or other plans to be mutually agreed upon for the sanitation of the cities of the island, to the end that a recurrence of the epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.
6. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.
7. That to enable the United States to maintain the independence of Cuba, and to protect the people

44. Cuban Constitution of 1901, title XI, section 3, articles 99-102.

45. Cuban Constitution of 1901, title XII, section 3, articles 110-113.

46. Cuban Constitution of 1901, title XI, sections 1-3, articles 99-112.

47. Cuban Constitution of 1901, title XIV, articles 115.

48. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 161.

49. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 161.

thereof, as well as for its defense, the Government of Cuba will sell or lease to the United States lands necessary for coaling, or enable stations at certain specified points, to be agreed upon by the President of the United States.

Thus, commenced 33 years of Cuban protest against, and resentment towards, a document that authorized the United States to intervene in Cuban affairs to protect Cuban national interest and independence, and required the Cuban government to lease certain properties to the United States for military purposes. On March 28, 1934, the United States Senate, at Roosevelt's insistence, abrogated the Platt Amendment.⁵⁰

The Constitution of 1940

The Constitution of 1940, a remarkably progressive document, established some of the most advanced civil rights principles of its time.⁵¹ It guaranteed social, economic, educational and cultural rights and privileges, and facilitated agricultural and industrial development.⁵²

The Constitution of 1940 consisted of 19 titles, 286 articles, a transitory and a final disposition.⁵³ The Constitution of 1940, (a) endorsed the previously established form of government, specifically republican, democratic, representative and centralized; (b) confirmed individual rights and privileges including

private property rights; and (c) substantiated voting as a right, obligation and function of the people.⁵⁴

Under the Constitution of 1940, the separation between the three branches of government remained, but with obvious distinctions. Specifically, (a) Congress' form was changed to one representative in the house to every 35,000 citizens or greater fraction of 17,500, and nine senators per province; (b) the role of the prime minister was introduced;⁵⁵ and (c) the executive branch converted to semi-parliamentary form, where half of its ministers could also be congressmen.⁵⁶

The president's role became one of moderator, director and promoter of national solidarity. The president was empowered to freely nominate and remove ministers.⁵⁷ A Council of Ministers was created under the president's power which was authorized to: (a) legislate by decree with congressional supervision; and (b) proclaim states of national emergency.⁵⁸

House representatives and senators, elected to four-year terms, comprised the legislative power.⁵⁹ Senatorial terms were renewable every four years, while house representative terms were renewable every two years for two-year terms.⁶⁰ Despite its progressive character, the Constitution of 1940 proposed inadequate reforms with respect to the form, function and efficiency of provincial and municipal government.⁶¹

50. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 165.

51. See Cuban Constitution of 1940, articles 1-286. The Constitution of 1940 has been called the most progressive constitutional document in the Americas.

52. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, pp. 221-222.

53. Cuban Constitution of 1940, titles I-XIX, articles 1-286.

54. Cuban Constitution of 1940. See also De la Cuesta, *Constituciones Cubanas*, p. 59.

55. Cuban Constitution of 1940. It was thought that a prime minister could assist in mediation of governmental disputes and foster national unity.

56. Congress was authorized to interplead the ministers and provoke a crisis situation within the cabinet. De la Cuesta, *Constituciones Cubanas*, p. 59.

57. Cuban Constitution of 1940, title X, sections 1-2, articles 138-146.

58. Cuban Constitution of 1940, title X, sections 1-2, articles 138-146.

59. Cuban Constitution of 1940, title IX, sections 1-6, articles 119-137.

60. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 222.

61. Márquez Sterling and Márquez Sterling, *Historia de la Isla de Cuba*, p. 222.

The Constitution of 1940 ratified the power and separation of the judiciary. Specifically, the judicial branch remained autonomous and empowered to nominate judges and magistrates.⁶² Like the Constitution of 1901, and the U.S. Constitution, Supreme Court justices were appointed by the president and confirmed by the senate.⁶³

In addition, the Constitution of 1940 instituted a Court of Constitutional and Social Guarantees (the “Constitutional Court”) under the Supreme Court’s jurisdiction.⁶⁴ The Constitutional Court was empowered to hear labor and constitutional law matters, and determine remedies for violations thereof.⁶⁵

Under the Constitution of 1940, (a) provincial government was terminated; the provincial counsels, however, endured, but were now comprised of the mayors of various municipalities incorporated into each province; (b) the governor’s power to suspend mayors ceased, while the municipalities gained the right to tax locally; (c) public expenses and budgeting at all levels became subject to a ministerial officer under the auspices of a newly created Court of Public Administration; and (d) a Court of Public Works was instituted.⁶⁶

The constitutional amendment clause was very strictly enforced in the Constitution of 1940. Title XIX, article 285 (a)-(b) of the Constitution of 1940, required a constitutional convention to modify the lan-

guage of the Constitution. Congress, however, was authorized to make minor reforms to the document; *provided, however*, that the following requirements were adhered to: (a) quorum (joint session); (b) two-thirds vote of the total number of legislators; and (c) “doble consideración” or consideration of the proposed amendments at two consecutive legislative sessions.⁶⁷ Additionally, the Constitution of 1940 could also be reformed via a referendum clause.⁶⁸

The most notable difference between the Constitution of 1901 and the Constitution of 1940 was the addition of constitutional protection for issues relating to family, culture, property and labor.⁶⁹ Without constitutional antecedents and expertise in the area of protection of social rights, the drafters of the Constitution of 1940 sought guidance from Spain’s “Constitución de la Segunda República Española” and Germany’s “Weimar Constitution.”⁷⁰

The Constitution of 1940 was only in effect for 12 years.⁷¹ Its implementation during this short period of time, however, was extremely arduous. Despite its extraordinarily progressive character, the Constitution of 1940 encompassed doctrines that were (a) never totally achieved; (b) at odds with other constitutional doctrines; or (c) never implemented.⁷²

62. Cuban Constitution of 1940, title XIV, section 1, article 170.

63. Cuban Constitution of 1940, title XIV, section 2, articles 172-181.

64. Cuban Constitution of 1940, title XIV, section 3, articles 182-183. See also De la Cuesta, *Constituciones Cubanas*, p. 59.

65. Cuban Constitution of 1940, title XIV, section 3, articles 182-183.

66. De la Cuesta, *Constituciones Cubanas*, p. 60.

67. Cuban Constitution of 1940, title XIX, article 285.

68. Cuban Constitution of 1940, title XIX, article 285.

69. For example, the Constitution of 1940 provided for collective bargaining agreements negotiated between management and labor specifically providing for (a) unremovability in the workplace after six months and one day of employment, (b) raises, (c) one month’s paid vacation annually, (d) 9 paid sick days and 4 paid holidays per year, (e) payment of one and one-half time for overtime work, (f) reinstatement for arbitrary and unjust dismissal of a worker as well as compensation for said dismissal of 55% of the worker’s salary, (g) right to strike, and (h) 12-weeks paid maternity leave. See generally, Cuban Constitution of 1940, articles 1-285.

70. De la Cuesta, *Constituciones Cubanas*, p. 60.

71. De la Cuesta, *Constituciones Cubanas*, p. 60.

72. De la Cuesta, *Constituciones Cubanas*, p. 61.

Notwithstanding, the Constitution of 1940 represented an important post-New Deal document.⁷³ This document, one of the most serious political achievements of the Cuban people, was accomplished as a result of the astonishing collaborative efforts of numerous politicians.⁷⁴ Despite the almost enumerated laundry list of constitutional rights en- scribed in the Constitution of 1940, the document signaled a veritable endeavor towards social democra- cy and reform.⁷⁵ To implicate controversial legislative ideas in the text of a Constitution, meant, however, that opposition to those measures could lead to dis- cussion, criticism or even denunciation of the Con- stitution itself.⁷⁶

CONCLUSION

It is difficult to forecast Cuba's constitutional-politi- cal future. What is evident, however, is the historical perseverance of the Cuban people to be governed by a system of elected officials under the auspices of a document representing their will. One hundred and seventy two years after implementation of its first constitution, the Cuban nation, once again, desper- ately seeks its freedom and independence from tyran- nical rule. Castro's exodus will not be simple. With his imminent fall, however, the issue of constitution- ally protected fundamental rights must be confront- ed in a new and democratic Cuba. A good beginning embraces reimplementaion of the Constitution of 1940.

73. Hugh Thomas, *Cuba: The Pursuit of Freedom* (New York: Harper and Row, 1971), p. 719.

74. Thomas, *Cuba: The Pursuit of Freedom*, p. 719.

75. Thomas, *Cuba: The Pursuit of Freedom*, p. 719.

76. Thomas, *Cuba: The Pursuit of Freedom*, p. 720.