

Constitutional Referendum: Correcting an Historical Error

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On Wednesday, 23rd July, 2014 Prime Minister Perry Christie, in a Communication to the House of Assembly, foreshadowed the introduction the introduction and first reading of four separate bills to amend the Constitution of The Bahamas ‘to institute full equality between men and women in matters of citizenship and, more broadly, to eliminate discrimination in The Bahamas based on sex.’ Prime Minister Christie asserted that the purpose of these four bills is remedial in nature: “The changes to the Constitution foreshadowed by these bills will not only help remediate the problem of structural gender inequality and discrimination in our country but will also assist in bringing greater inclusiveness and cohesion to family structures while at the same time ensuring that The Bahamas lives up to its international obligations in these matters.”

In a mature gesture of bipartisanship, the Leader of the Opposition, Dr. Hubert Minnis stated that while “there is much which divides us in this place, let us speak with one voice when the issue is equality before the law. Let us Mr. Speaker, speak as one in this place. If we can do so, we will signal to every Bahamian and the watching World our unified commitment to the advancement of Human Dignity in our beloved Bahamas.”

The four bills represent the culmination of the work that was done by the Constitutional Commission, appointed on the 1st August, 2012 to review and recommend changes to the Constitution of The Bahamas, in advance of the 40th Anniversary of Bahamian independence. The Commission was chaired by Mr. Sean McWeeney, Q.C. and the members included Mr. Loren Klein, a member and technical co-ordinator of the Commission’s Secretariat, Mr. Carl Bethell, Madam Justice Rubie Nottage (retired), Mr. Mark Wilson, Mr. Lester Mortimer, Mrs. Tara Cooper-Burnside, Professor Michael

Stevenson, Dr. Olivia Saunders, Mr. Michael Albury, Ms. Chandra Sands, Ms. Brandace Duncanson and Mrs. Carla Brown-Roker.

The Commission completed the constitutional review process that had been started by the Constitutional Commission that had been appointed by Prime Minister Christie on the 23rd December, 2002, under the joint chairpersons of Paul Adderley and Harvey Tynes, Q.C., but which process the Government under the Right Honourable Hubert Ingraham abandoned after the 2007 general elections.

The American legal scholar, Professor Myres McDougal, asserted that a constitution should be **“a living instrument, a dynamic and continuing process of communication, practices and decisions. It is made and continually remade in response to the changing demands and expectations of the people under ever-changing conditions. It should reflect not only the shared expectations of the original framers of the**

Constitution, but also those of succeeding generations. It should also reflect the contemporary shared expectations and experiences of community members today.”

The Bahamas Independence Order 1973, an Act of the British Parliament, provides for The Bahamas to become an independent sovereign nation. The Constitution is actually the appendix to The Bahamas Independence Order 1973. The representatives of the Bahamian people at the Constitutional Conference in London in December, 1972 comprised the following individuals: His Excellency Sir Arthur Foulkes, His Excellency Sir Orville A. Turnquest, The Late Right Honourable Sir Lynden O Pindling, The Late Honourable Sir Clement Maynard, His Excellency the Honourable Arthur Hanna, The Honourable Paul Adderley, The Honourable Philip Bethel, The Honourable George A. Smith, The Honourable Loftus A. Roker, The Late Honourable Cadwell Ambrister, the Late Honourable Norman Solomon, Excellency the Late Sir Milo Butler, The Late Honourable

Sir Kendal G.L. Isaacs, The Late Honourable Mr. Carlton Francis and The Late Honourable Mr. Henry Bowen. These fifteen (15) men are collectively known as the Framers of the Bahamian Constitution.

I contend that it was an historical error not to have included any women at the Constitutional Conference of 1972 in either the delegations of the Progressive Liberal Party or the Free National Movement. Further, It was also an historical error not to have consulted with women in The Bahamas on the issues of nationality, given the obvious disadvantage to them and their children. These omissions on the part of both political parties is particularly striking, given the prominent and decisive role that women had played in the affairs of both political parties, the struggle for majority rule and independence. These omissions also require a national reflection on the persistence of the singular traditional male perspective in the Bahamian body politic, legacies of the politics of

colonialism and the merchant elite who dominated politics in The Bahamas until 1967.

Prominent Bahamian women in the Progressive Liberal Party, such as Effie Walks, the unheralded strategist within the Progressive Liberal Party of the dramatic Black Tuesday incident, whose role in that historical event was captured brilliantly in the documentary,

Womanish Ways, by Marion Bethel, Maria Govan and Karem Mortimer, illustrate this blind spot in the political sociology of The Bahamas. At the time of the Constitutional Conference

In 1972 the suffragists Doris Johnson, Mable Walker, Albertha Isaacs, Ethel Kemp, Madge Brown and Althea Mortimer, just to name a few, were still alive. Other prominent women in

Bahamian civil society at that time included Jenny Thompson, Janet Bostwick, Judy

Munroe, Pauline Allen, Susan Wallace, Telcine Turner, Margaret McDonald, Mizpah

Tutulian and Eileen Carron.

The lack of women representation on the Constitutional Conference is the more stunning because by 1972 the women suffragist movement had already provided The Bahamas with the template for an inclusive and bipartisan coalition to achieve a legislative means. The template of an inclusive national coalition for constitutional change was shown by Janet Bostwick in her thoughtful essay “Bahamian History – The women suffrage movement in The Islands – then, and now: Women’s struggle in The Bahamas”, **the women suffrage movement “reached across partisan lines, racial and social class divides . . . started by a black woman who, after party politics was introduced in The Bahamas, was a member of the UBP, it was embraced by the PLP, it was adopted by women without party affiliation, supported by women of different races and social standing, and it was championed by progressive men.”** It is this progressive national coalition of women and men of all party affiliation, without party affiliation, of different races

and social standing that is needed today to ensure the success of the Referendum on the 6th November, 2014.

Because Bahamian women were not engaged in the historical error of 1972, the proposed referendum of the Constitution on the 6th November, 2014 will afford Bahamian women, for the first time in our history, an opportunity to be directly involved in the remaking of our Constitution, exercising the hard earned right to vote in 1962, as members of the Constitutional Commission, Members of Parliament and electors to remediate this historical error.

DISCRIMINATION AGAINST BAHAMIAN WOMEN

The discriminatory treatment of Bahamian women is reflected in Articles 8 and 9 in particular. Under Article 8, a child born outside of The Bahamas after the 9th

July, 1973 to a Bahamian father, inside of a marriage, shall become a Bahamian citizen automatically at the date of birth. Whereas, under Article 9, a child born outside of The Bahamas after the 9th July, 1973, to a Bahamian mother married to a non-Bahamian father, is not automatically a Bahamian citizen at birth. To become a Bahamian citizen, such a person must:

- 1) make application upon attaining the age of eighteen (18) years and before the age of twenty-one (21) years to be registered as a citizen of The Bahamas;
- 2) renounce or make a declaration with respect to any other citizenship;

- 3) take the oath of allegiance to The Bahamas;
- 4) make and register a declaration of her/his intention to reside in The Bahamas; and
- 5) have been born legitimately.

Even after fulfilling these five requirements, such a person can still be denied citizenship on the bases of national security or public policy. These disabilities on a child born outside of The Bahamas to a Bahamian woman married to a non-Bahamian husband constitutes invidious discrimination, when automatic citizenship

is conferred at birth upon the child born outside of The Bahamas to a Bahamian father married to a non Bahamian spouse.

Further, Bahamian women are treated less favourably than Bahamian men in granting Bahamian citizenship to their respective spouses. Under Article 10 of the Constitution, any women who marries a person who wishes to become a Bahamian citizen after the 9th July, 1973 shall be entitled to be registered as a Bahamian citizen, provided she makes an application, takes the oath of allegiance or makes a declaration and that there is no objection on the bases of national security or public policy. No such requirement is demanded of foreign spouses of Bahamian men.

Under Article 11, the Governor General may deprive a person of Bahamian citizenship if the Governor General is satisfied that any citizen of The Bahamas has at any time after the 9th July, 1973 acquired the citizenship of another country or voluntarily claimed or exercised rights in another country which are exclusively reserved for the citizens of that country.

These restrictions on women in relationship to the citizenship provisions of the Constitution, based on a stereotypical and traditional male perceptions of the role of the woman, could not be justified on the grounds of natural law, constitutional practice, international human rights law or contemporary democratic practice.

According to natural law, a progressive interpretation of the Bible would not support these restrictions. The Preamble of the Bahamian Constitution, in part, provides that the people of The Bahamas “**recognize that the preservation of their Freedom will be guaranteed by a national commitment to Self-discipline, Industry, Loyalty, Unity and an abiding respect for Christian values and the Rule of Law.**” Based on the theology of the Christian faith, it may be argued that the Risen Christ showed a gender preference when he first revealed himself to Mary Magdalene before he revealing himself to his male disciples. However, it is the common fatherhood of God, in the Christian faith, that establishes the acceptance of Jesus Christ as the basis for salvation

irrespective of one's gender. Just as portions of the Old Testament have been used to justify the discriminatory treatment of women. Similarly, as shown by Dilip Hiro in the book **Black British, White British**, portions of the Old Testament have been used to justify the Trans-Atlantic Slave Trade, an economic institution for the benefit of Europe and disadvantage of Africa and the Americas, by asserting that Africans were the descendants of Ham, the black son of Noah condemned to be "hewers of wood and drawers of water" and made a moral equivalence between the black skin of Africans with Satan. Today we are still dealing with the legacies of this racial stereotyping that was preached, taught and propagated for 400 years to justify the exploitation of Africa and the

Americas to fund the industrial revolution in Europe and the global military dominance of Europe. Today many of the stereotyping of the role of women in society is also rooted in portions of the Old Testament of the Bible to justify male dominance and inferior treatment of women. Traditional notions of male dominance are reflected in many religions to justify honour killing, female circumcision, denial of education and confinement to the home, all of which offend the global bill of human rights and norm of non-discrimination. From a Christian perspective, how can one justify treating women less favourably than men, when both claim a common fatherhood in God and equal right to salvation through an acceptance of Jesus Christ?

The liberal philosophy of John Locke, Jean Jacques Rousseau and Emanuel Kant establish that both men and women, as rational beings, prefer to exist, on the basis of equality, in a social contract rather than in an Hobbesian state of nature. Based on these liberal ideas, the world community has affirmed global democratic representative governance and the norm of non-discrimination, on the basis of race, national origin, sex, political persuasion, ethnicity and religion in the distribution of public goods.

This norm of non-discrimination in the right to nationality, with respect to women, is in Article 15 of the Universal Declaration of Human Rights of 1948; in the International Covenant on Civil and Political Rights of 1966; the International

Convention on the Elimination of All Forms of Racial Discrimination of 1965; and in Article 9 of the United Nations Declaration on the Elimination of Discrimination Against Women of 1967 which provides that **“1. State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”** Countries upon acceding to this Convention, at Article 2, agreed to condemn all forms of discrimination

against women and to **“embody the principle of the equality of men and women in their national constitutions . . . to ensure, through law and other appropriate means, the practical realization of this principle.”**

The Bahamas acceded to the Convention on the Elimination of All Forms of Discrimination against Women on the 6th October, 1993, with a reservation to Articles 1, 2(a) 9. For the past 11 years, The Bahamas, by maintaining the discriminatory provisions in its Constitution, is not in full compliance with Articles 1, 2 and 9 of CEDAW. The Bahamas’ fourth periodic report to the CEDAW Committee was reviewed in July 2012. The Committee expressed concern that the Bahamian Constitution and national legislation do not contain an explicit

definition of discrimination in accordance with Article 1 of the Convention which defines “discrimination against women” as **“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”** The CEDAW Committee further recommended that that The Bahamas withdraws its reservation to Article 2 (a) of the Convention and integrate the principle of equality of women and men in the Constitution. Therefore, the four Bills before Parliament and which, if

passed by the requisite majority, will be the subject of a constitutional referendum on the 6th November is an effort to make The Bahamas compliant with the international obligation of The Bahamas under CEDAW.

NATIONALITY AND INTERNATIONAL LAW

The concept of national sovereignty is defined, in part, by control by a nation state over its territory, resources and people. Membership in a political community or nation state is known as one's nationality. The citizen of a nation state gives her or his loyalty to the state in exchange for the diplomatic and other protection and the right to share in the public goods of the state. Under international law, states use certain principles to determine how one becomes a citizen of the state. The

three principles of nationality are: **Jus Soli** – where the place of birth determines nationality; **Jus Sanguinis** – where the nationality of a child follows that of one or both parents, irrespective of the place of birth of the child; and **Naturalisation** – where one voluntarily assumes the nationality of another country.

NATIONALITY BY BIRTH, DESCENT, MARRIAGE AND NATURALISATION

The Constitution of The Bahamas, Chapter II, uses the three principles of **Jus Soli**, **Jus Sanguinis** and Naturalisation in relation to citizenship.

Under Article 3, every person, who had been born in the former Colony of the Bahama Islands and was a citizen of the United Kingdom or if his or her father

would have become a citizen of The Bahamas or was a citizen of the United Kingdom by virtue of his or her having been registered in the former Colony of the Bahama Islands under the British Nationality Act, became a citizen of The Bahamas on the 10th July, 1973.

Under Article 4, with limited exceptions, every person who had previously been naturalised under the British Nationality Act in the former Colony of the Bahama Islands became a citizen of The Bahamas on the 9th July, 1973.

Article 5 of the Constitution entitles a woman to citizenship who, on the 9th July, 1973 is or has been married to a citizen by virtue of Article 3 or whose husband died before the 10th July, 1973 but would, but for his death, have become a citizen of The

Bahamas, provided that she applies, take the oath of allegiance and renounces her previous citizenship.

Every person born in The Bahamas after the 9th July, 1973, under Article 6, shall become a citizen of The Bahamas at the date of her or his birth if at that date either of her or his parents is a citizen of The Bahamas.

The present constitutional review will provide the entire Bahamian civil society an opportunity to reshape the Constitution in our own image.

As we review the Bahamian Constitution, we should learn some lessons from the constitutional practice of the United States of America. The United States' Constitution, adopted in 1789, is the oldest written constitution in our hemisphere. It is a living document, given new meaning and vitality under ever-changing conditions through

Supreme Court decisions and formal amendments. It extends its protection to all persons in the territory of United States, citizens rich and poor as well as aliens. In establishing a national government, the United States' Constitution sets up three branches and provides mechanisms for them to check and balance each other. It balances central federal authority with dispersed state reserved power. It protects the citizenry from the government and gives the power of judicial review to the judicial branch of government.

The limitations of the original United States' Constitution are very apparent from a brief historical review. In 1789 when the Constitution was founded, African Americans were still in slavery and, as property, were not considered as full citizens. However, there has been a continues process of correction, through constitutional amendments, judicial decisions, legislation and executive measures to create a more perfect democracy in the United States, as the society moved from an agrarian to an highly industrialised nation. The first

Ten (10) Amendments of the United States Constitution were passed in 1791. The 13th Amendment, adopted in 1865 immediately after the Civil War, abolished slavery. The 14th Amendment, adopted in 1868, gives citizenship to all persons born in the United States and guarantees due process and equal protection of the laws. Bahamians who had children in the United States, such as the parents of Sir Sidney Poitier, were and are the beneficiaries of this provision. The 15th Amendment, adopted in 1870, guarantees the right to vote irrespective of race, colour or previous condition of servitude. Up until 1971, the United States Constitution had been amended **27 times**.

Similarly, our sister Caribbean countries have also been trying to bring their constitutions in line with the shared expectations and aspirations of their contemporary societies.

Constitutional reviews have been undertaken and amendments proposed or effected, for example, in Barbados, Belize, Dominica, Grenada, Guyana, Jamaica and Trinidad & Tobago. Guyana and Trinidad & Tobago have totally replaced their independence constitutions.

After 40 years of constitutional practice in The Bahamas, it is now time that we correct the discrimination against women in our Constitution to ensure that it conforms to the demands and expectations of contemporary Bahamian society and its international obligations.

The lesson of the Bahamian suffragettes that should inform us during this pending referendum was summed up brilliantly by Janet Bostwick when she said that **“Women suffragettes showed us that, in order to bring about significant change, we must accept sometimes that the cause is bigger than the individual, than a party, than any**

of the things which divide and separate us and that much can be accomplished when we unite.”