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CONSTITUTIONAL AFFAIRS AND PARLIAMENTARY STUDIES UNIT



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# **CHANGING OUR CONSTITUTION**

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*A Comparison of the Existing Constitution of Trinidad and Tobago and the  
Working Document on Constitutional Reform for Public Consultation*

**Dr. Hamid Ghany**

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St. Augustine Campus Trinidad and Tobago, West Indies

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# Introduction

The island of Trinidad was claimed by Christopher Columbus in 1498 on behalf of Spain. The island was a Spanish colony until its capture by Britain from Spain during the French and Napoleonic Wars in 1797. Formal cession of Trinidad by Spain to Great Britain was effected by the Treaty of Amiens in 1802. <sup>1</sup>

Columbus sighted Tobago in 1498 however the island remained unoccupied by any imperial power until 1632 when some Dutch colonists tried to settle the island but were forced out by Amerindians and Spaniards in 1634.

Two proprietary grants were made by King Charles I for British settlers in respect of Tobago. The first was made to the Earl of Pembroke in 1628 and, the second, was made to the Duke of Courland (the Dukedom of Courland was a coastal district of what is today Latvia and was under British protection) in 1642.

A number of Courlanders settled in the north of the island, while a colony of Dutch settlers established themselves in the south of the island. The Courlanders were eventually overpowered by the Dutch settlers and they remained in possession of Tobago until surrendering their rights to the island in 1662.

In 1664, King Charles II renewed the grant of Charles I that had been made to the Duke of Courland in exchange for the Duke's surrender of his African interests in the River Gambia area to Charles II. In 1681, the Duke of Courland transferred his title to a company of London merchants.

During the American War of Independence, France captured Tobago in 1781 and the formal cession of the island to France was effected by the Treaty

of Paris of 1783. The British captured the island in 1793 during the French and Napoleonic Wars, but it was restored to France by the Treaty of Amiens in 1802. However, it was recaptured by Britain in 1803 and was formally ceded to Britain by the Treaty of Paris in 1814. <sup>2</sup>

As a consequence of the Trinidad and Tobago Act 1887 <sup>3</sup> of the British Parliament, the two colonies were joined as one under the authority of an Order-in-Council made on 17<sup>th</sup> November, 1888 <sup>4</sup> that came into effect on 1st January, 1889.

This Order-in-Council also made provision for the abolition of the Legislative Council of Tobago. The unification of these two British colonies, with completely different historical backgrounds, created the need for the British Government to establish a single legislature for the twin-island colony and also to ensure the continued operation of all laws in force in Trinidad and all laws in force in Tobago.

This was effected by way of an Order-in-Council made on 20<sup>th</sup> October, 1898 <sup>5</sup> that came into force on 1st January, 1899. This Order-in-Council made Tobago a ward of the colony of Trinidad and Tobago. It further provided that all laws that were in force in Trinidad on 1st January, 1899 would also extend to Tobago and that all laws that were in force in Tobago, at that date, that differed from the laws of Trinidad ceased to be in force. The Legislature in Trinidad became the Legislature for the twin-island colony and all future laws enacted by that legislature would be deemed to extend to Tobago. <sup>6</sup>

In this way, the British Government made a political and legal decision that would have ramifications for the twin-island colony long after its

unification by imperial law. The political, psychological and legal effect of the decisions expressed in the 1899 Order-in-Council continue to manifest themselves in the post-independence era of the twin-island state of Trinidad and Tobago.

In 1924, the first major reform towards the introduction of elected representation into the Legislative Council of Trinidad and Tobago was made under the authority of the Trinidad and Tobago (Legislative Council) Order in Council 1924<sup>7</sup> which was subsequently amended in 1928, 1941, 1942 and 1945 before being revoked and replaced by a new Order-in-Council that provided for a new Constitution for the colony in 1950.<sup>8</sup>

In 1924, the Legislative Council consisted of the Governor (who also presided over its sittings), twelve official members and thirteen unofficial members (of whom six were nominated and seven were elected). In 1941, the number of elected members was increased to nine and the number of official members stood at three.<sup>9</sup>

For the 1956 general elections, the Legislative Council consisted of twenty-four elected members, five nominated members and two official members. In 1961, a bicameral legislature was introduced which consisted of twenty-one nominated Senators in a Senate and thirty elected M.P.s in a House of Representatives. At independence in 1962, the Senate was increased to twenty-four and in 1966 the House of Representatives was increased to thirty-six M.P.s.

In 1976, Trinidad and Tobago became a republic within the Commonwealth and a President replaced Her Majesty Queen Elizabeth II as Head of State, while the Prime Minister remained as Head of Government in a parliamentary system of government. It retained its bicameral system with a House of Representatives of thirty-six M.P.s and an enlarged Senate of thirty-one Senators. In 2007, the number of seats contested for the House of Representatives was increased to forty-one.

## Eric Williams and the Introduction of a Nominated Senate

The advent of the People's National Movement (P.N.M.) led by Dr. Eric Williams, who became the Chief Minister following the 1956 general elections, changed the political landscape of Trinidad and Tobago in relation to the structure of the Legislature. One year before Williams became Chief Minister, he embarked on a lecture series throughout Trinidad and Tobago in which he publicly proclaimed his preference for a bicameral system.

Once in office, he opened negotiations with the Colonial Office to bring about such a change and after five years of political dialogue, both locally and with the Colonial Office, Trinidad and Tobago had its legislature changed from a unicameral to a bicameral system with an elected House of Representatives and a nominated Senate.

In 1961 Trinidad and Tobago was granted a Constitution that conferred full internal self-government on the Colony.<sup>10</sup> General elections were held in December 1961. The actual provisions in the Constitution mirrored exactly those that had been agreed since 1959 between the Government and the Colonial Office and read as follows :

“15. (1) *The Senate shall consist of twenty-one members (in this Constitution referred to as “Senators” who shall be appointed by the Governor by instrument under the Public Seal in accordance with this article.*

- (2) *Of the twenty-one Senators-*
- (a) *twelve shall be appointed by the Governor acting in accordance with the advice of the Premier;*
- (b) *two shall be appointed by the Governor acting in accordance with the*

*advice of the leader of the Opposition; and*

- (c) *seven shall be appointed, to represent religious, economic or social interests in the Territory, by the Governor, acting after consultation with such persons as, in his discretion, he considers can speak for those interests and ought to be consulted.”<sup>11</sup>*

In 1962, Trinidad and Tobago attained fully responsible status within the Commonwealth and this bicameral system was, in general, retained with some modifications to the numbers of Senators with the number appointed on the advice of the Prime Minister being set at thirteen (13) and the number appointed on the advice of the Leader of the Opposition being set at four (4). The seven Senators who were previously appointed by the Governor in his discretion were, at independence, to be appointed by the Governor-General on the advice of the Prime Minister after the Prime Minister had consulted those religious, economic or social bodies or associations from which the Prime Minister considered that such Senators should have been selected.<sup>12</sup>

Since 1976, the Senate has consisted of sixteen Senators appointed by the President on the advice of the Prime Minister, six Senators appointed by the President on the advice of the Leader of the Opposition and nine Senators appointed by the President in his discretion from outstanding persons from economic or social or community organizations and other major fields of endeavour (this latter category is commonly known as independent Senators).

# The Office of Speaker in Trinidad and Tobago

The office of Speaker was first created for the Legislative Council of Trinidad and Tobago in 1950. The Speaker was to be nominated by the Governor in his own discretion. This did not resemble standard House of Commons practice at the time whereby the Speaker was an elected member of the House.

The creation of the office of Speaker in Trinidad and Tobago in 1950 was part of a wider collection of constitutional reforms that were introduced in the colony by the British Government. In his despatch to the Governor, the Secretary of State for the Colonies, Arthur Creech Jones, had this to say about the intentions of the British Government :

*“I agree that the stage has been reached when the people of Trinidad and Tobago must be enabled to assume greater responsibility for the control of their own affairs. As I stated in my opening speech at the Conference on Closer Association held at Montego Bay in 1947, it is one of the tasks of His Majesty’s Government to see that such responsibility is passed increasingly from London to the peoples of the territories themselves, and I am anxious, whenever possible, to increase the measure of responsibility for government borne by Colonial Legislatures.”*<sup>13</sup>

It was in the spirit of advancing the development of representative and responsible government in Trinidad and Tobago, as part of a wider policy of the British Government in the British West Indies, that the office of Speaker of the Legislative Council was created in 1950.

Clearly the introduction of a Speaker in the Legislative Council was a major reform issue and whether he should be an elected member or an

appointed member appeared to be the key issue in deciding upon the introduction of the office, more so than the fact that the Governor would cease to preside in the Legislative Council.

However, it should be noted that the appointment of a retired judge as the first Speaker of the Legislative Council of Trinidad and Tobago, as opposed to someone experienced in the affairs of the Legislative Council, reflected a desire to ensure the impartiality of the office in the eyes of the legislators and the society.

The question of an elected or a nominated Speaker was the key issue to be determined for future reforms.<sup>14</sup> Unlike the British system of government with its long history of political evolution and the emergence of traditions over time, many of the legislatures in the former colonies of Great Britain did not have adequately settled traditions that can be described as being akin to the Westminster model.

Political institutions may be copied, but there is no guarantee of assimilation into the local political culture. The problem in respect of Trinidad and Tobago was indicative of the need to try and preserve impartiality, but what became the deeper issue was the continuation in office of someone who was a good Speaker.

The basic position of the British Government on this issue was apparently formulated at a meeting between Colonial Office civil servants and the then Governor of Trinidad and Tobago, Sir Edward Beetham, on 31st May, 1955. The meeting was held in Mr. Philip Rogers’ office at the Colonial Office in London and according to the Minutes of the meeting, those in attendance were : Mr. P.

Rogers, Sir E. Beetham, Mr. W. Wallace, Mr. J. McPetrie, Mr. I. Watt and Mr. W. Ward.

On the issue of the Speaker, the meeting agreed as follows :

*“(d) If the Constitution Reform Committee reported in favour of an elected Speaker we should agree to it. We should prefer that the Legislative Council be empowered to elect their Speaker from inside or outside membership of the Council; once elected he would hold office for the lifetime of the Council, or until his resignation.”*<sup>15</sup>

The decision was taken between the Colonial Office civil servants and the then Governor of Trinidad and Tobago, Sir Edward Beetham, to allow a Speaker to be chosen from among elected members of the Legislative Council or to be chosen from outside the Council. They had clearly worked out two possible responses to the Constitution Reform Committee of the Legislative Council of 1955 – one was to agree to an elected Speaker if so recommended and the other was to suggest the election of a Speaker from either inside the Legislative Council or from outside of it. This latter view clearly was recommended to Ministers and the 1950 Constitution of Trinidad and Tobago<sup>16</sup> was amended in 1956 at section 29 as follows:

*“29. There shall be a Legislative Council in and for the Colony which shall consist of thirty-one Members, namely two ex officio Members, five Nominated Members and twenty-four Elected Members:*

*Provided that if any person elected to be Speaker of the Legislative Council shall not at the time of his election be a Member of the Council, the person so elected as Speaker shall be a Member of the Legislative Council in addition to the aforesaid thirty-one Members, and in such event the Legislative Council shall consist of thirty-two Members.”*<sup>17</sup>

The election of the Speaker was to take place on the basis of a secret ballot among the members which had the effect of reducing the imposition of any strict party discipline. The emphasis was being placed upon the quality of the individual who would be elected to hold the office of Speaker by removing the strictures of party discipline so as to ensure that the quality of the nominee could count above the loyalty to party. These new constitutional provisions did not allow for the removal of the Speaker from office by a vote of censure in the Legislative Council. Clearly it was expected that the person who would be elected to that office would observe the traditions of the office such as they were at Westminster at the time.

The decision to allow someone who was not a member of the Legislative Council to be eligible to become its Speaker was a significant policy decision not in keeping with the traditions of Westminster. That such a provision was modified in 1956 in Trinidad and Tobago to allow for an elected member to also be eligible for election to the office was an attempt to make a compromise in favour of the Westminster model in a colonial setting. The final product did not resemble Westminster at all and the seeds of a Whitehall model were sown insofar as the creation of the office of Speaker for a later independence constitution were concerned. The term Whitehall model is used to describe the influence of Colonial Office civil servants over the creation of new constitutions for the British colonies. The home of the British civil service is often referred to as “Whitehall”.

By 1961 when next the office of Speaker was modified in the context of wider constitutional reform in Trinidad and Tobago,<sup>18</sup> the Whitehall version of the office had been firmly entrenched in the Constitution that now provided for full internal self-government with a bicameral Parliament.

The Speaker was to be elected either from among the members of the House of Representatives who were not Ministers or Parliamentary Secretaries or from among persons who were not members of either chamber of the Legislature and the use of a secret ballot was removed.

The Whitehall version of the office of Speaker has been firmly entrenched in Trinidad and Tobago. Without a long tradition of Speakership in the legislative process, the challenge of impartiality would have to rest upon the future holders of the office in order to establish lasting traditions.

The question of the absolute impartiality of the Speaker in Commonwealth countries other than the United Kingdom has been widely discussed. It has been conceded that the dissociation of the Speaker from party politics is difficult to achieve, because the position has come to be regarded as a

privilege of the party in power. In this regard, de Smith<sup>19</sup> and Wilding and Laundy<sup>20</sup> have indicated the nature of those difficulties. It is apparent that the evolution of the political culture in many Commonwealth countries has contributed to this situation to such an extent that copying the Westminster practice is politically difficult.

One aspect of this dimension of privilege of the party in power when combined with the fact that the Speaker may be elected from outside of the House has had an unusual twist in Trinidad and Tobago. In 1995 and in 2001, the House of Representatives elected a defeated candidate from the general election, in each instance, to be its Speaker. Trinidad and Tobago has also had its own unique problems in 1995 and in 2002 when difficulties arose over the removal of the Speaker (1995)<sup>21</sup> and the election of a Speaker (2002).

# The Judiciary

In establishing the Judiciary for Trinidad and Tobago in the independence constitution, the Constitutional Adviser to the Cabinet, Mr. (later Sir) Ellis Clarke, expressed the following views in an explanatory memorandum to the Colonial Office which has since been declassified :

*“Provision is made in section 8 of the draft Order in Council for the Supreme Court as constituted at present to continue under the name of the High Court. The Judges of the Supreme Court become the Judges of the High Court and suffer no loss of status, emoluments, allowances or else.*

*It will be noted that no provision is made for the holder of the post of Chief Justice of the Supreme Court. The reason for this is that there will be no exactly comparable post on independence. The new post of Chief Justice in the draft Constitution is a joint post of Chief Justice and President of the Court of Appeal. In his capacity as Chief Justice the holder of that post is responsible for the administration of all the courts in the territory from the lowest to the highest. As President of the Court of Appeal he presides over the final court in Trinidad and Tobago.”* <sup>22</sup>

In providing the insight into the creation of the post of Chief Justice at independence, Ellis Clarke outlined the intent of the draftsman as follows :

*“It will be observed that in fact the position of the Chief Justice and President of the Court of Appeal is more analogous to that of the Lord Chancellor in England than to that of the Lord Chief Justice. The Lord Chancellor presides over the House of Lords, the highest court in England, the ultimate court of appeal. He is also responsible for all judicial appointments, for the conferment of silk, etc. The Chief Justice and President of the Court of Appeal will preside over the final Court*

*of Appeal in Trinidad and Tobago and as Chairman of the Judicial and Legal Service Commission will be largely responsible for judicial and other legal appointments.”*<sup>23</sup>

At the Queen’s Hall Conference in April 1962, the meeting of commentators on the draft Constitution had a three-day discussion on the draft that was prepared in February 1962 by the then Constitutional Adviser to the Cabinet, Ellis Clarke. When the Queen’s Hall Conference got around to discussing the provisions on the Judiciary on Friday 27th April, 1962, a number of interesting comments were made by the Constitutional Adviser to the Cabinet.

According to Ellis Clarke:

*“Let me deal, if I may, Mr. Chairman, now with the question of tenure of office of Judges. This is a matter of great importance because obviously any man who goes into a field such as the Judiciary is primarily concerned with his tenure of office; how long he is going to be there and under what circumstances. First of all let me say that there is no such thing under this Constitution as disciplinary proceedings against a Judge. There are disciplinary proceedings against Civil Servants and against other people but there are no disciplinary proceedings against a Judge. If a Judge is so bad that he should not continue as a Judge then you must get rid of him but a Judge must not be under any threat of being disciplined.”* <sup>24</sup>

What Ellis Clarke was doing was making out a case for the independence Constitution to recognize judges in a separate category from all other persons.

He went further to say :

*“The Judicial Committee of the Privy Council will have the final say, and in fact the only say on the dismissal of a Judge. That is not a matter in which the Prime Minister will have any say. The dismissal of a Judge, all that the Prime Minister may do is to say that he thinks that a Judge, through infirmity of mind or body, or misbehaviour, ought to be removed.”*<sup>25</sup>

Here, Ellis Clarke was indicating to the Conference that the role of the Prime Minister was confined to reporting his belief that there was a basis for considering the removal of a Judge from office on the ground of infirmity of mind or body or misbehaviour.

He went further to say the following :

*“We have inserted a further safeguard; that is to say instead of saying if the Prime Minister thinks so and so, he can refer the matter to the Privy Council, in much the same way, mind you that if anybody thinks that a Judge has done anything wrong he can bring proceedings against that Judge or against anybody, including the Prime Minister. All that the Prime Minister can do is initiate something, say that it ought to be taken up, but instead of saying that, it goes straight to the Privy Council because the Prime Minister says so. There is interposed a Committee of Judges, a Tribunal consisting of three Judges or ex-Judges, and these good gentlemen have to say whether in their view it should go to the Privy Council at all.”*<sup>26</sup>

A separation was being made here between the removal of a judge from office and the initiation of proceedings against a judge (or any other official) for any alleged wrongdoing.

As far as Executive - Judiciary relations are concerned in the context of the power of the Prime Minister to pursue the removal of a Chief Justice, Ellis Clarke had this to say :

*“What then are the political consequences for the Prime Minister. Will any Prime Minister, be he sane or be he rash, attempt lightly to initiate such proceedings ? Suppose they say there is a case to go to the Privy Council, then the case goes to the Privy Council and is heard by the Privy Council, and the Privy Council can say, and can say in clear and unmistakable terms that there was not a vestige of a case to come to them. They can criticise very strongly indeed the conduct either of the Prime Minister in initiating proceedings or the three judges if they think they are going to be weak and send the matter to the Privy Council that ought never to reach there. So do not think that because the expression “Prime Minister” occurs here and there in this chapter that the power is vested in the Prime Minister. The power of dismissal is vested solely in the Judicial Committee of the Privy Council and before it can ever get to the Judicial Committee of the Privy Council, three Judges have to be of the opinion that it ought to go to them for consideration.”*<sup>27</sup>

These provisions have barely been modified in the 1976 republican Constitution, but the intent remains the same. These comments about the foundations of our constitution are as valid today as they were at independence.

In his explanatory memorandum on the draft independence constitution for Trinidad and Tobago dated 16th April, 1962, Ellis Clarke had this to say about the provisions created for the tenure of office of judges :

*“Perhaps the most important single feature which goes to ensure the independence of the Judiciary and the attraction to the Judiciary of the right type of Judge is the security of tenure afforded to Judges. For that reason no attempt has been made in the draft Constitution to be original. A formula, carefully devised by the Colonial Office after many years as being the most likely to be effective and acceptable and yet not to derogate from the principles of independence, has been adopted. It is word for word the formula that the Colonial Of-*

*vice was able to persuade Nigeria, Sierra Leone and Tanganyika to accept. There can be little doubt that it is what they would wish Trinidad and Tobago to accept.”*<sup>28</sup>

Ellis Clarke reveals that the provisions regarding the tenure of office of judges in the Trinidad and Tobago independence Constitution were virtually lifted word-for-word from the independence Constitutions of Nigeria (1960), Sierra Leone (1961) and the then state of Tanganyika (1961) which later became Tanzania.

He went further in his memorandum to say the following :

*“When the formula is carefully studied and understood there is little need to apologise for the lack of originality in the draft Constitution. The effect is to ensure that the Judicial Committee of Her Majesty’s Privy Council, and no one else, can cause a Judge to be removed from his office as such. It is difficult to imagine how any greater security can be given to any Judge.”*<sup>29</sup>

The Colonial Office formula was imported at independence from Nigeria, Sierra Leone and Tanganyika and the Privy Council was going to be the final arbiter on the removal of a judge from office. His further explanation of the process is also worth noting :

*“In order, however, that there should be a sifting process which would prevent any case without merits from even reaching the Judicial Committee for its consideration, there is provision for a kind of preliminary inquiry to be held locally. The persons who sit on this preliminary inquiry are Judges or ex-Judges. A Chairman and two other members constitute a tribunal. If this tribunal does*

*not consider that it is appropriate that the question of the Judge’s dismissal should go to the Judicial Committee of the Privy Council then that question cannot even be referred to the Privy Council. It is only if that tribunal advises that the question of the removal of a Judge should be referred to the Judicial Committee that the matter is so referred.”*<sup>30</sup>

In his explanation, Ellis Clarke was arguing that the case against a judge could end locally and never be referred to the Privy Council if the tribunal was not satisfied that there was a case to go forward. However, as regards the issue of a case being referred to the Privy Council by the tribunal, he had this to say :

*“It is not difficult to imagine how careful such a tribunal would be to ensure that the Judicial Committee does not find itself considering any but the clearly substantial case. Nor is it difficult to imagine the type of comment which the Privy Council would make if the question of the removal of a Judge was referred to them when there was no ground for so referring it.”*<sup>31</sup>

Ellis Clarke was highlighting the fact that the reputation of the members of any tribunal would be at stake if they were to refer a weak case to the Privy Council for their consideration. From his viewpoint, the Privy Council would be scathing in their comments on the members of any such tribunal if a matter came before them on referral that ought never to have been sent to them in the first place.

These provisions were essentially retained in our republican constitution as the President has been substituted for the Governor-General. Their intent, as devised by the Colonial Office in the 1960s has never been changed.

## The President

In the post-independence era in the Commonwealth Caribbean three presidencies have been established in Guyana (formerly British Guiana), Trinidad and Tobago and Dominica. In Guyana and Trinidad and Tobago, the transfer from an independent monarchy to an independent republic required the removal of the personal authority of Queen Elizabeth II as Queen of Guyana and Queen of Trinidad and Tobago respectively and the establishment, *in lieu* of her authority, of presidencies in which the executive authority of the State is vested.

For Dominica, the authority of Queen Elizabeth II as Queen of the Associated State of Dominica was transferred to the presidency of the independent republic of the Commonwealth of Dominica upon the termination of associated statehood.

Guyana had independent monarchical status between 1966 and 1970 with Queen Elizabeth II as its Queen and became a republic with a ceremonial President in 1970. However, in 1980, after a controversial referendum in 1979 and also legislative changes in 1980, its presidency was significantly changed from a ceremonial one to an executive one. Trinidad and Tobago was an independent monarchy from 1962 to 1976 when it became an independent republic in 1976 with a quasi-ceremonial president.

The creation of monarchies at independence as successor states to the colonial state changed the relationship between Queen Elizabeth II as Queen of the colonies of Trinidad and Tobago and of British Guiana where she acted on the advice of British Ministers to the status where she was Queen of these independent monarchies acting on the advice of her Guyanese or Trinidad and Tobago Ministers.

The office of Governor-General was created by

the British Government to ensure that there was a personal representative for the Monarch in all countries or territories of which there was a constitutional requirement for the British Monarch to serve in a capacity that required his or her personal authority to be exercised. The office of Governor-General was accepted into the constitutional arrangements of those countries or territories where it was necessary for such arrangements to exist.

Owing to the fact that Queen Elizabeth II cannot reside in all of the countries of which she is Queen, it is, therefore, necessary for her to have a personal representative in each independent country of which she is Queen in the person of the Governor-General. The authority of the Governor-General is grounded in the Royal Prerogative of the British Monarchy and it is those powers that are exercised by the Governor-General on behalf of Her Majesty on the advice of local Ministers.

The reality of that arrangement is that the executive authority of the State is grounded in the Royal Prerogative of the British Monarchy. In those countries where Queen Elizabeth II is their Queen, Ministers and other parliamentarians pledge an oath of allegiance to Queen Elizabeth II, her heirs and successors upon taking office.

The transfer from monarchical to republican status in Trinidad and Tobago was accompanied by the transfer of the Royal Prerogative of the Crown to the new republic as the basis of their State power and the inclusion of transitional provisions in the Act of Parliament<sup>32</sup> and the new republican Constitution.<sup>33</sup> In Guyana, provision was already made in the Independence (monarchical) Constitution of 1966<sup>34</sup> for Guyana to become a republic upon the approval of a resolution to that effect in the National Assembly by simple majority vote.<sup>35</sup> There were no transitional provisions in the Con-

stitution, but rather replacement provisions. In 1980, Guyana enacted a new Constitution<sup>36</sup> to become the Co-operative Republic of Guyana.

In the case of Dominica, the island became a State in free association with the United Kingdom (an Associated State) in 1967 under the provisions of the West Indies Act 1967.<sup>37</sup> An Associated State enjoyed full internal self-government, while citizenship, defence and external affairs were the responsibility of the United Kingdom. Either party (the United Kingdom or an Associated State) could withdraw from the arrangement unilaterally under the provisions of the Act.<sup>38</sup>

The Independence Constitution of Dominica of 1978<sup>39</sup> came into force on 3rd November, 1978 together with an Order<sup>40</sup> made after a resolution was passed in the Dominica House of Assembly on 12th July, 1978 that led to the termination of Dominica's associated statehood following discussions with the British Government. Transitional provisions relating to the transfer from associated statehood to a sovereign democratic republic were included in the Constitution.

The replacement of the monarchy by a republic in Trinidad and Tobago and in Guyana; and the creation of a republic at independence in Dominica created the need for a method of election to choose an indigenous Head of State, namely the President of the Republic.

Previously, the appointment of the Governor-General was normally based on Letters Patent from Her Majesty given on the advice of the Prime Minister of the independent monarchy. The Governor-General in both Trinidad and Tobago and in Guyana held office "during Her Majesty's pleasure."<sup>41</sup>

Owing to the fact that Queen Elizabeth II was Queen of Trinidad and Tobago and also Queen of Guyana, it was evident that there was no need to devise any formula for succession. The heir to the

British Throne would become the new Head of State of independent monarchies in the Commonwealth upon succession.

In Guyana, the President is now elected by direct election using the first-past-the-post method of election; in Trinidad and Tobago the President is elected by an Electoral College which consists of a joint sitting of both Houses of Parliament; while in Dominica the President is elected by the House of Assembly only if the Prime Minister and the Leader of the Opposition are unable to agree on a single nominee for the office.

These methods, therefore, vary from the direct choice of the electorate, to the indirect choice of the Legislature and to the concurrence of the Prime Minister and the Leader of the Opposition. In all instances the President serves for a period of five years.

In Trinidad and Tobago, the President is chosen by indirect election through the Legislature. An Electoral College<sup>42</sup> has been established for this purpose which is a joint sitting of both the House of Representatives (an elected House) and the Senate (a nominated House). The House of Representatives determines the nomination of candidates for the Presidency as the nomination papers of candidates must be signed by at least twelve Members of that House.<sup>43</sup>

The nominated members get to vote on the election of the President if there is a contested election in the Electoral College. The Speaker of the House of Representatives presides at sittings of the Electoral College and voting is by secret ballot among the elected M.P.s and the nominated Senators. Once elected, the President serves for a term of five years which is not co-terminous with the life of the Parliament.<sup>44</sup> There may be changes in the composition of the Parliament as a result of a dissolution and general elections, but these will not affect the tenure of office of the President.

However, in creating a body to elect the President, the framers of the Constitution opted to borrow and adapt the terminology used in the United States for the body that elects the President. This was originally taken from the Report of the Constitution Commission that was chaired by the Right Honourable Sir Hugh Wooding, a former Chief Justice of Trinidad and Tobago, even though the Constitution Commission based their idea on the Indian model.<sup>45</sup>

There was disagreement between the then Prime Minister, Dr. Eric Williams, and the Wooding Commission on this matter because the Commission was attempting to create a body of parliamentarians and local government representatives for their Electoral College, while the Prime Minister chose to exclude the local government representatives from the proposals of his Government.

The Commission sought to justify its proposal by equating the inclusion of local government representatives with representatives in the State legislatures in India. Eric Williams was vehemently opposed to this idea as he could see no comparison between the two given the disparity in status between a legislature of a State in India and the inferior status of county councils in Trinidad and Tobago that had no legislative authority. However, the political reality was that with just the House of Representatives and the Senate, any government of the day ought to be able to control the election of a President as opposed to adding the unpredictable nature of the political composition of local government bodies to the political management task involved in electing a President.

Neither the Commission nor the Prime Minister ever stated that their example was drawn from the United States in respect of function, but the Government certainly adapted the title and the concept of the Electoral College from the United States for carrying out the function of electing the President.

The obvious modification of Article 2, Section 1(2) of the United States Constitution in relation to the framing of the republican constitution of Trinidad and Tobago saw the merging of the functions of the Electors and the members of the Senate and the House of Representatives in the United States for the election of the President.

In the United States Constitution there is a clear separation between these persons as follows:

*“Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress : but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”*<sup>46</sup>

By making this adjustment, the members of the House of Representatives and the Senate of Trinidad and Tobago were converted into electors of the President.

Additional modifications were made to the practice in the United States Constitution whereby the responsibility of the President of the Senate in the United States for counting the votes of the Electors was transferred to the Speaker of the House of Representatives. According to Article 2, Section 1(2) of the United States Constitution :

*“The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.”*<sup>47</sup>

This conversion of Article 2, Section 1(2) can be seen in sections 28 and 29 of the republican Constitution of Trinidad and Tobago as follows :

*“28. (1) There shall be an Electoral College for the purposes of this Chapter which shall be a unicameral body consist-*

*ing of all the members of the Senate and all the members of the House of Representatives assembled together;*

- (2) *The Electoral College shall be convened by the Speaker;*
- (3) *The Speaker shall preside as Chairman over the proceedings of the Electoral College and shall have an original vote.*

29. *The President shall be elected by the Electoral College voting in secret ballot.”<sup>48</sup>*

It is clear that the institution of the Electoral College in Trinidad and Tobago for the election of the President represented the obvious modification of

the American Constitution and allowed the framers of the republican constitution of Trinidad and Tobago, in 1976, to create an institution that could be adapted to suit local circumstances. After all, it was necessary to ensure that the replacement of the monarchy and the Governor-General was done in such a way as to permit the election of a President who would not challenge the Prime Minister and the Cabinet in the parliamentary system, but yet be the choice of the majority of the two Houses of Parliament. The legitimacy for the office of President would come from the dignified use of the power of the majority of both Houses all ceremonially veiled for the occasion in the Electoral College. Up to the time of writing in Trinidad and Tobago, the Electoral College has been convened in 1977, 1982, 1987, 1992, 1997, 2003 and 2008.

## The Westminster-Whitehall Model and Trinidad and Tobago

Any analysis of constitutional reform in Trinidad and Tobago must include an appreciation of the foundation of the constitutional model adopted and the main features of the system of government.

Indeed, it is in this context that the constitutional thinking of Dr. Eric Williams, first Chief Minister, first Premier and first Prime Minister of Trinidad and Tobago will help us to appreciate the character of the foundations of our constitutional system. In an address to a public meeting about 14 months before he became Chief Minister, in Port-of-Spain, Trinidad on 19th July, 1955, Williams remarked, *“The Colonial Office does not need to examine its second hand colonial constitutions. It has a constitution at hand which it can apply immediately to Trinidad and Tobago. That is the British Constitution.”*<sup>49</sup> At the same meeting he also said: *“Ladies and Gentlemen, I suggest to you that the time has come when the British Constitution, suitably modified, can be applied to Trinidad and Tobago. After all, if the British Constitution is good enough for Great Britain, it should be good enough for Trinidad and Tobago.”*<sup>50</sup>

It is clear that the desire of Eric Williams was for the creation of a suitably modified Westminster model for Trinidad and Tobago. The Westminster model has been described as:

*“...a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary in as much as Ministers*

*must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature.”*<sup>51</sup>

This definition, as de Smith rightly confesses in the book, is a narrow one, because it emphasizes the executive and legislative branches of government to the exclusion of the role, powers, duties and functions of the judiciary, which at the time of writing in 1964 were far different from what was enacted in the Constitutional Reform Act 2005<sup>52</sup> in the United Kingdom. That Act provided for a greater separation of powers by significantly altering the office of Lord Chancellor which led to the creation of a Ministry of Justice in 2007 and the establishment of a Supreme Court for the United Kingdom that assumed office on 1<sup>st</sup> October, 2009.

It is clear that Dr. Eric Williams was intent on establishing a Westminster-style democracy in Trinidad and Tobago and he certainly pursued this after he became the Chief Minister in 1956.

At the same time, a closer investigation of what was established would lead us to find that a pure Westminster system was not established, but rather a Westminster-Whitehall model that had all of the hallmarks of Westminster in titles of offices, etc., but not the exact structures and functions. The following quotation summarises the essence of the creation of the constitutional systems of government in the Commonwealth Caribbean:

*“...[I]t is widely supposed that British policy, if it has ever had any long term aims at all, has throughout the centuries of imperial rule - ‘the Commonwealth experience’ - been at pains to es-*

*tablish, even to impose, in the dependencies of the Crown a Westminster model, irrespective of local wish or circumstance: that the Mother of Parliaments was concerned to spawn a brood of little Westminsters and to export them to the colonies. Though this is the common currency of contemporary British politicians, and of British schoolmasters, it seems on investigation to be substantially quite untrue.”*<sup>53</sup>

While Madden devotes the thrust of his article to disproving the thesis that the British Government ever had any intention of establishing the Westminster model overseas, he fails to address the reality of what was erected for the ex-colonies at their independence by Britain. On closer examination, it can be seen that a completely unique system of government was introduced. By identifying and describing that unique system of government and the legislative institutions that were created and subsequently retained, we can confirm the creation of the Westminster-Whitehall model in the Commonwealth Caribbean.

Sacred Westminster doctrines, such as the Supremacy of Parliament, find themselves being challenged in the constitutions of the Commonwealth Caribbean because of the presence of Bills of Rights in those constitutions. Furthermore, the spirit of the Westminster model cannot comfortably settle itself in the Commonwealth Caribbean because of substantial parliamentary and procedural differences in its architecture. These differences have fundamentally altered the character and content of the so-called Westminster model in the Commonwealth Caribbean. And so, to continually refer to the Commonwealth Caribbean systems of government as a manifestation of the Westminster model can be regarded as a misnomer.

The idea of the Westminster model as defined by de Smith, and the export of that model as discussed by Burns in Parliament as an Export<sup>54</sup> would have suited the 1960s and early 1970s. This was an era

during which many new states gained their independence from Great Britain and the composition of the British Commonwealth assumed a greater Third World representation. It was too early to assess the impact and the significance of the constitutions that had been established in many of these newly-independent states, especially in the Commonwealth Caribbean whose era of independence started in 1962 with Jamaica and Trinidad and Tobago.

By the late 1970s, doubts about the Westminster model and its export were expressed. Madden rejected, in a general sense, the idea that the Westminster model of government could be exported and established overseas. In fact, Madden argued that it was never the intention of British colonial administrators to export the Westminster Model in its purest form. According to him, *“the only true Westminster model remained inevitably at home in Westminster: it was not intended for export, but was strictly ‘to be consumed only on the premises’”*.<sup>55</sup>

This argument, therefore, begs the question that if the Westminster model was not exported, then what was? Madden does not answer this question but he makes the following assertion:

*“Canadians, Australians and Indians made constitutions which they believed would last. The new generation of constitution makers in the 1950s and 1960s were not concerned with creating a permanent instrument for government so much as a device for securing independence which could be altered subsequently at will. Something akin to the British model might serve its temporary purpose in allaying fears in Britain about transferring power. But it remains to be proved that it is appropriate for the tasks of self-government anywhere else than in Britain.”*<sup>56</sup>

This is the challenge with reference to the Commonwealth Caribbean where constitutions “akin to the British model” have been established. Forty-

seven years after the first territories in the English-speaking Caribbean gained their independence from Great Britain, only Guyana has actually completed any fundamental constitutional reform to the extent that their constitution can no longer be described as being “akin to the British model”. All of the other countries have made changes that can only be described as cosmetic and, therefore, the identity of those constitutions have been preserved, thereby allowing them to still be classified as belonging to the Westminster-Whitehall model. Furthermore, the procedures of entrenchment of the provisions of these constitutions have made them secure from being “*altered subsequently at will*” as Madden declares.

The issue that must now be addressed is whether these constitutions have reached an evolutionary point in their growth and development where they are in need of reform. Every single country in the Commonwealth Caribbean has entered the dialogue phase of this exercise and, at the time of writing, St. Vincent and the Grenadines passed a Constitution Bill 2009 in their Parliament with the required two-thirds majority on 3<sup>rd</sup> September, 2009 that is constitutionally required to be subjected to a referendum. That referendum was fixed for 25<sup>th</sup> November, 2009.

The Whitehall model, named by Leslie Wolf-Phillips in the *Journal Parliamentary Affairs* in 1984<sup>57</sup> bears no relation to the Whitehall model advocated by Anthony Birch in *The British System of Government*<sup>58</sup> which stresses the importance of the Crown in the British constitution, and places less emphasis on the role and importance of Parliament. Birch’s Whitehall model relates to the United Kingdom, while Wolf-Phillips’ relates to the Commonwealth Caribbean.

Nevertheless, the argument put forward by Birch is interesting in that it reveals a disagreement about the concept of the Westminster model in the United Kingdom itself. In these circumstances, the Whitehall model overseas reflects the input of the

Colonial Office and civil servants in Whitehall (hence the name) in the drafting of independence constitutions. However, this exercise was not completely one-sided from the point of view of the recipients.

The acceptance of the Whitehall model in the Commonwealth Caribbean revealed a high degree of reverence for British-inspired constitutional technique. This can be accounted for in terms of the fact that the political elites of the Commonwealth Caribbean were brought up under an English-influenced educational system, while those who went abroad to study invariably went to England. Many of them became barristers-at-law of the Inns of Court, or solicitors. Furthermore, the experiences of British colonialism would not have exposed these elites, or the wider society, to any other type of constitutional formulae, apart from the British Constitution.

The cultural legacy of British colonialism was such that societies in the former British West Indies trusted the Westminster model as a source of guidance and inspiration, despite the desire to seek independence and to sever ties with the so-called colonial master. Nearly fifty years after the first countries that got their independence from Great Britain, the changes in attitude towards the Westminster model can be seen among some of the political elites, many of whom were educated at the University of the West Indies and who hold a different view of constitution-making than was the case thirty or forty years ago.

The natural reverence for the British Constitution may not be there in the Caribbean societies of today to the same degree as it was for Eric Williams and his advisers in 1955 and beyond. As far as he was concerned, the arguments cited above only serve to reinforce the view that we have the British Constitution “suitably modified” or something “*akin to the British model*”. No matter how one may wish to view it, there seems to be ample evi-

dence to show that the Westminster model was not exported or transplanted to the Commonwealth Caribbean, but rather that we created something unique that we may call the Westminster-Whitehall model.

*The main features of that model are :*

- (i) the inclusion of a Bill of Rights in the Constitution that guarantees constitutional protection of the rights and freedoms of the individual which does not exist in the Westminster model, notwithstanding the Bill of Rights of 1998 in the United Kingdom;*
- (ii) a unique bicameral system in eight of the twelve independent countries which does not resemble the bicameral system at Westminster;*
- (iii) a more rigid enforcement of the Separation of Powers than that which had existed at Westminster until 1<sup>st</sup> October, 2009 when the Supreme Court of the United Kingdom came into being following the prior creation of a Ministry of Justice on 9<sup>th</sup> May, 2007;*
- (iv) the importation of unwritten Westminster constitutional conventions into our constitutions thereby*

*creating the Westminster-Whitehall model;*

- (v) the entrenchment of constitutional provisions in our written constitutions for which there is no equivalent at Westminster as they do not have a written constitution.*

The Westminster model has changed significantly since Trinidad and Tobago and other Commonwealth Caribbean countries got their independence between 1962 and 1983. The Bill of Rights of 1998 and the Constitution Reform Act of 2005 have allowed fundamental alteration to the system of government in the United Kingdom. For the people of Commonwealth Caribbean countries seeking to advance themselves by changing their constitutions, the main challenge will be to look beyond the Westminster model while providing comfort to their societies that the changes that will be made are safe ones if they fall outside of the Westminster zone that has provided comfort, especially to political elites, for almost five decades.

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6<sup>th</sup> October, 2009

# NOTES

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4. S.R.O. & S.I. Rev. XXIII, p. 297.
5. S.R.O. & S.I. Rev. XXIII, p. 298.
6. S.R.O. & S.I. Rev. XXIII, p. 299.
7. S.R. & O. 1924, p. 1891.
8. Trinidad and Tobago (Constitution) Order-in-Council 1950 (S.I. 1950 / No. 510).
9. For a useful historical account of the Legislature of Trinidad and Tobago between 1887 and 1941, see Martin Wight, *British Colonial Constitutions* (Oxford: Clarendon Press, 1952), pp. 301 - 334.
10. See Trinidad and Tobago (Constitution) Order in Council 1961 (S.I. 1961 / No. 1192).
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17. Trinidad and Tobago (Constitution) (Amendment) Order in Council 1956 (S.I. 1956 / No. 835), s.23.
18. Trinidad and Tobago (Constitution) Order in Council 1961 (S.I. 1961 / No. 1192), s. 24.
19. S.A. De Smith, "Legislatures under Written Constitutions" in Sir Alan Burns (ed.) *Parliament as an Export* (London : George Allen & Unwin, 1966), p. 216.
20. N. Wilding and P. Laundy, *An Encyclopedia of Parliament*, (London : Cassell, 1972), p. 710.
21. Ghany, "Parliamentary Crisis and the Removal of the Speaker : The Case of Trinidad and Tobago", pp. 112 - 138.
22. United Kingdom National Archives, CO 1031 / 3226, Explanatory Memorandum by the Constitutional Adviser to the Cabinet on the Draft Independence Constitution for Trinidad and Tobago, 16th April, 1962, p. 9.
23. United Kingdom National Archives, CO 1031 / 3226, Explanatory Memorandum by the Constitutional Adviser to the Cabinet on the Draft Independence Constitution for Trinidad and Tobago, 16th April, 1962, pp. 9 - 10.
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25. Verbatim Report of the Meeting of Commentators on the Draft Constitution at Queen's Hall, 25th - 27th April, 1962, p. 196 .
26. Verbatim Report of the Meeting of Commentators on the Draft Constitution at Queen's Hall, 25th - 27th April, 1962, pp. 196.
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- stitution for Trinidad and Tobago, 16th April, 1962, p. 10.
29. United Kingdom National Archives, CO 1031 / 3226, Explanatory Memorandum by the Constitutional Adviser to the Cabinet on the Draft Independence Constitution for Trinidad and Tobago, 16th April, 1962, p. 10.
30. United Kingdom National Archives, CO 1031 / 3226, Explanatory Memorandum by the Constitutional Adviser to the Cabinet on the Draft Independence Constitution for Trinidad and Tobago, 16th April, 1962, pp. 10 - 11.
31. United Kingdom National Archives, CO 1031 / 3226, Explanatory Memorandum by the Constitutional Adviser to the Cabinet on the Draft Independence Constitution for Trinidad and Tobago, 16th April, 1962, pp. 10 - 11.
32. Laws of Trinidad and Tobago, Ch. 1:01.
33. Laws of Trinidad and Tobago, Ch. 1:01, The Schedule.
34. The Guyana Independence Order 1966, S.I. 1966 / No.575.
35. By virtue of Resolution No. XXVI passed by the National Assembly on 29<sup>th</sup> August, 1969, Guyana became a Republic on 23rd February, 1970 and the alterations to the Constitution originally set out in the Second Schedule to the Constitution (S.I. 1966 / No.575) took effect in accordance with section 73(5) of that Constitution.
36. By virtue of Act No. 2 of 1980 Guyana enacted a new Constitution of the Co-operative Republic of Guyana, repealed the Guyana Independence Act 1966, the Guyana Independence Order 1966, and the Constitution existing at that time. The new Constitution was contained in Act No. 2 of 1980 as a Schedule.
37. 15 & 16 Eliz. 2, c. 4. Under the provisions of this Act, the United Kingdom created associated statehood status for Antigua and Barbuda, Dominica, Grenada, St. Kitts-Nevis, St. Lucia, and St. Vincent and the Grenadines.
38. 15 & 16 Eliz. 2, c. 4, s.10.
39. The Commonwealth of Dominica Constitution Order 1978, S.I. 1978/No.1027
40. The Dominica Termination of Association Order 1978, S.I. 1978 / No.1031
41. The Trinidad and Tobago (Constitution) Order in Council 1962, s.19 and the Guyana Independence Order 1966, s.30.
42. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s.28.
43. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s.30.
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45. Report of the Constitution Commission, Trinidad and Tobago, (Trinidad and Tobago Printing and Packaging Ltd., 22<sup>nd</sup> January, 1974), paras. 149 and 150.
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47. Roddey Holder and Roddey Holder, *The Meaning of the Constitution*, p. 36.
48. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, ss. 28 and 29.
49. Eric Williams, *Constitution Reform in Trinidad and Tobago*, Public Affairs Pamphlet No. 2, Teachers' Educational and Cultural Association, Trinidad, 1955, p.30.
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52. United Kingdom Statutes, 2005, c.4.
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57. Leslie Wolf-Phillips, "A Long Look at the British Constitution", *Parliamentary Affairs*, Vol. 37 (4) 1984.
58. Anthony Birch, *The British System of Government* (London, George Allen and Unwin, 4th ed., 1980), pp. 25 - 26).

## Part One

# Constitutional Controversies and Constitutional Reform

Many of our institutions and constitutional processes have not performed in the manner that was intended. The major one has been the presidency. It has been severely damaged by periodic political wrangling between the office of the Prime Minister and the office of the President which was never intended as well as the frequent attacks of bias that have been made against the office by some parliamentarians and politicians who have served in opposition to the government.

As stated earlier, the President is chosen by indirect election through Parliament and the institution called the Electoral College (borrowing a name for the institution that elects the President of the United States) has been established for this purpose. It is a joint sitting of both the House of Representatives and the Senate. The members of the House of Representatives determine the nomination of candidates for the Presidency as the nomination papers of candidates must be signed by at least twelve Members of that House. The Speaker of the House of Representatives presides over the Electoral College and voting is by secret ballot (only if there is more than one candidate) among the forty-one elected M.P.s and the thirty-one nominated Senators. Once elected, the President serves for a term of five years which is not co-terminous with the life of the Parliament. There may be changes in the composition of the Parliament as a result of bye elections or a dissolution and general elections, but these will not affect the tenure of office of the President.

The creation of this hybrid for the office of President of the Republic to replace the Governor General introduced the principle of indirect election by the Legislature as an alternative method to the advice of the Prime Minister being given to the Queen of Trinidad and Tobago (who also happened to be Queen of the United Kingdom and several other Commonwealth countries) for the appointment of the Governor General. The replacement of the monarchy and the Governor-General by the election, through the Electoral College, of a President who would not challenge the Prime Minister and the Cabinet in the parliamentary system, but yet be the choice of the majority party, was an innovation that still left the presidency open to the challenge of being biased in favour of the party that elected him into office.

### **Presiding Officers to act as President**

Perhaps, the area in which the modification of the United States Constitution in the framing of the 1976 republican Constitution of Trinidad and Tobago can best be seen is in the use of the President of the Senate and the Speaker of the House of Representatives in a chain of command to act as President of the Republic if the President is unable to perform the functions of his / her office.

In the United States, these offices are decidedly partisan; however, in Trinidad and Tobago they are intended to be just the opposite given the Westminster ethos of the Constitution. Nevertheless, the clever use of the titles allowed the fram-

ers of the republican constitution to construct an edifice of impartiality that would support the presidency in maintaining its intended character of being an impartial office given its historical evolution out of the office of the Governor-General.

The royal blessings that would normally cover the acting Governor-General meant that the search for an almost equal veil of impartiality would lead the framers to the presiding officers of Parliament.

The use of the President of the Senate to act as President of the Republic of Trinidad and Tobago undoubtedly recalls the Twenty Fifth Amendment to the United States Constitution that addresses the question of the inability of the President to discharge his / her functions.

There are however some difficulties associated with this procedure of using the President of the Senate in the Parliament of Trinidad and Tobago to act as President of the Republic. The main areas of concern revolve around (i) the method of appointment of the President of the Senate; (ii) the inability to impeach a President while Parliament is dissolved; (iii) the complications associated with the need for an acting President while Parliament is dissolved; (iv) the determination of the inability of the President to perform the functions of his / her office; (v) the potential for defeated candidates to be elected as Presiding Officers and thereby be eligible to serve as an acting President; (vi) the failure of the House of Representatives to elect a Speaker after a general election.

### **Method of Appointment of the President of the Senate**

The President of the Senate is elected from among the Senators at the first sitting of the Senate after a dissolution of Parliament. In Trinidad and Tobago, sixteen Senators are appointed by the President on the advice of the Prime Minister, six Senators are appointed by the President on the advice

of the Leader of the Opposition, and nine Senators are appointed by the President in his / her discretion from among outstanding persons from economic or social or community organizations and other major fields of endeavour.<sup>1</sup>

Since the introduction of these arrangements, the President of the Senate has always been elected from among those Senators recommended by the Prime Minister because of the existence of a fixed Government majority (16 – 6 – 9). As a consequence, there has always been a harmonious relationship between the Prime Minister and the acting President whenever the President has been unable to perform the functions of his office in Trinidad and Tobago since 1976.

However, a fundamental problem would arise if the acting President (in the person of the President of the Senate) and the Prime Minister were to have a disagreement which would lead to the Prime Minister advising the acting President to revoke his / her own appointment as a Senator. It is perhaps constitutionally impossible to revoke one's own appointment other than by resignation under your own hand.

In such a situation, the President of the Senate who would be acting as President of the Republic could hardly write a letter of resignation to himself / herself. This is a weakness in the creation of the hybrid even though the situation has not arisen up to the time of writing. In another sense, it may be seen as a strength as it preserves the independence of the office during the period of an acting presidency by ensuring that the acting President cannot be removed for any other reason than by inability to perform the functions of the office, but there is no guarantee that constitutional complications could arise.

Among the qualifications for the office of President is a requirement that the person so elected must be 35 years old. At the same time, the qualifications for nomination as a Senator include that

the person should be 25 years old. It is possible that a President of the Senate who is 25 years old could act as President of the Republic notwithstanding the requirement that the holder of the office should be 35 years old or there may be a constitutional conundrum which may deem the President of the Senate incapable of acting by virtue of his / her age.

### **The Inability to Impeach the President during a Dissolution**

During a dissolution of Parliament, it is impossible to impeach the President of the Republic as any motion seeking to initiate such proceedings must be commenced in the House of Representatives.<sup>2</sup>

The recall of the House of Representatives and the Senate during a dissolution and before a general election can only be accomplished by the President acting on the advice of the Prime Minister<sup>3</sup> and it is unlikely that a President would agree to recall a Parliament for the purpose of having himself / herself impeached.

In January 2001, a situation arose in which the President violated the provisions of the Constitution by refusing the advice of the Prime Minister on the appointment of seven of the sixteen Senators recommended by him (the Prime Minister) on the ground that they were defeated candidates. There is no constitutional or parliamentary prohibition on defeated candidates being appointed as Senators.

The effect of this action also had the potential to compromise the election of a President of the Senate when Parliament was eventually opened on 12<sup>th</sup> January, 2001 after the general election on 11<sup>th</sup> December, 2000. The nominee of the Government side (Mr. Ganace Ramdial) was eventually elected unopposed even though the Opposition could have mounted a challenge by nominating someone of

their own choosing seeing that the Government did not have a mathematical majority in the Senate at the opening of Parliament.

In the intervening period between the general election and the opening of Parliament the Prime Minister could take no action to deal with this violation as Parliament was dissolved. By placing the Government side in a minority position in the Senate at the opening of Parliament, the President was in a position to cause someone other than a Government nominee to be elected as President of the Senate.

Furthermore, even if the Government wished to commence impeachment proceedings against the President, the fact that the Government did not have seven Senators available to them meant that any attempted impeachment would be likely to fail.

The impeachment process depends upon a two-thirds majority of the Electoral College for the successful removal of a President. Being seven Senators short at the opening of Parliament meant that the President could have violated the Constitution without fear of being impeached. Furthermore, all Senators do not enjoy security of tenure and they can be removed by the President on the advice of the person who advised their appointment.

### **Complications associated with an Acting President during a Dissolution**

When Parliament is dissolved, the President of the Senate and the Speaker of the House of Representatives hold office until a new Parliament is opened after a general election.<sup>4</sup> At the moment, when, at the opening of Parliament, the Clerk of the Senate and the Clerk of the House of Representatives recite the proclamation by the President summoning a new Parliament, the offices of these presiding officers become vacant.

During the period of the dissolution of Parliament between 28<sup>th</sup> August, 2002 and the opening of Parliament on 17<sup>th</sup> October, 2002, the President of the Republic, Mr. Arthur N.R. Robinson, was ill at various times and Dr. Linda Baboolal, the President of the Senate, had to act as President.

However, on the day of the ceremonial opening of Parliament, there was an interesting situation of great constitutional importance when, after the completion of the agenda in the Senate by Dr. Baboolal as President of the Senate, it was necessary for her to leave the Parliament Building and go to President's House where she was sworn into office as Acting President of the Republic. She then rode in state to the Parliament Building where she addressed both Houses of Parliament as the Acting President of the Republic.

The constitutional niceties of what had occurred may best be summed up this way. Dr. Baboolal had been acting President up to the day on which the Parliament was to be opened owing to the illness of President Robinson. Just prior to the sitting of Parliament, President Robinson resumed his functions as President as the effect of the recital by the Clerk of the Senate of the Proclamation summoning Parliament to meet effected the termination of Dr. Baboolal's term of office as President of the Senate.

This effectively meant that she could not serve as Acting President from that moment. Between that time and her eventual arrival at President's House to be sworn in as Acting President, it was necessary for President Robinson to be available for State duty.

His availability for duty was made all the more necessary as there had been no Speaker of the House of Representatives elected in the previous Parliament owing to a parliamentary deadlock as a result of an 18 – 18 tie after the general election. In the circumstances, the chain of command for the acting presidency could not extend beyond the

President of the Senate that day as a Speaker was being elected for the first time since the first failed attempt on 5<sup>th</sup> April 2002.

These were anxious moments of constitutional uncertainty at the opening of Parliament in 2002.

### **Determination of Presidential Inability to Perform Duties**

The determination of the inability of the President to perform his duties is a key component in having the President of the Senate act as President of the Republic. Such a situation arose in 1998 when President Arthur N.R. Robinson became ill for a prolonged period and had to undergo a series of medical tests. The President of the Senate, Mr. Ganace Ramdial, acted as President during this period. Additionally, there were public occasions that President Robinson attended while being unable to perform his duties, but he was well enough to attend a social engagement. This created awkward moments of having both the substantive and the acting Presidents in attendance at the same event. Such a situation arose on Tuesday 24<sup>th</sup> March, 1998 when His Royal Highness Prince Phillip, the Duke of Edinburgh, was received at President's House by President Arthur N.R. Robinson while he was incapable of performing his functions as President, but was well enough to receive Prince Phillip socially. Simultaneously, the President of the Senate, Mr. Ganace Ramdial, was performing the duties of Acting President and was also at President's House to present gold and silver medals to 122 persons in the President's Award Scheme (formerly known as the Duke of Edinburgh's Award Scheme before Trinidad and Tobago became a republic).

Another difficulty related to the determination by the President as to whether or not he was incapable of carrying out his functions. Such a situation arose in 1986 when the then President, Sir Ellis Clarke, travelled out of the country for three days and made no arrangements for the President

of the Senate, Dr. Wahid Ali, to act for him.

President Clarke's explanation upon his return was that he determined that he would have been able to carry out his functions, notwithstanding his absence from the country, as he was only overseas for three days and he knew that there was not anything that he was required, as President, to do over those three days. In a newspaper interview on the subject, President Clarke said, **inter alia**, as follows :

*"If I had been leaving the country on a Sunday to return the following Sunday, I would have no doubt in my mind that the President of the Senate would act. But whether he should act when I am away for one or two days, that is for me to determine."*<sup>5</sup>

This interpretation clearly places the burden of determination of inability to perform presidential duties on the President and removes any automatic requirement to have an acting President if the substantive President does not believe that one is required. In the circumstances, the President of the Senate does not automatically act as President. However, another President may hold a different view and this is open to debate on constitutional grounds.

### **The Potential for Defeated Candidates to be Elected Presiding Officers**

Another possible complication arising out of the model of using the Presiding Officers of Parliament in the chain of command for the acting presidency is the possibility of having defeated candidates from a general election being elected as Presiding Officers.

In November 1995 and in January 2001, defeated candidates were elected to the office of Speaker of the House of Representatives. In all Commonwealth Caribbean Parliaments (with the exception of Barbados) the Speaker may be elected either

from among elected M.P.s or from outside the House. This is the Whitehall version of the office of Speaker discussed earlier.<sup>6</sup>

The election of two defeated candidates in successive general elections to serve as Speaker of the House of Representatives created a situation whereby it could have been possible for either one of them to serve as Acting President of the Republic if the President of the Senate was unable to act as President of the Republic for whatever reason.

### **The Failure of the House of Representatives to Elect a Speaker**

After the December 2001 general election in Trinidad and Tobago, the House of Representatives was unable to elect a Speaker at its first sitting on 5<sup>th</sup> April, 2002. Parliament was prorogued on 6<sup>th</sup> April, 2002 and it was summoned for a second session on 28<sup>th</sup> August, 2002 in another attempt to elect a Speaker which also failed. The Parliament was subsequently dissolved at midnight on 28<sup>th</sup> August, 2002 without a Speaker.

This created an area of weakness in the chain of command for the acting presidency as the chain could not go beyond the President of the Senate. Even if the Vice – President of the Senate were to assume duties as the acting President in a crisis, there would not have been any Deputy Speaker to convene the Electoral College to elect someone to act as President in accordance with section 27(3) of the Constitution (supra) as there was no Speaker or Deputy Speaker.

Additionally, if there were a state of emergency, the Proclamation by the President could only last fifteen days as there would be no Speaker to convene the House of Representatives to debate the statement by the President outlining the specific grounds on which the emergency was declared as required by the Constitution.<sup>7</sup>

Once again, the use of the Presiding Officers of

Parliament in the chain of command for the presidency has its own built-in complications when a Speaker cannot be elected. These complications can operate two ways by creating vulnerabilities in the legislature and in the presidency.

A related theoretical complication in cases where a Speaker is chosen from among the elected members could arise in relation to the age of the Speaker. Among the qualifications for the office of President is a requirement that the person so elected must be 35 years old. At the same time, the qualifications for election as a Member of Parliament include that the person should be 18 years old. It is possible that a Speaker of the House of Representatives who is 18 years old could act as President of the Republic notwithstanding the requirement that the holder of the office should be 35 years old. However, the same constitutional conundrum that applies to the President of the Senate (supra) could also apply here.

### **Impact of the Method of Election on the Presidency**

The election of the President of Trinidad and Tobago highlights the challenge of devising a method of election that allows the holder of the office of President an important measure of legitimacy without competing with the Prime Minister and the Cabinet for political dominance in the system.

The method of indirect election dominated by the elected representatives of the people in Trinidad and Tobago caters to that need. Trinidad and Tobago may be described as having a quasi-ceremonial Presidency based on the mixture of advisory and minimal discretionary powers exercised by the President.

### **Impartiality, Responsibility and Immunity**

The President of Trinidad and Tobago does not

carry any political responsibility for the exercise of his / her discretionary powers, while Ministers bear responsibility for those powers exercised by the President on their advice.

Apart from the fact that the President is not directly elected at a general election, it appears as though the concept of 'The Monarch can do no wrong' has been transferred from the office of Governor-General to the Presidency in Trinidad and Tobago. This concept and its immunities are best expressed as follows :

*"English law has always clung to the theory that the king is subject to law and, accordingly, can break the law.....The courts were the king's courts, and like other feudal lords the king could not be sued in his own court. He could be plaintiff - and as plaintiff he had important prerogatives in the law of procedure - but he could not be defendant. No form of writ or execution would issue against him, for there was no way of compelling his submission to it. Even today, when most of the obstacles to justice have been removed, it has been found necessary to make important modifications of the law of procedure and execution in the Crown's favour.*

*The maxim that 'the king can do no wrong' does not in fact have much to do with this procedural immunity. Its true meaning is that the king has no legal power to do wrong. His legal position, the powers and prerogatives which distinguish him from an ordinary subject, is given to him by the law, and the law gives him no authority to transgress.....But the king had a personal as well as a political capacity, and in his personal capacity he was just as capable of acting illegally as was anyone else - and there were special temptations in his path. But the procedural obstacles were the same in either capacity. English law never succeeded in distinguishing effectively between the king's two capacities."* <sup>8</sup>

As far as Trinidad and Tobago is concerned, the

constitution provides the necessary exemptions for the exercise of the President's powers in keeping with the principle 'that the king can do no wrong'. The constitution also goes further to protect the President in both his / her official and personal capacities. In Trinidad and Tobago, section 38 of the Constitution reads as follows :

*"Subject to section 36, the President shall not be answerable to any court for the performance of the functions of his office or for any act done by him in the performance of those functions."*<sup>9</sup>

There are also further exemptions in respect of civil and criminal proceedings contained in the same section.

Additionally, the exercise of powers by the President on the advice of, or after consultation with, any person or authority is protected from the scrutiny of the courts by the Constitution.<sup>10</sup>

While this is, perhaps, not an unusual protection for any Head of State to enjoy, the fact that political responsibility (exclusive of misbehaviour) does not exist and the fact that it is accompanied by judicial exemption places the President of Trinidad and Tobago in a special position in relation to the constitution and the law in some respects. The President exercises fundamental powers of appointment of persons to high offices of State and other important offices of a national character after consultation (which means that he is not directed on advice and can act in his own discretion or deliberate judgment once he has consulted relevant persons or authorities).

### **Republicanism and the United States Constitution**

In becoming a republic, Trinidad and Tobago was faced with the challenge of combining its republican presidency with its British foundations. The establishment of a presidency that was not dis-

similar to the Governor-General of any Commonwealth country in character still presented anomalies beyond the methods of election.

To this end, certain aspects of the United States Constitution appeared attractive enough for a process of hybridization to take place.

In the case of Trinidad and Tobago, the title of the body that would elect the President was named the "Electoral College". In trying to balance the shift to republicanism and yet maintain the impartiality associated with the Crown, the use of the Presiding Officers of Parliament as eligible persons in a chain of command for the presidency was a political response given to the framers of the constitution.

In Trinidad and Tobago the President of the Senate followed by the Speaker of the House of Representatives is the dedicated chain of command. Where neither of them are able to act, then the Vice President of the Senate shall act as President while the Deputy Speaker of the House of Representatives convenes a sitting of the Electoral College to elect someone to act as President within the first seven days of the Vice-President of the Senate acting as President.

These arrangements seek, as far as possible, to cloak the Presidency with the cloth of impartiality through the clever use of titles and functions that reveal a Westminster – Washington hybrid.

### **Exercise of Presidential Powers in Cases of Transition**

Political change came to Trinidad and Tobago for the first time in 1986. The transition of power was smooth, however, the attitude of the new Prime Minister A.N.R. Robinson towards the outgoing President Ellis Clarke left much to be desired in relation to appointments that were to be made by the President himself.

The re-appointment of James Alva Bain to the Public and Police Service Commissions on 31st December, 1986 ended up in a court battle that Prime Minister Robinson lost. This acrimony was followed by further controversy over the appointment of former Chief Justice Cecil Kelsick, on 14th March, 1987, to the Judicial and Legal Service Commission to replace Noor Hassanali who had resigned in order to become the new President of the Republic.

The fundamental issue was whether the President ought to be swayed by the opinion of the Prime Minister in exercising his powers of appointment after consultation (as opposed to advice). These controversies resulted in the appointment of a Constitution Commission under the chairmanship of Sir Isaac Hyatali in June 1987.

Further controversy arose in 1997 when the UNC / NAR coalition did not propose a third term for President Noor Hassanali, but rather accommodated the shift of ANR Robinson from his portfolio of Minister Extraordinaire in the Cabinet of the coalition Government into the office of the President. This move introduced the challenge of having a serving politician being elevated to the presidency. Prime Minister Panday paid dearly for this move as it was not long before President Robinson engaged in open public defiance of the Prime Minister by refusing his advice on the exercise of certain constitutional functions where such advice was required.

The country was subjected to the spectacle of the President refusing the advice of the Prime Minister over the revocation of the appointment of two Senators and the refusal of the Prime Minister's advice to appoint another two Senators in their place in January 2000. By December 2000, there was a lengthy delay in the re-appointment of Basdeo Panday as Prime Minister after the UNC won the general election. This was followed by the refusal to appoint seven defeated candidates as Senators and a prolonged standoff of 55 days

before the President capitulated and made the appointments.

There was further controversy when the President delayed the dissolution of Parliament after that advice was tendered by Prime Minister Panday in October 2001. Further difficulties arose in December 2001 when Robinson removed Panday as Prime Minister in the face of an 18 – 18 tie.

Any future conflict of this nature between the Prime Minister and the President will expand the damage that has already been done to the presidency. Some have argued that the time has come for a merger of the functions of the Head of Government and the Head of State in order to avoid a repeat of these precedents, either in the office of the Prime Minister or the office of the President.

Under our current system of government, it is only the Prime Minister who is required to bear political responsibility for his actions. The President is insulated from legal challenge by the Constitution in sections 38(1) and 80(2). The Prime Minister is bound by the collective responsibility of the Cabinet to Parliament and by his own individual ministerial responsibility to Parliament in the discharge of his functions. The President has no such accountability requirement and he is simultaneously protected by the Constitution.

The public political wrangling that has taken place in the past between Prime Minister and President has now made the strongest case for changing the presidency at this time by merging the offices of Prime Minister and President into one. Future loopholes are likely to emerge if constitutional reform is not undertaken.

In more recent times, there have been problems for the presidency associated with the appointment and resignation of the entire Integrity Commission of Trinidad and Tobago over a period of eleven days in May 2009. This came after the members of the previous Integrity Commission

had resigned in February 2009 following an adverse outcome in a matter in the High Court. Up to the time of writing, the President had been unable to appoint members of a new Integrity Commission to effect the transition from one Commission to another. The political reality is that the President does not bear any political responsibility to any person or authority for the appointment or the failure to appoint an Integrity Commission or any other Commission or office holder for which he is required to make an appointment. That is a major loophole in the existing Constitution.

**ENDNOTES**

1. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s. 40(2).
2. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s. 36(1).
3. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s. 68(4).
4. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s. 45(1) and s. 50(1).
5. See “President Clears the Air” in Sunday Guardian, 13<sup>th</sup> April, 1986, pp.1 and 18. The Sunday Guardian is a newspaper published in Trinidad and Tobago.
6. For a fuller discussion on the office of Speaker in Trinidad and Tobago, see : Hamid Ghany “Parliamentary Deadlock and the Removal of the Speaker : The Case of Trinidad and Tobago” in Journal of Legislative Studies 3 (2) (1997), pp. 112 - 138.
7. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s. 9.
8. H.W.R. Wade, Administrative Law (Oxford University Press, 1990), p.809.
9. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s.38.
10. Laws of Trinidad and Tobago, Ch. 1:01, Schedule, s. 80(2)

## Part Two

# The Working Document on Constitutional Reform for Public Consultation

On 9<sup>th</sup> January, 2009, the Prime Minister of the Republic of Trinidad and Tobago, the Honourable Patrick Manning, M.P., laid in the House of Representatives “The Working Document on Constitutional Reform for Public Consultation”. According to the Hansard for the House of Representatives for that date, the Prime Minister said *inter alia* the following :

*“I am sure by now it is clear that we will have an extended period of discussion on a new Constitution for Trinidad and Tobago. My estimation is that it would be almost two years before we are able to finalize a document for the consideration of Parliament. The length of time, the depth of discussion and the participation by the citizenry are not only appropriate, but very necessary, given the seriousness of this matter. Arising out of these deliberations, the Government will then produce a Green Paper for further public comment. Mr. Speaker, today we have completed an important phase in this all- important process. Let us, therefore, now go forward to shape a new Constitution for the Republic of Trinidad and Tobago; one that would serve us well in this 21st Century and beyond. As we seek to effect change, let us be mindful of one inalienable fact: the basic and fundamental rights and freedoms of all the people in our diverse society must not only be preserved, but strengthened. So thankfully entrenched are the principles of democracy in this country, that our citizens would tolerate nothing less. Whatever changes we effect in our constitutional arrangements, we must continue to protect our country against any possible assaults on our freedoms or belief in justice and equality for all the people of*

*our beloved country. Let us, therefore, never underestimate the gravity of this undertaking. It is one of the most important exercises since the attainment of independence of this country. We must give it the serious attention it deserves, and I urge all citizens to get involved. This is the inescapable responsibility of nationhood.”*<sup>1</sup>

The process of public consultation and discussion is about to begin. Having been asked by the Honourable Prime Minister to lead this phase of the process that he outlined in the House of Representatives on 9<sup>th</sup> January, 2009, there are some explanatory comments that need to be made on the Working Document.

### The Effect of Hybridization

It is clear that the intention is to create a hybrid parliamentary – presidential constitution with parliamentarism being the dominant force in the hybrid. It is clear also that the balance between the executive and the legislature will now be tilted in favour of the legislature and the executive will be weakened owing to the fact that there will no longer be a dominant parliamentary executive in which members of the Executive branch of the State (Cabinet and Ministers) will be now be prevented (except for four ministers in each House) from also being members of the Legislative branch of the State (Parliament). This will create a more level political situation in relation to the Separation of Powers in which the dominance of the Cabinet over the Parliament will be diminished as persons who seek to stand for election as a Member of the House of Representatives or are

appointed to the Senate will be doing so on the basis that they cannot become Ministers (except for four out of forty-one, for the time being, in the House of Representatives and four out of thirty-seven in the proposed Senate). These persons will be seeking to become parliamentarians, not Ministers. The Cabinet is capped at twenty-five Ministers and includes the President, the Vice-President, the Attorney General, the two Majority Leaders from both Houses of Parliament and such number of Ministers (not to exceed the remaining twenty positions of Minister that would be available) (see sections 96 and 97 of the Working Document).

The possibility of the Majority Leader of the House of Representatives being in the Cabinet who does not belong to the same political party as the President may arise if there is a hung Parliament at the commencement of the parliamentary term just after a general election. Seeing that the requirements for the establishment of the new Cabinet list the Majority Leaders of the House and the Senate as members of the Cabinet, this will provide the outward expression of a coalition in the Cabinet that will be reflective of the inconclusive political outcome in the House of Representatives after the general election.

The proposed merger between the existing office of President and the existing office of Prime Minister (with the abolition of the office of Prime Minister) will remove an impartial arbiter from the system. The actual presidency that is now being proposed will be weaker than the office of Prime Minister under the existing constitutional arrangements for the following reasons :

- (i) The election of the President through the House of Representatives and his / her removal from that House after elevation to the presidency provides for a more rigid separation of powers which will strengthen the hand of that House in relation to the Executive.
- (ii) The retention of a nominated Senate ensures that the House of Representatives will be dominant over the Senate. When coupled with the removal of the President from that House (unlike the current arrangement where the Prime Minister is a member of that House), the effect will be to make the House of Representatives and whoever controls an effective majority in it the effective power broker under the proposed constitution.
- (iii) The proposal to have the President appoint four Ministers from each House of Parliament as well as to have the Majority Leaders in either House become members of the Cabinet and also possibly appointed as Ministers will provide the opportunity for more effective power to reside with those Majority Leaders and Ministers as they are the only ones who will sit in both the Executive (Cabinet) and Legislative (Parliament) branches of government. In effect, the person who will become the most powerful of them all is likely to be the Majority Leader in the House of Representatives seeing that the elected House of Representatives is to be superior to the nominated Senate.
- (iv) The Majority Leaders in both Houses can only be removed for their inability to perform their functions and it is the Majority Leader in the House of Representatives who must initiate any action with the Speaker to inform him / her about any members of parliament who support the majority who have either resigned, or been expelled, from their party (where there is a hung parliament, this function will be muted for both Majority and Minority Leaders in the House of Representatives and will not apply at all to third parties – see section 64). **This function does not reside with the President.** In this way, the Majority Leader in the House of Representatives becomes a virtual Prime Minister because of the hybrid model. This will have an

impact on political party structures as two poles of effective political power will be constructed as opposed to the existence of one under the existing constitution. These two poles of political power will be the President, on the one hand, who will be required to exercise both the dignified and efficient aspects of power, and, the Majority Leader, who will manage the political majority in the House of Representatives and also sit in the Cabinet, thereby making him / her a very powerful power broker in the party, the Cabinet and the Parliament.

- (v) The proposed retention of the parliamentary doctrine of the collective responsibility of the Cabinet to Parliament under these proposed hybrid arrangements will strengthen the political power of the Majority Leader in the House of Representatives and reduce the President to a dependent role in the process. The President is not accountable as head of the Cabinet to Parliament seeing that he / she will not be a member of the House of Representatives. The only person who can ensure the implementation of that collective responsibility will be the Majority Leader in the House of Representatives who leads that House and who is also a member of the Cabinet.

### **Collective Responsibility and the Hybrid**

The constitutional doctrine of collective responsibility as it applies in parliamentary systems has three main rules which are (i) the confidence rule; (ii) the confidentiality rule; and (iii) the unanimity rule. Under this proposed hybrid, two of these rules, namely confidence and unanimity, can be breached without fear of Cabinet disruption. However, the Cabinet will have to depend upon the Majority Leaders in the House of Representatives and the Senate to uphold the unanimity rule so that the Government will speak with only one

voice. As regards the confidence rule, the Majority Leader in the House of Representatives will have to try and ensure that Government policy is supported in that House, however, as a power broker, it is the Majority Leader and not the President who can effect compromises to policy and legislation given his / her control over party discipline in the House.

This change will alter the way in which political parties will structure their legislative / parliamentary party arms as the Political Leader of a party may or may not be the Majority Leader. Based on how the Working Document has established the separate roles of the President and the Majority Leader there is unlikely to be any “maximum leader”. The concept of the “maximum leader” is a phenomenon of the parliamentary system that currently exists, but will not exist under the proposed hybrid revisions.

In parliamentary systems, legislators who support the majority usually toe the party line so as to avoid disrupting power arrangements for the Cabinet that depends upon the continued confidence of a majority of elected legislators. Under this hybrid that promotes a greater separation of powers (by removing the President from Parliament), the fear of creating a Cabinet crisis is diminished and legislators will be free to treat with bills, motions, etc. in a more independent manner. The person that the legislators who support the majority party will have to fear will be the Majority Leader, and not the President. Additionally, Ministers will be free to publicly disagree with one another as there will be no fear of creating a Cabinet crisis as unanimity will not have the same effect as under the existing constitutional arrangements. The need for discipline in the Cabinet will be the task of the President. Seeing that most Ministers will come from outside of the Parliament, there will be no problems in removing indisciplined Ministers. However, political problems may arise in the cases of Ministers from the House of Representatives who are dismissed from, or who may resign, their

ministerial portfolios as they may join others in the House of Representatives who may not toe the party line.

The invocation of the crossing-the-floor provisions by the Majority Leader will lead to bye elections in the first four years of the Parliament. Any reversals in those bye elections for the party with a majority may lead to a Parliament controlled by another party and a Cabinet dominated by the party that previously had a majority in the Parliament. With this hybrid, the Cabinet will not collapse (as would be the case under the doctrine of collective responsibility under the present constitution). All that would happen is that the Parliament will continue and the Cabinet will continue and they will have to engage in constructive dialogue and compromise in order to effect policy and legislative changes. The President may decide to dissolve Parliament, but that will also terminate the presidency as well.

The removal of the motion of no confidence that applies to the Prime Minister under the existing constitution and the retention of the doctrine of collective responsibility will create a constitutional conundrum. Instead of the motion of no confidence (which is the constitutional device that gives expression to the confidence rule in the doctrine of collective responsibility in parliamentary systems), it is proposed to subject the new president to the impeachment procedures for the presidency that exist under the current constitution. This means that the confidence rule that applies to the doctrine of collective responsibility will no longer exist, but the doctrine will still apply. By this means, power sharing can be effected with one party controlling the presidency and another party controlling the parliament if there is a hung parliament. Outside of that, the President and the Cabinet will have to account to the Parliament for their general direction and control of the affairs of state. The Working Document speaks about the President keeping Parliament fully informed through addresses to joint sittings of the House of

Representatives and the Senate (clause 102). Also, the Working Document speaks about Ministers being required to appear in either House to report on the conduct of his / her duties as a Minister [clause 79(1)(c)].

The appointment of Ministers from outside of Parliament and a minority of Ministers from inside of Parliament will greatly remove any danger that a lack of unanimity will bring for the Cabinet (unlike the dangers that would be posed under the existing constitution). The requirement for all Ministers to belong to the Legislature (House of Representatives or the Senate) in parliamentary systems (which is the constitutional device that gives expression to the unanimity rule in the doctrine of collective responsibility in parliamentary systems) will be altered in such a way that either public disagreement among Ministers or internal divisions within the Cabinet will enhance the power base of those Ministers who are also elected parliamentarians. Their possible dismissal will lead to their greater independence without overthrowing the President thereby creating legislative management problems for the President and the Cabinet. **Party discipline in the House of Representatives will be enforceable by the Majority Leader and not the President.**

The retention of the provisions for the exercise of presidential powers under the existing constitution for the proposed constitution will diminish the powers of the President under this parliamentary – presidential hybrid. The requirement to have the President act in accordance with the advice of the Cabinet will substantially reduce the level of presidential influence and power. **In presidential systems, the Cabinet is advisory to the President and the President acts in his / her own deliberate judgment. This is not the case here.**

In this hybrid, the President has to take his / her directions from the Cabinet which will substantially alter the way in which power will be exercised. The majority vote of the Cabinet will bind

the President (as the President will now be a member of the Cabinet), unlike the current arrangements whereby the President (who is not a member of the Cabinet) acts on the advice of the Prime Minister (who chairs the Cabinet and whose word is accepted by the President regardless of the outcome inside the Cabinet).

### **The Presidency and the Hybrid**

Presidential powers under this hybrid will be further reduced by the removal of the veto power in respect of legislation that is currently available to the President under the existing constitution. The absence of a veto power means that the President must enact whatever legislation is sent to him / her by the Parliament and such legislation will not be alterable by the President as he / she will only have a power to assent and not to veto. This will enhance the powers of the Legislature over the Executive as any failure by the President to assent to legislation approved by Parliament will constitute a violation of the constitution if more than fourteen days elapses after a Bill is presented to him / her for assent.

The political will has been expressed for a President to be elected by indirect means through the House of Representatives as opposed to a direct election. The effect of the proposals are as follows :

- (a) each candidate for the office of President does not have to be the political leader of their party and political parties are free to choose their presidential candidates by whatever means that will be acceptable to the Elections and Boundaries Commission;
- (b) in cases where the presidential candidate of a party does not win his / her seat but the party wins a majority, the political leader of that party shall choose another person as their presidential candidate from among its elected members for appointment as President;
- (c) in cases where no party secures a majority and / or none of the presidential candidates have won their seats, there will be cross-party negotiations to determine who should be recognized by the Chairman of the Elections and Boundaries Commission for appointment as the President;
- (d) these proposed arrangements lend themselves to power-sharing opportunities more so than the existing constitutional arrangements;
- (e) the creation of a co-terminous presidency with the House of Representatives implies that the use of the power of dissolution by the President also terminates the term of office of the President which diminishes the power of the President insofar as the President will have no guarantee of being re-nominated by his / her party as their presidential candidate which will precede whether or not the party will win the ensuing general election;
- (f) the exercise of the power of prorogation by the President on the advice of the Cabinet will provide the President and the Cabinet an advantage over Parliament to send it into a recess if the Parliament is hostile to the Executive and this can only be overcome by the requirement to have a sitting once every six months between one session and another. There will also be the requirement for the President to address a joint sitting of both Houses of Parliament at least once per year. These two requirements may be combined into one; however, the requirements for the approval of the Appropriation Act and the need to avoid annulment of presidential notifications in the House of Representatives in respect of appointments to a range of high offices of State will put pressure on the President and the Cabinet to avoid lengthy prorogations or time the use of prorogation as a disabling tool against the Parliament;

- (g) this aspect of the hybrid at (f) will need to be closely reviewed to determine the extent to which the Parliament may enjoy some separation of powers on the subject of prerogation by the Executive.

### The Senate

The proposed Senate will be nominated and security of tenure will be given only to those Senators who will be appointed to represent special interests. Nothing will prevent any President from appointing persons who are loyal to the party of the President as Senators to represent special interests and they will only be removable by a motion passed in the Senate. This can become controversial as it will be a matter of political trust.

The appointment of Senators by the President will obviously be done by presidential instrument with the seal of the State, however, in the case of Senators appointed on the advice of the Minority Leader they will be removable by a direct notification to the President of the Senate from the Minority Leader after their appointment. This will allow insulation for the appointments of those Senators supportive of the Minority Leader to the extent that the President cannot remove them by the use of State power.

However, as a general principle, the President of the Senate under this hybrid will now be given the power to declare a seat vacant before any appointment can be made by the President or the Minority Leader in respect of filling a vacancy after the first appointments are made.

This power does not currently exist in relation to the President of the Senate and, therefore, the need for concurrence between the President and the President of the Senate will be required before a senatorial seat is declared vacant.

### The Judiciary

The judicial provisions appear to mirror the developments that have taken place in the United Kingdom insofar as the office of Lord Chancellor has been substantially altered and there has been the creation of a Ministry of Justice. The effect of this hybrid is to separate the powers given to the Chief Justice at independence to be both a jurist and an administrator and leave the Chief Justice with judicial powers and place the responsibility for the administrative powers in the hands of a line Minister of Justice who will be responsible to Parliament for the administration of justice.

In the making of these changes in the United Kingdom, there was a Concordat between the Lord Chief Justice and the Lord Chancellor that was announced in January 2004, the enactment of a Constitutional Reform Act in 2005, the creation of a Ministry of Justice in May 2007 and the commencement of Supreme Court of the United Kingdom in October 2009.

Insofar as the Lord Chancellor (who is also the Secretary of State for Justice) and the Lord Chief Justice were concerned, it was necessary for both offices to have a Concordat to govern their relations. Given the comments of the Chief Justice of Trinidad and Tobago at the opening of the 2009 / 2010 Law term in September 2009 in Trinidad and Tobago, this may be a useful tool to be pursued if the political will to have a Ministry of Justice is going to be sustained.

The matter of the need for reform in the Judiciary was perhaps best made by Professor Selwyn Ryan writing in his weekly column in the Sunday Express on Sunday 13th February, 2005 under the headline "Regime Change Needed in Judiciary". He dealt with matters beyond the system itself. According to him :

*"It is in fact now becoming clearer that what we*

*seem to have done when we achieved independence in 1962 was to interweave the woolen wig of the colonizer with the ethnic hair of the tribesman. We did it so 'skilllessly' that the links between the one and the other are there for all who have eyes to see."* <sup>2</sup>

Ryan argues that the problems in the Judiciary may not be systemic, but instead ought to be viewed in the context of the personalities. He goes further to say :

*"It is also clear that there continues to be a great deal of cronyism and jockeying for position within the judiciary and that the brethren are as divided along ethnic and personal lines as they have been in the past."* <sup>3</sup>

Such a scathing attack on the personnel of the Judiciary who dispense justice to the nation cannot be ignored simply on the grounds of maintaining independence of the judiciary. If this is what the framers of the independence constitution had intended, then what are we protecting ? Is the Judiciary as racially divided as Ryan makes it out to be ? This is not a new position taken by Ryan about the political positions adopted by judges. In writing the biography of the late Sir Hugh Wooding, first Chief Justice of Trinidad and Tobago, Ryan had this to say about the appointment of Mr. Justice Isaac Hyatali as Chief Justice in July 1972 :

*"There were some who felt that control of the highest judicial office in the land had passed to someone who was too partial to the concerns of the executive and that control of the highest judicial office in the land had been snatched from the hands of the group which had controlled it during the decade following Independence and which had established certain traditions which now appeared to be in danger. Those who defended the logic of Hyatali's appointment note that he was appointed to the Appeal Court earlier than Clement-Phillips and was thus senior, even if by a few minutes. This was an argument that was not taken seriously by*

*Eric Williams and others who felt that seniority was not a criterion one used to choose a Chief Justice. It was also asserted that Phillips, though a very brilliant lawyer, (some claim that he was better than Wooding) was too eccentric (he was known to have a 'mental' problem) to be appointed Chief Justice, a job which required its holder to be the Chief Administrative Officer of the Judicial Branch. It was argued by the President of the Bar Association, Gaston Johnson and others that Phillips' health would not stand up under the strain. Fraser and Georges wanted Phillips to be Chief Justice and it was understood that they would have helped him to 'arrange things' whenever necessary. Others felt that the real reason for Hyatali's choice had to do with the fact that he was regarded as being more politically pliable. It would however appear that in the final analysis the critical factor was neither Clement Phillips's poor health, the fact that he was not politically pliable, the fact that his wife had annoyed Williams by lobbying for his appointment, or that Wooding had backed Phillips. Hyatali was appointed as part of an ethnic package deal. After considering the Wooding / Procope proposal to split the responsibility of the job between a Chancellor and a Chief Justice or Hudson-Phillips' proposal to recall Ellis Clarke to occupy the post, Williams opted for Hyatali because he was an Indian."* <sup>4</sup>

Based on this account, one must ask whether a mistake was made at independence in the way that our judicial system was established ? Ryan asserted in 2005 that there was a mistake and he seems to suggest that it is now necessary to unweave what he calls the "woolen wig" from the "ethnic hair". His link between ethnicity and judicial politics in Trinidad and Tobago is not a recent viewpoint and his language is crystal clear. If that is so, then what must be done ?

Ellis Clarke indicated in his pre-independence memorandum of 16<sup>th</sup> April, 1962 (supra) that the office of Chief Justice that was created at inde-

pendence was akin to that of the Lord Chancellor in Great Britain at that time. Since that time, Great Britain has significantly revised the office of Lord Chancellor by separating the judicial functions of that office into the Lord Chief Justice (judicial) and Secretary of State for Justice and Lord Chancellor (political / administrative).

Can such a reform work here or are the woolen wig and the ethnic hair interminably interwoven ?

### **The Edinburgh Plan of Action and the Independence of the Judiciary**

The Edinburgh Plan of Action for the Commonwealth that was prepared at the end of the Commonwealth (Latimer House) Colloquium held on 6<sup>th</sup> and 7<sup>th</sup> July, 2008 at the Scottish Parliament and presented to the Commonwealth Law Ministers meeting in Edinburgh in July 2008, in recalling the Commonwealth (Latimer House) Principles (CLHP) that were endorsed at the Commonwealth Heads of Government Meeting in Abuja, Nigeria in 2003, advocated the following in respect of the Judiciary :

#### *“1.3 Independence of the Judiciary*

*‘Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.’ (CLHP –IV.3)*

#### **ACTION:**

*The allocation of resources by Parliament, for the judiciary and the running of the courts, should be made following consultation between the Head of the Judiciary and the relevant minister.*

*Appropriate dispute resolution mechanisms should be put in place to deal with any disputes arising in relation to the allocation of resources.*

*There remain jurisdictions where adequate resources have not been made available for judicial*

*training, including training on basic constitutional issues. Such resources should be made available and programmes established for judicial training under the control of the Head of the Judiciary.”<sup>5</sup>*

While the Edinburgh Plan of Action for the Commonwealth envisages consultation between the Head of the Judiciary and the relevant Minister of Government responsible for the running of the courts before Parliament approves resources for the judiciary, the fundamental premise of the argument is that the judiciary must be given adequate resources for it to function so as not to compromise the independence of the judiciary.

The Edinburgh Plan of Action goes further to say:

#### *“2.3 Judicial accountability and confidence building*

*‘Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity.’ (CLHP VII- b)*

#### **ACTION:**

*The Heads of the Judiciary should submit regular reviews to Parliaments on the financing and administration of the courts.*

*The judiciary should continue to develop and review their codes of conduct/ethics on a regular basis.*

*Information on the complaints and disciplinary procedures in relation to judicial misconduct should be publicly available.”<sup>6</sup>*

The Edinburgh Plan of Action is envisaging a level of functional cooperation between the Judiciary and Parliament and the Judiciary and the Executive, on the one hand, and the Judiciary and the public, on the other hand, which will promote confidence building in the public domain. The Edinburgh Plan of Action was submitted to Commonwealth Law Ministers for consideration at

their Meeting in Edinburgh over the period 8<sup>th</sup> – 11<sup>th</sup> July, 2008.

According to the Communiqué issued at the end of the Commonwealth Law Ministers meeting in Edinburgh in July 2008 at paragraph 7 :

*“7. The latter paper provided the basis for the High Level Panel deliberations, which covered many important contemporary issues relating to the diverse challenges facing the rule of law, including the central role of the Justice Minister in defending the independence of the judiciary, facilitating international cooperation in the light of differing legal regimes and governmental structures, and strengthening the interaction of Law Ministries with other stakeholders in the development and implementation of legal policy.”*<sup>7</sup>

The question of a Minister of Justice relating to a Chief Justice has been accepted at various fora in the Commonwealth as means of carrying out the administration of justice. This will become a matter on which further deliberation and consultation is likely to take place based on the experiences in other Commonwealth countries. The reforms in the United Kingdom with regard to the Lord Chancellor and Secretary of State for Justice, on the one hand, and the Lord Chief Justice, on the other hand, was the subject of extensive review by a Select Committee of the House of Lords.<sup>8</sup>

## General Comments

It is possible that this attempted move away from maximum political leadership towards power-sharing and consociational democracy may cause some disquiet in the public domain because the analysis of it may be personalized and the familiarity with other constitutional norms may be limited. Further comments and discussion may help to enhance the thinking on, and development of, a parliamentary-presidential hybrid that shares power as opposed to concentrating it.

## NOTES

1. Hansard, House of Representatives, 9<sup>th</sup> January, 2009, Vol. 8, Session 2009, p. 35.
2. Sunday Express, 13<sup>th</sup> February, 2005, p. 11.
3. Sunday Express, 13<sup>th</sup> February, 2005, p. 11.
4. Selwyn Ryan, *The Pursuit of Honour : The Life and Times of H.O.B. Wooding*, ISER, UWI, St. Augustine, 1990, pp. 223 – 224.
5. “The Edinburgh Plan of Action for the Commonwealth” prepared by the Commonwealth (Latimer House) Colloquium, held at the Scottish Parliament, 6 – 7 July, 2008, para. 1.3.
6. “The Edinburgh Plan of Action for the Commonwealth” prepared by the Commonwealth (Latimer House) Colloquium, held at the Scottish Parliament, 6 – 7 July, 2008, para. 2.3.
7. Commonwealth Law Ministers Meeting Communiqué 2008, (Commonwealth Secretariat, London, July 2008), para.7.
8. Select Committee on the Constitution, Sixth Report, Session 2006 – 2007, “Relations between the executive, the judiciary and Parliament” (House of Lords Paper 151).

## Part Three

# Comparison with the Existing Constitution

The independence draft constitution was first published for public comment on 19th February, 1962 and subsequently on 10th March, 1962, the Secretary to the Cabinet, Alan Reece, issued invitations to civil society groups to offer their comments on the draft at a meeting of commentators on the draft constitution that was to be held at Queen's Hall from 25th to 27th April, 1962. Following that, there was a Joint Select Committee of the Parliament on the draft constitution that sat between 9th and 16th May, 1962. This was followed by the Marlborough House Conference in London from 28th May to 8th June, 1962 to discuss the draft constitution. After that, the final draft was prepared and Trinidad and Tobago became independent on 31st August, 1962. The consultation period for the independence constitution only lasted from 19th February to 8th June, 1962. After that the final draft was prepared in London in time for the celebration of Independence Day on 31<sup>st</sup> August, 1962.

In the case of the 1976 republican constitution, a Constitution Commission, under the chairmanship of Sir Hugh Wooding, a retired Chief Justice of Trinidad and Tobago, was announced in the Throne Speech read by the Governor-General, Sir Solomon Hochoy, at the opening of Parliament on 18th June, 1971. The Prime Minister, Dr. Eric Williams, had to employ this method because the Parliament that assembled on 18<sup>th</sup> June, 1971 after the general election of 24th May, 1971 did not have any opposition members. In the circumstances, Williams had to use the Commission of Inquiry as an alternative technique for consultation.

That Commission reported in January 1974 and

Williams disputed most of their report in his contribution to the House of Representatives in December 1974 when the documents were laid in Parliament. He subsequently appointed Mr. Wilfred Mc Kell, the then Director of Personnel Administration, to receive comments on the constitution in 1975, this was followed by a Joint Select Committee of Parliament and then the new constitution was enacted in 1976 before the dissolution of Parliament for the general elections of that year. The period of consultation started in 1971 and ended in 1976.

The current exercise for the review of the 1976 republican constitution (the existing constitution) started in 2006 and involved the establishment of a Round Table of scholars, technocrats and Ministers that considered two draft constitutions – the Ellis Clarke draft and the Principles of Fairness draft (both produced in 2006). There were nationwide public consultations co-chaired by Professors Selwyn Ryan and John La Guerre in 2006 and 2007, further discussions within the Round Table in 2007 that were adjourned for the holding of the 2007 general election and resumed in 2008 with an additional member. Discussions continued throughout 2008 and a Working Document was laid in the House of Representatives in January 2009.

Nationwide public consultations are to be held again in 2009 and 2010 on the Working Document before a report is submitted to the Government for their consideration. After that, it is proposed that a Green Paper will be produced by the Government as an official statement of their policy and any future activities beyond that will be announced by the Government.

The Working Document and the existing Constitution will now be compared in a simple, but not simplistic manner.

## Preamble and Preliminary

The Preamble has remained the same as in the existing Constitution except for the change of the word “community” which has been replaced by the word “society” in line three of clause (b). The effect of this change appears to be more broad-based.

The Preliminary clauses remain the same in clauses 1 and 2. Clause 3 adds ten new words to this interpretation section. These new words for which definitions are provided are (i) “Act”; (ii) “Caribbean Court of Justice”; (iii) “Government”; (iv) “House of Assembly”; (v) “Local Government body”; (vi) “Minority Leader”; (vii) “Minister”; (viii) “President”; (ix) “Senator”; and, (x) “State”. Clause 3 also removes two words from the existing Constitution, namely “the Commonwealth” and “Judicial Committee”.

In the case of the removal of the words “Judicial Committee”, it is apparent that inclusion of the new words “Caribbean Court of Justice” will be in conflict with “Judicial Committee” as the political intention of the Working Document is to replace the Judicial Committee of the Privy Council with the Caribbean Court of Justice.

As regards the omission of the words “the Commonwealth” from the Working Document, it is difficult to assess whether this was an oversight or whether the draftsman felt that the provisions of Chapter Two, in general, or clause 30, in particular, of the Working Document were adequate for a definition of the Commonwealth.

Insofar as the definition of the word “law” in clause 3 of the Working Document is concerned, there is a change from the existing Constitution. The change can be seen as follows :

Existing Constitution : “law” includes any enactment, and any Act or statutory instrument of the United Kingdom that before the commencement of this Constitution had effect as part of the law of Trinidad and Tobago, having the force of law and any unwritten rule of law.

Working Document : “law” includes any written and unwritten law, and any Act of Parliament or statutory instrument of the United Kingdom that before the commencement of this Constitution has effect as part of the law of Trinidad and Tobago.

This may be a matter of some debate as regards the re-arrangement of the words “unwritten rule of law” at the end of the sentence in the existing Constitution into “unwritten law” at the commencement of the sentence in the Working Document.

## Chapter One - The Recognition and Protection of Fundamental Human Rights and Freedoms

### Part One

Part One of Chapter One has retained essentially the same intent as the existing Constitution; however, there are expansions in the application of the rights and freedoms when compared to the existing Constitution which has followed the model of the Canadian Bill of Rights 1960.

The expansions in the Working Document seem to lean somewhat in the direction of the European Convention on Human Rights 1950 model by the inclusion of some prohibitions against infringements. This may be seen as a hybridization of the Bill of Rights in an attempt to expand what it offers the citizen by way of the recognition and protection of fundamental human rights and freedoms.

These expansions may be categorized as follows :

- (a) The use of the word “Everyone” at the beginning of clauses 5 to 10 and 12 to 16 makes clear to whom these clauses are applicable;
  - (b) clauses 5 and 6 are an expansion of section 4(a) of the existing Constitution;
  - (c) clause 7 expands section 4(b) of the existing Constitution to provide for the “equal protection of the law” which is not expressly stated in the existing Constitution;
  - (d) clause 9 expands the recognition and protection afforded everyone in respect of their private and family life in section 4(c) of the existing Constitution to include their home and correspondence, while including a denial clause against unreasonable search or seizure;
  - (e) clause 10 expands the provisions of section 4(e) of the existing Constitution by including the right to make political choices;
  - (f) clause 11 is expanded to permit a parent or guardian to obtain access to educational facilities for his child or ward over and above the existing provisions in section 4(f) that relate only to the provision of a school of his choice for the education of his child or ward;
  - (g) clause 13 is expands section 4(h) of the existing Constitution by including a denial clause against the advocacy of hatred, ridicule or contempt in the pursuance of their right to enjoy freedom of conscience and religion. Religious belief and observance in the existing Constitution have been combined into “freedom of religion” in the Working Document;
  - (h) clause 14 expands section 4(i) of the existing Constitution by including a denial clause against the advocacy of hatred, ridicule or contempt in their pursuance of their right to enjoy freedom of thought and expression.
- This freedom is further expanded in the Working Document to include freedom of belief and opinion which is not present in the existing Constitution;
- (i) clause 15 imposes a restraint upon the provisions of section 4(j) of the existing Constitution by restricting freedom of association to “lawful purpose”, while leaving freedom of assembly untouched;
  - (j) clause 16 expands freedom of the press from the provisions of section 4(k) in the existing Constitution by including “other media of communication”, while simultaneously imposing a denial clause against the advocacy of hatred, ridicule or contempt in the pursuance of this freedom;
  - (k) clause 18 is a saving clause for any existing right or freedom on the ground that if it is not included in the Working Document or is only included in a part of Chapter One of the Working Document, then it is protected from abrogation, abridgement or infringement.

## **Part Two**

Part Two of Chapter One is designed in a manner similar to the existing Constitution insofar as it continues to make provision for “Exceptions for Existing Law” . The significant alteration is the incorporation of the provisions of section 5(1) and 5(3) from the Constitution of the Republic of Trinidad and Tobago Act (Act No. 4 of 1976) into the provisions for the “Savings for existing law” clause in the Working Document.

The effect of this is to permit all laws in force at the commencement of the new Constitution (the existing laws) to continue being in force, while providing for them to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the new Constitution.

## Part Three

Part Three of Chapter One retains essentially the same provisions for the “Exceptions for Emergencies” as are to be found in the existing Constitution. There are two alterations to those provisions.

The first is to be found in clause 24(1) of the Working Document where the qualifications for the attorney-at-law who is to preside over a detention tribunal are specified. These qualifications are that the attorney-at-law must have been qualified for ten years and must be practicing in Trinidad and Tobago.

The second is to be found in clause 25(1) of the Working Document whereby the publication of the existence of a state of emergency and related documents where it is impracticable or inexpedient to publish such notifications in the Gazette, they may also be brought to the attention of the public by any other means seeking to reach the widest public. This is in addition to the existing provisions whereby such documents may be affixed to public buildings, distributed amongst the public, and announced orally in the public.

## Parts Four and Five

Part Four (Exceptions for Certain Legislation) and Part Five (General - that relates to the enforcement of the protective provisions) of the Working Document remain essentially the same as in the existing Constitution.

## Chapter Two – Citizenship

The provisions of Chapter Two relating to citizenship have remained essentially the same as in the existing Constitution with the following two exceptions :

(a) provision is made in clause 32(d) of the Working Document for former citizens of Trinidad and Tobago to be able to re-acquire their citizenship;

(b) provision is made in clause 33(2) of the Working Document for persons born outside of Trinidad and Tobago to assume the citizenship of their mothers in cases where they are born aboard a registered ship or aircraft or an unregistered ship or aircraft or the aircraft of the government of any country.

## Chapter Three – The Presidency

Chapter Three of the Working Document represents the most fundamental area of change from the existing Constitution. It alters the premise of the presidency by substituting the House of Representatives for the Electoral College in the method of election. The effect of this change is to retain the method of indirect election of the President by the Parliament with the significant alteration that the will of the majority of the elected representatives of the people will not compete with the nominated Senators for the election of the President.

In the circumstances, it expects the presidency to be filled by one of the members of the House of Representatives and that such a person must have been designated by their political party as their presidential candidate among all of their other candidates prior to the general election. That presidential candidate (once so designated) will also have an alternate candidate standing for election with them in their constituency. The purpose of that alternate candidate is to fill any vacancy in the constituency that may arise if the presidential candidate wins his / her seat and is subsequently elected President.

The effect will be to ensure that there is no need for a bye election in that constituency while satisfying the need to remove the President from the House of Representatives to ensure a separation of powers between the President and the Parliament.

Provision is made for the office of Vice-President.

The person holding this office will be selected by the President from among members of the House of Representatives or the Senators and can be removed from office by the President in his / her discretion. There is a prohibition clause [39(3)] in the Working Document which prevents the President from appointing the Vice-President as the Majority Leader in either the House of Representatives or the Senate.

The Vice-President shall act temporarily as President in cases where the President is incapable of performing the functions of the presidency by reason of absence or illness or otherwise. In cases where the Vice-President is unable to assume these duties, the President shall appoint another member of Parliament to act temporarily as President.

In cases where the Vice-President is required to perform the functions of the office of President, the Vice-President shall temporarily cease to perform his / her functions as a member of the House of Representatives or the Senate and shall resume those functions upon ceasing to act as President.

The Vice-President shall vacate his / her office in cases where (i) someone else is appointed Vice-President, (ii) he / she is appointed President or re-appointed as Vice-President after a dissolution of Parliament, or (iii) loses their qualifications to be a member of the House of Representatives or the Senate as the case may be.

The President is to be elected by an actual majority vote in the House of Representatives in cases where no political party wins a majority of seats and two or more parties join to secure a majority and they fail to elect from among themselves a member to be the President. The Speaker of the House of Representatives will preside over this election.

There will be a vote among the elected members of a party that wins a majority of seats in the House of Representatives after a general election where

its presidential candidate loses his / her seat and the political leader of that party fails to designate another elected member of his / her party as its presidential nominee for appointment by the Chairman of the Elections and Boundaries Commission. The Speaker of the House of Representatives will preside over this election.

In cases where the elected members of the majority party or the elected members of the parties that have joined together to secure a majority fail to elect someone from among them to become the President, then the Speaker will select an elected member from among those of the majority party or the parties that joined together to secure a majority to be appointed as the President. In exercising this power, the Speaker will choose the elected member who in his opinion is most likely to command the support of the majority of the members of the House of Representatives and who is willing to be the President.

In the circumstances where the elected member who is appointed President was not a designated presidential candidate of any of the political parties, then it will be necessary to hold a bye election in the constituency for which that member had been elected.

Once a President is elected that President shall assume office upon the expiration of fourteen days after his / her election.

A second general election will have to be held in cases where no political party or coalition of parties can secure a majority and there is no quorum of the House of Representatives after two occasions to try to elect a President. Such a general election will be held within thirty-five days of the dissolution of Parliament which must be done by the President in office within five days of receiving correspondence from the Speaker to this effect.

The term of office of the President is linked to the

election of a successor President. In the circumstances, there is no vacancy in the office of President and the onus is on the members of the House of Representatives to elect a President from among a majority of themselves in order for the term of office of one President to end and the term of office of another President to begin.

Provision is made for the President to vacate his / her office in cases of death, resignation, impeachment, election of someone else as President, or loss of qualifications to be elected as a member of the House of Representatives.

The immunities of the presidency remain the same as in the existing Constitution and the determination of questions as to the election of the President have been consequentially modified to reflect the roles of the Chairman of the Elections and Boundaries Commission and the Speaker of the House of Representatives in the certification of the election of the President.

## Chapter Four – Parliament

Chapter Four of the Working Document retains the Parliament of Trinidad and Tobago as consisting of the President, the Senate and the House of Representatives.

### The Senate

The size of the Senate is increased from thirty-one in the existing Constitution to thirty-seven in the Working Document. All appointments to the Senate will be made by the President using the following formula (i) nineteen in his / her own discretion; (ii) seven on the advice of the Minority Leader; (iii) eleven after consultation with various interest groups and organizations with a requirement that a representative shall be appointed from the following sectors : business, labour, the environment, the village council movement, the energy sector, and finance. There is also a special requirement that two Senators from Tobago must

be appointed after consultation with the Tobago House of Assembly.

The tenure of office of Senators has been revised in the Working Document when compared to the existing Constitution. Provision is now being made in the Working Document at clause 57 for the President of the Senate to declare the seat of a Senator vacant. Under the existing Constitution at section 43(2), the President of the Republic declares the seat of a Senator vacant. The Working Document divides the termination of office into three categories, namely, (i) the President to advise the President of the Senate of the appointment of a new Senator in respect of the nineteen Senators that he / she can appoint in his / her discretion and the President of the Senate declares the seat vacant; (ii) the Minority Leader to advise the President of the Senate that a new Senator is to be appointed and the President of the Senate declares the seat vacant; and (iii) a motion for the removal of any of the eleven Senators appointed is passed by the Senate and the President of the Senate declares the seat vacant.

No new appointments can be made by the President if the President of the Senate does not declare the seat of a Senator vacant. No provision is made for the resolution of a difference of opinion between the President and the President of the Senate so that all Senators appointed at the discretion of the President, once appointed, can only be removed if there is concurrence between the President and the President of the Senate for the removal. Those Senators appointed by the Minority Leader can only be removed if there is concurrence between the Minority Leader and the President of the Senate. As regards those Senators appointed by the President to represent various special interests, the President of the Senate will be required to concur with a majority of the Senate to declare the seat of such a Senator vacant after a motion for his removal has been passed.

In respect of the tenure of the President of the Sen-

ate, he / she will have to agree to declare his / her own seat vacant if any replacement Senator is to be appointed in his / her place.

Additionally, the President of the Senate is being given the power to appoint temporary Senators on the advice of the President or the Minority Leader as the case may be.

The provisions regarding the qualifications and disqualifications for the appointment of Senators in the Working Document are comparable to the existing Constitution.

The provisions regarding the election and functioning of the President of the Senate and the Vice-President of the Senate are comparable to the existing Constitution.

### **The House of Representatives**

The composition, manner of election, and tenure of members of the House of Representatives in the Working Document are comparable to the existing Constitution with one major difference. The enforcement of the “crossing-the-floor” provisions in clauses 63(2)(e) and 64(1) in the Working Document place the responsibility for enforcement and party discipline with the Majority and Minority Leaders, as the case may be, of the members who have either resigned from, or been expelled, by their parties.

When compared to the existing Constitution, the difference is that a party with a majority may lose that majority if there are enough dissenting M.P.s who cease to perform their functions by virtue of the declaration of the Speaker that they have resigned from or been expelled by their party. Under the existing Constitution, this would cause the Government to fall. Under the Working Document, the President and the Cabinet will not lose office, but would not be able to count on a majority of sympathetic M.P.s for support and this will create the need for consensus government for measures

to be passed in the House of Representatives as that would be the only way to secure a majority, pending the holding of bye elections if the legal challenges go against the dissenting M.P.s. The outcome of the bye elections can also change the composition of the House of Representatives.

In the case of the Minority Leader, the control of the elected members in the House of Representatives from his / her party could also face the same challenges. If there are any third parties in the House of Representatives, these provisions will not apply to them.

The provisions regarding the Speaker and the Deputy Speaker are comparable to the existing Constitution.

### **Powers, Privileges and Procedure of Parliament**

The entrenchment provisions are applied with the same methodology of permitting amendments to the Constitution with (i) simple majorities in both Houses of Parliament, (ii) a two-thirds majority in both Houses of Parliament; and (iii) a three-quarters majority in the House of Representatives and a two-thirds majority in the Senate.

Under clause 73 of the Working Document, the Minority Leader (known as the Leader of the Opposition under the existing Constitution) has been given the right to set the Order Paper of each House once per month on a date agreed upon by the President.

The quorum for each House has been increased in the Working Document to fifty percent of the membership of each House owing to the removal of the person presiding from the reckoning of the size of the quorum.

The President is required only to assent to Bills passed by Parliament as the veto power held by the President in the existing Constitution has been

abolished by the Working Document. A maximum period of fifty-four days can elapse between passage of a Bill by Parliament and its compulsory assent by the President.

Ministers will continue to have a right of audience in either of the Houses of Parliament as provided in the existing Constitution. However, with only four out of forty-one M.P.s being Ministers in the House of Representatives and four out of thirty-seven Senators being Ministers, the Working Document makes provision for the President of the Senate or the Speaker to require Ministers to appear before either House, as the case may be, to report on their performance as Ministers.

In the Working Document, the House of Representatives continues to be dominant over the Senate in respect of the passage of Money Bills and other Bills as is expressed in the existing Constitution.

### **Certain Joint Select Committees**

The Departmental Joint Select Committees that were created in 1999 by way of constitutional amendment in the existing Constitution at section 66A are expanded in the Working Document at clause 84 to also include scrutiny of Government Departments and Local Government bodies, Foreign Affairs, Energy and Public Accounts over and above what prevails in the existing Constitution.

These Joint Select Committees are also empowered in the Working Document to examine the annual reports of these bodies to determine when they were submitted and to question the relevant persons about their contents and seek explanations for any delays in submission.

### **Summoning Prorogation and Dissolution**

The provisions in the Working Document on summoning, prorogation and dissolution of

Parliament remain comparable to the existing Constitution.

### **Elections and Boundaries Commission**

The provisions in the Working Document with regard to the Elections and Boundaries Commission are comparable to the existing Constitution in language, but not effect. The President is no longer an impartial arbiter, but rather an elected member of the House of Representatives (in the first instance) and the Chairman of the Elections and Boundaries Commission has a new role in respect of the appointment of the President.

At the same time, the Commission is given the power to adjudicate on all election matters and together with this has been made the subject of judicial review in clause 93 of the Working Document.

### **The System of Balloting**

The first-past-the-post system of balloting for the House of Representatives in the existing Constitution is retained in the Working Document.

### **Chapter Five – Executive Powers**

Chapter Five of the Working Document represents another fundamental area of change from the existing Constitution. The office of Prime Minister is abolished and the executive authority of Trinidad and Tobago is vested in the President and the President is now made a part of the Cabinet. The principle of collective responsibility of the Cabinet to Parliament is retained, while the essential officers in the Cabinet that constitute a Cabinet are expanded from just the Prime Minister, the Attorney General and another Minister in the existing Constitution to the President, the Vice-President, the Attorney General, the two Majority Leaders from both Houses of Parliament and at least one other

Minister. The outer size of the Cabinet is capped at twenty-five Ministers.

The Working Document provides, at clause 97, that the Ministers will largely be drawn from outside of Parliament as only four Ministers can be appointed from the members of the House of Representatives and four Ministers can be appointed from the Senate. The qualifications to be appointed as Ministers are those of persons who are qualified to be elected to the House of Representatives.

In the allocation of portfolios to Ministers, the Working Document, at clause 99(2), prescribes that a member of the Senate or of the House of Representatives shall be appointed Minister of Justice and that the responsibility of that portfolio shall include such administrative matters relating to the Judiciary as may be prescribed.

The Working Document retains the provisions of the existing Constitution that the President shall act on the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. The Working Document also retains the exceptions to these provisions, namely (i) in his / her discretion, (ii) after consultation with any person or authority other than the Cabinet, and (iii) on the advice of any person or authority other than the Cabinet.

The effect of this is that the President will take instructions from Ministers, except where otherwise provided.

The Working Document requires the President to keep Parliament fully informed concerning the general conduct of the Government and he / she shall do so at least once per year by way of an address to a joint sitting of Parliament.

The Working Document provides that the President shall appoint Majority Leaders in the House of Representatives and the Senate in his / her own discretion.

Provision is made in the Working Document for the Speaker of the House of Representatives to appoint a Minority Leader in the House of Representatives after an election is held among those members of the House who do not support the Government and one of those members wins the greatest number of votes cast. This provision is based upon a pre-existing parliamentary premise where the majority in the House of Representatives and the Government were one and the same. In the provisions outlined in the Working Document, it is possible for a majority of members in the House of Representatives to be opposed to the Government and the Government will not be in jeopardy of falling.

### **Permanent Secretaries**

The Working Document introduces the concept of the appointment of Permanent Secretaries on contract by the Public Service Commission subject to the concurrence of the President at clause 105. This is a departure from the existing Constitution which confines the choices for the appointment of Permanent Secretaries to the public service alone. These new provisions permit the appointment of permanent secretaries from either the public or private sectors on contract.

### **The Power of Pardon**

The power of pardon in the Working Document remains comparable to the existing Constitution except for the Minister designated for pardons appointed on the advice of the Prime Minister being replaced by the President himself / herself. Additionally, the Attorney General is proposed as the new Chairman of the Advisory Committee on the Power of Pardon thereby replacing the Minister designated for pardons who was previously appointed on the advice of the Prime Minister.

## **Chapter Six The Director of Public Prosecutions and the Ombudsman**

The relationship between the Attorney General and the Director of Public Prosecutions is not clearly spelt out in the existing Constitution in respect of the extent to which the Director of Public Prosecutions falls under the ministerial responsibility of the Attorney General insofar as direction and control are concerned.

Clause 110 of the Working Document attempts to clarify this ambiguity by specifying that the Director of Public Prosecutions shall exercise his / her powers and discharge his / her functions in matters involving official secrets, terrorism and State-to-State relations with the prior approval of the Attorney General. In respect of criminal proceedings, the Director of Public Prosecutions shall act in his / her discretion.

To this end, the Working Document requires the Director of Public Prosecutions to submit to the Attorney General, before 31<sup>st</sup> August each year, an annual report on the administration of his / her office, the exercise of his / her powers and the discharge of his / her functions and the Attorney General shall cause the report to be laid before each House of Parliament within sixty days.

The Working Document changes the method of appointment of the Ombudsman from what obtains in the existing Constitution by requiring the President to consult the Minority Leader, the Speaker of the House of Representatives and the President of the Senate before making the appointment.

Provision is made in the Working Document for the Ombudsman to hire staff other than public officers for the performance of the duties of the office which is a change from the existing Constitution. Other changes from the existing Constitution include decisions of Service Commissions in

respect of complaints made by public officers which can be reviewed and the Ombudsman may also investigate any inaction therefrom.

Another proposed reform is that special reports by the Ombudsman shall be presented before a Joint Select Committee of Parliament and that Committee shall consider the report and recommend to Parliament the urgent consideration of the matters in the report and the steps it should take to address the issues set out in the report.

Permanent Secretaries will be required to provide the Ombudsman with reasons for any omission or decision that gave rise to a complaint and the Permanent Secretary shall forward the reasons to the Ombudsman within twenty-one days of receiving the request.

It is further proposed in the Working Document that the Ombudsman be permitted to examine Cabinet documents, or confidential income tax documents in relation to any complaint and that such an examination shall take place where those documents are held.

## **Chapter Seven – The Judicature**

Chapter Seven of the Working Document represents another area of fundamental change insofar as a separation between the judicial and administrative functions of the Chief Justice is proposed. It appears that the model for this has been drawn from the recent reforms (that had been agreed since 2005) in the United Kingdom under their Constitution Reform Act 2005 which fundamentally altered the office of Lord Chancellor and led to the creation of a Ministry of Justice in May 2007 headed by the Secretary of State for Justice and the assumption of office of a Supreme Court in October 2009 headed by the Lord Chief Justice. The Working Document proposes a change from the existing Constitution whereby the Chief Justice would now be required to submit an annual report to the President on 1<sup>st</sup> August every year on

the judicial functioning of the Judiciary. The Judicial and Legal Service Commission will still be required to report to Parliament in the manner prescribed in the existing Constitution, however, the Chief Justice will no longer be the chairman of that Commission.

The Working Document also creates the office of Permanent Secretary to the Judiciary which is proposed to be appointed by the Public Service Commission after consultation with the Chief Justice and with the concurrence of the President. The intention is for this Permanent Secretary to act as the public functionary between the Government and the Judiciary and shall report to the Minister of Justice.

The Working Document seeks to empower Parliament to confer on any court any part of the jurisdiction of the High Court and any of the powers of the High Court under the Constitution or any other law. It is also proposed to confer on the Chief Justice the power to designate any Puisne Judge as a Justice of Appeal and vice versa.

The Working Document changes the method of appointment of the Chief Justice to include a requirement for the President to consult the Minority Leader and the President of the Law Association before making a nomination to the office and issuing a Notification which shall be subject to the negative resolution of the House of Representatives and the President will be required to wait on the vote in the House of Representatives before making the appointment.

The Chief Justice will no longer serve as the Chairman of the Judicial and Legal Service Commission, however, he / she will be responsible for the general business and administration of the Supreme Court, while subject to that, the Minister of Justice will have control of administrative matters relating to the Judiciary and, in the exercise of those powers, the Minister of Justice shall first

consult the Chief Justice.

The Working Document proposes the abolition of appeals to the Judicial Committee of the Privy Council and replaces that with the Caribbean Court of Justice as the final court of appeal for Trinidad and Tobago.

The composition of the Judicial and Legal Service Commission is proposed to be changed to exclude the Chief Justice and to include at least two and not more than three lay members among its seven members. All of these appointments will be subject to a negative resolution of the House of Representatives of the Notification issued by the President before the appointments can be made.

The procedure for the removal of the Chief Justice is comparable with the existing Constitution except for the requirement that the President must consult the Minority Leader and the President of the Law Association before appointing a tribunal to investigate the Chief Justice. In respect of Judges other than the Chief Justice, the President will act in accordance with the representation made to him / her by the Judicial and Legal Service Commission. The tribunal for investigating the Chief Justice will consist of a chairman and not less than two other members appointed by the President after consultation with the Minority Leader and the President of the Law Association, while the tribunal investigating judges other than the Chief Justice will consist of a chairman and not less than two other members appointed by the President after consultation with the Judicial and Legal Service Commission.

The suspension of the Chief Justice or of a judge other than the Chief Justice may be effected by the President after consultation with the Minority Leader and the President of the Law Association (for the Chief Justice) and after consultation with the Chief Justice in the case of the other judges.

Such suspensions may be revoked by the President after consultation with the Minority Leader and the President of the Law Association (in the case of the Chief Justice) and after consultation with the Chief Justice (in the case of other judges) before the tribunals have reported.

## Chapter Eight – Finance

The provisions of Chapter Eight of the Working Document on Finance are comparable with the existing Constitution except for the method of appointment of the Auditor General and the chairmen of the Public Accounts Committee and Public Accounts (Enterprises) Committee.

The Auditor General shall be nominated by the President after consultation with the Minority Leader and a Notification shall be issued by the President which shall be subject to the negative resolution of the House of Representatives. The President will only make the appointment if the Notification has not been annulled by the House of Representatives.

The chairman of the Public Accounts Committee shall be chosen from among the members of the House of Representatives who do not support the Government, if any and if willing to serve. Where no such member is willing to serve, then a Senator who does not support the Government will be appointed as chairman. If such a Senator is unwilling to serve, then a Senator will be appointed chairman.

The chairman of the Public Accounts (Enterprises) Committee shall be chosen from among the Senators who do not support the Government. Where there is no such Senator, then a member of the House of Representatives who does not support the Government can be appointed and if no such member is willing to serve, then a Senator will be appointed chairman.

## Chapter Nine Appointments to, and Tenure of Offices

### Service Commissions

The Working Document proposes changes to the Public Service Commission by altering its membership from the existing Constitution to include a Chairman, a Deputy Chairman, the Head of the Public Service as an ex officio member and four other members. The members (other than the ex officio member) will be appointed by the President after consultation with the Minority Leader and their nominations made subject to negative resolution of the House of Representatives. The members would include a retired judge, an attorney-at-law with ten years standing, a retired senior public officer, and a person qualified and experienced in human resource management.

The Working Document transfers the powers of Service Commissions under the existing Constitution to Permanent Secretaries to make appointments on promotion of, to confirm appointments of, to transfer, to exercise disciplinary control over, to enforce standards of conduct on, and to remove, persons from offices in their Ministries that do not have similar offices in other Ministries. Otherwise, the powers retained by the Public Service Commission in relation to offices that exist in another Ministry will include the power to make appointments on promotion, to transfer and to remove such persons from such offices. In these cases of similar offices in other Ministries, the Permanent Secretaries will have the power to exercise disciplinary control over, enforce standards of conduct on, and confirm appointments of persons appointed to such offices by the Public Service Commission.

A permanent Secretary cannot remove or inflict any punishment on a public officer for any act done or omitted to be done in the exercise of a judicial

function unless the Judicial and Legal Service Commission concurs.

The concurrence of the President is required for any appointment to the offices of Chief Technical Officer, Chief Professional Adviser and the deputy to these offices in any Ministry of Government.

The President shall have the power to make appointments or to transfer any office holder for the proper discharge of their functions outside of Trinidad and Tobago. The President shall also be able to make appointments to such offices in the Ministry of Foreign Affairs or to transfer persons to such offices as the President may designate.

The provisions relating to the Police Service Commission remain comparable to the existing Constitution save for the change in clause 162(4) whereby the President shall issue a Notification subject to negative resolution of the House of Representatives in respect of his / her nominees for the Police Service Commission made after consultation with the Minority Leader.

The Teaching Service Commission is revised in the Working Document to include a Chairman, a Deputy Chairman, the Permanent Secretary of the Ministry responsible for education as an ex officio member and four other members. The President will nominate the members (other than the ex officio member) after consultation with the Minority Leader. The members would include a retired judge, an attorney-at-law with ten years standing, a retired senior public officer, a person qualified and experienced in human resource management and a person qualified and experienced in education. The President will issue a Notification in respect of these nominations which shall be subject to negative resolution of the House of Representatives before any appointment can be made.

The Working Document proposes the creation of an Education Human Resource Agency which

shall have the power to appoint persons to hold or act in public offices in the Teaching Service established under the Education Act. The Education Human Resource Agency will also have the power to make appointments on promotion, confirm appointments, transfer persons, remove persons, exercise disciplinary control, and enforce standards of conduct in respect of these offices. The decisions of the Education Human Resource Agency can be appealed to the Teaching Service Commission.

### **Appeals**

The Working Document reconfigures the appellate process in the public service as follows :

- (a) an appeal to the Public Service Appeal Board in disciplinary matters from the Public Service Commission;
- (b) an appeal from the decision of a Permanent Secretary to the Public Service Commission.

The Public Service Appeal Board is proposed to consist of a Chairman who shall be a retired judge or an attorney-at-law of ten years standing appointed by the President after consultation with the Chief Justice and four other members appointed by the President after consultation with the Minority Leader and the President of the Law Association.

Where a public officer is aggrieved by a decision of a Service Commission, that officer may file an appeal to the Public Service Appeal Board.

### **General Provisions on Service Commissions**

An additional disqualification has been added to the existing provisions of the Constitution for the creation of a vacancy in a Service Commission, namely where a member becomes an elected or nominated member of a Local Government body.

The grounds of removal of a member of a Service Commission by the President have been expanded by the Working Document over the existing Constitution to include failure to attend four consecutive meetings without reasonable cause, convicted of a criminal offence by a court punishable by a sentence of six or more months or without a fine, fails to perform duties in a responsible or timely manner, fails to recuse himself/herself from meetings where there is a conflict of interest, or demonstrates a lack of competence to perform duties. In arriving at conclusions on these grounds, the President may consider the annual reports of Service Commissions laid in Parliament.

### **Special Offices**

The tenure of special offices has been altered by the Working Document to include a wider set of grounds for vacating such offices such as becoming a Minister, Senator, nominated for election to the House of Representatives or the Tobago House of Assembly or becoming an elected or nominated member of a Local Government body.

### **Chapter Ten The Integrity Commission**

The provisions in the Working Document in relation to the Integrity Commission remain comparable to the existing Constitution except for the narrowing of the scope of those required to file declarations of their assets and liabilities, namely Ministers, Members of Parliament and the members and holders of such public offices as may be prescribed.

### **Chapter Eleven – The Salaries Review Commission**

The provisions in the Working Document in relation to the Salaries Review Commission remain

comparable to the existing Constitution except for the appointment of the Chairman and the four other members who shall be appointed by the President after consultation with the Minority Leader.

### **Chapter Twelve The Tobago House of Assembly**

The provisions in the Working Document in relation to the Tobago House of Assembly remain comparable to the existing Constitution.

### **Chapter Thirteen Local Government**

The Working Document makes provision for Local Government in the Constitution which did not previously exist. Twelve local government bodies are proposed and their boundaries shall be fixed in consultation with the Elections and Boundaries Commission.

### **Chapter Fourteen General Provisions**

The provisions in the Working Document in relation to the General Provisions remain comparable to the existing Constitution in respect of the provisions on resignation and re-appointment.

### **Chapter Fifteen – Regional Integration**

Provision is made in the Working Document for the pursuit of regional integration, but only if Parliament expressly enacts such a measure.