

Chapter Fifteen

Constitutional Change

I will now address how the Constitution can be changed and the changes which should in my view be contemplated.

How to change the Constitution.

The Constitution contains clauses which are entrenched and others which are not. The entrenched clauses can only be removed or changed by a two thirds majority in the National Assembly followed by two thirds majority votes in St. Kitts and in Nevis. The non-entrenched clauses can be removed or changed by the National Assembly on a two thirds majority.

The entrenched clauses

- *Chapter I- the description and territory of the country and the supremacy of the constitution*
- *Chapter II- the fundamental rights and freedoms*
- *The establishment of the office of Governor General (GG) and the authority vested in that office.*
- *Establishment and composition of the National Assembly (NA), the election of Representatives and the appointment of Senators*
- *Establishment and composition of the Electoral Commission and the office and functions of the Supervisor of Elections*
- *Powers of the High Court to determine questions of membership of the NA*
- *The powers of the NA to make laws*
- *The provisions for summoning, proroguing and dissolving the NA and for the timing of elections*

- *Establishment and functions of the Constituency Boundaries Commission*
- *Establishment and functions of the DPP*
- *Chapter VI containing the finance provisions including establishment of the Consolidated Fund, restrictions on withdrawals from it and establishment of the office of Director of Audit*
- *Chapter VII providing for the Public Service*
- *Chapter IX containing the powers of the courts in interpreting and enforcing the constitution.*
- *Chapter X containing the provisions for government in Nevis and including Clause 113 on secession*
- *Schedule 2 providing rules for delimiting constituencies*
- *Schedule 5 setting out the exclusive legislative powers of the Nevis Assembly*
- *Provisions of the Supreme Court Order establishing the Supreme Court and providing for the appointment of the Chief Justice and Judges of the Court and the tenure and remuneration of Judges and the establishment and functions of the Judicial and Legal Services Commission all intended to protect the independence of the judiciary from the executive and legislature*

Suggested Changes

Republic

It is high time we move to a Republic. This will require changes to entrenched clauses. Retaining the British monarch as Head of State may have been a wise step in the early days of independence to help the country find its feet and become established in the international order but after 40 years the country is old enough to go on its own. We have outgrown the need for the purely formal role of the monarchy. But approval for that change

may not be the walkover it should be. We haven't seen it fit yet to replace the Privy Council with the Caribbean Court of Justice even though approval by referendum is not required for that change. Many think the value of the Privy Council was shown definitively in 2015 when the Privy Council prevented Douglas' seizure of power through illegal boundary changes. You cannot blame many who thought the British connection saved our democracy in that case. The same suspicion may apply to changing the monarchy to an appointed or elected Head of State. I will therefore begin by addressing that position.

Head of State.

The key issue for national debate over the move to a Republic will be the role and powers of the person who replaces the British Monarch as the Head of State. This will require changes to entrenched clauses. Some may argue why do we need to continue with a Head of State separate from the Head of Government. The simple answer is the Prime Minister as Head of Government already has excessive powers. Do you want to give him or her more?

We have examples to look at in other Caribbean countries which have made the move to a Republic like Trinidad and Tobago, Dominica and Barbados. The issue is also being debated in Jamaica which is contemplating the move. The primary power of the Governor General as representative of the monarch in our current system is to appoint the Prime Minister. That power is exercised by the Governor General in his or her independent judgment. It should be a relatively straightforward decision but the fact that the Governor General is recommended by the Prime Minister unfortunately brings the political baggage to bear on the public perception of the decisions made in that regard by the Governor General. We have unfortunate experiences of that in 1993 and 2020. The prime concern in determining the powers of the Head of State in a Republic will be to establish a system of appointment to the office that brings wide public confidence. If the decision is that the Prime Minister will

appoint the Head of State, our Republic will be doomed from day one. Same will happen if the appointment is made on a simple majority vote in the National Assembly. Even if the appointment is ultimately made by the National Assembly it should be by a two thirds majority from nominees recommended by a panel of highly respected nationals and by way of a fully transparent process in the nomination and in the National Assembly.

Then what powers should he or she have? Our Caribbean colleagues who have taken the move have given varying additional powers to the Head of State in all cases called the President. I will use that term. In Trinidad and Tobago the President has powers going beyond those of our current Governor General. Acting in her own judgment the President appoints 9 of the 31 members of the Senate. The President also makes several appointments to the judiciary and the Electoral and Boundaries Commission. The President also makes key appointments to the public service after consultation with the Prime Minister and the Leader of the Opposition and not on the directive of the Prime Minister.

The St. Kitts and Nevis President should have power over and above the appointment of the Prime Minister. The President should, acting in his or her independent judgment, appoint independent Senators, the entire Electoral Commission, the Supervisor of Elections, the Boundaries Commission and the independent office holders in the public sector including the Public Service Commission, the Police Service Commission, the Integrity Commission, the Director of Audit and the Salaries Review Commission. That would de-politicize these appointments and help to make them more independent and transparent.

The term of appointment of the President is also an important consideration. In Barbados the term length is four years renewable once. In Dominica it is five years renewable once. In Trinidad and Tobago it is five years renewable indefinitely. I support five years with one renewal.

Term limits

Term limits for the Prime Minister and Representatives do not require changes to any entrenched provisions and can therefore be done by two thirds majority of the National Assembly without referenda. We have seen first hand that the rule of law can be overcome by the rule of man if the people are not vigilant especially as the Prime Minister of St. Kitts and Nevis has many autocratic powers and our system lacks many of the traditional features of a constitutional democracy to promote accountability of the executive.

The Phillips Task Force addressed the subject of term limits at page 30 of its 1999 report. It said this;

It was strongly represented to the Task Force that a limit of two successive terms (not necessarily ten years) should be set for Parliamentarians, both elected and appointed. The person could re-enter Parliament after an intermission of one term. The Task Force feels that this proposal should be given serious consideration in all its aspects.

My view is that a Prime Minister should not serve in that office for more than two terms in total. This is an important lesson from the country's experience.

I will take a brief look at the history of term limits and their prevalence in today's world. The ancient Greeks had term limits in their system of governance 2,700 years ago. The Romans had them around the time of Christ. A large number of modern democracies have them. Two thirds of sub-Saharan African countries have them. Almost all of Latin America does as well. A large number of Asian countries have them. They are not however common in Europe nor in the Commonwealth Caribbean. The United States restricts its President to two terms but does not limit terms of Representatives and Senators in its Congress.

Let's look at the arguments for and against term limits. The main argument against them is that voters are deprived of their right to elect whomsoever they want to public office.

It is also argued that removing longer serving politicians from office can result in the election of inexperienced politicians. Another argument is that when an elected politician is coming to the end of his term and cannot seek re-election he does not have to heed the concerns of his constituents and can use his power to set himself up in the future whereas if he had to face the electorate he would have to worry about how voters think. It is also argued that you do not necessarily get better leaders by rotating them.

The main arguments in favour of term limits are:-

- they prevent persons in power from using that power to remain in office indefinitely;
- they make room for fresh candidates, new faces, and encourage participation in the process;
- they deter politicians from making choices solely to prolong their career; and
- most importantly they recognize the negative and often disastrous impact which power can have on human nature.

I used to think, when I was young and idealistic, that term limits were not necessary because no one would want to subject himself for too long to the pressures of political power. It is interesting that the framers of the US Constitution seem to have held that view because the term limitation on the US President was imposed only in 1951. I have, after 54 years of watching our democracy, changed my mind principally on the basis of the last argument that I recited in favor of term limits that is they recognize the negative and at times disastrous impact which power can have on human nature. While the world has in physical conditions advanced in the 2700 years since the Greeks imposed term limits, human nature has remained the same.

I said that term limits are rare in Commonwealth countries. That is because we inherited the British system which does not impose term limits. The issue is however being

hotly debated in our region, particularly among our youth. It featured in the debate in St. Vincent on constitutional reform which, for other reasons, failed in a referendum.

In considering this issue we should look at the peculiarities of our system. As I said we do not have a true separation of powers. We have an elective dictatorship and an office of Prime Minister which can, as has been very apparent, be easily used by any holder to manipulate almost everything and everybody except the judiciary. And we have a political tribalism that promotes hatred and the one-sided exercise of political power, that aggrandizes and almost deifies politicians and demonizes others. We have an entitlements mentality which says that Government must provide for all our desires, the result of which is that, given its financial limitations, Government cannot satisfy everyone's needs and therefore favours some over others. We have a country motto of '*Country above Self*' but in practice it is '*Party above all else*'. This form of politics, which none of our leaders of the past has tried to change, makes it extremely difficult for a leader to provide balanced governance for a long period of time, no matter how idealistic he or she may have been when he or she began in politics. It encourages instead an autocratic and self-centered application of power which degrades the objectivity of a politician who is in it for too long. As I have quoted previously the system moulds the Prime Minister not vice versa.

In my opinion there should be a limit of three consecutive terms (a maximum of 15 years) and four terms in total for elected representatives in the National Assembly; subject to that limitation, a limit of two terms (a maximum of 10 years) for Prime Minister; and two terms (a maximum of 10 years) for non-elected Senators.

Motion of No Confidence

We saw in 2013 and again in 2022 the ridiculously excessive powers granted to a Prime Minister who has been defeated in or who faces and wants to postpone a Motion of No

Confidence. Even after he is thrown out of office by the National Assembly he can still decide when within 90 days the next election will be held. He should have no such power. When he is thrown out he should leave office immediately and there should be a process which enables a new Government to be formed with the support of a majority of Representatives. If such majority does not exist then the President should immediately call an election.

The constitution should be amended also to require that a Motion of No Confidence be tabled in the National Assembly within 14 days of its filing with the Speaker. There should also be an amendment expressly to enable the Court acting quickly to mandate a Speaker to comply with the requirement. This would not require changes to any entrenched clause and can be done without referenda.

Political parties are not officially recognised in our Constitution. This is because we have a constituency system under which each constituency elects as its Representative a person who is qualified (in accordance with the Constitution and any laws made under it) to sit as a member in the National Assembly. Membership of or allegiance to a political party is not a qualifying requirement in the Constitution or any law made under it. Nor do the provisions relating to voting in the Assembly say anything about political parties.

The provisions of section 52(2) for appointment of a Prime Minister also reflect the independence of Representatives (in that capacity) by providing that '*whenever the Governor General has occasion to appoint a Prime Minister he shall appoint a Representative who appears to him likely to command the support of the majority of the Representatives*'. No mention whatever is made of political parties nor is there any other constraint on how the Representative determines whom he supports. Same with section 52(6) dealing with removal of the Prime Minister following a vote of no confidence. Those sections leave it open to

Representatives to give their support to any other Representative after a general election and to vote as he or she wishes on a vote of no confidence. It is on this basis that coalitions are formed to assume executive power and Prime Ministers are removed by vote of no confidence. If the leader of a political party whose members hold the majority of seats in the Assembly was automatically entitled to be Prime Minister for a full term of five years there would be no need for the discretion given to the Governor General in section 52(2) nor for the provisions for a vote of no confidence in section 52(6).

The vote of no confidence is the counter balance created by the Constitution to the overwhelming powers given to the Prime Minister. Those powers are vested personally in the man or woman who holds the office and not in him or her as leader of a political party. The Prime Minister is not bound to follow any party positions and can bring any member of the Assembly (regardless of party affiliation) into the Cabinet. The Prime Minister appoints and removes Cabinet members. Likewise the Representatives can in effect appoint or remove him.

Issue ballots

A mature democracy requires that while day to day running of the country is entrusted to an elected government the will of the people should be reflected directly on critical issues. The checks and balances in our system are clearly inadequate to restrain governments from acting in the self interest of those who wield the power. We need referenda on important decisions affecting the country. That will also help to transfer the debate from personalities to issues. A system should be established to permit specific issues to be put to the people at an election or separate referendum.

Legislation can be passed by simple majority to enable the Government to call a referendum to take the views of the people on any issue but such referendum would not

necessarily be binding. The ideal solution would be to amend the Constitution to make referenda binding. That would likely require changes to entrenched provisions by two thirds majorities in St. Kitts and separately in Nevis.

Election of Speaker

The Douglas 26 Month Election showed the need for this change. Rather than being elected by the National Assembly, the Speaker should be elected by the electorate in a ballot at the time of each general election. While that would not guarantee his or her independence, it would expose candidates to public scrutiny. The provisions for appointment of the Speaker are not entrenched provisions of the Constitution and can therefore be changed by two thirds majority of the National Assembly without the need for referenda.

Removal of Bryant clause

Section 27 of the Constitution is known as the '*Bryant clause*' because its effect (many think intention) was to prevent Fitzroy Bryant, who had served as a Minister of Government under Labour administrations pre-independence, to qualify post-independence to become a candidate for election. Bryant had become a citizen by residence under the Statehood Constitution and his citizenship continued after independence. However, after independence, section 27 deprived him of the right to contest an election for the National Assembly as neither he nor his parents were born in St. Kitts. Section 27 has no place in a modern constitution. Qualification for election should not be based only on citizenship. People who buy citizenship should be excluded in any event. The Constitution should allow qualification based on citizenship by birth, descent or long-term residence. As the Constitution stands residence is not a requirement for election. Thus we have the anomaly that a citizen who was born abroad and has never lived here but who has a parent born here can qualify but not a person like Bryant, born in Antigua but who spent most of his life here.

Section 27 is not an entrenched clause and can therefore be removed or changed without referenda.

Removal of dual nationality clause

Likewise, Section 28 of the Constitution which is referred to as the dual nationality clause. That clause creates the ridiculous anomaly that a person who was born here and then takes a second nationality of choice cannot seek elective office, but his son or daughter who was born abroad and has two nationalities, may not be debarred.

Strengthening the right of free speech

The fundamental right of free speech should be strengthened by the addition of provisions which allow the public to exercise that right effectively in relation to government owned media. The Courts have ruled in recent years that candidates for political office have a fundamental right of access to the Government owned media. That was agreed by all political parties as long ago as 1994 in the Four Seasons Accord, but to no avail. Provisions should be added to the Constitution to guarantee that access to the public and to allow for independent monitoring of the use of government media. Access to government owned media is part of our fundamental right of free speech and should be fully and meaningfully implemented. That is another lesson of the 26 Month Election. The charade that took place on election night on ZIZ TV should not be allowed to happen again.

Any changes to the fundamental rights provisions of the Constitution would require referenda as the whole Part containing such rights is entrenched.

Election of Ombudsman

The Ombudsman should ideally be an elected position under the Constitution but that can be achieved by legislation without changing the Constitution. That would give the holder of that office greater independence and powers to protect the citizen from the abuse of

government power. It would also give the office higher profile. Very little is heard of the Ombudsman or his work under the current legislation. If he were removed from the influence of the Prime Minister the office might be more effective to protect the interests of the citizen in his or her dealings with the public service.

Constituency System

Changes to the constituency system would require changes to entrenched provisions of the Constitution and therefore require referenda. There is a strong argument for the replacement of the constituency system with a system of proportional representation or a combination of both. There are grounds too for more localized government e.g Local Councils with limited powers. There are models in the Caribbean and all over the world which can be studied for application or adaptation. This is an excellent topic for research and debate in the CFB College and in the High Schools to sensitize our people, particularly the young who may have to decide. Civil Society should also initiate this discussion outside of the political process and elements.

I support the view expressed as follows by the late Professor Simeon MacIntosh, who was Dean of the Faculty of Law at UWI and Professor Emeritus of Law at Howard University in Washington, U.S.A.

The 'winner-take-all' situation or 'to the victor the spoils' mentality that our current electoral system indulges compounds the problem ten-fold. As Professor Selwyn Ryan observes, our Westminster-type democracy, under a 'winner-take-all' electoral rule, has encouraged a too destructive competition for political office. It has placed too heavy a concentration of power in the hands of the ruling elites and has encouraged the marginalization and alienation of a substantial part of the population from participation in the governance and development of their society. On this view, it would seem that

proportional representation is the more attractive electoral system.

I agree entirely with these views. The constituency system adds to our culture of political patronage, which like the political tribalism from which we suffer, is a yoke on our country's democracy. We are a very small country – in fact we are really a village in international terms. We do not need a constituency representative to lean on to improve conditions in our constituencies. Any Government Minister is just as reachable as any constituency representative.

Proportional representation would change for the better our system of political campaigning. It would help to shift the focus from personalities to issues. The inclination to deify a party's candidate and demonize the opponent would be lessened. While the competence of individual politicians will always be relevant to elections, the removal of multiple head to head election races will help to focus the election debate on issues.

The role of Senators

The role of Senators in the Assembly was also highlighted by the 26 Month Election and should be reviewed. In a small Parliament like ours the vote of Senators can carry great weight. The votes of Senators were influential in the passage of the Senators Bill which was later struck down by the Court. If the Act was allowed to stand there could have been a total of 7 Senators which is far too many with only 11 elected Representatives.

Based on this experience, it is argued that the Constitution should be changed to prevent Senators from voting on legislation to expand their number. There is ground also to require that the Assembly should debate the nominees for Senator before they are appointed. While that would not guarantee that competent people would be appointed it would allow scrutiny in public of such nominees. The reduction in political partisanship would help in the appointment of persons to the office of Senator who will exercise mature and independent

judgment and not just be puppets. These changes would not necessarily require changes to entrenched provisions of the Constitution. Depending on the extent and nature of the changes they might not require referenda.