

A constitutional framework for a free Cuba

(PART TWO)
Alfred G. Cuzán

The Constitution of 1940

The Cuban Constitution of 1940, the product of an assembly elected for the purpose in which every political current, including that of the communists, participated, though short-lived, having been in effect a mere twelve years, soon attained mythic status among generations of Cubans.²⁹ Its legitimacy was such that, when Fulgencio Batista's 1952 coup d'état rendered it de facto inoperable, "its restoration soon developed into the rallying cry of the opposition movement".³⁰

In 1955, having emerged triumphant in a single-candidate "election" arranged the previous year, even the dictator himself felt compelled to declare that the constitution was again in effect. Following Batista's flight four years later, Fidel Castro initially pretended only to have had it amended, even though from the very beginning his regime was in clear violation of its most basic provisions, such as proscription of the death penalty, prohibition of expropriation of property, except for matters of public utility or interest, and then only after judicially-adjudicated compensation, independent courts, elections for legislative and executive offices, and amendment procedures. Today, nearly half a century after its disemboweling by Batista and betrayal by Castro, there are those who argue not only that restoration of the 1940 Constitution should be the first order of business of a post-Castro provisional government but that, it never having been abrogated, the 1940 Constitution remains in effect (in some sort of legal limbo, I suppose).³¹

Institutionally, the 1940 Constitution attempted to do the very thing which Shugart and Carey believe one should avoid, i.e., construct a "presidential-parliamentary" republic.³² It provided for separate but concurrent elections of a president and a bicameral congress, all to a four-year term, with half the lower house elected every two

years. The president was free to appoint and dismiss members of his cabinet, but these, including a prime minister, were responsible to the congress. Either house could interpellate and censure ministers individually or the cabinet as a whole, upon which vote of no confidence they were required to resign. The president, however, was free to reappoint them to another portfolio.

As diagnosed by Shugart and Carey, this recipe was, indeed, problematic.³³ Too much scarce congressional energy (and it was scarce, absenteeism being rampant) was spent in a tug of war with the president over his ministers. On one occasion, the congress censured the Minister of Commerce, whereupon President Ramón Grau San Martín made manifest his contempt of the legislature by promoting him to head Foreign Relations, an action that left the opposition frustrated and bitter.

A contemporary analyst noted that "dangerous friction between executive and legislative branches in the years 1945-1947 presage further deterioration in the chances of ultimate successful operation unless both branches cooperate earnestly to give meaning to the Constitution".³⁴ But the problem was not only that of a lack of good will on the part of political

adversaries, which was undoubtedly in short supply, with demagogic scandal-mongering and irresponsible oppositionism the order of the day, but also structural, the consequence of a "confused" division of authority between the president and the congress over the cabinet.³⁵

Two other structural problems in the 1940 Constitution are worth mentioning. One, shared with many others in Latin America, prohibited the immediate reelection of the president, but allowed him to run again after two terms had elapsed. One can expect such a rule to have two effects. One, in his first term the president will cause some political capital to be spent by adherents and detractors alike over a scheme to amend the constitution to allow him to run for reelection. Two, if this stratagem fails, following the end of his term the former president will not abandon the spotlight completely, but from time to time will call attention to himself, hoping for a comeback. Nor he will let go the reins of his political party.³⁶

This appears to have happened in the case of President Grau San Martín, elected in 1944. First, he intrigued to amend the constitution. That went nowhere, it having met with opposition even from within his own party, the Auténticos. So, after vacating the presidential palace he lost no time in criticizing his successor, Carlos

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Prío Socarrás, a former protégé, expressing regret at having “made” him president and characterizing him as an “unfaithful disciple”.³⁷ That set the two men at loggerheads. For his part, Batista, who had won a senate seat in 1948, and was eligible for election to the presidency in 1952, entered the race. A May 1951 survey showed him trailing badly, with only 20 percent of respondents favoring his candidacy. Less than a year later, the Auténticos still outnumbered Batista’s party two to one among registered voters.³⁸ Three months before the election, he staged a coup.

If it is a mistake to prohibit presidential reelection—and I believe it is—the error is only compounded by allowing the president to try again after sitting out one or two terms. Better to limit the president to one sole term, as is done in Costa Rica, than having him waiting in the wings until he is eligible to run again. However, even this does not solve the problem because, during his one and only term, the president still has the incentive to scheme to change the constitution so that he can run for reelection.³⁹

The last organic problem in the 1940 Constitution I will take up has to do with the organization of provinces. It provided for the election of a governor, but not of a provincial assembly. Rather, a provincial council, made up of all the mayors of the province, was to exercise the legislative power. It was given authority to draw up a budget, to be financed by assessing each member municipality a quota in proportion to its revenues. In this aspect, the provincial government resembled a confederal arrangement. Not having read any studies of their operations, I have no empirical knowledge how the provincial governments worked in practice. However, my guess is that they were plagued by collective action and free-rider problems that are the bane of confederations, i.e., indifference on the part of many of their members, great difficulty in getting them to agree to undertake projects of common interest, and many municipalities falling in arrears with their financial obligations.

That said, and without minimizing the seriousness of these organic flaws, the Cuban Constitution of 1940 amounted to an earnest attempt to decentralize authority in a manner that is consistent with consensual democracy. Specifically, it provided for a bicameral congress, judicial review, an electoral tribunal administered by the judiciary, a Tribunal de Cuentas (a national inspector of accounts charged with auditing the books of all government entities), and municipal autonomy. At a time when most of Latin America and Europe was under the thrall of one dictatorship or another or rent by political conflict, this was no mean feat. As Thomas puts it, “The new Constitution was one of the most serious political achievements of the

Cubans, and it was achieved as a result of an unusual degree of cooperation between the different politicians.”⁴⁰

²⁹ René Gómez Manzano, “Constitución y Cambio Democrático en Cuba”, *Cuba in Transition*, 1997, 7, 395-414; Néstor Carbonell Cortina, “La Constitución de 1940: Simbolismo y Vigencia”, *Cuba in Transition*, 1997, 7, 415-421.

³⁰ Marifelli Pérez Stable, *The Cuban Revolution. Origins, Course, and Legacy*, Second Edition, New York: Oxford University Press, 1999, 9.

³¹ José D. Acosta, “El Marco Jurídico-Institucional de un Gobierno Provisional de Unidad Nacional en Cuba”, *Cuba in Transition*, 1993, 2, 61-84.

³² I have relied on Spanish and English versions of the text of the 1940 Constitution. For the former, see Mariano Sánchez Roca, *Leyes Civiles de Cuba y su Jurisprudencia*, Vol. I, La Habana, Editorial Lex, 1951, 1-100 and, for the latter, Amos J. Peaslee, *Constitutions of Nations*, Volume I, Concord, NH: The Rumford Press, 1950, 526-594. For the motivations of the drafters, and how well the system actually worked in practice, see William S. Stokes, “The Cuban Parliamentary System in Action, 1940-1947”, *The Journal of Politics*, 1949, 11 (2), 335-364; Hugh Thomas, *Cuba or The Pursuit of Freedom*, Updated Edition, New York: De Capo Press, 1998, 691-789; Charles D. Ameringer, *The Cuban Democratic Experience. The Auténtico Years, 1944-1952*, Gainesville: University Press of Florida, 2000.

³³ This is not to deny that extra-constitutional factors played at least as important a role in the demise of Cuban democracy. The appeasement of political gangsters by both Grau and Prío was a particularly nefarious practice. See Ameringer, *The Cuban Democratic Experience*.

³⁴ Stokes, “The Cuban Parliamentary System”, 362.

³⁵ Something pointedly denied by Carbonell, who concludes that “los fallos de nuestro sistema semiparlamentario [...] no fueron realmente orgánicos, sino funcionales-producto de viejas corruptelas y de hábitos presidencialistas arraigados. Esos fallos son superables, a mi juicio, con una buena dosis de la democracia, experiencia, y probidad”, Carbonell, “La Constitución de 1940”, 421.

³⁶ Recent examples of newly-elected presidents who made it a priority to change the constitution to allow their reelection are Menem in Argentina, Cardoso in Brazil, and Fujimori in Perú. For its part, Venezuela offers two examples of former presidents who, bent upon making a come-back, prevented their parties’ renewal: APRA’s Andrés Pérez and COPEI’s Rafael Caldera. These two men bear at least some responsibility for the decline of their respective parties, an erosion which paved the way for the populist demagogue Hugo Chávez to sweep the political slate clean.

³⁷ Ameringer, *The Cuban Democratic Experience*, 77-78.

³⁸ *Ibid.*, 153, 162.

³⁹ True, now that it does not have to accommodate José Figueres (elected first in 1953 and then again in 1970), Costa Rica is free of that problem. But there the tradition of one-term presidents has taken such deep roots that presidents see no mileage in taking it on.

⁴⁰ Thomas, *Cuba*, 720.

In his next article professor Cuzán will offers us his proposed constitutional framework.