UNDERSTANDING OUR CONSTITUTIONAL FOUNDATIONS

IN A SOCIETY AND REGION STEEPED IN BRITISH TRADITIONS

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At a public meeting on 19th July 1955 in Woodford Square, Port of Spain, Trinidad, before he had entered electoral politics, Dr Eric Williams said: "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. 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." *(Eric Williams, Constitution Reform in Trinidad and Tobago, Public Affairs Pamphlet No. 2, Teachers' Educational and Cultural Association, Trinidad, 1955, p30).*

The views of Williams as expressed here openly contradict the intellectual line of argument that he developed in his famous work *Capitalism and Slavery* in which he challenged the very foundations upon which the philosophy of British trusteeship in the West Indies had been built. His central thesis was that the British Government had not abolished slavery and the slave trade for humanitarian reasons, but rather for economic reasons because the sugar industry was no longer economically profitable in this region for them.

According to him: "…the issues were not only the inhumanity of West Indian slavery, but the unprofitableness of West Indian monopoly." *(Eric Williams, Capitalism and Slavery, London, Andre Deutsch, 1964, p188 – originally published by the University of North Carolina Press, 1944).*

The humanitarian argument had provided a view that British imperial policy could have been swayed by moral and humanitarian appeals to put an end to inequality, injustice and exploitation that were the hallmarks of the colonial state. As a consequence, continued British oversight in the West Indies could therefore be trusted because of its genuine concern for the upliftment of the West Indian person.

Williams' argument challenged all of that. However, his view of the British system of government can be seen as a contradiction of his views on British oversight and its end product which was fully responsible status, otherwise known as independence, with constitutional arrangements that reflected a "suitably modified" version of the British Constitution.

What we must understand here is that Williams' advocacy of the British Constitution in a suitably modified format was his way of saying that the British constitutional formula was one that we could adopt as our own because we did not have an indigenous system of government.

Indeed, his entire stewardship as Chief Minister, Premier and Prime Minister of Trinidad and Tobago represented a defence of the British Constitution suitably modified and when the greatest opportunity of all presented itself for constitution reform in 1971 when his People's National Movement (PNM) won all of the seats in the general election, he adopted the approach of engaging in a further suitable

Her Majesty The Queen shakes hands with Prime Minister Dr Eric Williams, February, 1966

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modification of the existing constitution which was already a suitably modified version of the British Constitution.

Williams' manner of thinking can be contrasted with his colleague Premier in Jamaica, Norman Manley, who had this to say in the Jamaican House of Representatives in January 1962: "Let us not make the mistake of describing as colonial, institutions which are part and parcel of the heritage of this country. If we have any confidence in our own individuality and our own personality we would absorb these things and incorporate them into our being and turn them to our own use as part of the heritage we are not ashamed of." *(Norman Manley, Proceedings of the Jamaican House of Representatives 1961-62, 24th January, 1962, p766)*.

Norman Manley was not speaking about importing the British constitution and converting it into local usage in the way that Williams had advocated, but rather he was urging that the existing institutions of the colonial era, that evolved as part of Jamaica's development, should not be regarded as colonial, but rather as indigenous. These institutions were installed as part of the colonial evolution. Yet, Norman Manley was describing it as a "mistake" to regard these institutions as being "colonial". He preferred to bless them as being part of the "heritage" of Jamaica.

The primary reason for the juxtaposition of these two views as expressed by two leaders who were part of the independence movement some 50 years ago will help us to understand the difficulties being experienced today with the prospect of constitutional reform.

Are we reforming constitutions that have been imported into our societies or constitutions that are indigenous to our societies? For Williams, the argument was that if it was good enough for Great Britain, it would be good enough for Trinidad and Tobago. For Manley, it was not colonial, but rather part of the heritage of Jamaica.

Is it that we are wedded to the Westminster-Whitehall model of governance and any alteration may only get as far as the creation of a hybrid by importing features that are genuinely alien to our heritage of the British Constitution suitably modified or our evolved colonial institutions that are supposedly part of our heritage?

In a folio entry dated 2nd March 1962 for Mr J.A. Peck, Assistant Legal Adviser at the Colonial Office in the now-declassified Colonial Office file CO1031/3226 from Mr J.E. Whitelegg at the West Indian Department, the following is noted: "Mr Peck, Mr Ellis Clarke telephoned me that the sources of the draft Trinidad Constitution are as follows:-

- Citizenship – Sierra Leone with the proviso to Article 1(1) omitted and an entirely new Article 2(1).
- Human Rights – Sierra Leone except the Property Article.
- Governor General – Sierra Leone.
- Parliament – present Trinidad provisions modified.
- Judicature – new form.
- Appeals to HM in Council – new form.
- Judicial and Legal Service Commission – based on Sierra Leone.
- Finance – common form provisions with modifications.
- Public Service Commission – new form.
- Police Service Commission – largely new form but Nigeria provided the basis.
- Pension and miscellaneous provisions – common form modified."

At the time when this was written, Ellis Clarke was on a visit to London in his capacity as Constitutional Adviser to the Cabinet of Trinidad and Tobago. The draft constitution for public comment had just been published in Trinidad and Tobago on 19th February, 1962. What we get here are the sources that Ellis Clarke used in drafting the constitution for public comment. The only originality in the document appears to have arisen in the sections on the Judicature, Appeals to Her Majesty in Council and the Public Service Commission.

Are we reforming constitutions that have been imported into our societies or constitutions that are indigenous to our societies? For Williams, if it was good enough for Great Britain, it would be good enough for T&T. For Manley, it was not colonial, but rather part of the heritage of Jamaica

These provisions were barely modified in the 1976 republican Constitution, but the intent remains the same with the new office of Chief Justice that was created at Independence being both that of a jurist and an administrator

In establishing the Judiciary for Trinidad and Tobago in the independence constitution, Ellis Clarke, expressed the following views in a declassified confidential explanatory memorandum to the Colonial Office: "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." *(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, p9.)*

Photograph courtesy of the Ministry of Communication, Information Division

Eminent mathematician and politician Rudranath Capildeo, Founder and Leader of the Democratic Labour Party and Leader of the Opposition in Parliament from 1960-67. Together with Eric Williams he laid the foundations for independence

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." *(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, pp9-10.)*

These provisions were barely modified in the 1976 republican Constitution, but the intent remains the same with the new office of Chief Justice that was created at independence being both that of a jurist and an administrator. These provisions have been the source of great debate within and without the Judiciary as regards the role, powers and duties of the Chief Justice.

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 Office 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." *(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, p10.)*

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, like Eric Williams before him, was confident that the population would accept what the Colonial Office, he presumed, would want us to accept.

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 Washington Model

Our geographical location in this hemisphere means that we are exposed to the Washington model as an alternative to the Westminster-Whitehall model. However, there appears to be a collective fear of moving too far from our Westminster-Whitehall moorings, yet there is a deep-rooted desire to import certain aspects of the Washington model for the specific purpose of curbing the excesses of power enjoyed by those who hold office under the Westminster-Whitehall model.

There has been particular concern in the region that our Prime Ministers are able to exercise tremendous power because the adaptations from the British system in which there is a House of Commons of more than 600 members and a political culture that can function on the basis of an unwritten constitution either were not comfortably transported across the ocean or have evolved differently in political systems where the size of the elected membership of Parliaments may vary from 63 in Jamaica to 11 in St Kitts and Nevis.

In Jamaica, in the last Parliament that was dissolved in December 2011, there was a bill that had been laid in the House of Representatives that sought to introduce term limits for the office of Prime Minister.

The long title of the Bill was: "An Act to amend the Constitution of Jamaica to preclude appointment to the office of Prime Minister of a person who has previously held that office for a specified period."

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Photograph courtesy of Faarees Hosein

Distinguished QC and member of the first House of Representatives after Independence, Tajmool Hosein. An unsung hero of the Independence story, it was his level-headedness and astute intervention during the Independence conference at Marlborough House that enabled the talks to reach a successful conclusion

These forays into the domain of restricting prime ministerial power represent responses that have echoes in the wider society

The intention of the Bill was to amend section 70 of the Jamaican Constitution. The amendment proposed to insert a subsection (1A) and (1B) after subsection (1) that was to read as follows: "(1A) A person shall not be appointed to the office of Prime Minister if he has held that office for periods (whether consecutive or not) which when added together total more than nine years.

(1B) A person appointed to the office of Prime Minister shall not be required to vacate office by reason only that, while in office, the period of his holding office when added together with any previous periods of his holding office total more than nine years."

The Memorandum of Objects and Reasons attached to the Bill indicated that the government "has taken a decision to amend the Constitution, in order to limit the period of time for which a person may hold office as Prime Minister to periods (whether consecutive or not) which when added together do not exceed nine years, however, an incumbent Prime Minister shall not be required to vacate his office by reason only of the fact that after his appointment he exceeds the nine year limit."

Photograph courtesy of Paria Archive

This would have constituted an adaptation of the Washington model concept of the two-term limit into a Westminster-Whitehall model constitution such as Jamaica.

Perhaps the source of the desire to curb such executive power lies in our own attitudes to power and authority.

The former Jamaican Prime Minister, Michael Manley, writing in his book *The Politics of Change* in 1974, had this to say about how the society perceived power and authority: "To the Jamaican's historical distrust of authority must be added the fact that all the institutions through which the newly freed slave, and indeed the entire society, began to attain social coherence, were designed in the shadow of the Westminster model of democracy." *(Michael Manley, The Politics of Change, Andre Deutsch, London, 1974, p29).*

As regards term limits and fixed dates for elections, that will obviously have to be a matter of wider debate in all of the countries of the region as none of them have adopted that. Jamaica is the only one that brought a Bill to Parliament and there has since been a change of government.

Guyana is the only country in the region that has introduced term limits by post-independence constitutional reform, while the quasi-ceremonial President of Dominica has been limited since independence to two five-year terms and not the Prime Minister of Dominica.

However, Guyana is a presidential system, which lends itself more easily to term limits as opposed to parliamentary systems.

The Westminster-Whitehall model is based on the philosophy of the rotation of power and not the principle of power-sharing. This means that political change happens largely by virtue of the will of the population.

In Trinidad and Tobago, an attempt was made at power-sharing in the 2010 general election by the

People's Partnership. At the time of writing, that was still a work in progress and further analysis will be required at the end of their term to determine whether the philosophy of consociationalism, which is based upon the accommodative behaviour of opposing political elites, can work in a Commonwealth Caribbean arena that is founded on the principles of majoritarian two-party government in which the winner takes all.

Is the consociational model the way forward for reforming Caribbean constitutions? Can there be agreement on the fundamental items of reform without disturbing the foundation, whether that foundation was an adapted import or part of the native soil ?

That is really a challenge for leaders on all sides of the political divide.

The Relationship Between Trinidad and Tobago

The Trinidad and Tobago Act 1887 *(United Kingdom Statutes 50 & 51 Vict., c44.)* that provided the legal foundation for the union of the British colonies of Trinidad and of Tobago to create a single colony of Trinidad and Tobago opened the door of disadvantage for Tobago. The island was required to take a backward step by becoming ultimately a ward of Trinidad and Tobago by 1899.

The act of union of 1887 was followed by an Order in Council that was made in 1888 and came into effect in 1889. Further reform was to take place in 1898 that resulted in the ultimate downgrade for the island by 1899 when it became a ward. It is this act of historical disadvantage that has left a level of bitterness about the manner in which the island has been treated by officials based in Trinidad.

The final act of total unification took place during the period of the governorship of Sir Hubert Jerningham who became the Governor of Trinidad and Tobago in 1897. It was he who made the case to the Colonial Office for this final legislative act of union that would come into effect in 1899.

It should be noted, however, that Tobago's Commissioner at the time, William Low, had his reservations before he yielded to Governor Jerningham's view about closer union. Writing to Jerningham on 10th December, 1897, Low had this to say: "I must candidly confess that for the first 2 or 3 years of my residence here I was not an advocate for closer union with Trinidad; and even now the fact that an essentially English island, with such a brilliant page of history, will merge its identity on being amalgamated with an island largely permeated with Franco-Spanish ideas, although a mere matter of sentiment, causes a certain amount of regret." *(United Kingdom National Archives, CO 295/384.)*

As far as political culture is concerned, there is still great relevance in what Commissioner Low had to say to Governor Jerningham in 1897. The issue of Tobago and its relationship with Trinidad was addressed on a legislative and policy basis in 1980 and 1996 whereby a measure of internal self-government was gradually granted.

This movement has continued and there have been constitutional consultations throughout the island over the last few years to discuss the issue of an enhanced degree of internal self-government. The Government of Trinidad and Tobago has issued a Green Paper on its proposals for the status of Tobago within the state of Trinidad and Tobago.

From a political culture standpoint, this will continue to be a growing area of demand given the historical hurts that have been suffered by the island.

As Trinidad and Tobago celebrate 50 years of independence in 2012, our unity remains intact both on a geographical and a social level. Our democracy has funtioned effectively to deliver five changes of government in 12 general elections. We continue to discuss constitutional reform in a civil manner when compared to the realities of other developing countries who also attained their independence 50 or less years ago. ▪

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Opposite: Princess Alice, Countess of Athlone, reads the Queen's speech at the opening of the first Parliament on Independence Day, 31st August 1962. On her left, Sir Solomon Hochoy KCMG, on her right Lady Thelma Hochoy