

WHITHER THE REVOLUTION? FRAMING POLITICAL ANIMOSITIES BETWEEN SEXUAL MINORITIES AND CHURCHES IN CUBA’S NEW CONSTITUTION

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I. INTRODUCTION

No liberal state by the standards of the West’s capitalist democracies, Cuba provides its citizens with qualified rights of expression, assembly, and religious exercise. These rights are qualified—from a liberal perspective—because they remain subject to the ongoing political interpretation of the Cuban Revolution (“Revolution”), a 1959 *coup d’état* that has morphed into a touchstone for socialist law on the island. In 2018, Cuba began a constitutional reform, the first since the adoption of the 1976 Constitution.² The

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² See *infra* text accompanying notes 98–109.

constitutional reform considered whether to introduce more market institutions into a command economy, how to promote self-employment, how to recognize modified forms of private property, and how to improve the island's complex currency system.³ The reform also considered noneconomic issues about the role of civil society, fundamental rights, and political participation.

This Article examines what became the most prominent and contentious constitutional conflict—how the state should define civil marriage given the conflicting political preferences of heteronormative churches and sexual minorities. These political conflicts play out routinely in liberal democracies with established constitutional frameworks, but the open antagonism between churches and sexual minorities had never erupted with such force in post-Revolutionary Cuba. Moreover, the political claims on behalf of churches took hold in a formally antireligious country whose ideology had long stripped churches of any meaningful political power.

What triggered the conflict was a provision in the draft constitution of the Cuban Communist Party (“Party”) that would have allowed gays and lesbians to marry—Article 68.⁴ This provision triggered spirited opposition from Protestant churches (many supported by U.S. groups) and the Cuban Conference of Catholic Bishops, who joined forces to successfully block the measure. The constitutional text that was finally adopted in 2019 (“2019 Constitution”) dropped Article 68 though it did not—as urged by the Catholic-Protestant alliance—define marriage in cross-sex terms. Instead, a national referendum on family law will have the last word on marriage as a legal, though not constitutional, matter, a solution that completely satisfies no one.

Cuba's critics have long praised civil society as a wellspring of democratic potential and equality, stymied by a malefactor state opposed to individual rights.⁵ This time, however, the marriage debate reversed these roles as religious leaders and their followers in civil society kept the government from promoting equality for sexual minorities. Constitutionalizing the right to same-sex marriage would have been a major human rights accomplish-

³ William LeoGrande, *Book Review: The Ideological Challenges of Cuban Socialism*, 45 *LAT. AM. PERSPECTIVES* 156 (2018).

⁴ As proposed, Art. 68, CONST. CUBA (draft 2018) read as follows:

Marriage is a voluntary union between two legally eligible people for the purpose of creating a shared life. It rests in the absolute equality of rights and duties of spouses, who are obligated to maintain the home and to raise their children through joint effort, in a way that is compatible with the development of their social activities. (translated text)

Cuba's Draft Constitution of 2018, constituteproject.com, archived at <https://perma.cc/XSA8-J446>.

⁵ See, e.g., U.S. STATE DEPARTMENT, *U.S. Statement of UPR Review of Cuba's Human Rights Record* (May 16, 2018), <https://cu.usembassy.gov/u-s-statement-at-upr-review-of-cubas-human-rights-record/>, archived at <https://perma.cc/L6NC-JSKH>.

ment. Other Latin American countries have legalized same-sex marriage, but none have elevated it to constitutional status.⁶

Despite the political losses of sexual minorities and their allies, many see the pitched struggle over marriage as a positive turning point in political participation by Cuba's civil society, given that the Cuban government changed course in response to the demands of civil society.⁷ Make no mistake though—Cuba has not now become a conventional Western democracy, as the 2019 Constitution recognizes communism, socialism, and Marxism as political foundations of the state.⁸ The constitutional reform did, however, involve a quasi-liberal form of public political debate and constitutional balancing of competing fundamental rights, including equality, freedom of expression, and religious liberty.⁹

A recent article in the *Christian Science Monitor* asked whether churches and sexual minorities can both advance in a future Cuba.¹⁰ If the experience of other countries is any indicator, these constituencies can coexist only in permanent conflict because heteronormative churches and sexual minorities stand for antithetical values. Much will turn on the rising power of Cuba's Catholic Church ("Church"). Evangelicals and other Protestants have gained followers, but Catholicism remains the island's largest religious denomination.¹¹ To understand the path forward, one must appreciate how the constitutional reform formalized emerging political tensions between sexual minorities and heteronormative churches (in particular *the Church*). To that end, the Article uses social history, legal analysis, and constitutional interpretation to examine how the 2019 Constitution frames these tensions going forward.

Parts II and III survey how (ironically enough) the Church and sexual minorities faced parallel destinies after the Revolution—first as counter-Revolutionary pariahs excluded from political life and now as rights-bearing subjects empowered to make constitutional demands. Part I rebuts the popu-

⁶ In Ecuador, Colombia, and Brazil, courts have recognized the right to marriage of same-sex couples; in Uruguay and Argentina, legislatures have granted the right; and in Mexico, the Supreme Court has recognized the right, but it has not been implemented uniformly across the country. David Masci, PEW RESEARCH CENTER, *Courts Same-Sex Marriage Around the World* (Oct. 28, 2019), <https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/>, archived at <https://perma.cc/N9J3-BDRU>.

⁷ Elizabeth Malkin, *Cubans Approve a Constitution, but Opponents Speak Out*, N.Y. TIMES, Feb. 25, 2019, <https://www.nytimes.com/2019/02/25/world/americas/cuba-constitution-vote-referendum.html>, archived at <https://perma.cc/MK5H-TDKE>.

⁸ Art. 4, 5, & 6, CONST. CUBA (2019).

⁹ See *infra* text accompanying notes 110–136.

¹⁰ Storey Hinckley, *In today's Cuba can churches and LGBTQ rights each find a way forward?*, CHRISTIAN SCIENCE MONITOR (Jun. 3, 2019), <https://www.csmonitor.com/World/Americas/2019/0603/In-today-s-Cuba-can-churches-and-LGBTQ-rights-each-find-path-forward>, archived at <https://perma.cc/YYN3-39X8>.

¹¹ A 2015 study sponsored by the Washington Post and Bendixen & Amandi found that 27% of Cubans consider themselves Catholic, 13% practice Santeria, and 7% are Evangelical or Protestant. Fernand R. Amandi, *National Survey of Cubans Living in Cuba* (Apr. 2015), <http://cubastudygroup.org/polls/2015-washington-post-univision-bendixen-associates-poll-of-cubans-living-in-cuba/>, archived at <https://perma.cc/7Z9U-ZDDF>.

lar narrative that the Revolution converted a country with religious freedom into an atheist regime that persecuted Catholics and other people of faith through a Marxist inquisition that forbade private conscience.¹² That is not true. Cuba's pre-Revolutionary constitutions had provided qualified freedom for religious exercise that did not offend Christian values, a vestigial reminder of the island's past as a Catholic Spanish colony. As its economy became integrated into that of the Soviet Union, Cuba dismantled the island's religious institutions, prohibiting public displays of faith, and discriminating selectively against religious adherents. Unlike the Soviet Union, however, the Revolution did not ban private religious exercise in order to promote state atheism. Under the Revolution, Cuba became neither atheist nor secular, but, instead, adopted a pragmatic—some might say opportunist—approach to religion that left the door permanently open to ongoing policy adjustments. Tolerance for religion in Cuba increased after the demise of the Soviet economic bloc.

Part III notes a similar process of marginalization followed by tolerance for sexual and gender minorities, especially feminine or sex-nonconforming male homosexuals.¹³ The Revolution equated heterosexuality with male virility with patriotism and tarred homosexuality and male effeminacy as diseases of bourgeois decadence. Homosexuals recognizable as such were (like Catholics) excluded from the Party, and, for a time, interned in labor reeducation camps. The landscape for sexual and gender minorities improved in the 1990s, thanks largely to the efforts of Mariela Castro, daughter of Raul Castro.¹⁴ Once sidelined as counter-Revolutionaries, both the Church and sexual minorities became rights-bearing and rights-seeking political subjects, who would vie for official recognition during the constitutional reform.

Part IV traces how religious groups and sexual minorities faced off in rough and tumble constitutional debates, stunning observers who expected the potted formalism of Cuban politics that has sometimes been in view.¹⁵ Religious groups defeated the Party's attempted reform of marriage on behalf of sexual minorities and added a sentence to the 2019 Constitution saying that Cuba is a secular country. No small thing, this redesignation matters because it broke from the Revolution's strategic indeterminacy about religion in favor of a more conventional framework common in liberal democracies. Sexual minorities got something too. The 2019 Constitution prohibited discrimination on the basis of sexual orientation, gender, and gender identity, redefined marriage as just one of several alternative family arrangements, and removed the previous link between marriage and reproduction. Going

¹² See *infra* text accompanying notes 20–68.

¹³ See *infra* text accompanying notes 69–97.

¹⁴ In 2016, HBO aired a documentary about Mariela Castro's role in mobilizing sexual and gender minority rights in Cuba, *Mariela Castro's March: Cuba's LGBT Revolution*, <https://www.hbo.com/documentaries/mariela-castros-march-cubas-lgbt-revolution>, archived at <https://perma.cc/MW7L-GMSV>.

¹⁵ See *infra* text accompanying notes 110–136.

forward, sexual minorities and religious groups will compete to influence the regulation of families and intimate life, albeit in diametrically opposing directions.

The constitutional reform tested (and breached) the *cordon sanitaire* that had long limited the political power of churches.¹⁶ Their appetites whetted by these political successes, Cuban bishops now seek to recover the corporate privileges enjoyed before the Revolution. This episode obliges the Cuban government to consider which side of the debate—marriage equality or religious liberty—best comports with its ideological commitments going forward. Part IV concludes by urging the Cuban government to side with sexual minorities, the policy position that best contributes to renewing the Revolution as an ongoing symbol of social transformation. As they demonstrated during the reform, the island's churches urge a return to pre-modern social values rejected not only by the Revolution, but by liberal democracies as well. In contrast, what sexual and gender minorities seeks complements the Revolution's doctrinal commitment to transform the social order.

In warning about the Church's ongoing threats to individual freedom, this Article speaks to and from the concerns that animate an individual's freedom *from* religion—insulation from the direct imposition of another's religious views as well as protection from the indirect imposition of such views through state structure. When fundamental rights clash with the Church's doctrine or its corporate privileges—and by definition they must in any modern society—the Church moves to quash those rights.¹⁷ This does not make the Church bad; it must obey its nature, just as secular societies should obey their nature by containing political overreaching in the name of God.¹⁸ Arguing for limits on religious exercise may not change legal doctrine in the United States, where constitutional law favors religious interests so much that even for-profit businesses can demand religious privileges based on those enjoyed by individuals.¹⁹ However, Cuba can provide more muscular protection for freedom from religion consistent with the renewal of its critical political tradition.

¹⁶ See *infra* text accompanying notes 119–121, 130–138.

¹⁷ When secular law clashes with Church doctrine, some Catholic legal authorities urge a practitioner to put the religious claim first. In this view, the primacy of Church doctrine means that the Catholic judge involved in a proceeding that may require her to impose the death penalty recuse herself rather than disregard the religious mandate or, also unacceptable, conform secular law to sectarian doctrine. Amy C. Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303 (1997-1998).

¹⁸ Moreover, none of this denies the good that the Church does in Cuba and elsewhere in terms of its ministry to the needy. For example, in June 2019, the Church opened a home for the elderly in Camaguey. See *Cuban archdiocese opens home for the elderly*, CATHOLIC NEWS AGENCY (June 6, 2019), <https://www.catholicnewsagency.com/news/cuban-archdiocese-opens-home-for-the-elderly-72379>, archived at <https://perma.cc/4M6C-BXGH>.

¹⁹ Mala Corbin, *Corporate Religious Liberty*, 30 CONSTITUTIONAL COMMENTARY 277 (Feb. 1, 2015).

II. THE REVOLUTION'S EVOLVING STANCE ON CHURCH POWER

With some prominent exceptions, much U.S. legal scholarship about Cuba does not put Cuban institutions in their actual political context.²⁰ This is unfortunate because Cuba's idiosyncratic modification of legal institutions is a defining characteristic.²¹ Cuba's approach to religious freedom is a cardinal example of this legal distinctiveness. Church-state relations since the Revolution have passed through three separate major phases. Initially, the Revolution carried over the political formula for religious freedom that emerged after Cuba's independence from Spain. In tandem with the Sovietization of Cuba, the Cuban government actively opposed institutional religion and subordinated rights of self-expression and religious freedom to Marxist principles, manifested most explicitly in the Constitution of 1976. After the demise of the Soviet Union, Cuba adopted a more formally tolerant stance towards religion, illustrated by constitutional amendments made in 1992.

A. *Post-independence Separation of Church and State*

In other European countries, the Protestant Revolution challenged the hegemony of the Church. As a result, many states that had adopted Catholicism as a state religion became more secularized in response to Protestant demands.²² Not so in Spain, which, since the 15th century, embraced and protected the Catholic faith. Consequently, the Church was a joint partner in Spain's efforts to colonize what would become Latin America. As a colonial power, Spain served as a portal for a different notion of sovereignty in its colonies. Unlike the Enlightenment-infused notion of popular sovereignty of the United States and French Revolutions, Spain promoted a standard of sovereignty that limited individual rights of self-expression and accorded more protection of the Church.²³ Latin American independence movements

²⁰ Observers often posit values alien to Cuban socialism, e.g., neoliberal economics, regime change, and then proceed to answer political questions that do not actually arise in Cuba. Larry Catá Backer is the most prominent legal scholar who understands and analyzes the internal logic of Cuban law and institutions. See, e.g., Larry Catá Backer, *The Cuban Communist Party at the Cusp of Change* in REFORMING COMMUNISM: CUBA IN A COMPARATIVE PERSPECTIVE 157–191 (Scott Morgenstern and Jorge Pérez López, ed., 2018); Larry Catá Backer, CUBA'S CARIBBEAN MARXISM: ESSAYS ON IDEOLOGY, GOVERNMENT, SOCIETY, AND ECONOMY IN THE POST-FIDEL ERA (2018).

²¹ I have tried to do the same in previous articles. José Gabilondo, *Economic Coercion and the Limits of Sovereignty: Cuba's Sanctions Claim Against the United States*, 20 HARV. LATINX L. REV. 51 (2017); José Gabilondo, *Cuban Claims: Embargoed Identities and the Cuban-American Oedipal Conflict (el grito de la Yuma)*, 9 RUTGERS RACE & L. REV. 335 (2008); José Gabilondo, *Sending the Right Signals: Using Rent-Seeking Theory to Analyze the Cuban Central Bank*, 27 HOUS. J. INT'L L. 483 (2005).

²² See DAVID MARTIN, A GENERAL THEORY OF SECULARIZATION (1978). See also Peter L. Berger, *The Desecularization of the World: A Global Overview*, in THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS (Peter L. Berger ed., 1999).

²³ Ted Piccone and Ashley Miller, *Cuba, the U.S., and the concept of sovereignty: Toward a common vocabulary?*, BROOKINGS INSTITUTE (Dec. 19, 2016), <https://www.brookings.edu/>

of the 18th and 19th century succeeded in throwing off the Spanish crown, but the Church remained in place, an early demonstration of its ability to survive by mutating. Indeed, Catholic political power is one of the constants in the varied historical paths followed by countries in Latin America. To this day, the Church continues to enjoy a favored status in Spain's former colonies.²⁴

During Cuba's war of independence, a minority of Catholic clergy on the island defended the insurgency, but the Church supported Spain.²⁵ During the first occupation by the United States, Cuba adopted a constitution in 1901 that formally separated the state from any religious institution.²⁶ This Constitution invoked God in the preamble, though it separated church and state, prohibited the state from supporting any particular religion, and guaranteed a qualified form of religious freedom, so long as it did not offend "Christian morality and public order."²⁷

Essentially the same standard survived through the constitutions of 1934, 1935, 1940, and 1952.²⁸ Seen as the high-water mark of Cuba's political history, the constitutional convention of 1940 revisited the place of religion and ended up affirming the preexisting arrangements.²⁹ Protestant churches had tried to limit the Church's political influence, in particular over educational policy.³⁰ Article 55 established the public education was secular, but that private schools, subject to regulation and inspection by the state, could teach religion.

After the United States officially left Cuba in 1902, the Church had begun to rebuild its relationships with the island's remaining Spaniards and the urban middle class.³¹ On the eve of the Revolution, the island's Church retained strong ties to Franco's Spain, the Batista regime, and the Cuban middle and upper classes, particularly in cities. In 1959, when it succeeded in ousting Fulgencio Batista from the presidency, the Revolution confronted a Church whose doctrine emphasized individual charity rather than social reforms as a way to deal with economic inequality.³² The Church also retained its peninsular character as suggested by the fact that in 1959 about 2,500 of the island's 3,000 priests were from Spain.³³ Nevertheless, some

research/cuba-the-u-s-and-the-concept-of-sovereignty-toward-a-common-vocabulary/#foot-note-8, archived at <https://perma.cc/5ZBT-MUDN>.

²⁴ ALFREDO GRIMALDOS, *LA IGLESIA EN ESPAÑA: 1977-2008* (2008).

²⁵ JOHN KIRK, *BETWEEN GOD AND THE PARTY: RELIGION AND POLITICS IN REVOLUTIONARY CUBA* 35–36 (Board of Regents of the State of Florida, 1989).

²⁶ Art. 26, CONST. CUBA (1901) in LEONEL DE LA CUESTA, *CONSTITUCIONES CUBANAS* 136–176 (Alexandria Library, 2007).

²⁷ *Id.*

²⁸ *Id.*

²⁹ NÉSTOR CARBONELL CORTINA, *GRANDES DEBATES DE LA CONSTITUYENTE CUBANA DE 1940*, 65–73, 193–208, 258–275 (Ediciones Universales, 2001).

³⁰ See Kirk, *supra* note 25, at 44.

³¹ See *id.* at 39–40.

³² Margaret Crahan, *Catholicism in Cuba*, 19 *CUBAN STUDIES* 6 (1989).

³³ Margaret Crahan, *Freedom of Worship in Revolutionary Cuba*, in *THE CUBA READER: THE MAKING OF A REVOLUTIONARY SOCIETY* (Philip Brenner ed., 1989).

within the island's Catholic hierarchy supported Castro's challenge to Batista.

Animosity between the Church and the Revolution emerged quickly.³⁴ In 1959, over one million people gathered in Havana at a National Catholic Congress that formally rejected communism.³⁵ In 1960, the Church celebrated the anniversary of Francisco Franco's armed uprising against Spain's democratically established Second Republic.³⁶ As it lost access to United States markets for sugar, Cuba began to substitute the Soviet Union as its major trading partner. That same year, Cuba entered into a five-year trade and financing agreement with the Soviet Union.³⁷ The Church vigorously opposed these attempts to enhance the island's economic position.³⁸ Castro's announcement that the new government was socialist increased the polarization.

Things would come to a head in 1961 after the Bay of Pigs invasion. The United States had hoped that the Bay of Pigs would proceed as had the U.S.-supported coup in 1954 in Guatemala.³⁹ The Cuban invasion included four Spanish priests and was directed by a prominent member of a lay Catholic organization, *Agrupación Católica*, validating the Cuban government's perception that the Church was aligned with counterrevolutionary activities and the United States.⁴⁰

As the antagonism grew between the Revolution and the Church, seen as counter-revolutionary, the Cuban government abandoned the church-state arrangements that had continued essentially unbroken since Cuba's independence from Spain. Catholic bishops lost political power, control over their schools, substantial properties, and their status as leaders of the government's favored religion. On May 1, 1961, the government nationalized all private schools, including religious ones, and prohibited public religious processions.⁴¹ This triggered the departure from Cuba of many Catholics, which contributed to the marginal position of the Church in the following years.⁴² Though the island's bishops had lost all political power by this point, Cuba maintained diplomatic relationships with the Vatican.⁴³ During this period, the government carried out some of its most harsh persecution of religious opponents of the Cuban government. Nevertheless, as late as 1963,

³⁴ Joseph Holbrook, *The Catholic Church in Cuba 1959-62: The Clash of Ideologies*, 2 INT'L J. OF CUBAN STUD. 264-275 (Autumn/Winter 2010).

³⁵ Crahan, *supra* note 32 at 8.

³⁶ See Kirk *supra* note 25 at 83.

³⁷ MARIFELI PÉREZ-STABLE, THE CUBAN REVOLUTION: ORIGINS, COURSE, AND LEGACY 79-80 (Oxford, 1999).

³⁸ See Kirk *supra* note 25, at 76-77.

³⁹ PÉREZ-STABLE, *supra* note 37 at 80.

⁴⁰ Crahan, *supra* note 32 at 6.

⁴¹ *Id.*

⁴² Holbrook, *supra* note 34 at 264-275.

⁴³ Thomas Quigley, *The Catholic Church and Cuba's International Ties*, in RELIGION, CULTURE, AND SOCIETY: THE CASE OF CUBA, A CONFERENCE REPORT 95-96 (Margaret Crahan ed., 2003).

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Fidel Castro still noted that the Revolution respected private religious freedom.⁴⁴

By relegating the Church to private ministry, Cuba was able to safeguard some human rights more effectively than other Latin American countries had done. In 1965 Cuba became the first Latin American country to legalize abortion, noteworthy in a region where women and girls still lack basic reproductive rights because of laws based on religious notions about the fetus.⁴⁵

The Revolution's symbolic challenge was to create a master narrative, one that would necessarily displace the frameworks for meaning offered by the Church. Eventually Cuba would get a new Trinity: the Revolution, the nation, and Fidel Castro. This symbolic project continued through 1965 as Fidel Castro established the Central Committee of the Party, which would become the custodian of the Revolution as a political symbol.⁴⁶ In 1968 the government banned the public celebration of Christmas in connection with the sugar harvest.⁴⁷ Catholic churches remained free to minister to the faithful, though they lost all state support.

Though ousted from the island, the Church's experience in Cuba would contribute to the systemic changes initiated by the Second Vatican Council

⁴⁴ In a famous speech on the steps of the University of Havana, Castro emphasized the Revolution's tolerance for religion:

The Revolution stood firm in its principles of respect for the religious beliefs of any citizen, their respect for worship. It did not occupy churches, it did not close churches, it did not impede the activities of any priest willing to perform his proper religious functions, and it can even be said that the conflicts between the Revolution and the Catholic Church began to disappear. (text translated by author)

Discurso pronunciado por el Comandante Fidel Castro Ruiz, Primer Ministro del Gobierno Revolucionario de Cuba, en la clausura del acto para conmemorar el VI aniversario del asalto al Palacio Presidencial, celebrado en la Escalinata de la Universidad de la Habana, DEPARTAMENTO DE VERSIONES TAQUIGRAFICAS DEL GOBIERNO REVOLUCIONARIO (Mar. 13, 1963), <http://www.cuba.cu/gobierno/discursos/1963/esp/f130363e.html>, archived at <https://perma.cc/Z243-TM7H>.

⁴⁵ Not until 2012 would another Latin American country—Uruguay—do the same. See *Uruguay: New Abortion Law Breaks Ground for Women's Rights*, HUMAN RIGHTS WATCH (Oct. 26, 2012), <https://www.hrw.org/news/2012/10/26/uruguay-new-abortion-law-breaks-ground-womens-rights#>, archived at <https://perma.cc/LT2L-ATZT>. Of the 33 countries that comprise Latin America, abortion is legal only in Cuba, Uruguay, Guyana, and Mexico. Annie Kelley, *Latin America's fight to legalize abortion: the key battlegrounds*, THE GUARDIAN, Aug. 9, 2018, <https://www.theguardian.com/global-development/2018/aug/09/latin-america-fight-to-legalise-abortion-argentina-brazil-chile-venezuela-uruguay-colombia-el-salvador-peru>, archived at <https://perma.cc/37AH-3MN9>. As of 2008, Latin America had the world's highest rate of unsafe abortions, resulting in more than 1,100 deaths of women. WORLD HEALTH ORGANIZATION, UNSAFE ABORTION INCIDENCE AND MORTALITY: GLOBAL AND REGIONAL LEVELS IN 2008 AND TRENDS DURING 1990-2008.

⁴⁶ PÉREZ-STABLE, *supra* note 37 at 111. See also generally LOUIS A. PEREZ, JR., CUBA BETWEEN REFORM AND REVOLUTION (1988).

⁴⁷ *A Recent History of Christmas in Cuba*, CUBA J. (Nov. 29, 2015), <http://cubajournal.co/a-recent-history-of-christmas-in-cuba/>, archived at <https://perma.cc/97LB-LXU4>.

in 1961 (“Vatican II”).⁴⁸ Vatican II put in place several changes that made the Church more attractive to followers in Latin America, where structural inequality left the ground fertile for radical political movements promising change.⁴⁹ The Cuban experience left the Church more open to liberation theology in Latin America, seen as a way of avoiding further losses of adherents to leftist orientations.⁵⁰ Accordingly, after Vatican II the Church would become more aligned with the government’s policies.⁵¹ This culminated in pastoral letters for 1968 and 1969 by Cuban bishops condemning the United States embargo of Cuba and encouraging Catholics to cooperate with Marxists.⁵²

B. *The 1976 Constitution: Scientific Materialism*

The first post-Revolutionary statement of constitutional principles, the Organic Law of 1959, maintained the formal separation of church and state that had emerged during the first U.S. occupation.⁵³ The 1976 Constitution adopted the second post-Revolutionary legal standard for religious freedom. Though based loosely on the 1936 Soviet Constitution, the 1976 Constitution did not go as far as the Soviet text had in terms of enforcing state atheism. Without prohibiting the private exercise of faith, the 1976 Constitution adopted scientific materialism as the country’s guiding principle, a philosophy that emphasizes the scientific method, empiricism, and strategies to promote class-consciousness. In this framework, religious claims rank low because faith exempts subjective accounts of truth from critical or scientific examination. Also, religious ideas may keep workers from appreciating the true terms of their subordination by capitalism. If a church is also closely allied with the moneyed classes, this makes it even more incompatible with a communist project. Consequently, communist programs of action tend to make it a priority to take apart existing concentrations of religious power.

The 1976 Constitution (and all subsequent constitutional reforms) recognized the fundamental right to practice any religion or none at all, though it removed the invocation of God in its preamble. However, the constitutional text subordinated religious liberty to socialist values. Article 54 stated that individuals enjoyed freedom of conscience and religion, so long as it did not violate the person’s duty to the Revolution, a highly indeterminate standard that would violate the notions of religious freedom of most capitalist democracies.⁵⁴

⁴⁸ Jordan Teicher, *Why Is Vatican II So Important?*, NPR (Oct. 10, 2012), <https://www.npr.org/2012/10/10/162573716/why-is-vatican-ii-so-important>, archived at <https://perma.cc/R2HD-TZ4U>.

⁴⁹ Crahan, *supra* note 32 at 11–12.

⁵⁰ Holbrook, *supra* note 34 at 264.

⁵¹ See *supra* note 25 at 169.

⁵² Crahan, *supra* note 32 at 12.

⁵³ Art. 35, Ley Fundamental de la Republica de Cuba de 7 de Febrero de 1959 in LEONEL DE LA CUESTA, *CONSTITUCIONES CUBANAS* 400–464 (Alexandria Library, 2007).

⁵⁴ Art. 54, CONST. CUBA (2019) read:

The majority of commenters interpret the 1976 Constitution's approach to religion to mean that Cuba became an atheist country. I reject this assertion because neither the text nor related political documents mandate state atheism as a formal matter.⁵⁵ Moreover, some forms of atheism might not be able to survive the proof requirements of scientific materialism.⁵⁶ Scientific materialism does not forbid religion a priori, but claims based on religion are unlikely to amount to much in a system that rejects the supernatural. Indeed, some Cuban Catholics—including an official from the Cuban Conference of Bishops—welcomed the new standard because it provided textual support for some degree of religious freedom.⁵⁷

C. *Post-Soviet Constitutional Amendments: Creeping Secularism*

Beginning in the 1980s, Fidel Castro and the Party softened their anti-religious stance, which dovetailed with the Church's liberalizing trends after Vatican II. During the 1980s, Fidel Castro began to express some support for the Church by suggesting that its goals could be aligned at least in part with those of the Revolution.⁵⁸ Beginning in 1986, the Revolution began to undergo a process of "rectification" to adjust official policies to contemporary conditions.⁵⁹ The Party's Central Committee set up an Office of Religious Affairs, which increased the visibility of the Church and its involvement with the state.⁶⁰ The government had become more tolerant of religion, but the fundamental constitutional standard remained the same.

In 1992, after the break-up of the Soviet trading community, the 1976 Constitution underwent reforms as Cuba adapted to a world without its chief

The socialist State, which bases its activity and educates the people on the materialistic scientific conception of the universe, recognizes and guarantees the freedom of conscience, the right of everyone to profess any religious belief and to practice, within the framework of respect for the law, the belief of their preference. 2. The law regulates the activities of religious institutions. 3. It is illegal and punishable by law to oppose one's faith or religious belief to the Revolution, to education or to the fulfillment of the duty to work, to the defense of the homeland with arms, to reverence for its symbols and to other duties established by the Constitution. (translated text).

Cuba's Constitution of 2019, constituteproject.com, archived at <https://perma.cc/U4M4-UVS9>.

⁵⁵ Some also see the earlier polarization in 1961 between the Church and the Revolution as evidence that the island had become atheist. See MARK JUERGENSMEYER AND WADE CLARK ROOF, *ENCYCLOPEDIA OF GLOBAL RELIGION* 267 ("In 1961, Cuba was officially proclaimed an atheist country.")

⁵⁶ Cuba's application of scientific materialism to the economy has not performed as hoped although, at least until recently, Cuba had raised the standard of living for the worst off, seeming to meet the max-min criterion for fairness central to John Rawls' theory of justice. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁵⁷ Crahan, *supra* note 32 at 16.

⁵⁸ See Kirk, *supra* note 25 at 122.

⁵⁹ PÉREZ-STABLE, *supra* note 37 at 154.

⁶⁰ See Quigley, *supra* note 43 at 95.

trading partner and patron.⁶¹ This would lead to the Revolution's third constitutional standard for religious freedom. At the Fourth Congress of the Party in 1992, the Popular Assembly made several changes to the 1976 text. Atheism as a requirement for membership in the Communist Party was abolished.⁶² The standard for religious liberty also changed with the addition of Article 15, which clarified that religious liberty was no longer subordinated to other national or constitutional interests.⁶³ Some interpret these reforms as an abandonment of atheism in favor of secularism, but this overstates the case because Cuba was not atheist before the change and did not become secular by virtue of these changes.

Pope John Paul II's visit to Cuba in 1998 signaled ongoing improvement in the relationship between Cuba and the Vatican.⁶⁴ In his sermon, Pope John Paul II emphasized that Cuba had a "Christian soul," which he said in the context of excluding representatives of Santería from an ecumenical meeting.⁶⁵ After Pope John Paul II's visit, the Church began to press for political priorities in Cuba that, though dormant, had never been abandoned. Cuba began recognizing Christmas as an official public holiday again after Pope John Paul II's visit.⁶⁶

As part of its post-Fidel reforms, the Cuban government and the Vatican have also resumed a more robust relationship.⁶⁷ In 2014 Pope Francis met with Raul Castro, who toyed about returning to the fold. The current Pope has advocated for détente between Cuba and the United States.⁶⁸

III. SEXUAL MINORITIES: FROM SOCIAL VERMIN TO POLITICAL SUBJECTS

Like the Church, sexual minorities in Cuba went through a similar process of exclusion and reincorporation. Initially, Fidel Castro's government defined visible expressions of homosexuality and gender dissidence as

⁶¹ GAIL REED, ISLAND IN THE STORM, THE CUBAN COMMUNIST PARTY'S FOURTH CONGRESS 132–35 (1992). See also Milán Pérez, *Motivos Para Una Reforma*, 7 REVISTA CUBANA DE DERECHO (1992).

⁶² PÉREZ-STABLE, *supra* note 37 at 175.

⁶³ Art. 15, CONST. CUBA (2019) read as follows: "The State recognizes, respects, and guarantees religious liberty. The Republic of Cuba is secular. In the Republic of Cuba, the religious institutions and fraternal associations are separate from the State and they all have the same rights and duties. Distinct beliefs and religions enjoy equal consideration." (translated text). *Cuba's Constitution of 2019*, constituteproject.com, archived at <https://perma.cc/U4M4-UVS9>.

⁶⁴ See Kirk, *supra* note 25 at 110.

⁶⁵ Pope John Paul II, *Pope John Paul II Speaks in Cuba*, in THE CUBA READER 553–54 (AVIVA CHOMSKY ed., 2019) ("As everyone knows, Cuba has a Christian soul and this has brought her a universal vocation.").

⁶⁶ *A Recent History of Christmas in Cuba*, CUBA J. (Nov. 29, 2015), <http://cubajournal.co/a-recent-history-of-christmas-in-cuba/>, archived at <https://perma.cc/97LB-LXU4>.

⁶⁷ José Gabilondo, *Raul and the Church: A Faustian Pact?*, HUFFPOST (Jun. 4, 2015).

⁶⁸ Jonathan Watts & Stephanie Kirchgaessner, *Pope calls on Cuba and US to set global 'example of reconciliation'*, THE GUARDIAN, Sep. 19, 2015, <https://www.theguardian.com/world/2015/sep/19/pope-francis-cuba-us-reconciliation-havana>, archived at <https://perma.cc/QP4J-CRQ6>.

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counter-Revolutionary carryovers of capitalist decadence, to be purged in the name of social hygiene. Later, the Revolution medicalized homosexuality by emphasizing the threat that HIV and AIDS posed to society. Beginning in 1990s, progressive Cuban intellectuals and Party operatives began to analogize sexual minorities to women, for whom the Revolution had opened many doors. As this political analogy succeeded, the official stance changed, and sexual and gender minorities became full-fledged subjects of the Revolution. The Party's constitutional proposal in support of marriage equality would be the highpoint of Revolutionary inclusion.

A. *Homosexuality as a Social Hygiene Problem*

Before the Revolution, Cuban society adhered to conventional gender expectations built on binary sex. These gender standards elevated overt male dominance and conventional notions of masculinity, celebrating machismo and subjecting females to strict expectations about acceptable feminine behavior. Reinforced by Christian notions of sin, these gender standards framed homosexuality as deviance.

In particular, two statutes based on the Spanish law provided the framework for the persecution of homosexuals. The island's Social Defense Code of 1936 penalized public displays of same-sex desire as sources of prohibited "public disorder."⁶⁹ A separate statute allowed the government to pursue individuals and practices seen as leading to delinquency.⁷⁰ That said, sexual minorities enjoyed some degree of freedom, especially in Havana's cosmopolitan nightlife, which included bars and spaces for gay males and sex workers.⁷¹ Unfortunately, Adrienne Rich's observation about the invisibility of lesbians is generally true about Cuban women during this period.⁷² This invisibility makes it hard to appreciate the role played by sexual minority women, but it also protected them from the worst violence directed at homosexual males whose visibility threatened the heterosexual power structure.

In effect, the Revolution restated gender norms in political rather than religious terms. In this view, homosexuality was a carryover of negative elements of society before the Revolution.⁷³ Leninism provided the intellectual framework for these programs. Lenin saw culture as a powerful tool of revolutionary construction, so he argued for using political criteria—in par-

⁶⁹ Robert Brito, *Locking the Closet Door: Reformation of the Cuban Man and the Attempt to Eliminate Homosexuality, 1950-1962* 30 (2015) (unpublished Masters thesis, University of Florida) (on file with author).

⁷⁰ SUSAN PEÑA, *OYE LOCA: FROM THE MARIEL BOATLIFT TO GAY CUBAN MIAMI* 6 (Minnesota, 2013).

⁷¹ See Brito, *supra* note 69 at 24–25.

⁷² Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *WOMEN: SEX AND SEXUALITY* 631 (1980) ("[L]esbian existence has been written out of history or catalogued under disease. . .").

⁷³ Emily Kirk, *Setting The Agenda for Cuban Sexuality: The Role of Cuba's CENESEX*, 36 *CANADIAN J. OF LATIN AMERICAN AND CARIBBEAN STUD.* 143, 146 (2011).

ticular as they supported revolutionary goals—to evaluate culture. Activities that strayed from the sanctioned revolutionary path were classified as ideological diversions (*diversionismo ideologico*), not in the sense of pleasure but, rather, as a displacement of priorities towards an antisocial goal. Ideological diversions referred to practices associated with the United States consumption and counterculture, including long hair, rock and roll, tight pants, and excess consumerism. Social hygiene would require purging activities that undermined revolutionary goals.

Che Guevara’s notion of the “new man” embodied this ideological re-framing of gender as a political attribute.⁷⁴ The Revolution’s new man was virile, active, and patriotic, renouncing all ties to capitalist decadence.⁷⁵ No longer a violation of Christian order, homosexuality became a form of sedition, threatening the virtuous heterosexual masculinity at the center of the Revolutionary army. Consequently, the government took steps to liquidate these unwelcome social elements.⁷⁶ These efforts did not target sexual or gender minorities who could pass as conforming heterosexuals. Instead, persecution targeted obvious expressions of sexual and gender dissidence, much as it had before the Revolution.⁷⁷ In 1961, the government conducted a major sweep of prostitutes, homosexuals, and others viewed as counter-Revolutionary “scum,” an epithet that invoked hygienic attempts to clean up society.⁷⁸ Gay bars and cruising areas became seen as potential centers of counter-revolutionary activity.⁷⁹

In a 1963 speech on the steps of the University of Havana, Castro outlined a formula that would form the basis of later efforts to liquidate homosexuality and nonconforming expressions of gender. In this view, homosexuality was a symptom of bourgeois laxity, to be remedied by the

⁷⁴ Erasmo Calzadilla, *Che Guevara and the Making of the New Man*, HAVANA TIMES (Oct. 30, 2012), <https://havanatimes.org/diaries/erasmo-calzadilla/che-guevara-and-the-making-of-the-new-man/>, archived at <https://perma.cc/D6NX-WW8V>.

⁷⁵ See PEÑA, *supra* note 70 at 3.

⁷⁶ As Glenda Russell has noted:

A group is conceptually liquidated – or demolished in a culture’s thoughts – when its members are seen as less than human, as massively confused about the right order of things, and as lost in a hopeless cognitive and spiritual morass. . . [There are] four steps in the process of the conceptual liquidation of LGBs [lesbians, gays, and bisexuals] by anti-gay campaigns. The first step involves portraying LGB people as a threat. Step two focuses on equating LBG orientation with a pathology. The third step is the construction of an explanation for their orientation. . . [the] final step is the social construction of a cure for the presumed pathology of LBG orientation.

GLEND A M. RUSSELL, VOTED OUT: THE PSYCHOLOGICAL CONSEQUENCES OF ANTI-GAY POLITICS (2000) (analyzing anti-gay stigma created by Colorado’s constitutional reform).

⁷⁷ See PEÑA, *supra* note 70 at 3.

⁷⁸ See Brito, *supra* note 69 at 42.

⁷⁹ See also Lourdes Arguelles & B. Ruby Rich, *Homosexuality, Homophobia, and Revolution: Notes toward an Understanding of the Cuban Lesbian and Gay Male Experience, Part I*, 9 THE LESBIAN ISSUE 683–699, 690 (1984).

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rigors of agrarian discipline.⁸⁰ Two years later, Castro announced that homosexuals were unfit to serve as militants of the Communist Party.⁸¹

Giving effect to Castro's formula, from 1965 to 1968 the Cuban government operated several work camps for sexual minorities, some members of religious groups, and others deemed as threats to the revolutionary order—the *Unidades Militares de Ayuda a La Producción* (UMAP).⁸² Raul Castro played a significant role in implementing the UMAP, which were modeled on the Russian government's repression of dissidents and which targeted male homosexuals.⁸³ Presented as efforts to rehabilitate deviants for their own good and that of the public, the UMAP also served as inadvertently homosocial environments that allowed friendships to form between men.⁸⁴ After Jean Paul Sartre, Susan Sontag, and other Left intellectuals condemned operations of the UMAP, the government closed them.⁸⁵

This reflected a begrudging resignation that homosexuality and gender dissidence could not be purged from the Revolutionary state. However, official persecution of homosexuals continued even after the closing of the UMAP. During the 1970s, laws passed after the National Congress on Education and Culture prohibited the employment of known or obvious homosexuals in jobs involving youth, culture, or foreign representation.⁸⁶ In 1979, the National Assembly decriminalized homosexuality, but the official narrative still pathologized homosexuality. In 1980, a sudden demonstration at the Peruvian embassy in Havana led to a mass exodus to the United States through the port of Mariel.⁸⁷ Again, the government framed the Mariel emi-

⁸⁰ This would be the theory of the work camps set up a few years later:

Many of those . . . children of bourgeois, walk around with tight pants . . . and have taken their debauchery to such extremes of wanting to have public displays of their femininity . . . Socialist society cannot allow such degeneracy. Young boys aspiring to that? Absolutely not! "Tree that grew crooked . . .", and the remedy will not so easy. I will not say that we are going to apply drastic measures against those crooked trees, but aspiring youngsters, watch out! There are a few theories, I am not a scientist . . . but I do notice that the countryside does not produce that problem.

Fidel Castro Ruiz, *Discurso pronunciado por el Comandante Fidel Castro Ruiz, Primer Ministro del Gobierno Revolucionario de Cuba, en la clausura del acto para conmemorar el VI aniversario del asalto al Palacio Presidencial, celebrado en la Escalinata de la Universidad de la Habana*, PORTAL CUBA (Mar. 13, 1963), <http://www.cuba.cu/gobierno/discursos/1963/esp/f130363e.html>, archived at <https://perma.cc/Z243-TM7H>.

⁸¹ IAN LUMSDEN, *MACHOS MARICONES & GAYS: CUBA AND HOMOSEXUALITY* 92–94 (1996).

⁸² Joseph Tahbaz, *Demystifying las UMAP: The Politics of Sugar, Gender, and Religion in 1960s Cuba*, 14 DEL. REV. LATIN AMERICAN STUD. 2 (Dec. 31, 2013).

⁸³ See Lourdes Arguelles & B. Ruby Rich, *Homosexuality, Homophobia, and Revolution: Notes toward an Understanding of the Cuban Lesbian and Gay Male Experience, Part I*, 9 THE LESBIAN ISSUE 683, 691–692 (1984).

⁸⁴ See PEÑA, *supra* note 70 at 9 (quoting Reynaldo Arenas).

⁸⁵ It is difficult to find reliable estimates of how many people were affected. Some estimate that 30,000 were interned, several dozen were executed or tortured to death, and perhaps 180 took their own life. ENRIQUE ROS, *LA UMAP: EL GULAG CASTRISTA* (2004).

⁸⁶ See PEÑA, *supra* note 70, at 7.

⁸⁷ *Id.* at 34.

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gration in terms of social hygiene by labeling those who left as counter-Revolutionary scum and deviants.⁸⁸

In response to risks from HIV, in 1982, Cuba began implementing public health measures that earned high marks for containment of the disease at the expense of civil liberties.⁸⁹ After setting up a National AIDS Commission, quarantining persons with HIV, and destroying the foreign blood supply, Cuba would not register its first case of HIV infection until 1986, four years after doctors in New York, San Francisco, and Paris diagnosed the first cases of “Gay-Related Immunodeficiency Disease” in 1982. Since Cuba began to manufacture and distribute generic anti-retrovirals in 2001, the rate of mortality and opportunistic infections from AIDS has decreased substantially.⁹⁰

B. CENESEX and the Sexual Spring

In the years leading up to the constitutional reform, the Revolution’s treatment of sexual and gender minorities improved mostly due to the efforts of Mariela Castro, the daughter of Raul Castro. In 1989, the National Assembly established the National Center for Sex Education (CENESEX), which would become the government’s most visible institutional face supportive of sexual minorities. CENESEX began as an agency devoted to sex education, but it changed into an advocacy group.⁹¹

In tandem with these changes, gays and lesbians found more spaces for association. After the demise of the Soviet Trade Bloc, Cuba began to promote foreign investment and tourism. During the 1990s, both Cubans and gay foreigners could attend *fiestas de diez pesos*, tropical tea dances held in public settings with the tacit acquiescence of the authorities.⁹² For several years, the most popular gay discotheque took place in the Plaza de la Revolución, the site of Fidel Castro’s most celebrated political speeches.⁹³

By 2004, national surveys demonstrated growing acceptance of sexual minorities.⁹⁴ These trends accelerated after Fidel Castro left the Presidency. In 2005, the National Assembly formed a national commission on the treatment of transgendered persons. In 2008, Cuba became the first country in Latin America to provide its citizens with free access to gender confirmation surgery, enabling transsexuals to bring their somatic sex into alignment with

⁸⁸ *Id.* at 52. One needed a permit from the police to leave though Mariel, so heterosexual men sometimes pretended to be gay in order to get the permit.

⁸⁹ Sarah Z. Hoffman, *HIV/AIDS in Cuba: a model for care or an ethical dilemma?* 4 AFRICAN HEALTH SCIENCES 208 (Dec. 2004).

⁹⁰ WORLD HEALTH ORGANIZATION, *Case Study: Approaches to the Management of HIV/AIDS in Cuba* (2004).

⁹¹ See Kirk, *supra* note 73, at 146.

⁹² IAN LUMSDEN, *MACHOS MARICONES & GAYS: CUBA AND HOMOSEXUALITY* (1996)

⁹³ Samuel Rivas, *The Best Gay-Friendly Places in Havana* (Feb. 14, 2017), <http://www.visitcuba.com/2017/02/the-best-gay-friendly-places-in-havana-2017/>, archived at <https://perma.cc/CE5U-QXZ6>.

⁹⁴ See Kirk, *supra* note 73, at 204.

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their gender.⁹⁵ Two years later, Fidel Castro repudiated Cuba's previous treatment of homosexuals, in particular the UMAP.⁹⁶

In 2005, CENESEX began a visible annual event to promote education and advocacy efforts on behalf of sexual minorities, the National Day Against Homophobia (*Jornada Nacional Contra La Homophobia*), made famous with the Conga de La Diversidad. Cuba also began including equality efforts as part of its foreign policy initiatives, beginning to support UN resolutions in support of gay rights in 2010. In effect, sexual and gender minorities became acceptable as subjects of the Revolution rather than a form of capitalist decadence. Some see these developments as "pink-washing," i.e., using the advances made on behalf of sexual minorities to detract attention from more serious human rights abuses.⁹⁷ That argument has some merit, but it is hard to deny the improvement in the lives of sexual and gender minorities on the island.

IV. THE 2019 CONSTITUTION: CIVIL SOCIETY'S FRACTIOUS CLAIMS

On the eve of the constitutional reform, both churches (including the Church) and sexual minorities had won important freedoms. The constitutional reform would set these groups in opposition. Par for Cuban central planning, the reform obeyed detailed procedures for coordinating legislative, drafting, and executive committees. However, public contention about the marriage proposal broke out on social media and in other public spaces. The 2019 Constitution that was finally approved left the question of marriage open for final determination in a subsequent national referendum.

A. *The Communist Party's Draft Constitution*

The 1992 constitutional amendments had been driven largely by an exogenous factor: the need to adjust after the loss of the Soviet Union as patron; this time the impulse to reform the constitution obeyed internal forces.⁹⁸ In contrast, internal developments framed the national context for the 2018 reform, triggered by important political changes. In 2008, after almost 50 years in power, Fidel Castro had stepped down as President and was succeeded by his brother, Raul Castro. During Raul's tenure, much had

⁹⁵ Emily K. Kirk and Robert Huish, *Transsexuals' Right to Health? A Cuban Case Study*, 20 HEALTH AND HUM. RTS. J. 215–222 (Dec. 2018).

⁹⁶ Fidel Castro takes blame for persecution of Cuban gays, BBC, Aug. 31, 2010, <https://www.bbc.com/news/world-latin-america-11147157>, archived at <https://perma.cc/6R49-4C2H>.

⁹⁷ Justin Rohrlich, *Cuba Wants You To Think It's a Gay Paradise. It's Not*, FOREIGN POLICY, July 3, 2014, <https://foreignpolicy.com/2014/07/03/cuba-wants-you-to-think-its-a-gay-paradise-its-not/>, archived at <https://perma.cc/K56H-DK44> (putting Cuba's gay rights advances in the context of ongoing government control).

⁹⁸ Teodoro Yan Guzmán Hernández, *El procedimiento de reforma, la participación popular y las reformas de la Constitución en Cuba (1959-2002)* (*Procedure, Democratic Participation, and Reforms to the Cuban Constitution (1959-2002)*), ESTUDIOS CONSTITUCIONALES, Año 13, N° 2, 2015, 237–272 (Chile).

changed, though the government's fundamental commitment to socialism continued. Cubans became able to buy and sell real property, access the Internet, get passports, and move more freely across and outside of the country.⁹⁹ Some Cubans began to accumulate private wealth, drawing attention to growing inequality on the island.¹⁰⁰

In 2011, the Sixth Meeting of the Party had adopted the Lineamientos, a white paper on reform measures designed to update the socialist model.¹⁰¹ Focused on economic policy, the Lineamientos sought to shrink the state sector, increase the size of the private sector, facilitate a private market for real estate, promote foreign investment, and move towards unifying Cuba's byzantine system of multiple currencies and exchange rates.

After Raul Castro resigned the Presidency, Miguel Díaz-Canel was elected the first leader of post-Batista Cuba unrelated to the Castro family.¹⁰² As the first major reform after the departure of Fidel and Raul Castro, the constitutional process would reveal something important about where the country was headed. By the 1976 Constitution, the reform would require a two thirds majority vote in the National Assembly and a simple majority in a national referendum.¹⁰³ The reform would also include a consultative process to allow voters to respond to a draft of the proposed institution. Over-

⁹⁹ José Gabilondo, *Voices: In Cuba, Economic Contradictions Amid Change*, NBC NEWS LATINO BLOG (Aug. 21, 2014), <http://www.nbcnews.com/news/latino/voices-cuba-economic-contradictions-amid-change-n181616>, archived at <https://perma.cc/F6D6-56BP> (reviewing economic changes on the island); José Gabilondo, *Making Sense of Today's Cuban Economy: Promises in the Making*, HUFFPOST (June 8, 2015), https://www.huffpost.com/entry/making-sense-of-todays-cuban-economy-promises-in-the-making_b_7527380, archived at <https://perma.cc/R883-ZJ77> (noting the implementation of new economic policies).

¹⁰⁰ CARMELO MESO LAGO and JORGE PÉREZ, *CUBA UNDER RAUL CASTRO: ASSESSING THE REFORMS* (2013).

¹⁰¹ CUBAN COMMUNIST PARTY, *LINEAMIENTOS DE LA POLÍTICA ECONÓMICA Y SOCIAL DEL PARTIDO Y LA REVOLUCIÓN* (Apr. 18, 2011). Larry Catá Backer and his colleagues distinguish between the reform of Cuba's de facto political constitution that began with the Lineamientos in 2011 and the reform of the "administrative constitution" that was formalized in 2019. Larry Catá Backer, Flora Sapio, and James Korman, *Popular Participation in the Constitution of the Illiberal State—An Empirical Study of Popular Engagement and Constitutional Reform in Cuba and the Contours of Cuban Socialist Democracy 2.0*, 34(1) EMORY INT'L L. REV. (forthcoming 2019)

¹⁰² Anthony Failla, *In Cuba, the Castro era ends this week as Raúl steps down as ruler*, WASH. POST, Apr. 17, 2018, https://www.washingtonpost.com/world/the_americas/for-the-first-time-in-six-decades-cuba-wont-be-led-by-a-castro/2018/04/17/f1df8b3c-3e61-11e8-955b-7d2e19b79966_story.html, archived at <https://perma.cc/Q3V4-G2E8>.

¹⁰³ Art. 137, CONST. CUBA (1976) reads:

This Constitution can only be modified by the National Assembly of People's Power, by means of resolutions adopted by roll-call vote by a majority of no less than two-thirds of the total number of members; except [where the modification] regards the political, social and economic system, whose irrevocable character is established in Article 3 of Chapter I, and the prohibition against negotiations under aggression, threats or coercion by a foreign power as established in Article 11.

If the modification has to do with the integration and authority of the National Assembly of the People's Power or its Council of State or involves any rights and duties contained in the Constitution, it shall also require the approval of the majority of citizens with the right to vote by means of a referendum called upon for this purpose by the Assembly itself.

all, the reform process became a highly orchestrated exercise requiring the coordinated participation of vast sectors of society. Notably, the government took exceptional steps to include nonresident Cubans and descendants of the Cuban diaspora in the process.¹⁰⁴

On June 2, 2018, President Miguel Díaz-Canel convened a constitutional drafting commission to draft the proposed text. On July 22, 2018, the National Assembly unanimously approved the draft constitution prepared by the commission. The 2018 draft affirmed the primacy of the Party, but it made several changes to government structure at the national, local, and provincial levels.¹⁰⁵ It imposed a term limit on the President and created the new position of prime minister. It also separated executive and legislative functions more neatly by providing that the President of the National Assembly rather than the President of the nation now heads the Council of State (a legislative organ) and that members of the Council of State can no longer belong to the Council of Ministers (an executive body). By eliminating the word “imperialism,” the tone of the document also differed from the 1976 Constitution.

The draft also forbade discrimination on the basis of gender, sexual orientation, and gender orientation, an expansive set of categories.¹⁰⁶ The most contentious proposal in the draft related to Article 36 of the 1976 Constitution, which had defined marriage as the union between a man and a woman and linked marriage with reproduction and childrearing.¹⁰⁷ The draft constitution included a proposal (Article 68) made by Mariela Castro and CENESEX to redefine civil marriage by removing references to the sex of the spouses and eliminating any link to childrearing in the definition.¹⁰⁸ In

(translated text) *Cuba's Constitution of 1976 with Amendments through 2002*, constituteproject.org, archived at <https://perma.cc/Z6RT-T4RF>.

¹⁰⁴ During the reform, the Cuban government invited nonresident Cubans to submit proposals on for the constitutional reform and to express their views. *Cubanos en el exterior: cómo participar en la consulta popular?*, CUBA AHORA (Aug. 26, 2018), <https://www.cubahora.cu/especiales/reforma-constitucional-cuba/noticias/cubanos-en-el-exterior-como-participar-en-la-consulta-popular>, archived at <https://perma.cc/9XH5-BB42>. CUBA AHORA is the digital journal of the Cuban government.

¹⁰⁵ *Cuba abre su Constitución a la propiedad privada y al matrimonio homosexual*, EL MUNDO, July 21, 2018, <https://www.elmundo.es/internacional/2018/07/21/5b538476e2704e39658b4591.html>, archived at <https://perma.cc/5KF6-WGEG>.

¹⁰⁶ This provision survived the consultation process and is now contained in Article 42 of the 2019 Constitution.

¹⁰⁷ Art. 36, CONST. CUBA (1976) reads:

[M]arriage is the voluntary established union between a man and a woman, who are legally fit to marry, in order to live together. It is based on full equality of rights and duties for the partners, who must see to the support of the home and the integral education of their children through a joint effort compatible with the social activities of both.

The law regulates the formalization, recognition and dissolution of marriage and the rights and obligations deriving from such acts.” (translated text).

Cuba's Constitution of 1976 with Amendments through 2002, constituteproject.org, archived at <https://perma.cc/Z6RT-T4RF>.

¹⁰⁸ See *supra* note 6.

Granma, the Party's official daily publication, President Díaz-Canel and the Party expressed strong support for these marriage reforms, including the provision on same-sex marriage.¹⁰⁹

B. *The Public Consultation and Revision Process*

After the National Assembly approved the draft constitution, it was presented for public comments and proposals. It was during this consultative process that the conflicts between churches and sexual minorities emerged. Until then, the near universal standoff between sexual minorities and the Church remained dormant because both groups had been suppressed to varying degrees by the government. This changed as both the Church and sexual minorities began to recover their political power.¹¹⁰

The prospect of marriage equality activated the island's most conservative religious groups.¹¹¹ Foreign press coverage emphasized the role of Evangelical groups in this process.¹¹² In particular, foreign representatives from Evangelical groups helped to organize the most visible demonstrations.¹¹³ In a protest on the Malecón (the Havana seawall that serves as an elongated town square), a hundred married couples donned their wedding clothes to protest the proposed provision.¹¹⁴ Evangelical leaders released a public letter outlining their objections to same-sex marriage because of the

¹⁰⁹ Yudy Castro Morales, *Cuatro preceptos sobre la familia revelan superioridad de la propuesta constitucional*, GRANMA, Sept. 12, 2018, <http://www.granma.cu/cuestion-de-leyes/2018-09-12/el-valor-de-lo-esencial-la-familia-i-parte-12-09-2018-20-09-44>, archived at <https://perma.cc/G5DU-TAQR>. (for concepts about the family demonstrate the superiority of the draft Constitution).

¹¹⁰ See *supra* text at notes 73–88.

¹¹¹ Sexual and gender orientation issues belong to a small circle of issues compelling enough that churches which are ordinarily in competition set aside these differences to form multi-sectarian alliances that draw the wagons around a platform of religious values that transcend sectarian differences. Jose Gabilondo, *When God Hates: Why Liberal Guilt Lets The Right Get Away With Murder*, 44 WAKE FOREST L. REV. 617 (2009) (arguing that the prospect of marriage equality was such a trigger).

¹¹² *Cuba Eliminates Language About Same-Sex Marriage From Draft of New Constitution*, N.Y. TIMES, Dec. 19, 2018, <https://www.nytimes.com/2018/12/18/world/americas/cuba-gay-marriage-constitution.html>, archived at <https://perma.cc/8FUK-XX5C> (arguing that lobbying by Evangelicals and “ordinary citizens” contributed to elimination of same-sex marriage protections); *Constitution Is Approved In Cuba Amid Opposition*, N.Y. TIMES, Feb. 26, 2019 (noting the Original Design campaign by Evangelical churches); *Defying Officials, Gay Cubans Hold a Colorful March to the Sea*, N.Y. TIMES, May 13, 2019 (noting the potential role of Evangelical churches in encouraging the government to crack down on a LGBTQ parade).

¹¹³ Rebeca Bodenheimer, *How American Evangelicals Helped Stop Same-Sex Marriage in Cuba*, VICE (Aug. 20, 2019, 11:12 AM), https://www.vice.com/en_us/article/qvg8pw/how-american-evangelicals-helped-stop-same-sex-marriage-in-cuba, archived at <https://perma.cc/Q6M7-3ZG5>.

¹¹⁴ *Cuba's churches reject gay marriage before vote on new constitution*, THE GUARDIAN, Feb. 18, 2019, <https://www.theguardian.com/world/2019/feb/18/cubas-churches-reject-gay-marriage-before-vote-on-new-constitution>, archived at <https://perma.cc/4ETY-8FYG>.

divine nature of marriage, the family and heterosexuality.¹¹⁵ It argued that “gender ideology” is alien not only to Cuba history and the Revolution but also to other Communist countries, including the former Soviet Union, North Korea, and Vietnam. The letter also clarified that after repentance, even homosexuals could be welcomed into God’s community. Equality opponents waged a colorful grassroots campaign framed in terms of support for God’s “original design.” Blue posters with a figure of man and a woman declared “I’m for the original design” and quoted Genesis 1:27, “God created man in His own image, in the image of God He created him; male and female He created them.”¹¹⁶

Most coverage of the marriage controversy paid short shrift to the actions of the Cuban Conference of Catholic Bishops (“Bishop’s Conference”), which was surprising because Catholics greatly outnumber Evangelicals on the island. The Bishop’s Conference widely disseminated a pastoral letter during the consultative process that outlined the Church’s political position. As had the letter released by Evangelicals, the pastoral letter objected to the same-sex marriage proposal because it disregarded the divine nature of heterosexual complementarity in marriage.¹¹⁷ In their sermons and communications, individual Catholic priests also exhorted followers to object to the same-sex marriage proposal. The Archdiocese of Santiago offered a classic defense of heterosexual complementarity in marriage, alleging that it was foreign imperialism rather than any local interest behind the support for marriage equality.¹¹⁸ The Bishop of Bayamo-Manzanillo also wrote against the reform.¹¹⁹

¹¹⁵ *Declaración Oficial* (June 28, 2018) (signed by the leaders of the Cuban Evangelical League, the Western Baptist Conference, the Eastern Baptist Conference, the Cuban Methodist Church, and the Evangelical Assembly of God).

¹¹⁶ *Cuba Scraps Words Establishing Same-Sex Marriage From Drafted Constitution*, NPR (Dec. 12, 2018), <https://www.npr.org/2018/12/19/678155969/cuba-scraps-words-establishing-same-sex-marriage-from-drafted-constitution>, archived at <https://perma.cc/CDR5-C9VU>.

¹¹⁷ *Mensaje Pastoral de los Obispos Católicos de Cuba*, IGLESIA CUBANA (Oct. 25, 2018), <https://iglesiacubana.org/cocc/pages/articles/843>, archived at <https://perma.cc/F4F9-QER3>. In pertinent part, the letter states:

The bishops consider it fundamentally improper and erroneous that the constitutional draft (Art. 68) defines marriage as “the union of two people with aptitude for it, in order to make a life together.” In expressing our objection we do not intend to ignore or in any way underestimate, the dignity of any person, then, as all must be respected their status and their social participation respected. The teaching of the Church has always been clear: reciprocal and complementary love between man and woman forms the vocation to marriage and the family, establishing a unit that cannot be equaled to any other. This distinction does not mean discrimination. (text translated by author).

¹¹⁸ Mons. Dionisio García Ibáñez, *Some timely observations about marriage*, ARCHDIOCESE OF SANTIAGO (Aug. 29, 2018), https://iglesiacubana.org/cocc/pages/sub_categories/68/0/, archived at <https://perma.cc/52JQ-XWRU>.

¹¹⁹ Mons. Álvaro Beyra, Obispo de Bayamo-Manzanillo, *El matrimonio, unión de un hombre y una mujer, forma parte de los hechos esenciales de la vida humana*, GASPARE, EL LUGAREÑO (Oct. 2, 2018), <http://www.ellugareno.com/2018/10/obispo-de-bayamo-manzanillo-el.html>, archived at <https://perma.cc/RH3F-UT4Z>.

From late summer 2017 through the winter of 2018, nonbinding consultations about the draft were carried out through neighborhood meetings and at work centers. According to official estimates of the public consultation, over 8,900,000 people expressed their opinions about the draft in over 100,000 meetings.¹²⁰ Almost one quarter of the proposals made during these meetings related to same-sex marriage.¹²¹ The majority of comments about the same-sex marriage proposal opposed it.¹²² Given U.S. policy of using civil society to destabilize the island's government, some of these purported grassroots activities may have reflected official foreign intervention.¹²³

C. *The National Referendum*

During the fall of 2018, a working group of the constitutional drafting commission sifted through the proposals generated by the public consultation and reported its recommendations about which ones should be adopted. In response to these consultations, the commission made 760 changes to the draft, including abandoning a proposal to further limit self-employment.¹²⁴

In the most significant change to the 2018 draft, the constitutional commission substituted Article 68 with Article 82 in the 2019 Constitution, which represented a third definition of marriage.¹²⁵ Article 82 did not specify

¹²⁰ Consejo de Estado, *Intervención de Homero Acosta en la Asamblea Nacional, sobre los principales cambios de la Constitución a partir de la consulta popular*, GRANMA, Dec. 22, 2018, <http://www.granma.cu/cuba/2018-12-22/un-texto-enriquecido-con-el-aporte-del-pueblo-22-12-2018-01-12-24>, archived at <https://perma.cc/ZJ7Q-KD3E> (Comments of Cuban Communist Party Secretary Homero Acosta regarding post-consultation revisions to the Constitution). According to these estimates, these participants made 1,706,872 comments in about 80,000 meetings were held in the community, 45,000 took place in worker collectives, 3,400 were rural meetings, and about 4,800 meetings took place with students. I respect the attention to formalism and accuracy in these estimates, but numbers do not convey the critical qualitative aspects of the deliberative process.

¹²¹ *Id.*

¹²² Of the 192,408 opinions produced by the public consultation, 158,376 supported restricting marriage to a union between a man and a woman. *Id.*

¹²³ The General Accounting Office's 2006 audit of these programs concluded that they lacked basic internal controls and could not guarantee that the recipients of funds complied with applicable regulations. GENERAL ACCOUNTING OFFICE, FOREIGN ASSISTANCE U.S. DEMOCRACY ASSISTANCE FOR CUBA NEEDS BETTER MANAGEMENT AND OVERSIGHT, GAO-07-147 (2006). These problems continued as recently as 2013. GENERAL ACCOUNTING OFFICE, CUBA DEMOCRACY ASSISTANCE: USAID'S PROGRAM IS IMPROVED, BUT STATE COULD BETTER MONITOR ITS IMPLEMENTING PARTNERS, GAO-13-285 (2013).

¹²⁴ Elisabeth Malkin, *Cubans Approve a Constitution, but Opponents Speak Out*, N.Y. TIMES, Feb. 25, 2019, <https://www.nytimes.com/2019/02/25/world/americas/cuba-constitution-vote-referendum.html>, archived at <https://perma.cc/MK5H-TDKE>.

¹²⁵ Art. 82, CONST. CUBA (2019) reads:

Marriage is a social and legal institution. It is one of the organizational structures of families. It is based on free consent and on the equality of rights, obligations, and legal capacity of spouses. The law determines how they are constituted and their effects. Furthermore, it recognizes the stable and singular union with legal capacity that effectively forms a common life plan that, under the conditions and circumstances indicated in the law, generates the rights and obligations that the law provides. (translated text)

the sex of spouses nor did it suggest any link between marriage and reproduction. It defined marriage as a “social and legal institution” rather than one based on nature or religion. At the same time, the revised draft provided that a subsequent referendum on the Family Code would have the last word on marriage. Temporary Provision 11 requires the National Assembly to conduct consultation and referendum within 2 years to decide on the definition of marriage.¹²⁶

On December 22, 2018, the National Assembly unanimously approved the revised constitutional text. When explaining the abandonment of the marriage proposal, Homero Acosta, the Secretary of the Council of State, affirmed the Party’s ongoing support for marriage equality but emphasized the desire to heed the concerns of both its supporters and its critics.¹²⁷

On the eve of the February 2019 constitutional referendum, the Conference of Catholic Bishops released a second pastoral letter outlining their political position on the final text.¹²⁸ With respect to marriage, the letter repeated the arguments made in the previous pastoral letter, complaining that the 2018 draft constitution ignored the popular will that marriage be restricted to a man and a woman.¹²⁹ The letter also objected that because marriage has not been defined in cross-sex terms, it is possible that a future legal reform would eliminate marriage discrimination.

As was widely expected, the revised constitutional draft easily passed the referendum.¹³⁰ In terms of religious freedom generally, the 2019 Constitution adopted what is, in effect, the Revolution’s fourth constitutional

Cuba’s Constitution of 2019, constituteproject.com, archived at <https://perma.cc/U4M4-UVS9>.

¹²⁶ Transitory Provision 11, CONST. CUBA (2019) reads: “In response to the Referendum that took place, the National Assembly of People’s Power will, within a period of two years after the Constitution takes effect, begin the process of popular consultation and referendum for the Family Code program, which must include the form that a marriage may take.” (translated text). *Cuba’s Constitution of 2019*, constituteproject.com, archived at <https://perma.cc/U4M4-UVS9>.

¹²⁷ In GRANMA, Council of State stated:

Regarding Article 82 (the revised marriage provision), the concerns of both supporters and opponents of same-sex marriage were considered. Here there are no winners and losers. The original proposal is what we wanted, but this is not the moment for it because there was no consensus. Nevertheless, it remains our intention to accomplish that going forward. The Family Code will be subject to voting because that is the most democratic way to define it.

Council of State, *Intervención de Homero Acosta en la Asamblea Nacional, sobre los principales cambios de la Constitución a partir de la consulta popular*, GRANMA, Dec. 22, 2018, <http://www.granma.cu/cuba/2018-12-22/un-texto-enriquecido-con-el-aporte-del-pueblo-22-12-2018-01-12-24>, archived at <https://perma.cc/ZJ7Q-KD3E>. (Comments of Homero Acosta regarding the main changes to the Constitution resulting from the public consultation).

¹²⁸ *Message of the Cuban Catholic Bishops Regarding the Forthcoming National Referendum on the New Constitution*, IGLESIA CUBANA (Feb. 2, 2019), <https://iglesiacubana.org/coccc/pages/articles/925>, archived at <https://perma.cc/XH4X-CZSL>.

¹²⁹ *Id.* at Sections 13 and 14.

¹³⁰ About 85% of registered voters participated in the referendum; of this group about 87% voted in favor of the draft text. Elizabeth Malkin, *Cuba Approves A New Constitution, But Opponents Speak Out*, N. Y. TIMES, Feb. 25, 2019, <https://www.nytimes.com/2019/02/25/world/americas/cuba-constitution-vote-referendum.html>, archived at <https://perma.cc/MK5H-TDKE>.

framework, but this issue generated little attention. Although I could not trace how this language emerged, the 2019 Constitution added an important declarative sentence: “Cuba is a secular country.”¹³¹ Secularism belongs more to the liberal register than the socialist one, which has expressed more hostility to religion in public life. Socialist materialism tends to contemplate more proactive limits on the political activities by churches, than does liberalism, which is much more susceptible to strong religion’s persistent attempts to erode secular restraints, hence the language represents a concession in the direction of more religious power. The Bishops welcomed it enthusiastically.¹³²

The 2019 Constitution did not enshrine same-sex marriage as a constitutional value, but the legal standard in Article 82 leaves open the possibility of legalizing same-sex marriage rather than foreclosing it.¹³³ Moreover, other provisions support an expansive and contemporary understanding of the family. Article 81 states that every person has the right to a family formed by legal or de facto bonds, without limiting family structure.¹³⁴ Since the 2019 Constitution defers resolution of the marriage question until a forthcoming reform of the Family Code, whether Cuban same-sex couples will eventually get the right to marry remains uncertain.

¹³¹ As finally adopted, Art. 15, CONST. CUBA (2019) reads: “The State recognizes, respects, and guarantees religious liberty. THE REPUBLIC OF CUBA IS SECULAR. In the Republic of Cuba, the religious institutions and fraternal associations are separate from the State and they all have the same rights and duties. Distinct beliefs and religions enjoy equal consideration.” (emphasis added) (translated text). *Cuba’s Constitution of 2019*, constituteproject.com, archived at <https://perma.cc/U4M4-UVS9>.

¹³² In a pastoral letter released on the eve of the referendum on the final constitution, the bishops affirmed the declaration about the secular state:

We Bishops note with pleasure that in Article 15 the declaration “The Cuban state is secular” is added [to the constitutional text], that is to say it respects the right that every person must believe, live and manifest the values that correspond to their beliefs, that is to say, the acceptance of plurality. However, this statement does not correspond to what is stated in the preamble of the constitutional text when it presents the absolute character of the Marxist-Leninist ideology. (text translated by author)

Mensaje de los Obispos Católicos Cubanos en Relación con la Nueva Constitución de la República de Cuba que Será Sometida a Referendo, IGLESIA CUBANA (Feb. 2, 2019), <https://iglesiacubana.org/cocc/pages/articles/925>, archived at <https://perma.cc/XH4X-CZSL>.

¹³³ It is unclear what the legal standard is for Cubans between the entry into force of the 2019 Constitution (which does eliminate the prior restriction to cross-sex couple) and the future referendum of the Family Code, which could be at least two years away. While adopting Article 68 would have clarified whether foreign same-sex marriages would be recognized, the current constitutional compromise leaves undetermined what foreign couples can expect while in Cuba.

¹³⁴ Art. 81, CONST. CUBA (2019) reads:

All people have the right to start a family. The State recognizes and protects families, regardless of their structure, as the basic cell of society, and works to guarantee that the holistic achievement of their objectives. They are formed by legal, de facto, or emotional ties, and are based on the equality of rights, duties, and opportunities of its members. Legal protection of the diverse types of families is regulated by the law. (translated text)

Cuba’s Constitution of 2019, constituteproject.com, archived at <https://perma.cc/U4M4-UVS9>.

The ultimate outcome of the future referendum on marriage remains to be seen, but there is a good chance that the voting majority will continue to object to ending discrimination. In that case, a Cuban judge could then declare that referendum unconstitutional. Cuban jurisprudence lacks a tradition of judicial review of executive and legislative acts. Judicial review would not require Cuba to abandon socialist legality; it would simply shift who has the last word on constitutional values to judges, not politicians. If the experience of the United States serves as an example, only an anti-majoritarian mechanism with the power to overrule majorities can safeguard individual rights and minorities.

The referendum is likely to clarify an important issue which remained unaddressed by the debates leading up to the adoption of the final text: whether churches would remain free to apply their religious doctrine if the reform had made same-sex marriage a constitutional right. Neither the churches nor the Cuban government emphasized that the original marriage provision applied only to civil marriage, but that is the most logical interpretation of what the provision would have required. Because civil marriage has long been more common in Cuba than religious marriage, the question may have seemed moot. If the forthcoming reform clarifies that churches may continue limiting religious marriage only to heterosexuals, doing so might make it more likely to legalize same-sex marriage in the Family Code.

By blocking same-sex marriage, the Church succeeded in bending secular law to its religious doctrine. Moreover, its political activity was framed in terms of promoting pluralism and individual rights in country not known for open dissent. Nevertheless, for the Church even this fell short of its political goal, which was to permanently abridge the right of sexual minorities to use their political power through a constitutional definition of marriage. The successful defeat of same-sex marriage is the most overt example of the risks to minorities—and to secular authority generally—of the resurgence of religious activity on the island.

The second pastoral letter issued by the Bishops is telling not only in terms of marriage but, more widely, because it heralds the Church's incipient efforts to claw back its corporate and political advantages lost after the Revolution. The logic is the same as in liberal democracies: define individual religious liberty in terms of the political power for the Church as a corporate actor. Unless the Church is free to conduct collateral activities not directly related to ministry—say the bishops—the constitutional standard for religious freedom is violated. Cuba still has time to do something about this.

The pastoral letter complains that the 2018 draft constitution's mention of socialism and communism as the only basis for human development threatens pluralism.¹³⁵ This is ironic coming after a successful campaign to limit the rights of those who do not adhere to Catholicism, but it is a textbook example of how the Church has learned to coopt secular values—here pluralism—by redefining them to conform to sectarian doctrine. In this

¹³⁵ *Id.* at Sections 5–7.

case, pluralism means pluralism for religious believers but restrictions for others. Tellingly, the letter also complains that the 2018 draft constitution does not provide adequate recognition of the Church's right to participate in education and evangelization and, importantly, to own and accumulate property.¹³⁶

V. IDEOLOGICAL RENEWAL BY SUPPORTING MARRIAGE EQUALITY

Until the constitutional reform, the conflict between sexual minorities and the Church had stayed under the surface. By exposing and formalizing the political tensions between religious groups and sexual minorities in a zero-sum competition, however, the reform confronts the Cuban government with a choice between favoring the political demands of heteronormative churches (in particular, the Church) or those of sexual minorities. Cuba remains grounded in Marxist theory, which contemplates a transformation of the social order much like that urged by sexual minorities. As noted below, many of the political demands of sexual (and gender) minorities resemble Marxism's efforts to transform society. Cuba's leaders looking for ways to renew the Revolution should consider building ideological bridges with these ideologically complementary demands rather than the competing claims of heteronormative churches.

Though it ended as a historical event with Fidel Castro's defeat of Fulgencio Batista in 1959, the Revolution has long served as an existential master frame for Cubans. As a totalizing narrative, it integrated Cuba's colonial and neo-colonial past, its transformations into a socialist state, and its relationship to the United States. At the high point of the Revolution's symbolic power, it functioned as a hermetic ontology producing not only citizens but, rather, subjects of a transcendental mission—the creation of a socialist society that would—for the first time in the island's history—safeguard Cuban honor that had suffered during colonialism, foreign occupations, the Platt Amendment, and the economic isolation created by the U.S. blockade.

Fidel Castro fathered the Revolution as a worldview, but, for it to survive as a political benchmark, it would have to stand on its own in a world without the Cold War, the Soviet Trade Bloc, and its other original referents. In this regard, the 2019 Constitution will impact the future of the Revolution as a symbol of the island's sovereignty. As custodian of the Revolution's symbolic value, the Party faces a formidable challenge in implementing the constitutional reform: how to make the Revolution relevant to today's Cubans rather than a treasured artifact of an experiment in sovereignty.¹³⁷ The conflict between heteronormative churches and sexual minorities

¹³⁶ *Id.* at Section 10.

¹³⁷ I was in Havana the day that Fidel Castro's death was announced. News accounts spoke not of his death but, instead, of his "physical disappearance," suggesting that his incorporation into the Cuban Revolution as a symbolic entity was complete. See CNN interview with José Gabilondo (Nov. 26, 2016), https://www.dropbox.com/s/es3zn41r0viewe6/CNNES_11-26-2016_JoseGabilondo_Castro%27sDeath.mp4?dl=0.

presents the Party with an opportunity to renew the Revolution's commitment to transform the social order.

Regimes based on Marxist theory have almost universally stigmatized sexual minorities, as shown by the homophobic remarks made by Russian, Chinese, and, previously, Cuban leaders.¹³⁸ That said, neither classic nor contemporary sources of Marxist theory object to homosexuality, non-procreative sexuality, or gender variation. Instead, Marxism contemplates a transformation of the economic order by centralizing ownership and control of a society's means of production in the state, making way for the dictatorship of the proletariat.¹³⁹ This economic reordering depends on transforming individual and collective consciousness so as to reimagine social relations outside of capitalism.

Marxist theory addresses sex, sexual orientation, and gender through the notion of the family. From this perspective, the family supports capitalism by reproducing patterns of capital accumulation, inequality, and political power. Karl Marx and Friedrich Engels defined the family in terms of capitalist exploitation, though they said little about the structure of a post-capitalist family.¹⁴⁰ Feminist Marxist scholarship has tried to promote greater equality for women in the heterosexual family by shifting the burden of child rearing. With some important exceptions, these approaches tend to posit heterosexuality as the lynchpin of the family, moving around the basic conceptual building blocks of sexuality, marriage, and reproduction rather than reimaging social arrangements. This matters because compulsory heterosexuality is not an isolated sexual behavior but instead a powerful form of consciousness that radically limits knowledge about human experience.¹⁴¹

In contrast, the politics implicated in being a sexual minority make possible a more radical appraisal of sex, sexual orientation, and gender, one consistent with the fundamental reimaging of social, sexual, and family relations demanded by Marxism. A sexual Left has advocated for forms of socialism that do not reproduce heterosexual patriarchy and its subordination of women and sexual minorities.¹⁴² Herbert Marcuse is the most notable example, but more is possible.¹⁴³

More recently, some theorists have also tried to build a queer Marxism cleansed of homophobia.¹⁴⁴ In general, they try to explain how capitalism

¹³⁸ In Cuba, the UMAP is the most overt example of that. *See infra* text at notes 82–88.

¹³⁹ *See, e.g.*, P.N. FEDOSEEV ET AL., *COMUNISMO CIENTÍFICO* (Editorial Pueblo y Educación, 1989) (expounding Marxist-Leninist theory about capitalism, socialism, and revolution).

¹⁴⁰ Richard Weikart, *Marx, Engels, and the Abolition of the Family*, 18 *HISTORY OF EUROPEAN IDEAS* 657–672 (1994).

¹⁴¹ José Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 *WIS. WOMEN'S L. J.* 1–21 (2006).

¹⁴² PAUL A. ROBINSON, *THE FREUDIAN LEFT: WILHELM REICH, GEZA ROHEIM, HERBERT MARCUSE* (Harper Row, 1969).

¹⁴³ *Id.*

¹⁴⁴ Peter Druker, *Towards A Queer Marxism*, *AGAINST THE CURRENT* 36–40 (Mar.–Apr. 2011) (reviewing scholarly approaches that combine Marxism and queer theory).

influences the situation of sexual minorities in straight society. For example, Marxist critics have noted that the development of a niche market (“pink market”) for consumption reinforces social divisions between middle-class, gender-conforming gays and lesbians and those who are less affluent or more radical.¹⁴⁵ Largely missing even from these innovative efforts, however, is the recognition that sexual minority consciousness could also contribute to Marxism’s twin goals of economic transformation and the liberation of consciousness.

Admittedly, it is difficult to generalize about the political demands of sexual and gender minorities. After the Stonewall Riots in 1969, these political demands could plausibly be grouped into two competing approaches—assimilationist and liberationist.¹⁴⁶ Advocates for assimilation accepted the overall social arrangements of straight society; what they sought was—to borrow a homely phrase from a book that encapsulated this view—a place at the table, no more no less.¹⁴⁷ In contrast, liberation approaches rejected the status quo at a more fundamental level, insisting on the need to reimagine how society might be cured of its invidious gender distinctions. More recently, the assimilation-liberation binary has been eclipsed by disparate sexual and gender minority movements, which seek also address the demands of transgendered individuals, bisexuals, asexuals, and those with nonbinary identities.¹⁴⁸

Despite their differences, these political claims tend to share some assumptions about the relationship of the sexual minority to a society organized around compulsory heterosexuality and its concomitant gender norms. First, the sexual or gender minority does not fully belong to the family of origin or mainstream society because these institutions are imagined and enforced in the context of compulsory heterosexuality. Unable to conform to the parental mandate to be heterosexual, the sexual or gender minority child negotiates their identity at home and looks elsewhere for an alternative.¹⁴⁹

¹⁴⁵ *Id.* at 40 (discussing “homonormativity” and “repressive desublimation”).

¹⁴⁶ The Harvard Gay and Lesbian Review has published a useful debate between liberationist and assimilationist approaches to gay rights. RICHARD SCHEIDER, ed., *THE BEST OF THE HARVARD GAY & LESBIAN REVIEW* 250–319 (1997).

¹⁴⁷ The metaphor comes from BRUCE BAWER, *A PLACE AT THE TABLE*, highly emblematic of assimilationist hopes.

¹⁴⁸ The largest sexual minority advocacy group in the United States today advocates for an increasingly broad range of federal and local rights. See Human Rights Campaign, <https://www.hrc.org/explore>, archived at <https://perma.cc/WH5P-TTPR>; see also National Center for Transgender Equality, *Frequently Asked Questions About Transgender People*, <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>, archived at <https://perma.cc/U9LA-UY2S>; National Center for Transgender Equality, *Understanding Nonbinary People[.] How to Be Respectful and Supportive*, <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive>, archived at <https://perma.cc/6PCJ-V8HF>.

¹⁴⁹ John Boswell suggests a similar juxtaposition between contrasting social structures embedded in heterosexuality and homosexuality. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* (1980). Boswell argued that heterosexuality and homosexuality served as the nuclei of two alternative social economies. Families built around heterosexual marriage dovetailed with an agrarian society, which benefitted from the labor of children and

As they accumulate insight from their patterned interactions with a heterosexual world, they build an alternative worldview, one in which they can show up as they actually are. Delinked from the mandate to reproduce for the sake of society, sex takes on a different meaning, becoming a basis for kinship, politics, and friendship. Thankfully, some sexual and gender minorities have now enjoyed a measure of freedom, but wherever compulsory heterosexuality reigns it will relegate these minorities to an inferior legal, moral, and ontological status.

The worldview of the sexual or gender minority often shares much with Marxist thought. These minorities and Marxists share common enemies: repressive family conditions, religious institutions that regulate sexuality and gender, and reproductive practices that transmit inequality. Each rely on aspirational challenges to entrenched social realities that violate an ideal, i.e., proletarian dictatorship in the case of Marxism and, for sexual and gender minorities, a social order free from heteronormativity, binary sex, and sex-based gender norms.

Each also assert that their class struggles show up globally in societies with different language, religion, and histories. The struggle of the individual sexual minority is part of a wider class conflict between an oppressive heterosexual majority and a group of similarly-situated minorities. The sexual minority rejects social institutions presented as natural and must generally resist the structures of straight authority, e.g., parents, clerics, doctors, teachers, and politicians. Breaking free of capitalism calls for similar mental shifts, albeit with respect to the economic rather than the sexual order. Hence, the mental work done by sexual minorities mirrors the change of consciousness sought by Marxism.

Given these parallels, explicitly incorporating the political demands of sexual and gender minorities into the Revolution's political platform makes much sense. Doing so would be in keeping with the Revolution's syncretic political tradition, which blends its original form of socialist theory with civil code elements from its past as a Spanish colony, modern liberal elements, and legacy notions from its ties with the Soviet Union.¹⁵⁰ More fully

the political stability formed by interlocking marriages. In contrast, homosexuality focused resources outside of the family and into public institutions composed of unrelated individuals, a framework more common in urban settings. While heterosexual kinship emphasized ties of blood and marriage, homosexual patterns of affiliation made for stronger ties to public institutions. Boswell died before large numbers of gays and lesbians decided to join society's most traditional institutions, i.e., marriage, childrearing, churches, and the military. So his model works best for sexual minorities that have not assimilated into straight society.

¹⁵⁰ In some countries based on the Napoleonic Code, the Civil Code provides more legal continuity than constitutions. In these contexts, projects of constitution-making may reflect a new government's desire to create legitimacy and found a new basis for the political order. To a certain extent, this was true about Cuba's pre-Revolutionary constitutions. The Cuban Civil Code (based in large part on the Spanish Civil Code) survived relatively intact while political constitutions rose and fell. Beginning in 1901 (imposed during the first U.S. occupation of Cuba), the Cuban Constitution adopted some features of the United States Constitution.

endorsing the political demands of sexual and gender minorities would enhance the best aspects of the Revolution's commitment to transformation of the social order.