

CONSTITUTIONAL REFORM

By Alfred M. Sears, Esq. ©

PART 1

On Wednesday, 1st August, 2012, Prime Minister Perry Christie, in a Communication to the House of Assembly, announced the appointment of a Constitutional Commission to review and recommend changes to the Constitution of The Bahamas, in advance of the 40th Anniversary of Bahamian independence. The Commission is chaired by Mr. Sean McWeeney, Q.C. and the members include 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 newly appointed Commission will be able complete 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 abandoned after the 2007 general elections.

This series of 20 articles on Constitutional Reform in The Bahamas, parts of which were first published by the Nassau Guardian in 2000 and now updated, is intended to engage the Bahamian community in public conversation about the Constitution in a frank and

constructive manner, in light of the changing shared experience and expectations of contemporary Bahamian society.

While I will examine the limitations of the Constitution, I will also provide recommendations, informed by the experience of other constitutional democracies, to assist us in creating a more perfect democracy in The Bahamas. It is my hope that these articles will encourage public discussion about our governmental structure, citizenship, fundamental rights, the independence of the judiciary, campaign finance reform, public contracts, the Privy Council, death penalty, republican status and the need for more effective checks and balance in our system of government.

The Bahamian Constitution, framed during the early period of modernisation in The Bahamas, concentrates too much power in the office of the Prime Minister, discriminates against women, does not guarantee the right to vote, freedom of the press, protect the environment and does not promote economic and social rights.

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. There were no Bahamian women represented at the Constitutional Conference of 1972. Therefore, the review of the Constitution will afford Bahamian women, for the first time in our history, an opportunity to be directly involved in the remaking of our Constitution, as members of the Constitutional Commission, Members of Parliament and electors in any referendum.

The form and structure of the Constitution of The Bahamas was patterned after the Constitution of Jamaica of the 25th July, 1962 which was itself patterned after the Nigerian Constitution of the 1st October, 1960, incorporating a bill of rights based on the European Convention for the Protection of Human Rights and Fundamental Freedoms. All of these Constitutions were drafted under the supervision of the Colonial Office in London. The

heading of chapters, the numbering of the parts, and over 60% of the sentences, clauses, phrases and words used in the Bahamian Constitution are to be found in exact form in the Constitutions of Jamaica and the earlier Constitutions of Nigeria and Sierra Leone. Due to this Westminster constitutional model received by The Bahamas and other Caribbean countries, Professor Trevor Munroe, in his book **The Politics of Constitutional Decolonisation: Jamaica 1944 to 1962**, argues that the real Founding Fathers of these Constitutions were not the Nigerians, Jamaicans and Bahamians, but the British who promoted the model to their former colonies. Similarly, the noted constitutional lawyer, Berthan Macaulay, Q.C. argued that the Westminster constitutional model was an attempt by the British to “**implant the legal form, conventions and understandings and governmental history of an alien people into ex-colonial societies and expect them to grow overnight without regard to the conventions, understandings and history of the**

local people . . . In their inflexible form these constitutions, leave much room for those who seek absolute power, or whose goal is the achievement almost unlimited power, in short dictatorship.”

The present constitutional review will provide the entire Bahamian civil society an opportunity to shape and model a 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 39 years of constitutional practice in The Bahamas, it is now time that we examine our Constitution to determine whether it conforms to the demands and expectations of contemporary Bahamian society. Does the Bahamian Constitution reflect the contemporary shared expectations and experiences of the Bahamian community today?