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**REGIONAL TRENDS IN CONSTITUTIONAL DEVELOPMENTS  
IN THE COMMONWEALTH CARIBBEAN**

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CONTENTS

Introduction ..... - 3 -

Historical Background ..... - 4 -

The Case for Constitutional Reform..... - 5 -

Repatriation of the Constitution..... - 9 -

The Agenda of Constitutional Reform in the Caribbean..... - 11 -

    Deepening of Political Democracy ..... - 11 -

    Judicial Reform ..... - 15 -

    Fundamental Rights and Freedoms..... - 18 -

    Dual Citizenship..... - 20 -

Guyana: Breaking New Ground ..... - 20 -

Conclusion: What Constitutional Reform?..... - 23 -

## Introduction

Globally, a multitude of systemic and conjunctural developments have brought to the fore the need for constitutional reform in states straddling democratic, military and authoritarian traditions. The Caribbean is no different and given the questionable level of political inclusiveness, the level of corruption, authoritarian governance, lack of accountability, lopsided parliaments and general political malaise in the region, it is unsurprising that most Caribbean States have contemplated starting a process of constitutional reform. Not only are Caribbean democracies dominated by powerful political executives but the tendency towards authoritarian rule is compounded by the results of general elections in several Caribbean democracies that have resulted in strong one-party control of parliaments. Further, election results in many jurisdictions reveal a pattern of declining voter participation which is a clear signal of public dissatisfaction and therefore the need for change. Transparency International rates many Caribbean countries extremely low on the corruption index and there is a clear perception on the part of Caribbean electorates that there is rampant political corruption regionally. In Jamaica for instance, in a 1999 poll, forty-nine percent thought that corruption was the greatest threat to Jamaican democracy.<sup>1</sup> Political and bureaucratic corruption in Antigua and Barbuda however appears to be even more alarming with at least two Commissions of Inquiry condemning illicit enrichment by politicians and bureaucrats<sup>2</sup>. Unfortunately, corruption and the perception of rampant political and bureaucratic corruption are not limited to these two countries.

In light of all of these subversions and limitations of Caribbean democracies several reform commissions have been established to advise the political administrations on the way in which constitutional governance can be enhanced and in so doing improve the quality of democracy in the region. There is hope that the democratic character of Caribbean states can be further bolstered. Yet few Caribbean governments have responded positively to these reports and fewer have undertaken a thorough rewriting of the sections of their constitutions that weaken governance.

This paper will focus on the context for renewed interest in constitutional reform in the region and identify the most critical issues that have been raised in the last two decades. The paper is divided into seven main sections, beginning with the backdrop against which constitutional reform has emerged. It then makes the case for constitutional

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<sup>1</sup> This perception is not unfounded. In Jamaica, for instance, in order to prevent a conflict of interest, the independence constitution prohibits members of parliament from owning or having financial interests in businesses that obtain government contract unless a waiver is given. Michael W. Collier however notes that despite this prohibition at least one-third of the 1999 elected parliamentarians were associated with business interests holding government contracts and that all of them received parliamentary waivers. Michael W. Collier, *Political Corruption in the Caribbean Basin: Constructing a Theory to Combat Corruption*. New York: Routledge, 2005.

<sup>2</sup> Commissions of Inquiry suggest that influence peddling has been a major issue in Antigua and Barbuda where bureaucrats and politicians routinely use their connections and contacts for personal benefit. The most spectacular case was the drugs for arms scandal outlined by the Louis Blom-Cooper Commission of Inquiry involving Vere Bird Junior, who at the time was Antigua's national security minister and the Israeli Maurice Sarfati. The various commissions of Inquiry into corruption in the country reveal that there is unusual governmental i.e. executive involvement in the awarding of contracts, many of which are riddled with conflicts of interest, and outright fraud. Two high profile Commissions of Inquiries, namely the Blom-Cooper Report (1990) and The Royal Commission of Inquiry into the Medical Benefits Scheme (2002) have condemned such practices in the country.

reform given the performance and perceived inadequacies of the existing parliamentary model and governance regionally. The following sections deal with some of the more vexing problems in the region, including repatriation of the constitution,<sup>3</sup> the need to deepen the democratic process in the region as a way of ensuring further democratic consolidation, the problematic Caribbean judiciary, the extension and preservation of fundamental human rights, and the new issue of dual citizenship, which has created political difficulties in a few Caribbean jurisdictions. Finally, the paper briefly presents Guyana as a case study of constitutional reform in the Commonwealth Caribbean.

## **Historical Background**

All Commonwealth Caribbean constitutions belong to a stock of constitutions that are based on the parliamentary Westminster system of government. It is instructive to note that the constitutions of Caribbean independent states were primarily produced by British civil servants at Whitehall, with little input from Caribbean publics. At independence almost all Commonwealth Caribbean countries adopted the parliamentary majoritarian political system with its dual executive power structure in the head of state and head of government.

In keeping with their parent country (Britain), independent Commonwealth Caribbean constitutions recognized the British monarch as the head of state with governors general acting as Her Majesty's personal representative. While the governors general exercise their functions in accordance with the advice of the cabinet or a minister acting under the general authority of the cabinet, in some Caribbean jurisdictions, governors general are empowered to act in their own deliberate judgment with respect to certain expressed provisions of the constitution. In the post-independence period some Commonwealth Caribbean countries either engaged in modifications to their constitutional monarchical constitutions or embarked on a republican course with a ceremonial president as head of state<sup>4</sup>.

Under the present constitutional arrangements, there is a clear centralization of power in the hands of the Prime Minister. Constitutionally and legally Prime Ministers have the power to select the majority of senators in the bicameral legislature and are vested with the power to hire and fire ministers of government and appoint a wide ranging number of individuals to important political, bureaucratic, and sometimes judicial positions. Further, the inherited Westminster arrangements, unlike the American presidential prototype, do not provide for strong and effective checks on prime ministerial power. These political arrangements do not easily allow consensual government and there is a natural tendency for partisan politics to be paramount in a context of both the fusion of

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<sup>3</sup> By repatriation of the Constitution I refer to the act of removing British imperial authority from our independent constitutions and in the process make the so called independent constitutions our own. It also involves the process of reinventing our constitutions through the process of democratic participation in the writing of our own constitutions.

<sup>4</sup> In 1978, for instance, Dominica gained its independence as a republic. Post-independence modifications in Guyana in 1970 and Trinidad and Tobago in 1976 saw the repatriation of their constitutions and the establishment of constitutional republics.

power and the need of the executive (the cabinet) to maintain the confidence of the legislature. It is primarily for this reason that parliament has been reduced to rubber stamping the wishes of the executive branch of government. Also, one of the major dysfunctionalities of the Westminster parliamentary system of government, as practiced in the Commonwealth Caribbean, is the virtual absence of oversight committees allowing for scrutiny of public officials and ensuring transparency and accountability. Beyond the issue of overwhelming control given to political leaders in the Caribbean, the quality of governance has been placed under the microscope. While most countries have maintained high levels of civil liberties and political rights and have enjoyed peaceful transitions during regime changes, there is nevertheless little doubt that the Westminster arrangement has been wilting and is in need of reform. In spite of these problems, all Commonwealth Caribbean countries, with the exception of Guyana which has adopted a hybrid presidential/parliamentary form, continue to practice Westminster parliamentary democracy.

## **The Case for Constitutional Reform**

From a historical perspective, it has been argued that our constitutions do not represent, in the true sense, a social contract, as they were handed down to the Anglophone Caribbean by the former colonial “master,” Britain. In that regard, Simeon McIntosh argued that the post-colonial constitutions of the Anglophone Caribbean countries were drafted “as part of an oligarchic, elitist exercise.” In his view, precisely because the “collective self” was not the author of the political community, regionally these constitutions continue to be perceived as received instruments from former colonial masters, and “fundamentally illegitimate, of subjection to imposition from without.” McIntosh asserts:

The independence constitutions are Orders-in-Council of the British Imperial Parliament –amended versions of the colonial constitution, with Bills of Rights engrafted onto them. This allowed easy transition from colony to independent state. This continuity implied no important changes between the colonial and independent constitution. The parliamentary system remained virtually the same, and the constitutions, for the most part, are said to have remained monarchical.<sup>5</sup>

All Commonwealth Caribbean countries are currently engaged in the process of reviewing their constitutions whether formally or informally. In that regard, the re-emergence of constitutional reform as an element of the national discourse in the Commonwealth Caribbean is partly related to the political imperative of engaging in a domestic political process that would not only help to shape a document that is home-grown but would also consciously seek to fashion a new society some thirty to fifty years after achieving independence from Britain. The regional constitutional reform process therefore sets out to correct or remedy the historical oversight by way of public debate, public education, and requests for written memoranda to as wide an audience as possible. The imperative for change is not only a reflection of the pressure from below for greater democracy, including the need for greater protection of citizens, more entitlement for citizens, greater equity, labour rights, protection of animals, and environmental protection

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<sup>5</sup> See Simeon C. R. McIntosh's, *Caribbean Constitutional Reform, Rethinking the West Indian Policy*; Kingston: Caribbean Law Publishing Company; 2002.

among others, but it is also a reflection of the need to conform to global best practice. Certainly in so far as the member countries of the Organisation of Eastern Caribbean States are concerned, a World Bank Report notes that:

None of the ... member countries has adopted laws which set forth clear and comprehensive framework for public sector procurement.... As executive acts, these rules can be easily changed by the Minister of Finance and do not reflect established government procurement principles and practices. Existing rules promote selective bidding, excessive discretion of decision making, and do not address the issues and aspects which are key to efficiency, fairness, transparency and accountability.<sup>6</sup>

While not directly related to constitutional amendments, in the last decade several Commonwealth Caribbean states have engaged in legislative changes as a direct result of developments in the character of the global economy and the international security environment since September 11, 2001. September 11th significantly changed the overall discourse on hemispheric and global security with an increasing emphasis on financial security especially with respect to transparency in operations and transactions. Since then a number of Commonwealth Caribbean states that maintain offshore financial centres have had to confront an increasingly cohesive and demanding global financial governance architecture requiring Caribbean states to make domestic adjustments to conform to the new global standards. Legislation seeking to reform domestic tax laws and other similar developments do not only touch on sensitive issues of sovereignty, but also have serious implications for the economic and financial survival of these states. These actions can be viewed as “the enforced adjustment of an independent state, to what powerful external elements would like to see implemented within the governance of that society.”<sup>7</sup> Indeed, as Tennyson S. D. Joseph noted, globalization has not only impacted Caribbean countries financially and economically, but it has had a serious political impact. Invariably, globalization has led to the erosion of the democratic standards achieved in the post-colonial period as domestic political actors find themselves often cajoled by external decision makers to make unpopular adjustments to not only the structuring of the economy but also to domestic legislation. According to Joseph:

One of the realities of our condition is that globalization has re-presented the old colonial problematic of power without responsibility in a new guise. Firstly, our new independent governments are now constrained in their policy choices and critical economic decisions are now being made more and

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<sup>6</sup> See the OECS Country Procurement Assessment Report (Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines), April 2003. For example, in Trinidad and Tobago the increasing decentralization of procurement decisions has led to numerous cases of corruption especially in the construction procurement as indicated by the Piarco Airport Development Project in which millions of dollars were wasted, and deliberate malfeasance occurred.

<sup>7</sup> View presented by Tennyson S. D. Joseph as part of a public lecture series organised by the St. Lucia Constitutional Reform Commission, August 21, 2008. In his contribution to the public discourse on constitutional reform, Joseph made a case for the Constitution Reform Commission to ground itself in the philosophy of constitution making arguing, among other things, that developments in the international political economy were having a profound impact on the direction and scope of constitutional reform throughout the Caribbean.

more in the IMF, World Bank, and the WTO, than in our domestic cabinet rooms. Whilst the power of our domestically elected governments have decreased, they remain no less accountable for actions over which they have very little or no control.<sup>8</sup>

September 11 2001 has therefore had important implications for constitutional and legal reform in the region. Major examples of this development are the anti-terrorism laws modelled along the lines of the American Patriot Act. These acts undermine fundamental rights in the Caribbean as these pieces of legislation pose possible threats to civil liberties. For example, the anti-terrorism acts have provisions for enhanced surveillance, law enforcement expansion, lengthy pre-trial detention of suspects, and reduction of procedural requirements such as obtaining court approval. These laws were passed without public input and packaged as a strategy to attract foreign investors in a context of acute investment shortage and increasing economic difficulties. Developments like these urge a review of the existing constitutions and the manner in which fundamental rights are being eroded by national governments.

The language through which the current exercise is justified is couched in issues of democracy and public participation but lost in that recent discourse are wider issues of political sovereignty, independence, self respect, nationalism, and autonomy which engaged the imagination of the immediate post independence nationalists. While the current global framework is undermining the sovereignty of states, current constitutional discourse, is devoid of a clear appreciation of the scale of the impact of globalization on the region. This stands in stark contrast to the immediate pre-independence and post independence period when the nationalist discourse focused on issues of sovereignty and self-determination. While sovereignty issues are even more problematic today than the 1960s and 1970s when most Commonwealth Caribbean countries gained their independence, the current debate is largely based on ways of improving democratic governance.<sup>9</sup> Undoubtedly, contemporary global trends have placed tremendous pressure on the states to maintain levels of economic development which are critical to the preservation of Caribbean democratic traditions. This clearly legitimises the need to rethink the Caribbean democratic environment, yet as the debate on the repatriation of the constitution and the establishment of the Caribbean Court of Justice suggest, consideration of issues of sovereignty and independence are also necessary.

The critique offered by Joseph of the constitution reform process of St. Lucia since 2005 is relevant for the process in other Commonwealth Caribbean jurisdictions. According to Joseph “The soul of the constitutional reform is lacking in a philosophy of independence and sovereignty and is couched very much in the administrative language of democracy.”<sup>10</sup> Thus Joseph argues that the discourse on constitutional reform is fundamentally sterile

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<sup>8</sup> Ibid. Joseph.

<sup>9</sup> In the last fifteen years the discourse has been couched in the language of recolonization which admits to the reduced autonomy of the nation state, the diminution of the autonomy of democratically elected governments and the increasing presence, intervention and control of International Financial Institutions and other global organisations in the decision making process of the independent state. Thus the concept of the Westphalian state has become outmoded and its replacement by a polycentric mode of governance now poses severe challenges to the sovereignty of Caribbean nation states.

<sup>10</sup> Tennyson S. D. Joseph in his presentation to UWI students and members of the St. Lucian Community in Barbados at the Cave Hill campus, 03 April 2008.

and technocratic and not tied to any philosophical direction for the nation state, given that Caribbean countries have endured centuries of colonisation, domination and control. Clearly the view is that both components of constitution making are critical.

As Prime Minister of St. Vincent and the Grenadines Ralph Gonsalves also argues:

Constitutional reform is not a political abstraction. It is a major, political exercise in governance involving real flesh-and-blood people awash with their peculiarities and contradictions, conditioned by their socio-political history and contemporary reality. The very exercise in constitution-making ought to involve an unprecedented campaign of structured, mass political education of all the relevant philosophical, practical, legal, political, historical and comparative issues....This educational campaign ought to be, as far as the competitive political market can bear, a national, as distinct from a party political affair. After all, the new constitutions will go to the people in a referendum for approval.<sup>11</sup>

In the 1970s discussion of constitutional reform for Jamaica, the Constitution Reform Division of the Ministry of Justice noted that some fifteen years after the independence of Jamaica, the relevance of the Jamaican constitution was questionable. Beyond the issue of relevance, the Reform Division also noted that the “Constitution must be ‘a people’s document’ in the sense that not only must it serve us but it must also evolve out of a programme of consultation, information and discussion in which all Jamaican have an opportunity to help make the constitution.”<sup>12</sup> [sic]

Given the fundamental changes that have occurred in the last fifty years, this view is more apt than it was some thirty years ago. In the immediate pre independence period leaders merely adopted the institutional premises of Whitehall civil servants who largely drafted our independent constitutions. In Jamaica for instance, there was virtually no input from the public in the first draft of the constitution and the fundamental law of the land was essentially the product of a few men. Monroe noted basic decisions regarding whether the country should be a constitutional monarchy, whether Jamaica should adopt unicameralism or maintain its bicameral legislature, and the question of the final court of appeal were taken by a Drafting Committee without the benefit or input of any public debate.<sup>13</sup> As I have said elsewhere, this process was mimicked throughout the English speaking Caribbean with the end result that by and large all the Independent Constitutions duplicated the main institutional elements of the Jamaican constitution with slight variations.<sup>14</sup> The 1978 Dominica independence constitution however contains an important difference as it declares this nation a Republic, which distinguishes that independent constitution from the others in the region.

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<sup>11</sup> These sentiments have been echoed by the Prime Minister of St. Vincent and the Grenadines, Ralph Gonsalves, in a keynote address delivered to a Conference on Constitutional Reform in the Caribbean on January 21, 2002.

<sup>12</sup> See “Constitutional Reform: Some Basic Facts”, compiled by the Constitutional Reform Division, Ministry of Justice Jamaica.

<sup>13</sup> Trevor Munroe, *The Politics of Constitutional Decolonisation: Jamaica 1944-62*, Kingston: ISER, 1983.

<sup>14</sup> Cynthia Barrow-Giles, *Introduction to Caribbean Politics*, Kingston: Ian Randle Publishers: 2002.



Many of the adopted and sometimes adapted institutions have not worked in the intended manner leading to a caricature of Westminster regionally. Moreover, the demands for greater participation in the processes of government by an increasingly educated populace struggling with bad managerial decisions, growing economic difficulties and growing disillusionment and apathy in the body politics require some invigoration from “below”. In keeping with this position, the statutory instrument of St. Lucia in 2005 and St. Vincent and the Grenadines in 2002 (two States that have recently embarked upon formal constitutional dialogue) speaks of the need to ensure popular legitimacy through bipartisanship and broad-based participation of the citizens of the two states at home and abroad. Unfortunately, in the process of consultation with the people, and in the case of the public discussions held thus far, the primary focus has been firstly on the architecture of the Constitution –the nuts and bolts of the Constitution– and, secondly, to correct the defects that political practice and culture in the region have revealed. Consequently, such discussions have not always been guided by a philosophical understanding or appreciation of sovereignty and independence. As such, constitutional conversations often take place around the following issues:

- The excessive powers of the Prime Minister and their implications for autocratic government.
- The separation of powers and checks and balances. The parliamentary political model in the region provides for the separation of functions but not of personnel. This is seen as a major deficiency.
- Ineffective separation of powers between the executive, legislative, and the judiciary; primarily given the fusion of power under the Westminster parliamentary system and some independent and post independent modifications, notably the 1974 amendment to the Barbados constitution.
- Reintroduction of local government as a way of encouraging greater public participation.
- The manner in which parliamentary representatives and Senators are selected.
- The nature of the parliament, especially its construction along partisan lines.
- A revisit of constitutional monarchy.
- The Role of the Head of State.
- Official corruption and lack of accountability of elected and public officials.
- Doubts about the independence and effectiveness of the courts of justice.

### **Repatriation of the Constitution**

The call for the abolition of constitutional monarchy in the region is a very controversial one. While its continuation is regarded by its opponents as the very definition of eternal colonialism, for many it is a preferred system to republicanism as the recent November 2009 “no” vote to republican status in St. Vincent and the Grenadines may suggest.<sup>15</sup> The views of former opposition leader of Barbados, Mia Mottley, are instructive in this regard. In true Nkrumahian style, Mottley has argued that:

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<sup>15</sup> The referendum on the new constitution was the first of its kind in the Eastern Caribbean. It was defeated in a national referendum with 43.13% (22,493) of voters opting for the new constitution and 55.64% (29,019) voting against. The referendum required a two-thirds majority vote to pass. This has therefore stalled the process in the country.

We cannot ever see a Barbadian being the Head of States of the United States of America. We cannot ever see a Barbadian being a Head of State of the United Kingdom, or of any other Commonwealth country. Therefore why should we deprive the 270,000 citizens of Barbados from the legitimate aspirations.... Therefore, if their aspiration is to become the President of Barbados, why should that be beyond the reach of ordinary Barbadian men and women, boys and girls.<sup>16</sup>

Former Prime Minister of Jamaica, P. J. Patterson also noted that, because the Jamaican constitution was an order in council of Britain and therefore not a creature of the Jamaican Parliament, the time had come for the supreme law of the land to be established as an act of the sovereign Jamaican Parliament.<sup>17</sup>

However, the debate on the republican versus monarchy has not often been grounded in an understanding of the imperatives of sovereignty and complete independence. The main narrative has been essentially conservative and couched within the framework of the nature of the republican form. Caribbean publics have expressed frustration with the existing parliamentary model of government but have also rejected the proposal of an executive type presidency in any new republic and have opted instead for a minimalist yet important adjustment to the constitution. In this case, the proposal is for the substitution of a ceremonial president for the Queen and Governor-General, with the powers and duties presently assigned to the Governor-General, including the reserve powers, remaining unchanged in the hands of the president.

The debate on repatriation of the constitution has also sought to depart from the tradition of a ceremonial president appointed by the Prime Minister. The most noteworthy proposals on the table are the creation of a publicly elected president or, alternatively, a president elected by members of parliament.

Another element in the debate is to ensure that, while the change would lead to the removal of the British sovereign, it does not facilitate the increased political control of the political elite nor enhance the possibilities for constitutional crisis. The constitutional controversies in Trinidad and Tobago between President Arthur Robinson and then Prime Minister Basdeo Panday that witnessed a contest of wills between the two office holders following the 2000 general elections are instructive. In that election the United National Congress won nineteen of the thirty-six seats in the National Assembly. However, following the elections, Prime Minister Basdeo Panday attempted to secure the appointment of several defeated candidates to the Senate and as junior ministers of government.<sup>18</sup> Under

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<sup>16</sup> Dr. Kwame Nkrumah argued that it was the height of incongruity for the inhabitants of a Ghanaian town to find the Head of State living in Buckingham Palace, London. Accordingly, the head of the West African State of Ghana should be a Ghanaian with residency in Ghana. See the Barbados Hansard, Tuesday October 11, 2005. p-2 Government of Barbados: St. Michael.

<sup>17</sup> See McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity*. The Caribbean Law Publishing Company: Kingston, 2002.

<sup>18</sup> Probably as many as seven defeated candidates were recommended by Basdeo Panday to the President to be appointed to the upper chamber (The Senate). Selwyn Ryan notes that prior to 2000 the practice was to refrain from appointing defeated candidates to the Senate. Mr. Panday sought to break with that established tradition which had been institutionalised by the Peoples National Party which had ruled Trinidad and Tobago from the inception of Independence in August 1962 except for a brief period between 1986 and 1991.

Section 40 (2) (a) of the Trinidad and Tobago constitution, the Prime Minister is empowered to appoint sixteen of the thirty-one senators. The Head of State has no discretion in this constitutional right. However, A. N. R. Robinson then president of Trinidad and Tobago refused to accept the recommendations on the grounds that he found “it impossible to accept the principle, not expressed or demanded in the constitution, that persons who have been rejected by the electorate can constitute a substantial part of the Cabinet, even the majority, and consequently the effective executive in our democratic state”.<sup>19</sup> A constitutional impasse developed which finally ended with the capitulation of the president some fifty-five days after the recommendations had been received by the President. Thus the refusal by President ANR Robinson of Trinidad and Tobago to swear in seven persons recommended by the Basdeo Panday Government is a testament to such a possibility. Devising an appropriate constitutional order that would not unduly affect the balance of power between the Head of Government and the Head of State remains a major challenge for constitutional reformers throughout the Commonwealth Caribbean.

## **The Agenda of Constitutional Reform in the Caribbean**

### *Deepening of Political Democracy*

Throughout the region it is clear that democratic reform is required to meet the new challenges of the twenty-first century and to ensure public confidence in government. Indeed there is much political interference, nepotism, and cronyism as well as sufficient evidence to suggest that governmental procedures are routinely and blatantly violated. Moreover, evidence suggests that governments are not sufficiently reform minded, are prone to abuse their positions in violation of existing legislation, and enjoy too much discretionary power. Consequently, in a number of Commonwealth Caribbean countries, little effort has been made to enhance accountability structures including introducing and enforcing conflict of interest rules and systems of income, asset, and liability disclosure. To a large extent, Commonwealth Caribbean countries have failed to adopt adequate regulation to guide the functions and responsibilities of parliamentary representatives.

Constitutional reform has been spawned by a perceived need to strengthen popular democracy, including the reintroduction of local government, and the institutionalization of the recall mechanism as a bulwark against abusive and tyrannical domestic government. Given the strong concentration of power in the Prime Ministers aforementioned, constitutional discourse has focused on limiting the tenure of the chief executive as a means of limiting the power of regional prime ministers. As early as the 1970s the Constitution Review Commission, under the chairmanship of the Right Honourable Sir Hugh Wooding in Trinidad, argued that:

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<sup>19</sup> See Selwyn Ryan *Deadlock: Ethnicity and Competition in Trinidad and Tobago 1995-2002*. St. Augustine: Sir Arthur Lewis Institute of Social and Economic Studies, 2003, pp. 52. Ironically A. N. R. Robinson was a former Prime Minister from 1986-1991 and had been appointed by Mr. Panday as Head of State. When President Noor Hasanali's second term of office expired Prime Minister Panday refused to reappoint him and instead the UNC/National Alliance for Reconstruction(NAR) appointed Robinson who was serving as a Minister Extraordinaire in the Cabinet of the coalition government. As Head of State Mr. Robinson was engaged in a number of controversies with the Prime Minister. This included the refusal to revoke two appointments to the Senate, the delay in appointment Panday as Prime Minister following the elections in December 2000, the delay in dissolving parliament in 2001 and the refusal to reappoint Mr. Panday to the office of the Prime Minister in 2001 following the hung parliament occasioned by the 18-18 election results.

Essentially at any general election voters choose the party which they wish to form the government. It seems to us unthinkable to impose any restrictions on the number of successive terms which any party could win. Once that is conceded, it would seem to be wrong in principle to place a restriction on the party's choice of leadership. This could have a significant effect on their chances of winning the elections. Compelling them to change their leader may, in effect, reduce their chances of success. We do not think that any useful purpose can be served from a study of the experience of the United States of America and some Latin American countries where the choice of President is essentially the choice of a person, not of a governing party. In these systems the office of President stands by itself separate and apart from Congress which may be controlled by a party other than that to which the President belongs.<sup>20</sup>

Moreover, the small size of the parliaments, particularly in Eastern Caribbean States, as well as an electoral system that permit the domination of a single party over an extended period of time do not allow for the scrutiny of government that is possible in larger states operating under a presidential political system. In several Commonwealth Caribbean States, single parties have been able to win every seat in the elected chamber of parliament thereby excluding all opposition. Debate has been waged over the tendency of the electoral system and parliamentary model to diminish the role of the opposition and its inability to act as an effective check on both the cabinet and the Prime Minister. Whereas the principle of loyal opposition under the constitution assumes that the opposition members of parliament will scrutinize and oppose government policy (and in the process ensure an adequate public debate of policy issues), the often small opposition ensures that government policy prevails. It is against this backdrop that considerable attention has been paid to reforming the existing political model in the region. Throughout the region, constitutional debate reveals the attractiveness and strong influence of the Washington model as a way of exercising greater scrutiny and checks and balances by way of reforming existing parliaments. Specifically the American presidential political model with its nearly independent legislative branch of government, offers the Commonwealth Caribbean the prospects of an important check on an increasingly powerful Executive branch of government.

Further, the associated strict party line that is linked to the Westminster parliamentary arrangement does not lend itself to an effective check on the ruling political party. Developments like these have fuelled public debate throughout the Caribbean on the efficacy of both the parliamentary system of government and the plurality/majoritarian electoral system. However, for the most part, there is a commitment to the reformed parliamentary system and the maintenance of the existing electoral system precisely because of their ability to provide strong governments<sup>21</sup>.

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<sup>20</sup> See Report of the Constitution Commission, Trinidad and Tobago. Printing and Packaging Co., 1974, para. 284.

<sup>21</sup> Notwithstanding the frustrations with the design premises of the Westminster parliamentary arrangements in the region, and the appeal of the American institutional form, Constitutional reform Commissions have generally agreed with *Walter Bagehot* in *The English Constitution: The Cabinet*, that "Even in quiet times, government by a president is, ... inferior to government by a cabinet; but the difficulty of quiet times is nothing as compared with the difficulty of unquiet times. The comparative deficiencies of the regular, common operation

One exception to this preference of the Westminster model was the Stone Committee Report of 1991 in Jamaica, which recommended the adoption of a presidential model of government that would create the much needed checks and balances on the political executive. The separation of power would also provide opportunity for the members of parliament to attend to their constituents while permitting them the political space to engage in meaningful executive oversight. The Stone Committee recommendations however received little traction in political quarters in Jamaica and the Jamaica government Constitutional Commission and the Joint Select Commission categorically rejected the proposal to adopt a presidential system. Here the Commission recommended that, given the overwhelming concern with the lack of a separation of power, a cap should be placed on the proportion of members of the legislature who could be appointed to the cabinet of ministers.

Caribbean citizens have also showed a clear dissatisfaction with the perceived poor performance of elected leaders and consequently one of the issues that has emerged as an important constitutional matter is the way in which parliamentarians can be held accountable for their actions by the citizenry. In this vein, an often repeated submission placed before Commissions is the need to institute a recall mechanism. To date, few Commissions have so recommended but it is worth noting that the Stone Commission Report recommended the institutionalization of the recall mechanism as a means of not only creating greater direct democracy but also of holding members of parliament to account. The unpopularity of the mechanism in political circles is linked to the perception that the measure would result in tremendous abuse.

Another concern has been directed at the practice of parliamentarians crossing the floor. Throughout the Commonwealth Caribbean a number of parliamentarians have, for a variety of reasons, jettisoned their political party for the other side (whether government or opposition)<sup>22</sup>. The recall mechanism is therefore seen as a good instrument to prevent such developments as often regional politicians win an election not on the basis of personal support but on a party platform.

On the question of the bicameral nature of Commonwealth Caribbean states, there have long been calls for reforming both the nature and the composition of parliament. This is reflective of the general dissatisfaction with the Senate in terms of its performance and its partisan orientation. In all Commonwealth Caribbean States, the Senate is dominated by the ruling political party with a minority of opposition appointed senators and independent Senators. The latter is appointed by the Heads of State acting in their

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of a presidential government are far less than the comparative deficiencies in time of sudden trouble – the want of elasticity, the impossibility of a dictatorship, the total absence of a *revolutionary reserve*.” Walter Bagehot, *The English Constitution: The Cabinet in Arend Lijphart (ed), Parliamentary Government Versus Presidential Government*. Oxford: Oxford University Press, 1992; pp.66-71.

<sup>22</sup> Following the 1989 general elections in Belize, the People’s United Party (PUP) with its fifteen of the twenty-eight parliamentary seats sought to increase its slim parliamentary majority by enticing members of the United Democratic Party (UDP) to its ranks. In the event, one UDP parliamentarian crossed the floor deserting his party to boost the PUP. In St. Lucia too, following two consecutive general elections separated by three weeks in 1987, Neville Cenac defected from the St. Lucia Labour Party (SLP) to strengthen the one seat majority of the John Compton led United Workers Party (UWP) which had won nine of the seventeen parliamentary seats. In Barbados in 1989, four members of the Democratic Labour Party (DLP) deserted the party and formed a new political party, the National Democratic Party (NDP). In the Barbados case, the four seats now enjoyed by the newly created NDP was sufficient to dislodge the BLP as the official opposition in office.

deliberate judgement. Overwhelmingly, the regional popular sentiment is that the Senate merely rubber stamps the decisions of the ruling political party and fails to live up to the expectation that it would serve as a delaying mechanism, provide minority interests in society some form of representation and perform the role of an educational chamber. In that regard Francis Alexis opined that:

Up and down the Caribbean, the political Executive has been busy exacting from the constitution, powers to choose for itself the source from which to draw its own members. Specifically the Executive has been demanding, and obtaining powers to select more and more of its members from among the nominated ranks of Parliament.<sup>23</sup>

The increasing abrogation of constitutional powers to heighten governmental control over the Senate commenced with Guyana in 1969. The independence constitution prohibited the appointment of more than four non-elected members of the National Assembly to ministerial posts. However a 1969 amendment to the constitution provided for the selection of 'six or such greater number as Parliament may prescribe'. Under the change the head of Government had the constitutional right to unilaterally appoint as many as six non-elected members to the Executive cabinet. Later changes in 1973 and 1980 did not only confirm the right of the Prime Minister of Guyana (1980 President) to appoint a number of non-elected members to the Senate but removed the discretion of parliament altogether. Trinidad and Tobago also modelled its constitutional change on this important issue on the Guyanese amendment when in 1970 the PNM administration increased the number of non-elected members who could be selected to the Cabinet from three to four. By 1976 the PNM administration succeeded in removing any such constitutional limitation in regards to appointments to the Senate.

Further as the 2000 constitutional impasse in Trinidad and Tobago highlights, a central concern is the tendency of both the ruling and Opposition political parties to see the Senate as either an avenue to engage in patronage by rewarding party 'faithfuls' with senatorial appointments or as a vehicle through which defeated electoral candidates can be facilitated into the Cabinet. While governments frequently defend their appointments on the grounds of sourcing technocratic skills for the Executive branch of government,<sup>24</sup> Alexis notes that the:

...credibility of this idea is put in jeopardy when a Ministerial appointment is given to an unsuccessful candidate for an elected seat in parliament. This is especially so if he is among those to whom the first major cabinet reshuffle takes place after elections...<sup>25</sup>

In that vein, the discourse on the reform of parliament has taken aim at the retention of the senate as it is perceived as an immobilized institution that has failed to perform in the

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<sup>23</sup> See Francis Alexis, *Changing Caribbean Constitutions*, Bridgetown: Carib Research and Publications Inc, 1983; pp.153.

<sup>24</sup> Prime Minister Michael Manley of Jamaica argued strongly that the capacity to appoint non elected members to the Senate was in fact necessitated by economic crisis and that constitutional change was required in order to "mobilise all managerial skill available so as to man the extremely complex and demanding economic package recently announced by his government..." see Alexis, pp.156.

<sup>25</sup> *Ibid.* Alexis, pp. 153.

manner intended by the framers of the constitution. The most repeated recommendation for reform is that the senate should be abolished and, at best, every effort should be made to severely limit the control of the ruling political party over the Upper Chamber of parliament. In that regard the Barbados Constitutional Review Recommendation Report of 1998 recommended that whilst the unequal bicameral parliament be retained, the composition of the Senate should be modified to provide for those who do not support the government of the day and to give due recognition to the fact that Barbados was not just a two party but a multi party democracy. By far the most repeated recommendation however is to deny the government the right to appoint defeated elected candidates to the Senate and ultimately to the political Executive.

While the Commonwealth Caribbean countries have a competitive multi-party system, their constitutions make no provision for the maintenance of political parties. Yet political parties are perhaps the single most important institutions that have undergirded Caribbean democracies. Interestingly, while political parties are beneficiaries of huge sums of money for electoral purposes, the constitutions and legislation do not provide for an enhanced system of scrutiny of the financial regime of political parties. It is partly for that reason and precisely because the political party and elections financing system is unregulated that Caribbean democracies have been rocked by a number of corruption scandals. Some analysts argue that several Caribbean democracies have legislated Integrity in Public Life Bills which should go a long way toward limiting corruption of public officials. Nonetheless, the spate of corruption scandals continues unabated.

Consequently, the political model and political culture in the region do not encourage accountability of the governing political elite and it is partly due to that reason that there is tremendous abuse of power. Such abuses have led to a public outcry for transparency and accountability, especially with respect to the use of state funds. In that regard, calls for the renewal of democracy in the region focus not only on the need to establish clear rules on ethical conduct in government, but also on the implementation of a robust administrative system as a check on government. This includes the enhancement of the role of the political ombudsman, an independent auditor and director of public prosecutor, and the establishment of an office of the contractor general in line with Jamaica and, since 2000 with that of Belize. This latter office is seen as a critical element in the chain of accountability, transparency and good governance given the number of corruption scandals pertaining to the awarding of contracts and the failure to complete many public works projects throughout the region. The Office of the Contractor General in these two countries is intended to monitor the award of contracts to ensure that these contracts are awarded on the basis of merit and impartiality, the circumstances under which contracts are both awarded and terminated and to ensure that there is no fraud, corruption, mismanagement, waste or abuse in the awarding of such contracts. Further, the 2000 Belize Act empowers the Contractor General to carry out investigations where necessary.

### *Judicial Reform*

Throughout the region the constitutional reform process has focused on the need for reforming and restructuring the current systems of justice partly because of the seamlessness between the judiciary and political executive. Indeed it is widely held that a genuinely independent judiciary is the last line of defense for individual freedom.

A very clear limitation in the enforcement of constitutional rights in the Commonwealth Caribbean is the manner in which judges are appointed. For example, in some jurisdictions, like the Bahamas and Barbados, the Chief Justice of the Supreme Court is appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the leader of the opposition. In the OECS countries, the Judicial and Legal Services Commission is empowered to appoint, discipline and dismiss judges, magistrates, and judges of the Eastern Caribbean Supreme Court. It is for that reason that former Caribbean jurist Telford P.C. Georges argued that there are some potential dangers in the prevailing system of judicial appointments. According to him:

There is the possibility of political influence in the appointment of Judges... Judges are appointed by the Head of State on the advice of the Judicial and Legal Service Commissions, which are themselves composed of persons nominated on the advice of the Head of Government. The possibility of political influence cannot be dismissed as remote in such an arrangement.<sup>26</sup>

Given the preeminence of the state in small societies, it is inevitable that the state would find itself as a litigant before the courts. Indeed in several Caribbean jurisdictions, members of the executive, including the Prime Minister, have been brought before the courts under Administration of Justice acts or for violation of financial acts.<sup>27</sup> These have formed the backdrop against which there have been repeated calls for constitutional amendments that will not only insulate the judiciary but would also serve to effect greater accountability and transparency in the body politics of the region in an effort to arrest the increasing criminalization of the Caribbean state.

The distancing of the judiciary from the executive branch of government is therefore seen as a critical imperative in order to achieve the twin goals of ensuring the confidence of the citizenry in the administration of justice and securing the independence of the judicial branch of government. Given the perceived level of political interference in the judiciary and attempts to politicize this important third branch of the government –which is amply illustrated by recent controversial appointments to the judiciary especially in non-OECS

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<sup>26</sup> See Telford Georges, P.C. “The Scope and Limitations of the State Machinery”, Int'l Comm'n of Jurists and Organization of Commonwealth Caribbean Bar Associations, *Human Rights and Development* p. 47.

<sup>27</sup> In St. Lucia, the Ramsahoye Commission of Inquiry, which investigated a number of so called wrongdoings by the SLP government from 1997-2006, found that then Prime Minister Kenny D. Anthony had contravened the finance act requiring foreign borrowing to be conducted only with the consent of the House of Assembly.<sup>27</sup> In doing so, the Commission accused the former prime minister of abusing his authority when he issued guarantees to investors to facilitate the purchase of the Hyatt Hotel in what was to be later dubbed the Rochamel Scandal. Further the government of Prime Minister Stephenson King has also been embroiled in a number of corruption scandals involving key ministers since 2006 some of which have been brought before the courts. Notable among them are the Housing Minister Richard Frederick who has been implicated in an alleged involvement in customs tax duty evasion and wrongdoings by the Minister of Health who approved duty free status granted to a tourism plant owned by him for his personal use. Such scandals are not only confined to the smaller OECS countries. From the Bahamas in the north to Guyana in the south, corruption scandals involving prominent politicians abound. In Trinidad and Tobago, a commission of inquiry into the Piarco Airport is another spectacular example of corruption. Here, the Robert Lindquist report on the construction of the Piarco Airport showed that the award of contracts for the \$1.426 billion Piarco Airport development project was not only a fraud but a clear abuse of public funds. In 2010 in Belize, a scandal connecting former Prime Minister Mousa with Lord Ashcroft and Belize Bank owed by Ashcroft was exposed.



countries— it is imperative that constitutional reformation focuses on restructuring the existing system of justice.

There has also been critical discussion about the accompanying repatriation of the Courts Order in the form of the Caribbean Court of Justice (CCJ) as the final court of appeal of the region. This, it is argued, represents the “essential last rite of passage to true nationhood and self determination” and the continuing presence of the Privy Council in the judicature of the countries represents an “...abdication of a fundamental aspect of our sovereignty”.<sup>28</sup> Indeed proponents of the establishment of the CCJ maintained that legal independence was in fact the “logical capstone of political independence.”<sup>29</sup> With respect to the need for the repatriation of the Courts Order, former Prime Minister of Jamaica, P.J. Patterson asserted in 2000 that Caribbean countries could not be genuinely independent when the British Privy Council exercised the final word on national law. In his view therefore:

...our sovereignty (cannot) be complete when the final word on the law as an essential ingredient in the functioning of our state is still the subject of external decision-making and interpretation by a ... court that is not indigenous.<sup>30</sup>

Echoing these Sentiments, Simeon C. R. McIntosh argues that:

...the continuing *presence* of the Crown and its Judicial Committee in the post-independence Commonwealth Caribbean political order represents a vestigial incongruity, a contradiction in the constitutional symbolism of a politically independent sovereign order.<sup>31</sup>

By contrast, opponents of the establishment of the CCJ pointed to the perceived partiality of the judiciary in a context of “small politically and tribalistically charged environments.”<sup>32</sup> Consequently, the view is that the ability of judges to appease the political directorate, vested interests, and their friends would be further enhanced by the removal of the Privy Council. For them, the British Privy Council represents the last line of defense against partial judges. Moreover given the prevailing view that the political directorate had become increasingly less tolerant and more authoritarian, it is argued that incursions on the political and civil liberties of members of society would best be arrested through appeals to the British Privy Council. It is clear that among a significant section of the body politic of individual Caribbean countries there exists a fear that regionalizing the final court of appeal could lead to political excesses and an undermining of individual liberty.

The narrative on the CCJ must also be placed against the backdrop of rising crime, especially violent crime throughout the member states of the Caribbean Community. This

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<sup>28</sup> McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity*: Kingston: The Caribbean Law Publishing Company, 2002. p. 264

<sup>29</sup> See Selwyn Ryan, *The Judiciary and Governance in the Caribbean. SALISES: St. Augustine, 2001, p.161.*

<sup>30</sup> As quoted in Selwyn Ryan's *The Judiciary*.... Ibid. p.163.

<sup>31</sup> McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity*: Kingston: The Caribbean Law Publishing Company, 2002. p. 264.

<sup>32</sup> Ryan. p.163

has spurred a debate on the relevancy of the death penalty. The common law penalty of death-by-hanging is still the established penalty for capital murder throughout the region. Supporters of the constitutional change point to the position of several Commonwealth Caribbean jurisdictions on the death penalty which is provided for in the constitution. Such a position is at variance with the prohibition of capital punishment by the United Kingdom, where the Final Court of Appeal (The British Privy Council) of many Caribbean states either resided or continues to reside. Further, a number of death penalty sentences have been overturned by judicial opinions and decisions from the Privy Council, following UK guidelines. Supporters of the establishment of a regional final court of appeal contend that judges from outside the region should not impose their values on the Caribbean countries. Critics, however, argue that the appellate jurisdiction of the CCJ will allow Commonwealth Caribbean countries easier recourse to implement the death penalty, and those who support the abolition of the death penalty view the establishment of the CCJ and the removal of the Privy Council in appellate matters as a potentially dangerous assault on human rights.

Both Trinidad and Tobago and Jamaica have indicated an interest in establishing their own final court of appeal and on December 20, 2010 Prime Minister Bruce Golding of Jamaica indicated a strong interest in establishing a local final court of appeal as distinct to either the Privy Council or the CCJ. In Golding's view:

We have to dispense with the Privy Council. We are not yet satisfied that in doing so, we must take out a final court which is an external entity, over which we do not have final control as a State. We wish to consider this in great detail, and in earnest, we believe that we have the judicial experience to do it. We believe that we have the maturity to do it.<sup>33</sup>

While there is no political consensus in the region on the Caribbean Court of Justice as envisaged under the revised treaty of Chaguaramas, the CCJ is expected to perform two functions. Firstly it will have a trade or original jurisdiction and secondly it will perform the role of final appellate jurisdiction. However, in the last decade, only a handful of Commonwealth Caribbean countries have acceded to the CCJ.

### *Fundamental Rights and Freedoms*

Fundamental rights and freedoms contained in the constitutions of Commonwealth Caribbean countries are generally reflective of political and civil rights recognized as natural rights. These include the right to life, to not to be deprived of property without due process or adequate compensation, to liberty, to freedom of speech, and to freedom of association. While these rights do exist, and are generally thought to be immune to political change, their realisation is often contingent on parliament and the attitude of the judiciary. Indeed in 1992, Ralph Gonsalves in an address to the Barbados Bar Association noted that

... I find that the approach of both parliament and the judiciary is less than wholesome in the protection of the constitutional right to freedom of expression..... Too often Caribbean legislators go beyond the outer limits of a

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<sup>33</sup> See Alicia Dunkley. 'PM suggests local final appeal court.' Observer, December 22, 2010. [http://www.jamaicaobserver.com/news/PM-suggests-local-final-appeal-court\\_8249600#ixzz18xiUriTB](http://www.jamaicaobserver.com/news/PM-suggests-local-final-appeal-court_8249600#ixzz18xiUriTB)

person's right to freedom of expression and they are insufficiently reproached by Caribbean judges.<sup>34</sup>

Unfortunately, these constitutions do not take into account the growing body of social and economic rights espoused in the International Covenant on Economic, Social and Cultural Rights which came into force in 1976 after ratification by thirty-five member states of the United Nations. This covenant recognizes the right to work, health, and education among others. More recently there have been calls to protect the right to environment and to review the existing grounds of discrimination to include, disability, and sexual orientation. There is also a need to strengthen protection of the right to privacy and confidentiality against the backdrop of HIV and AIDS and the new technological age and digital divide.

The developments of international human rights that give prime importance to economic rights place tremendous pressure on Caribbean governments to reform the existing constitutions to include such rights. Moreover the requirement for the institutionalization of adequate mechanisms to ensure certainty in the application of these rights regionally also provides further impetus for the revamping of the regional constitutions. Notwithstanding the provisions for political and civil rights, the protective provisions regarding individual fundamental rights and freedoms are framed, in many cases, in language which limits the exercise of those rights and freedoms and which affords the state too great an intervening power. Moreover, "savings" clauses which make provisions for exceptions to the rights enshrined in the constitution also serve to weaken and create ambiguity about fundamental rights under Caribbean constitutions. In all Commonwealth Caribbean countries with the exception of Belize, these clauses dot the entrenched sections of the constitution. Consequently as Simeon C.R. McIntosh notes, the inclusion of both a general and a special savings clause in the constitutional text compounds the true understanding of the fundamental rights provisions of the constitution.<sup>35</sup>

Where for example the constitution prohibits discrimination, "savings" clauses often make exceptions on the basis of citizenship thereby permitting discrimination. Similarly, where the constitution guarantees the right to free expression, the "savings" clauses expressly provides for this right to be abridged/restricted on the grounds of national security, public safety, and decency. Some of these saving clauses therefore protect the legitimacy of pre-constitutional independence legislation and as McIntosh notes "...bar constitutional review of any law saved."<sup>36</sup> Given that many saving clauses protect colonial legislation, there is the potential for serious contradictions with the provisions of the constitutions especially with regards to the entrenched Bill of Rights. Again as McIntosh notes the inclusion of the Bill of Rights to the independence constitution was probably the most profound change made to the colonial constitutions. Given that these rights are

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<sup>34</sup> Ralph E. Gonsalves, *The Politics of Our Caribbean Civilisation: Essays and Speeches*. Kingstown Great Works Depot ltd, 2001, p.222.

<sup>35</sup> McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity*; Kingston: The Caribbean Law Publishing Company, 2002. McIntosh notes that a general savings clause is one that refers in general to the entire Bill of Rights, while a special savings clause is addressed to a specific section or provision of the Bill of Rights. In his view a special savings clause might be one of the most disabling devices in the West Indian Independence constitutions and should therefore be removed.

<sup>36</sup> *Ibid.* pp. 251.

substantive constraints on the powers of the state, “...some existing laws may be inconsistent with the constitution...”<sup>37</sup>

Finally, the secrecy which is part and parcel of governance in the region is also seen as a denial of good governance. In the last decade there have been repeated calls for the legislation of freedom of information acts and to this end current constitutional reform processes have been considered for inclusion in a revised constitution. Currently Commonwealth Caribbean states restrict information to the extent that not only are ordinary citizens denied vital information upon which they can make informed decisions, but such restrictions also extend to the media. Legislation has been proposed, for example, in Barbados, which makes official information more freely available, provides for proper access by each person to official information, protects official information to the extent consistent with the public interest, preserves personal privacy, and establishes procedures for the achievement of those purposes.

### *Dual Citizenship*

A discussion about constitutional reform in the region would be incomplete without some reference to the recent controversies that have taken place in several Commonwealth Caribbean countries with respect to parliamentarians holding dual citizenship. Indeed there have been challenges to members of Parliament in Trinidad and Tobago, Dominica, and Jamaica. Following the 2009 general elections in Dominica, Prime Minister Roosevelt Skerrett’s election was challenged on the grounds that, at the time of his nomination and at the material time, he was under allegiance to a foreign state, namely the Republic of France. Similarly, in Jamaica four Jamaica Labour Party members of Parliament had their election declared null and void and were forced to again face the polls since the general election of 2007. The opposition Peoples National Party has not been immune to such charges as two members of the PNP face similar challenges. These developments have led to a fierce debate in the Caribbean on the current constitutional qualifications of members of Parliament. Indeed some observers argue that, given the fact that, under Caribbean constitutions, a citizen of a Commonwealth country having resided in countries like Jamaica for a year are permitted membership into the legislature, the dual citizenship provisions of the constitution forbidding Jamaicans from holding office are nonsensical. This is of special relevance to many Caribbean citizens in the diaspora who contribute significant financial and other resources to the Caribbean and who have expressed an interest in engaging in domestic politics at the highest level

### **Guyana: Breaking New Ground**

Guyana is the one country in the region that has successfully implemented meaningful constitutional reform recently. Indeed Guyana has a checkered post-independence history of tampering with the constitution in ways that were designed to augment the powers of the chief executive. In that regard, the constitutional reform process of the first fifteen years of independence did not only lead to the creation of a socialist constitution but also culminated in the adoption of a semi-parliamentary or semi-presidential system of government with an executive head of government combined with

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<sup>37</sup> Ibid. pp. 252.

the office of a head of state. Under article 89 of the reformed 1980 constitution, formal powers resided in the hands of the executive president. A further review of the 1980 Guyanese constitution also suggests that, for the first time in the constitutional history of the Commonwealth Caribbean, the chief executive was provided with veto authority.<sup>38</sup> Under article 89 the President had the power to veto all acts of parliament and was given the power to make that veto final inasmuch as, under the constitution, the president has been given the power to dissolve parliament and call an election. Barber and Jeffrey in their work, *Guyana, Politics, Economics and Society: Beyond the Burnham Era* argue that such power is no different from the overwhelming power typically held by prime ministers in the Commonwealth Caribbean. In their view, while the Guyanese president has veto power, such power can be defeated when the Guyanese National Assembly returns a vetoed bill to the president on a second occasion within six months by a two-thirds majority, and the president fails to give assent to it. At this point, the president acts in the same manner as any prime minister in the Commonwealth Caribbean, given the chief executive's constitutional right to dissolve the national assembly. Under the 1980 constitutional arrangements, the president was also empowered to act in accordance with his own deliberate judgement except in cases where under the constitution he is obliged to act in accordance with the advice or on the recommendations of a person or authority.

Prior to constitutional changes in 1999, the powers of the president of Guyana were so vast that the holder of the office appeared to be politically invincible. The 1980 constitution conferred upon the executive president the power to dismiss public officials, police officers and teachers. Combined with his constitutional power to hire and fire ministers of government, the president of Guyana had the absolute authority to determine the length of tenure of a wide ranging group of people whether they were directly appointed by him or not. There were few safeguards against arbitrary exercise of power on the part of the executive president of Guyana who, until the 1990s, was not subject to any re-election provisions. Thus, the 1980 Guyanese constitution provided for the emergence of an undisputed authoritarian political leader, especially in a context where articles 180 and 182 made removing the president from office a difficult enterprise.<sup>39</sup> Given the overwhelming power of the Guyanese president, it is unsurprising that constitutional reform focused on achieving more inclusiveness in governance and downsizing the powers of the chief executive.

In August 1999 a joint select committee was established to consider the recommendations of the Report of the Constitution Reform Commission to the National Assembly of Guyana which had been submitted in July 1999. This represented the first time in the history of the post independence constitutional experience of the Commonwealth Caribbean that a government responded with such remarkable speed in considering the contents of the report. The Joint Committee was charged with the responsibility of considering the 182 recommendations relating to twenty-three issues and

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<sup>38</sup> See R. James, and Harold Lutchman (1984), *Law and the Political Environment in Guyana* (1984), Institute of Development Studies.

<sup>39</sup> Under the 1980 constitution, the president had the right to assent or dissolve the national assembly within twenty-one days after the conditions of the impeachment article are in fact satisfied. While Article 180 gives parliamentarians a possible outlet to remove the president, he/she is given wide powers. Not only did the powers of appointment ensure that the president controls the entire process to remove himself from office, the process is also tedious and stacked against those who initiate this move. Moreover, the president can dissolve parliament and call fresh elections, either before or after his guilt has been established.

bringing “those recommendations which it proposed for adoption by the National Assembly to the level of implementability...”<sup>40</sup> One of the 1999 Constitutional Reform Commission’s major recommendations was that the President of Guyana should be subjected to a reelectability clause. Accordingly, the Commission recommended to the Parliament of Guyana that in the matter of the presidency, the office holder should be limited to a maximum of two consecutive terms of office. There was also a deep concern with the level of protection afforded to the chief executive. It was therefore not surprising that not only did the Reform Commission recommend the removal of some of the presidential immunities but that this recommendation was in fact endorsed by the joint committee.

Another major recommendation related to the judicial branch of government and the pressing need to roll back the post independence constitutional modification which had negatively affected the relationship between the Executive branch and the judiciary. Specifically while the 1977 and 1980 changes conferred tremendous power on the Chief executive acting in consultation with the leader of the Opposition (Minority Leader after 1980), the 1999 reform Commission strongly recommended that the appointment of all judges should be on the basis of the advice of the Judicial Services Commission. The Select Committee endorsed this recommendation. In 2001 acting on the advice of both Committees, the Government of Guyana further modified its constitution to place both the authority to appoint and determine the tenure of judges in the hands of the judicial Services Commission. This represented a positive constitutional development compared to the earlier retrograde steps which had seriously impinged on the independence of the judiciary and removed the division between the executive and the judicial branch of governments. Reform of this magnitude sought to create a judicature that was free from official influence and control.

Guyana too represents a case study of facilitating the political equality of gender. Not only have recent constitutional modifications focused on creating gender justice with respect to work, citizenship, and other socio-economic issues but the post 1999 constitutional reform process also made provisions for the achievement women’s political equality. In that regard, the reform Commissions recommended that there should be enshrined general principles in the Constitution that would encourage women’s participation in public decision making. In their view, Parliament should make every effort to increase women’s participation in the various processes and fora of decision making at the level of the National assembly and that specifically women should be accorded 33.3 percent representation in parliament. Accordingly Part II, 11B (5 - 7) of the Representation of People’s Act of Guyana, states that:

(5) The total number of females on each party’s national top-up list shall be at least one-third of the total number of persons on that list.

(6) The total number of females on each party’s lists for geographical Constituencies, taken together, shall be at least one-third of the total number of persons on those lists taken together for the geographical constituencies in which that party is contesting.

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<sup>40</sup> See National Assembly of the Seventh Parliament: Report of the Special Select Committee on the Report of the Constitution Reform Commission. Resolution No. 28 of 1999; pp.6

(7) There shall be no more than twenty percent of the number of geographical constituencies in which a party is contesting for which the party's geographical constituency list contains no females.

To date, no other Commonwealth Caribbean state has followed the example of Guyana and, politically, women continue to remain on the margins of the decision making process with parliaments being a bastion of maleness.

### **Conclusion: What Constitutional Reform?**

The legitimization of a form of governance for the Commonwealth Caribbean, despite the relative stability of the region, has been subjected to increased pressures partly arising from the dysfunctionalities of the Westminster model but also as a direct result of the abuses of power and the increasingly high level of political corruption. Moreover, the current distribution of power between the executive and legislative branches and the office of the Prime Minister does not provide adequate legislative checks on the executive. It is therefore not surprising that constitutional discussions have tended to be overly concentrated on how best to effect both a clearer division of power without necessarily sacrificing the efficiency of the political model. Additionally, international political and economic developments have placed increasing pressure on all Caribbean nations some fifty years after the first Anglophone Caribbean State gained constitutional independence from Britain.

Several countries have established constitutional reform commissions with bipartisan support, however relatively few of the minimalist recommended changes have been implemented. While Guyana continues to struggle with a myriad of socio-economic and political problems it remains one of the few countries to have engaged in recent meaningful constitutional reform. Thus while it is clear that democracy is in dire need of renewal in the region, it remains to be seen whether the political elites will demonstrate the necessary political will to implement the recommendations of the various reform commissions. This is especially critical given the departure from the past exercise in constitutional making which was largely devoid of input from the general citizenry.

It is worth noting however that, while the constitutional recommendations to date can be described as conventional, several noteworthy radical departures can be detected. These are the flagship recommendations of the recall mechanism in some countries, the limitation on the number of elected parliamentarians to be selected to the executive branch, the support for the removal of the British Privy Council as the final court of appeal, limits on reelectability of the Chief Executive, and the decision of Guyana to establish clear provisions to facilitate greater gender political equality.