

## RE-DRAFTING THE GRENADA CONSTITUTION

*The poet's eye, in a fine frenzy rolling,  
Doth glance from heaven to earth, from earth to heaven;  
And, as imagination bodies forth  
The form of things unknown, the poet's pen  
Turns them to shape and gives to airy nothing  
A local habitation and a name.*

William Shakespeare

1. The central idea of modern written constitutionalism, forged in the American founding, is that of a people as the sovereign constituent power, and as the active creators of their constitutional order, writing the fundamental laws that constitute their polity; 'the laws, that is, that fix their country's "constitutional essentials" – charter its popular-governmental and representative-governmental institutions and offices, define and limit their respective powers and jurisdictions, and thereby express a certain political conception [of themselves].'<sup>1</sup> In a word, it is the idea that admits of the original and supreme right of a people to frame their own political constitution; to *write* for themselves the fundamental laws by which they are to be governed. This is the ultimate ground of political legitimacy. For, a democratic constitution otherwise produced, say, by an occupying army or by a previous imperial power, now departed, will forever bear the taint of illegitimacy, and may never be fully embraced by the people.<sup>2</sup>
2. If the foregoing is a true expression of the ideal of constitutional founding, then it is fair to say that constitutional founding in the Commonwealth Caribbean has fallen far short of the ideal. For the process of lawful devolution of sovereignty by which Britain devolved sovereignty upon its former colonies in the Caribbean entailed, for the most part, the framing of the founding constitutional documents by British Colonial Office functionaries, and the enactment of these documents as orders-in-council of the British Imperial Parliament.

3. In the case of Grenada, for example, both the document which terminated Grenada's status as an Associate State of the United Kingdom and the existing Constitution of Grenada were enactments as Imperial Orders-in-Council of The Queen's Most Excellent Majesty. What is more, the Independence Constitution, which marked Grenada's founding as an independent sovereign State, has never received legislative approval by the Parliament of Grenada, nor has it been ratified in a public referendum. Rather, at the First Session of the Parliament of Grenada, on the 7<sup>th</sup> day of February, 1974, the Constitutional Instruments were handed over to the Honourable Prime Minister Sir Eric Matthew Gairy by Mr. Blaker, the Parliamentary Under-Secretary for Foreign and Commonwealth Affairs in the United Kingdom. Hansard of that First Session of Parliament discloses that there was no debate on these Instruments, nor was there any resolution passed for their acceptance.
  
4. It is for the foregoing reasons, among others, that it is argued that constitutional reform in Grenada, and in the Commonwealth Caribbean on the whole, has a special urgency: it must entail the active engagement of the citizenry in a careful rethinking of their polity and of their *story* of constitutional founding; in a critical reassessment of the Independence Constitution and of our constitutional practices, with a view to correcting and removing, once and for all, some of the more critical errors from our constitutional jurisprudence. But, above all, constitutional reform should result in a complete re-framing and re-writing and ratification of the Constitutional Text by the sovereign people of Grenada, so that, henceforth, the Constitution would be perceived as the authoritative expression of their collective *voice* and of their political identity. In a word, constitutional reform in Grenada should rather be, at bottom, an act of political refounding; a *re-constitution* of the polity.
  
5. And it bears emphasis that this process of constitutional *re-founding* in the democratic re-enactment of the Constitution by the sovereign people of Grenada, Carriacou and Petite Martinique is not a revolutionary act, though it is so much

more than the amending of the Independence Constitution according to its own terms. For, notwithstanding the profound nature of the changes entailed, the process remains within the existing paradigm of constitutional democracy. That is to say, in this process of constitution reform, the sovereign people of Grenada, Carriacou and Petite Martinique do not seek a radical transformation of the character of the Constitution and of the political society, comparable to that which took place during the political rule of the People's Revolutionary Government. In a word, the process does not seek to abandon the primary principles of sound constitutional governance. To the contrary, the process places itself in a continuity of the temporal development of the legal and political order so as to strengthen the foundational terms of that order and to better realize the substantive political values to which the sovereign people have committed themselves.

6. It should be stressed that, ideally, the founding and amending of a democratic constitution is the constituent act of a political society exercising the intellectual and moral powers of its members, sharing the status of equal citizenship.<sup>3</sup> However, we should avoid conflating constitutional founding and constitutional reform through the amendment process stated in the Constitution. For, 'constitution-making stands as *the singular act* of the political sovereign conceived of as that which precedes law and creates law through its words;' whereas the amendment of the democratic constitution is usually in accordance with the legalized procedures to which the sovereign people have bound themselves in the constituent act of constitution-making.
7. In this particular instance of constitutional re-founding, however, the question arises whether we are bound to strict compliance with the amendment procedures stipulated in the Independence Constitution; or, might we, as a sovereign people, devise alternative democratic procedures for the re-founding of the political order, outside of the amendment provisions of the Constitution? Specifically, are we bound to follow the specific procedures of a two-thirds majority vote of the members of the Houses of Parliament in favour of the Draft Constitution,

followed by a two-thirds majority vote in favour by the electorate in a public referendum? Rather, might the alternative procedures of a simple majority vote of the electorate in a public referendum, followed by the sitting of Parliament as a Constituent Assembly to give the requisite formalities to the *enactment* of the sovereign people be followed instead? In other words, may the process of constitutional refounding in which Grenada is for all intents and purposes engaged be legitimately accomplished by direct appeal to, and ratification by, the sovereign people of Grenada, Carriacou and Petite Martinique?

8. What is of the utmost importance here is that the proposed alternative procedures remain within the paradigm of democratic constitutionalism, in that the inalienable right of the sovereign people of Grenada, Carriacou and Petite Martinique to re-constitute their polity is preserved. And having regard to the fact that the people were not originally engaged in the framing of the Independence Constitution and the attendant procedures by which they are now governed, it is of compelling significance that the sovereign people be seen in some nonfictively attributable sense as the *authors* of their Fundamental Law.
  
9. In the round, in this act of re-framing and re-enacting the Constitution, we would have achieved what constitutional scholars refer to as constitutional autochthony; meaning, that the Constitution is seen, once and for all, as deriving its authority and all its powers from the great body of the people of Grenada, Carriacou and Petite Martinique. And what is more, this would have been accomplished from within and, on the authority of the very Independence Constitution that the sovereign people have accepted as their own these past thirty six years. For, notwithstanding that our Independence Constitution came from Britain, or maybe because of it, the people, by their acceptance of that Constitution, have implicitly asserted and preserved their *constitutional right* to re-make their Constitution by such mechanisms that would indeed have been the most politically legitimate means of constitutional founding. And these means are the essentials of the true

republican constitution, which are already tacitly recognized in the Independence Constitution.

10. As was earlier intimated, the task to which we have committed ourselves these past few years is that of re-thinking and deliberating on the current form of the political State and on the changes that would be most appropriate to our particular circumstance; changes, for example, in the institutional design of some of the most critical democratic offices of the State that experience has revealed these thirty plus years to be essential to the effective discharge of their duties. An essential aspect of this task is the re-writing of the Constitutional Text, the verbal artifact by which the people charter and mandate the form of life to which they aspire as a community. As the architectonic plan for the ordering and re-ordering of our political society, the Constitution, imbued with this overarching sense of constitutive purpose, must necessarily address the ways in which the political community is organized; and, also, the ways in which certain fundamental human relationships are addressed and defined; the ways in which members of our society are to stand to one another and to the State. The re-writing of the Constitutional Text must, therefore, above all, capture this overarching sense of constitutive purpose which the people have variously defined in their submissions to the Constitution Review Commissions, 1985 and 2006. This act of re-writing therefore purports to follow the Recommendations of the Review Commissions – in particular those of the second Commission – after a critical assessment as to the feasibility of incorporating them into the Constitutional Text.

## **THE PREAMBLE**

11. The Grenada Constitution Review Commission (The Commission) has recommended that, in the re-writing of the Constitution, the Preamble to the Constitution be ‘written in the first person rather than the third person, in order to give a greater sense of national identity among the citizens.’ Further, having

regard to the process by which the Grenada Independence Constitution had come into being, and the virtual absence of the people's engagement in that process, the redrafted Constitutional Text should be put to a vote in a national referendum, before going to Parliament for the requisite formalities to make it the Fundamental Law of the Nation-State of Grenada. This is to make it unmistakably clear that the Constitution now holds a Grenadian root of title; that is to say, it is now the '*enactment*' of the sovereign people of Grenada, Carriacou and Petite Martinique.

- 12.** We fully endorse these sentiments and the Preamble is redrafted to signify, above all else, that the Constitution of the Nation-State of Grenada is the '*enactment*' and the authoritative expression of the collective *voice* of the sovereign people of Grenada, Carriacou and Petite Martinique. And, in this regard, the Preamble also serves its essential purpose in expressing the moral and political ideals which the Constitution is intended to promote. In a most fundamental sense, the Preamble is an invocation of the overarching sense of fundamental purpose of which the Constitution, in its overall form, structure and content, is imbued.
- 13.** But in order to satisfy the fundamental requirement of '*enactedness*' by the sovereign people of Grenada, Carriacou and Petite Martinique, and thereby remove all doubt that the Constitution derives its legal and political authority as the Fundamental Law from the people and not from the Order-in-Council of the British Imperial Parliament, it is absolutely necessary that the rewritten Text be put to a vote in a national referendum, before the Parliament of Grenada, sitting as a duly elected Constituent Assembly, and not in its ordinary legislative capacity, invokes the requisite formalities to give the Text the inscription and imprimatur of law.
- 14.** However, it bears repeating that careful regard must be paid to what is being undertaken here. For, notwithstanding that Grenada has been engaged in the process of constitution review and appropriate changes have been recommended

by the Constitution Review Commission, it bears emphasis that what is being undertaken here is not a series of amendments to the Constitution. Rather, the extensive reconstitution of various offices of State, captured in a thorough redrafting of the Text and formally *'enacted'* into law by the sovereign people of Grenada, would suggest that something more fundamental than the mere amending of the Constitution is being undertaken here. Simply put, the sovereign people of Grenada, Carriacou and Petite Martinique are engaged in the **re-founding** and **re-constitution** of their polity. On that view, the 'legislative' requirement for the ratification of their Constitution in a national referendum could be a simple majority of fifty plus one percent.

15. Finally, with regard to the *'Change of the Name of the State'*; whether the State should continue to be named "Grenada," or whether it should be named "Grenada, Carriacou and Petite Martinique," we wish to assure the reader that if it were to be decided that it would be too costly to change the name of the State, the language in which the Preamble has been redrafted suffices as an adequate corrective of the perceived problem, since due recognition is given to the *'Sovereign People of Grenada, Carriacou and Petite Martinique'*.
16. The Preamble, as the prefatory section of the Constitutional Text, has been re-written to give elegant expression to the 'visionary' and 'poetic' quality of the Constitution. It expresses the essential spirit of the Constitutional Text. Indeed, it is in the Preamble that we find the people's commitment to the fundamental principle of justice, and those other moral and political values by which the people aspire to be known and in terms of which they affect to order their collective life. It is here, for the first time, we would hear (and ought to hear) the people's collective 'voice', addressing themselves and their posterity. It is here that they begin to articulate to themselves their conception of the good and just society, and their vision of the ideal community. The Preamble is, to repeat, a solemn introduction to the Constitutional Text, expressing the moral and political ideals which the Constitution is intended to promote; an invocation of the

overarching sense of fundamental purpose of which the Constitution, in its overall form, structure and content, is imbued.

17. The Preamble to the Constitution must therefore speak in the *'single voice'* of the people of Grenada, Carriacou, and Petite Martinique as the constituent power: **'We the People of Grenada, Carriacou and Petite Martinique do hereby re-enact and ordain'**. The importance of the word 're-enact' is to underscore the bindingness of the Constitution as law; that it is not just a mere hortatory document. But, by speaking in a single voice the constitutional instrument would appear to issue from a single 'postulated' author, consisting of all the people of the tri-island State, merged in a single identity in an act of self-constitution. 'The "People" are therefore at once the author and the creature of this instrument'. This is the poetic act by which the sovereign People of Grenada, Carriacou and Petite Martinique purport to give their Constitution a local habitation and a name. In other words, the Preamble has been rewritten to give evidence of the salient fact that the Constitution of Grenada, Carriacou and Petite Martinique is now the authoritative expression of the *collective voice* of the People. This is of the utmost importance given that the Grenada Independence Constitution is an Order-in-Council of the Queen's Most Excellent Majesty; that it was therefore not of the people's own making, and that it was drafted by a British Government official and handed over to Grenada's first Prime Minister on the seventh day of February, nineteen hundred and seventy four, at the first sitting of the Parliament of the sovereign State of Grenada.

## **FUNDAMENTAL RIGHTS AND FREEDOMS**

18. It is submitted that the decision as to what we say in our Constitution is of grave philosophical importance; for a democratic constitution, as was earlier intimated, rests, fundamentally, on a certain conception of the human person, and claims the moral premise that people are to be treated in a certain way: as free and equal. In no other section of a constitution is this truth more tellingly underscored than in



the section on fundamental rights. The embodiment of fundamental rights in our Constitution testifies to our acknowledgement of the dignity of the individual to be of fundamental moral and political value and, concordantly, to our commitment to safeguarding that dignity, not only by the careful articulation of those rights in the Constitutional Text; but also by a comportsing constitutional structure that would ensure judicial protection of those rights. For fundamental rights affect to protect such interests that are universally regarded as essentials of human well-being. They are therefore to be regarded as everlasting, continuing, and sacred; they are not to be abrogated at any time, and are not susceptible of repeal. It is in no small measure, therefore, that the section on fundamental rights in a constitution is deemed to express the moral legitimacy of the State and makes morally obligatory the exercise of governmental power within its compass.

19. Recognition of this ennobling function of fundamental rights in the Constitutional Text should school our ambition for literary felicity in the rewriting of our Constitution. It is certainly in the section on fundamental rights that our encompassing idealism should mark our prudence in the quest for prescriptive clarity. For it is in this section, if any, that we should find *man's* most evident attempt at articulating into positive constitutional law what the ancient poet, Sophocles, described as 'the gods' unwritten and unfailing laws.' Here, positive law functions with the aura of unchanging natural law and universal reason. In other words, natural law no longer functions as a mere collection of moral abstractions to which we might trust our government to confirm. Rather, it is given 'form' in a body of ideal legal precepts which, we have earlier noted, mark the moral obligatoriness of the State and of the Constitution itself.<sup>4</sup>
20. Thus, the language most appropriate to the task of articulating those rights we hold to be fundamental must necessarily be a language of generality; a language that would capture the organicity of the Constitutional Text and allow it to function as the evolving repository of our core political ideals, while, at the same

time, permitting the interpretive possibilities to meet changing circumstances and demands.

- 21.** In this regard, then, one must caution against the British style of constitution-drafting so evident in West Indian Constitutions. These are constitutions of detail and read more like statutes rather than constitutions. This is largely consequent on their having been produced as orders in council of her Britannic Majesty. Thus, every fundamental right or freedom catalogued is followed by detailed instructions both as to how such right or freedom is to be construed and the qualifications respecting its exercise. Such qualifications or exceptions are sometimes so detailed that they have the consequence of derogating from the essence of the rights and freedoms purportedly guaranteed. The implicit assumption underlying this style of drafting this section of the Constitution is that the interpretation of our fundamental rights and freedoms may be cabined within fixed and narrow boundaries. However, it bears emphasis that these rights and freedoms are moral rights; they are political instantiations of basic human rights that we all have, simply in virtue of the fact of being human. As such, their interpretation and meanings could not be so easily fixed by a style of drafting that purports to deny their essence as moral rights.
- 22.** One further troubling question remains, though: What catalogue of rights would it be appropriate to stipulate in our newly re-drafted Constitution as fundamental rights? That is to say, in addition to such political and civil rights as the equal protection of the laws, non-subjection to arbitrary searches and seizures, freedom of speech, religion, movement, etc., should the Constitution also stipulate such economic and social rights, such as the right to social security, to food, clothing, housing, medical care, education, to work, etc.?
- 23.** The strongest claim for the inclusion of these socio-economic or welfare rights in the Constitutional Text is that they are widely recognised to be essentials of human well-being and the indispensable conditions of equal citizenship, and are

therefore considered a necessary component of a just society. On this view, governments are obligated to ensure for all citizens some minimum level of health care, education, or living standard. However, it must be borne in mind that once we include these in our Bill of Rights, then they are to be enforced with the same diligence, and given parity with other fundamental rights such as freedom of religion, due process of law, etc.

24. But these socio-economic or welfare rights are peculiarly contingent in a way other fundamental rights are not. That is to say, their very existence, not to mention their enforcement, is so dependent on economic conditions, for example, the ability of the government to raise the taxes necessary to meet these right-claims, that their claim as justiciable rights is tenuous at best. We should therefore advise against their inclusion in the Bill of Rights for that would only serve to diminish the integrity of the Constitution as our basic law, since they are the sort of constitutional provisions whose reasoned reaffirmation and enforcement is largely meaningless or virtually impossible. Their moral and political significance may be more appropriately acknowledged in a 'General Welfare Clause', expressing an imperative of state policy to take such reasonable legislative and other measures to secure for the benefit of its citizens those socioeconomic rights that are equally essentials of human dignity. Or, stated more strongly, a revised Constitution should give positive recognition of the fundamental importance of these rights stated in the International Covenant on Economic, Social and Cultural Rights.
25. The Commission has recommended, among other things, that, in the re-writing of the Constitution, every effort should be made to simplify the language of the *Fundamental Rights and Freedoms Provisions*, so as to allow for ease of comprehension by the citizenry on the whole.
26. The Commission has also recommended that the list of Rights and Freedoms be expanded to include other rights as enunciated in the Charter of Civil Society; that

an effective legal system be established to facilitate legal protection for persons unable financially to secure legal counsel when needed; and that the Constitution enshrine the following duties and responsibilities: that ‘persons shall exercise their rights in a manner which respects the rights of others’; that ‘persons shall cooperate with lawful agencies in the maintenance of law and order’; and that ‘persons shall respect the National Anthem, the National Pledge, and all National Emblems’; and should exercise their right to vote in General Elections. Finally, it is recommended that Article XII of the Charter of Civil Society should be made part of the Chapter of the Constitution on Fundamental Rights and Freedoms.

27. We are in full agreement with the recommendation of the Commission that every effort should be made to simplify the language of the *Fundamental Rights and Freedoms Provisions*, so that it may be comprehensible to the citizen of moderate learning. Indeed, the ideal is to make the language less legalistic in nature, so that each citizen may have a clear understanding as to what his or her fundamental rights and freedoms are, and of the legitimate limitations that may be placed on the exercise of those rights. That is to say, each citizen must at once have a clear grasp of the fundamental rights and freedoms appertaining to him or her, and of the correlative duties and responsibilities to fellow-citizens consequent on the exercise of those rights and freedoms in a democratic polity.
  
28. There would seem to be, roughly speaking, two broad schools of thought, among others, represented by the US and Westminster models of constitution drafting, that we may consider here. The US model espouses a theoretical perspective that proceeds on the moral nature of the rights and freedoms in question; and would therefore suggest that the language most appropriate to the task of articulating these rights and freedoms in the Constitutional Text is one of generality, thereby allowing the Constitution to function as the evolving repository of our core political ideals and, at the same time, allowing for the interpretation of the Text to meet changing circumstances and demands.

29. To the contrary, the British style of constitution drafting, so evident in West Indian Independence Constitutions, would seem to be at the other extreme. That is to say, the Chapter on *Fundamental Rights and Freedoms* seems to aim for such precision in meaning that it would be nigh impossible for these rights and freedoms to be interpreted in a manner to meet changing circumstances and demands. For, the listing of each right or freedom is followed by detailed instructions as to how each is to be construed and the qualifications respecting the exercise of each right or freedom, that one wonders whether that right or freedom has not been *taken* away. The question therefore remains whether we should restrict ourselves to a ‘bare-bones listing’ of the fundamental rights and freedoms, leaving it to experience to flesh out these rights; or should we rather write a detailed account of these rights?
30. We are of the view that Grenada should steer a middle course between the two extreme positions, having regard to the fact that our tutelage under the Westminster system may require that the Constitution provide some guidance, generally accepted, as to how the Chapter on Fundamental Rights and Freedoms may be interpreted. Our hope is that the reader would find the redrafting of the Chapter on *Fundamental Rights and Freedoms* acceptable; and, that, the Constitution would at once function as the repository of our highest political ideals, and would allow for its interpretation to meet changing circumstances and demands.
31. We now consider the Commission’s recommendations regarding the inclusion of other rights enunciated in the Charter of Civil Society and, more specifically, the inclusion of Article XII – “Women’s Rights” – in the Chapter on *Fundamental Rights and Freedoms*.
32. First, we note that many of the rights enunciated in the Charter of Civil Society are in consonance with the rights and freedoms catalogued in the Chapter on *Fundamental Rights and Freedoms*. We are therefore left to consider which rights

the Commission may have in mind. Some of these rights may indeed be socio-economic or welfare rights, which are now broadly recognized as befitting the model of basic human rights. Some of these are the right to work, to education, to health care, to housing; in a word, to basic necessities.

33. We readily acknowledge that the socio-economic or welfare rights mentioned above are essentials of human well-being, and are therefore constitutive of human dignity. They should therefore be appropriately acknowledged as such in the Constitutional Text. The question is, whether it is in the Chapter on *Fundamental Rights and Freedoms* that they should be included.
34. It bears emphasis that, if they are to be included in the Chapter on *Fundamental Rights and Freedoms*, then they must be interpreted and enforced in the same manner, as the other civil and political rights, through the practice of judicial review. But is this feasible in reality? Take, for example, the right to work listed in the Grenada Independence Constitution. If the right means that every worker has the right to be free from discrimination in earning a living on account of race, gender or sexual orientation, then that is relatively easily enforceable. However, if the right means an obligation of the State to provide employment for every citizen willing and able to work, then enforcement becomes horribly problematic since the enjoyment of the right becomes directly contingent on the level of social and economic development of the country.
35. A similar problem attends the enforcement of such rights as the right to decent housing, to food, to an education such as one's talents may justify, to medical care, etc. The argument then is, rather than diminishing the effectiveness of the judicially enforceable rights and freedoms, we may honour the critical importance of these socio-economic or welfare rights by including them in a General Welfare Clause of the Constitution.

36. We now turn our attention to the specific recommendation that Article XII of the Charter of Civil Society, pertaining to the Rights of Women, be included in the Chapter on *Fundamental Rights and Freedoms*.
37. We are especially mindful that the compelling ground for the recommendation that the rights of women be accorded specific and dedicated treatment in the Chapter on *Fundamental Rights and Freedoms* is contingent on the historical fact that discrimination against women has been a pervasive feature of Grenadian and West Indian society, and that special measures are needed to eliminate it. It is a recognition that the contingent structure of social life in Grenada has produced circumstances in which women's interests are often subject to gender-specific forms of abuse. Threats to basic interests to which women are particularly vulnerable include, among others, domestic violence, exploitation of domestic labour, sexual harassment in the workplace, and the general subordination of women to men, whether in the public or private sphere.
38. The question however remains whether the rights of women should be accorded special treatment in the Constitutional Text, notwithstanding their recognition in the Charter of Civil Society and in certain international instruments, such as the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW). Put differently, the question is whether the articulation of the fundamental rights and freedoms of the citizenry does not already capture the basic rights of women as the most basic rights of all citizens of Grenada; that is, the right to be treated as an equal and, therefore, to the equal protection and due process of the law in every particular respect.
39. We take note of the fact that the rights listed in Article XII of the Charter are among the rights variously stated in the Chapter on *Fundamental Rights and Freedoms*. We are therefore of the view that it would be superfluous at best, and probably confusing, to include Article XII in the Constitution. Moreover, this may lead to the question as to why not the inclusion of Article XIII on Children's

rights; and of Article XIX on Workers' Rights. We are satisfied that a careful articulation of the fundamental rights and freedoms of democratic citizenship in gender-neutral language would suffice.

## **THE HEAD OF STATE**

- 40.** Our collective decision to maintain a parliamentary-style cabinet-executive, with the consequent merging of legislative and executive authority, should hold fundamental implications for the way we structure the office of 'Head of State'. However, before we specifically address that issue, it bears noting that it would be nothing short of absurd if we were to keep the Queen of England as the head of state in a reconstituted constitutional order. The symbolic importance of the office should caution us that we would be playing a cruel joke on ourselves if we were to continue to have the monarch of the very imperial power that once colonized us, and from which we have since gained independence, stand to symbolize the sovereignty, independence and continuity of the State. In other words, the convention of recognizing the British Monarch as our titular Head of State puts in question the logic of the assumption that Grenada is a politically independent, sovereign nation. The question therefore remains whether we should continue the practice of recognising the British Monarch as our Head of State.
- 41.** In the reconstituted constitutional order, the Head of State would not be the effective head of government. Instead, the executive power of the Nation-State would continue to reside in a Prime Minister presiding over a Cabinet of Ministers, whose appointments he or she would largely determine. But the Head of State would inevitably share in certain executive functions, such as the signing of treaties with other nations, commanding the armed forces, making judicial appointments, granting pardons, etc. In fine, then, there is bound to be an executive, as much as a legislative, cast to the office of Head of State, since, as symbol and guarantor of our independence, unity and sovereignty, the incumbent



of the office is ultimately required to be the guardian of the Constitution and the laws of the Commonwealth of Grenada.

- 42.** In sum, the idea is to have a Head of State existing above partisan politics, being an impartial arbiter, and though lacking the competence of a day-to-day governmental authority, is nonetheless ultimately responsible for ensuring the regular functioning of the political organs of government as well as the continuity of the Nation-State, and protecting the independence of the Nation and its territorial integrity. The fundamental question therefore remains: how ought we to re-constitute the office of Head of State in order to ensure its effectiveness in a revised constitutional order? First, let us turn our attention to the method that may be adopted for appointing the Head of State.
- 43.** Above all else, the method of appointment to, and the tenure of the office of, the Head of State should put the office beyond the sufferance of the powers of the office of the Prime Minister. The manner and tenure of appointment should mark the dignity of the office. Also, having regard to the enormity of the powers of the Prime Minister under our Westminster parliamentary system and, more specifically, to the events in Grenada from 1979 through 1983 and beyond, and to the role played by the then Governor-General during that period, we are well advised to reconstruct the office of Head of State in a way that would allow it to function, in the appropriate circumstances, as an effective check upon the powers of the Prime Minister and, above all, to serve as the protector of the Nation during any possible crises that may threaten the safety of our democratic institutions. On this view, the Chapter on Head of State can be carefully rewritten to spell out the method of appointment and the powers attending upon that office.
- 44.** First, it bears emphasis that the method of appointment to and the tenure of the office should contribute significantly to its independence vis-à-vis that of the Cabinet and the Legislature. Thus, to further reinforce the independence of the office, there ought to be an entrenched constitutional provision to the effect that

an appointee to the office of Head of State shall hold that office for at least seven to ten years, and may only be removed from the office by impeachment for crimes and misdemeanors committed during the term of office; or for ill health, which renders him or her incapable of carrying out the duties of the office. The tenure of office must ensure that it spans changes of government, thereby avoiding the possibility of the incumbent going out with every government.

- 45.** Second, the Head of State could also function as a check on the Cabinet and Legislature by constituting the office Commander-in-Chief of the defence forces, of the police, fire and prison services, and of any para-military forces, thereby requiring the Head of State's consent for the deployment of troops in the event of some national emergency. In addition, the Office of Head of State should be invested with greater 'energy' and authority than would otherwise have obtained in respect of the office of Governor-General. That is to say, in addition to placing certain cherished appointments in the Office of Head of State, such as judicial appointments, the Public Service Commission, the Judicial and Legal Services Commission, the Director of Audit, to name a few, the Office may be invested with a qualified or suspensory veto over legislation, by allowing the Head of State to return legislation to the Legislature for further consideration, where he or she might think the piece of legislation in question to be ill-conceived. Of course there must be provision for a legislative override of the veto of legislation, where, upon reconsideration of any legislation after a veto the Legislature resubmits it for signature, the Head of State is obligated to sign such legislation into law.
- 46.** It is submitted that a veto power over legislation in the Head of State could prove especially propitious in a constitutional order with a unicameral legislature or, in any event, with a fusion of the Cabinet and the Legislature, of executive and legislative authority, as is the case in Grenada and in virtually every Commonwealth Caribbean independent State. It would serve to encourage reconsideration of legislation – 'a sobering second thought' – thereby protecting the people against hasty, and even oppressive legislation. Otherwise stated, the

veto power would serve to institutionalize reconsideration of legislation as part of the regular lawmaking process, forcing legislators to give a second thought to legislation in anticipation of a possible veto. The qualified veto would force legislators to reassess their proposals in light of objections, actual or anticipated. This would likely result in more mature judgment and better laws.

- 47.** In virtue of the foregoing discussion, it is recommended that the appointment of the Head of State should no longer be the sole province of the Prime Minister. Rather, a procedure should be devised to give a participatory role to the Leader of the Opposition, and to the Parliament as a whole, functioning as an ‘Electoral College’. For example, the Prime Minister may retain the power to nominate a person to be Head of State; however, such nomination must be made only upon consultation with the Leader of the Opposition, since the nominee must be ratified or confirmed by Parliament. Under this procedure, the Prime Minister would continue to have a dominant voice in the appointment of the Head of State, but at least the process would now be open to public scrutiny. In the alternative, the Prime Minister and the Leader of the Opposition may jointly name a three-member committee to consider and make recommendations as to eminent persons who may be considered for appointment as Head of State. The committee must present a detailed report to the Prime Minister and Leader of the Opposition on the person or persons recommended for appointment; and the person so nominated must be ratified or confirmed by Parliament.
- 48.** In the event, it bears emphasis that this method of selection of the Head of State would contribute significantly to the sense of independence of that office *vis-à-vis* that of the Prime Minister, the Cabinet and the Legislature. For, the appointment to the Office of Head of State would no longer be perceived to be ‘a gift of the Prime Minister’s Office’. And, to repeat, in order to ensure that a Prime Minister would no longer be able to ‘hire’ and ‘fire’, a Head of State at will, there must be an entrenched constitutional provision to the effect that an appointee to that office shall hold it for at least ten (10) years, which may be renewed, and he or she may

only be removed from office by impeachment for crimes and misdemeanors committed during the term of office; or, in the event of ill health which renders the Head incapable of carrying out the duties of the office.

**49.** The Commission has made certain recommendations respecting the Office of Head of State, *viz*:

- (i) That Grenada be formally declared a parliamentary republic with the Head of State being a Ceremonial President, with the executive power of the State being exercised by a Cabinet, and with the Head of Government being the Prime Minister.
- (ii) That the President should be a citizen of Grenada by birth or descent.
- (iii) That the age of the President should be between 40-75 years.
- (iv) That the person selected as President should have resided in Grenada continuously for at least 5 years.
- (v) That the tenure of Office of the President should be no more than 10 years.
- (vi) That the selection of the President should be done by an Electoral College comprising members of both Houses of Parliament sitting in a joint session for that purpose, or the National Assembly when established.
- (vii) That the procedures for the selection of the President should be formulated.
- (viii) That the terms and conditions for the removal of the President should be laid down.
- (ix) That the President should enjoy certain immunities.
- (x) That provisions should be made for the selection of an Acting or Deputy President.
- (xi) That Section 22 of the Constitution be amended to allow the President to spend his annual vacation at home or abroad while someone is appointed to act as his Deputy during the period.

- 50.** We are in full agreement with these recommendations and, accordingly, have faithfully redrafted the Chapter on Head of State to incorporate the recommendations. We however prefer to recognize the President as a formal, as opposed to a ceremonial, Head of State, having regard to the critical importance of the Office to democratic governance in the parliamentary republican State, and as the symbol and guarantor of our independence, unity and sovereignty; and, therefore, the guardian of the Constitution and of the laws of Grenada.
- 51.** It is for the foregoing reasons that we have redrafted the Chapter of the Office of Head of State to reflect its position as a constitutional office, standing apart from those of the Executive and the Legislature. For, in order that the Office be accorded the dignity and authority attendant on its constitutional station, we were careful to spell out its powers over and against those of the Legislature and the Executive.

## **THE LEGISLATURE**

- 52.** We have now arrived at that juncture where our quest reduces itself to the more practical, still fundamental, question of the articulation and organization of state-power into its various departments for the express purpose of facilitating good democratic governance in Grenada and advancing the goals of justice and liberty defined in the Preamble, and further extended in the section on fundamental rights. Otherwise put, the question before us is one of the forms, procedures, and institutional arrangements most suitable for limiting governmental power and implementing a conception of political right and justice, most appropriate to good democratic governance.
- 53.** Constitutional democratic governance, as a concept of modern political thought, expresses the root idea of protecting the rights of individuals and minorities from majoritarian actions. In the context of political theory, it signifies a concern with the problem of how the institutions of the State are to be organized in order to

secure the basic rights of the citizens. On this view, the philosophical warrant for constitutional government is to secure the individual rights of the citizens; thus, the Constitution must be so designed to ensure governmental respect for those rights. For although every State may be said to have a constitution, in the sense of an institutional structure and established procedures for conducting political affairs, not every State may be classified as a constitutionalist State, in the sense of being defined by forms and procedures that limit the exercise of state power. It therefore bears emphasis that the form of government argued for here is that of ‘republican government’, as defined by the philosophic principle of republicanism. And we hasten to add that the term ‘republican government’ is not here being used in the rather simplistic sense it has come to be understood in West Indian constitutional law and politics; that the Head of State is called a ‘President’ rather than ‘Her Majesty’. No, the term is used here as a concept of political philosophy to express the idea of government – particularly legislative authority – being vested in representatives elected by all the citizens in accordance with the principle of universal adult suffrage. The emphasis on legislative power is obvious; the power to make laws to govern and regulate the lives of people in society is generally considered the most awesome power of the State. In essence, then, the true principles of republican government recognise the great body of the people as the sole constituent power with authority to frame the constitution and its various offices for their governance. On this view, all powers of government are said to derive directly or indirectly from the great body of the people, and those powers are exercised by their representatives.

- 54.** The question therefore remains as to how the Legislature should be constituted. What powers should devolve to it? Should we retain the bicameral structure or should we opt for a unicameral legislature? And what should be its size?
- 55.** To my view, the history of a nominated Senate in West Indian politics, an upper second chamber, supposedly modelled on the British House of Lords, has been one of remarkable failure. It contributes very little to strong democratic

governance. Moreover, a two-tiered elected legislature might prove too costly for a small economy like ours. A plausible alternative might therefore be a unicameral Legislature comprised of the fifteen (15) established seats, elected on the electoral principle of first-past-the post, and an additional thirteen (13) seats, selected on the basis of the percentage of votes each political party has received in the general elections. And the legislative powers attendant on this unicameral Legislature should concern the regulation of all matters pertaining to the peace, order, and good government of Grenada. The suggested alternative will ensure that there is always an Opposition in the House of Assembly and that all Government Ministers will be held accountable to this House for the stewardship of their respective Ministries.

**56.** Among the recommendations of the Commission, regarding the re-constitution of the Parliament of Grenada, are the following:

- (i) That the Parliament be unicameral in nature and referred to as the National Assembly.
- (ii) That a system of elections under the “First-Past-The-Post” system be retained, and that the successful candidates be referred to as “Constituency Representative Members of Parliament” or simply “Constituency Representatives.”
- (iii) That a number of seats in the National Assembly be allocated to persons chosen by the Leader of each political party that contested the general elections for Constituency Representative Members of Parliament. Those seats shall be allocated on the basis of the percentage of votes received by each party that contested the elections. Those members shall be referred to as “Proportional Representation Members of Parliament.”
- (iv) Provision should be made in this unicameral National Assembly for a small number of nominated members who may be called “Senators.” They should be chosen by the State President in his own deliberate judgment to represent different interest groups.

- (v) There should also be provisions in the National Assembly for a Local Government Representative. That representative would be nominated by the Local Government bodies.
- (vi) Of the four different categories of the National Assembly, only one category, the Constituency Representative Members, may speak or vote on a motion of no confidence in the Government, and only a Constituency Representative Member may be the Prime Minister or may act as Prime Minister.
- (vii) A specific date for the holding of General Elections should be enshrined in the Constitution.
- (viii) Persons elected to serve in the National Assembly on a party ticket should not be allowed to “cross the floor” and join another party but, rather, should be required to resign and face the electorate.
- (ix) Candidates who contested a general election and lost may be appointed as Senators, but not as Ministers.
- (x) Only elected members to the National Assembly should be eligible for appointment as Ministers of Government.
- (xi) Persons seeking election or nomination to the National Assembly should be made to declare their assets before being elected or nominated and after they have completed their term of service.

**57.** We are largely in agreement with the recommendations made for the reconstitution of the Parliament of Grenada. However, we raise a few queries regarding one or two of these recommendations. First, we query the recommendation that there should be a small number of nominated members in the National Assembly, who may be called “Senators,” and who should be chosen by the President in his or her deliberate judgment to represent different interest groups.

**58.** We are of the view that this adds a bit of confusion to the composition of the National Assembly. The virtue of the recommendation that the National



Assembly shall consist of those members winning their seats under the First-Past-The-Post system, plus those selected by the leader of each political party contesting a general election on the basis of the percentage of votes received, is that the country would have a more just and fair representative body in the Legislature, in addition to the fact that we are not likely to re-live the possibility of the party winning the election by 51% of the votes, say, winning all the seats, while the party receiving 49% of the votes having no seats in the House. It bears emphasis that the ‘new’ National Assembly, constituted according to the recommendation of First-Part-The-Post and Proportional Representation is a fully elected body, given that Proportional Representation is an electoral system and often requires that the slate of candidates to be chosen on this basis be declared prior to the general election. It is therefore up to each party to select all its candidates wisely, spanning a broad cross-section of interests in the society. The Office of Head of State, constituted separate and apart from both the Legislature and the Executive, should have no say in deciding who sits as members of the National Assembly.

- 59.** This leads to our second concern regarding the manner in which the “Proportional Representation Members of Parliament” are to be treated *vis-à-vis* the “Constituency Representative Members of Parliament.” If we are correct in the assertion that all members of the National Assembly are indeed ‘elected’ members, then they must each enjoy all rights and privileges pertaining to their membership. Any member of the majority party in the House can therefore be chosen to serve as a Minister of Government; and, likewise, every member should be entitled to vote on a motion of no confidence brought against the Government.
- 60.** We caution against diluting the substantial benefits of this ‘new’ system. In addition to the very important benefit mentioned above, the ‘new’ system gives a Prime Minister the option of choosing most of his or her Cabinet from the list of candidates carefully chosen under the system of Proportional Representation. First, this would mean that the entire Cabinet will belong in the National

Assembly and, therefore, would be held accountable to the people for the stewardship of their respective Ministries, through the Representatives of the people in the elected Chamber. This is in fact the essence of the parliamentary system, as opposed to the presidential system.

61. Second, a critical benefit of this new arrangement is the quality of representation the Constituency Members may be able to give to their respective communities. Some Members may or may not be chosen as Ministers. In either case, they may be able to solicit the assistance of their colleagues in the House in bringing good service to their constituencies.
62. However, the overriding benefit of the new arrangement is likely to be the enhancement of deliberative democracy and of the maturing of democratic governance in Grenada. All parties contesting a general election in Grenada would be well-advised to choose all their candidates very carefully, in order to ensure that, in the event of success, there will be an excellent team of Ministers and parliamentarians. By the same token, members of the Opposition are equally advised to prove their worth as the future Government of Grenada, by their stewardship of their office.

## **THE EXECUTIVE**

63. In the political context, the term 'executive' refers to that branch of government charged with the execution of the laws enacted by the legislature. The term is sometimes used to embrace the notion of a person (or persons) in whom the high magistracy of the State is vested. This person is often known as the 'Head of State'. In this, and earlier writings, the term has been used in the first sense only, since the preference has always been for the parliamentary, cabinet-style executive; which means that the office of head of state rests in a separate institution. And, for this reason, it is preferable that we maintain the separate names of these two institutions.

- 64.** Executive power embraces the two categories of political and administrative. Above all, the principal function of the Executive is to execute and enforce the Constitution and the laws of the Commonwealth of Grenada. And, as an incident of this function, the Executive may recommend to the legislature any legislation it may deem necessary for the execution of the Constitution and laws of the Commonwealth. It bears remarking that this task of execution requires an administrative structure to help put into effect the laws enacted by the legislature – whether they be in the area of commerce, banking, collection of taxes, etc.
- 65.** To the Executive falls the task of securing the nation’s survival; representing it to the world; conducting its relations with foreign nations; and commanding its armed forces. With regard to securing the nation’s survival, it is absolutely essential that the executive has the authority to act in the case of national emergencies, to meet any threat to the nation’s security. And in respect of exercising the powers of external sovereignty, such as declaring and waging war, concluding peace, making treaties, and maintaining diplomatic relations with other sovereignties, the Executive is the most appropriate medium for the international expression of the sovereignty of the nation.
- 66.** In reality, though, under the parliamentary, cabinet-style system, the Cabinet is actually charged with the planning, initiation, and execution of laws. So, in addition to sharing some appointment and diplomatic powers with the Head of State, the Cabinet, headed by the Prime Minister, would have policy-making, administrative, and legislative powers. This concentration of all political power: legislative and executive, in the Cabinet, is consequent upon the fact of its control over legislation, particularly in a small legislative body. For although the executive power in our parliamentary regime is generated by legislative majorities and, in theory, depends on such majorities for survival, the reality is that the Cabinet, through its control of the majority in Parliament, rather determines the survival of the latter. Needless to say, the reality of this virtual fusion of executive

and legislative authority would lend to our form of government a totalitarianistic cast, and puts in question some of the normative claims that have been made for the retention of the parliamentary constitutional model. It therefore bears emphasis that the reality of this state of affairs would hold fundamental implications for our restructuring of the Judiciary and the Office of Head of State.

67. In light of the above admissions, then, the case for the retention of the parliamentary, cabinet-style executive can only be made in terms of our ambition to wed efficiency, economy, stability and flexibility in government, without too much sacrifice of the requirement of responsible government. Ironically, in light of this stated ambition it would seem that the single executive, directly elected by the electorate, and independent of the legislature, highly recommends itself. For if we consider promptness and efficiency in the executive an essential of good government, then it would seem that a single executive would discharge the duties of office with more consummate dispatch than the more deliberative, collegial body of a parliamentary, cabinet executive. In addition, it might be thought that the single executive is more likely to meet national emergencies with greater promptness and efficiency, thereby ensuring the safety and survival of the Commonwealth. In theory, at least, a single, rather than a plural, executive would seem to be possessed of greater 'energy', in that there is likely to be greater unity in government headed by a single president, say, rather than a Cabinet. The latter is given to more prolonged discussion, debate, and even obstruction, since, in theory, the members of a Cabinet are all equals. Such an executive, it is believed, endangers national security, and destroys republican responsibility, since each executive member can hide behind the others; each can claim he or she was overruled or pressured against his or her better judgment by the others. As it is stated,

Experience teaches that emergencies arise, that there are times when swift action is necessary, that some things can be done only in secrecy, that sometimes decisive action is better than continual debate, and finally that

if men are to be accountable for their actions, personal responsibility must be clear. It is simply in the nature of things that the capacity of vigorous, forceful, effective action resides and must reside in a single executive.<sup>5</sup>

- 68.** Still, an independent executive, directly elected by the people, might prove too costly, given that there would have to be a national election throughout the Commonwealth for the Executive, in addition to the elections for representatives to the Legislature. More important, though, is the possibility of intense conflicts between the Executive and the Legislature, as often occur in the United States, which could make it virtually impossible for the executive (president, say) to get the legislature to pass the appropriate enabling legislation to put national policies into effect. This possibility is made real by the fact that, being elected by the electorate, the executive is directly responsible to the people, and not to them through the legislature. Therefore, the possibility of conflicts and deadlocks between Executive and Legislature might, in the long haul, prove to be disabling to the political stability and economic progress of a small, nascent Commonwealth as Grenada.
- 69.** It might well be, then, that the parliamentary Cabinet-Executive might prove to be more effective than the single, directly elected executive. Equally important is the fact that a parliamentary system of government may prove more flexible to meet the need for change in government than a presidential system, where both the executive and the legislature would most likely be elected to fixed terms. A parliamentary regime can more readily adapt to certain political events facilitating the formation of new governments, possibly through the formation of coalitions. This is especially important in countries with multiple political parties, where power-sharing and coalition-forming are common. This state of affairs has the virtue of making incumbents more attentive to the demands and interests of the smaller political parties, thereby helping to promote national unity. In sum, therefore, the parliamentary system would more likely combine efficient government with national unity. For if it be essential to our progress and stability

that we have strong and efficient government, then it is absolutely necessary that the Executive and the Legislature work as one; and this can be more effectively achieved under a parliamentary system which links the 'election' of the Executive to the election of the members of the Legislature.

- 70.** In its Report, the Review Commission has pointed to the fact that the Constitution, in Section 57, vests the executive authority of the sovereign State of Grenada in Her Majesty Queen Elizabeth II of Great Britain; that, as such, the executive authority of Grenada may indeed be exercised in Her Majesty's behalf by the Governor-General, either directly or through officers subordinate to him or her; but, that, in reality, the executive powers of the State are exercised by a Cabinet of Ministers, headed by a Prime Minister. The Commission has also given detailed evidence to establish the enormous powers of a Prime Minister, under the current constitutional arrangements. In the interest, then, of better governance, the Commission has made some of the following recommendations:
- (a) That no person should hold the office of Prime Minister for more than two five-year consecutive terms.
  - (b) That, in the interest of good governance, the Constitution should provide for some important functions to be performed by the Leader of the Opposition, such as sharing with the Prime Minister the appointment of persons in key positions in the Public Service.
  - (c) That, in respect of the appointment of Permanent Secretaries, the Prime Minister should be consulted but should not have veto power over such appointments.
  - (d)
    - (i) That the Office of Attorney-General should be a political appointment and not a public office. This would allow him or her to be both a member of Cabinet and of the National Assembly.
    - (ii) That the Office of Director of Public Prosecutions should not be shared with any other office.

- 71.** We note, respectfully, that, having regard to the critical importance of the Head of State to democratic governance, the Office of Head of State and the Office of the Executive should be so reconstituted in the re-drafted Constitution, in order to avoid any confusion whatsoever as to which Office is vested with the executive authority of the State. This would allow for the vesting of certain powers in the Office of Head of State in order to curb the excesses of the Office of Prime Minister. This would ensure that certain cherished powers of appointment, which are now in the hands of a Prime Minister, would now be in the Office of Head of State, with the authority to consult both the Prime Minister and the Leader of the Opposition. Accordingly, we strongly suggest that the Chapter on the Executive be re-drafted to state that: ‘The Executive Authority of the State shall vest in a Cabinet headed by a Prime Minister ....’
- 72.** With regard to the recommendation on the tenure of the Office of Prime Minister, we advise a careful rethinking of this. To restate the obvious, in the established constitutional practice, the leader of the political party winning the majority of seats in the elected House is the person appointed Prime Minister. A limitation on terms of office a person may serve as Prime Minister would mandate that a political party, which was successful for two terms, choose a new leader to lead the team into the new elections. Worse still, it may require the Head of State to choose someone, other than the leader of the winning party to be Prime Minister, on the view that the true leader had already served two terms as Prime Minister. Therefore, as laudable as this recommendation may seem on first blush, it may lead to far greater confusion than the problem it purports to correct.
- 73.** Accordingly, we advise against dictating how political parties should choose their leaders, or who should be chosen as leaders. If we are to develop a culture of political maturity in Grenada, all persons exercising their fundamental rights to form political parties should also act prudently in making their choices of political leaders. Obviously, they would wish to choose a leader of obvious talents to win the elections and to lead the government of the country. By the same token, the

electorate should not be denied the right to vote for the government of its choice; and the person chosen as leader of a political party may be a critical factor in the minds of many voters as to whether they would vote for the candidates of one political party over the others.

74. A better way, then, to curb the powers of the Prime Minister in the revised constitutional order might well be in the careful crafting of the powers of the Office *vis-à-vis* those of the Head of State, among other things. The American model is not the one for us, having regard to the fact that the President is directly elected and, more important, the enormous burdens of the office, not only as head of state and government of a vast country, but also as head of the world's superpower, would have counseled in favour of limiting the number of consecutive terms a person may serve as President. Also, compared to a small country like Grenada, there is an enormous pool of talents in the United States. We should therefore be very cautious in this particular move and allow for the maturing of our political culture by leaving the voters to make their choices.
75. Similarly, rather than 'frustrate' the electorate in its choice of Prime Minister and government, we should give due warning to every Opposition in Parliament that it ought to pay scrupulous regard to its responsibility as the 'government in waiting' in our parliamentary democracy and, accordingly, discharge the duties of its office in such a manner as to convince the electorate that it is indeed worthy of forming the government. On this view, the Leader of the Opposition and his or her team must offer the kind of constructive criticism of Government that may sometimes take the form of position papers that are credible alternative proposals to the Government's fiscal policy, agricultural policy, foreign policy, development strategy, to name a few. In other words, the Opposition must address every conceivable aspect of governance and praise and support the Government when that is due, and give the public the benefit of viable alternative proposals to the Government's position, when that is required. The net result of all this would be the civic education of parliamentarians and public alike, the enhancement of



deliberative democracy in Grenada, and, the maturing of the overall practice of democratic governance in the Tri-Island State.

## **THE JUDICIARY**

- 76.** The republican principle on which our parliamentary constitutional model purportedly rests, requires the establishment of a strong and independent judiciary. In most constitutional democracies which take fundamental rights seriously, an independent judiciary is seen as the ultimate protector of these rights. In our case, the need for an independent judiciary is made even more compelling by the fact that, under our parliamentary constitutional model, there is a virtual fusion of legislative and executive authority.
- 77.** The fundamental political ethic at stake here is that, in the execution of their judicial function, judges are to be subject to no other authority than that of the constitution and the law. In sum, this all important function of a judiciary in a constitutional democracy can, at a minimum, only be effected by a mechanism of judicial independence which is the subject of explicit provisions in the constitution. That is to say, the clear and unequivocal vesting of the judicial power of the Commonwealth of Grenada in an independent and co-ordinate branch of government – the Judiciary. So, to repeat: given the Executive’s virtual control over the Legislature, we could not rely on these two institutions to check each other’s ‘ambitions’. Therefore, it devolves upon the Judiciary, through constitutional review of both executive and legislative actions, to secure the citizenry against any arbitrary exercise of power that might infringe their constitutional rights. In other words, decisions concerning the extent to which individual rights must give way to the wider considerations cannot be seen exclusively as political decisions best taken by political leaders responsible to the electorate, and, therefore, beyond the concern of the Judiciary. It is simply too easy to justify legislative or executive action on the ground that it is for the public good or the general welfare.

- 78.** Specifically, then, the question is one of the theoretical justification for the courts' power to declare legislative acts contravening the Constitution null and void. Why is this independence of the courts of justice a peculiarly essential principle of limited constitutional rule? Why is this power of judicial review an essential adjunct of constitutional government?
- 79.** In Anglo-American constitutional debate, for example, it has been heavily disputed whether the exercise of judicial review is indeed the consequence of the compelling logic of ideas regarding limited government and the rights of individuals against interference by public authority. It is, nonetheless, the conventional wisdom that the Judiciary is that branch of government with the greatest institutional capacity to enforce the legal norms of the fundamental law in a disinterested way. The lesson of *Marbury v. Madison*<sup>6</sup> carries considerable purchase here; for, to paraphrase Chief Justice John Marshall, it would be too much to ask of an executive/legislative body of such immense power, as obtains in our small-island republic, to be the ultimate interpreter of the principled, institutional restraints on that power. At bottom, this dispute therefore resolves itself into the question of the role of the Judiciary in Grenadian and West Indian society and, specifically, in the realization of the kind of political community we aspire to be. It is a question about the nature of the political community we wish for ourselves and our posterity.
- 80.** Our ambition for a political community founded on justice and the rule of law as its forming principle and in which the moral equality of all human beings is constitutionally sanctioned, would more readily endorse the value of judicial review as a political ethic – especially where the protection of the fundamental rights of the citizen is in issue. Otherwise put, the idea of fundamental rights secured by the constitutional text makes compelling the need for an independent judiciary, whose duty it is to guard the fundamental law and to check the departments of government so far as they might attempt to infringe these vested rights. And it bears remarking that an independent judiciary is the least

positioned to pose any threats to the liberties of the citizens. For, from the nature of its office, the Judiciary will always be the least dangerous to the political rights of the Constitution, because it will be least in capacity to annoy or injure them. Compared to the Executive and the Legislature which, among them, wield the ‘sword of the community’; ‘command the purse’; ‘and prescribe the rules by which the duties and rights of every citizen are to be regulated’, the Judiciary has no influence over either of the strength or of the wealth of society, and can take no active resolution whatever. In sum, the judicial branch possesses neither force nor will – presumably the prerogatives of the Executive and the Legislature – ‘but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.’<sup>7</sup>

**81.** It is submitted, then, that an independent judiciary is an important feature of a constitutional democracy. But the question still beckons, whether the exercise of judicial power this paper endorses is not in fact incompatible with the theory of republican, representative government. That is to say, is it not contrary to the democratic ideal to have the unelected, non-majoritarian institution pass on the validity of the acts of the elected representatives of the people? Suffice it to say, though, that the ‘democratic’ case for judicial review does not ‘by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.’<sup>8</sup>

**82.** As was earlier intimated, however, the question of political morality is as to the kind of political community we aspire to be. For if we should wish for the kind of political community wherein the rights of a minority would be secured even when the common interests would form in majority against it, then to compromise the principle of representative government in this way is merely to advance the higher ideal of a more just community. We find Professor Erwin Chemerinsky’s

thoughts on this matter particularly insightful. As he reasons, the current debate in constitutional theory centers on how to reconcile judicial review with democracy, defined as majority rule. However, such a definition of democracy, he warns, is not descriptively accurate nor normatively desirable; for it is overly procedural and lacking in the attendant substantive component, such as the equal protection of the fundamental rights and freedoms of the citizenry. Instead, the operative assumption is that all decisions in a democracy should be subject to control by politically accountable institutions.<sup>9</sup>

- 83.** But democracy is a contested, normative concept, which embraces tolerance for minorities and respect for those fundamental rights and freedoms, widely regarded as ‘a sublime oration’ on the essential dignity of the human individual; and, therefore, whose meaning is not exhausted by the phrase ‘majority rule’. Otherwise put, democracy is a political philosophy respecting a particular form of life in which respect of human dignity is cherished as a supreme moral value. Therefore, it is necessary that fundamental rights which are essential to human dignity be secured, even if it sometimes means compromising the principle of majority rule. In other words, even while giving due regard to our philosophic commitment to the principle that governmental policymaking ought to be subject to control by persons accountable to the electorate, we should keep in mind our commitment to the principle that certain values embraced by the Constitution are beyond revision by ordinary political processes; and an independent judiciary, because of its political insulation and its method of decision making, may be best suited to protect these fundamental rights.
- 84.** The question of making an independent judiciary a reality remains. By what means is the idea of an independent judiciary to be effectuated? At a minimum, the Judiciary must be invested with a ‘will’ of its own, very much like the Legislature and the Executive. That is to say, the Constitution must expressly state that the judicial power of the Commonwealth of Grenada vests in the Judiciary; and stipulate what courts would comprise the Judiciary. In addition, as

the prominent Bahamian jurist, Maurice Glinton, has observed, the answer to the question of establishing an independent judiciary largely depends ‘on whether or not the requisite “outward and recognizable guarantees” of judicial independence are sufficiently met in those provisions of the Constitution which spell out the qualifications for the office of a judge, the method of appointment, the safeguards against removal from office...all provisions which are said to provide security and tenure.’<sup>10</sup> In other words, given that the judiciary is a nominated, rather than an elected, institution, it is of telling importance that we constitutionalize such matters as the tenure of judges and the procedures by which they are to be appointed to their office, to ensure that such important appointments are not perceived as ‘gifts’ of a particular office – the Prime Minister’s or the President’s, say. In the final analysis, what this paper advocates will redound to the evolution of a ‘judicial self-portrait’ that is commensurate with the judges’ perception of their principal responsibility for the impartial adjudication of the laws. It bears emphasis that the independence of the judge derives in part from his or her sense of security in the appointment.

- 85.** The question therefore arises as to the possible reforms in the current methods of judicial appointments that would further strengthen the independence of the Judiciary. This is intimately linked to the issue of the courts comprising the judicial system, given that Grenada currently shares a Supreme Court System (a High Court and Court of Appeal) in common with the other countries of the Eastern Caribbean comprising the Organization of Eastern Caribbean States, and, one would hope, soon accept the Caribbean Court of Justice (CCJ) as our Final Court of Appeal in place of the Privy Council. In a word, the courts comprising the judicial system of the Commonwealth of Grenada must be carefully articulated in the Constitutional Text.
- 86.** It is therefore instructive to note that the current Chapter on Judicial Provisions does not address such fundamental issues as the constitution of the Judiciary, the appointment of judges, the qualifications for judicial office and, most importantly,

Grenada's participation in the OECS Supreme Court System. These matters are all taken up in the Courts Order – a statutory instrument legislating the Grenada Supreme Court structure. The Chapter on Judicial Provisions rather concerns itself with such matters as the original jurisdiction of the High Court in constitutional questions, appeals to the Court of Appeal and to Her Majesty in Council (the Privy Council); but, to repeat, no such system of courts is described in the Constitutional Text, in which the judicial power of the State is vested. This Chapter should therefore be rewritten to make the appropriate corrections and to state categorically that the judicial power of the Commonwealth of Grenada vests in the system of courts described.

- 87.** One issue of supreme importance remains; and that is the question of the proper location of the Magistrates' Courts in the constitutional scheme: Whether the Magistracy should be formally recognised in the Constitution as part of the judicial system of the Commonwealth of Grenada, rather than being a part of the Public Service, as is now the case. There is, however, clear recognition in countries like Barbados and in some Member States of the Eastern Caribbean, of the urgent need to refashion and establish a new Magistracy consistent with our republican Constitutions, all of which embody the principle of separation of powers – in particular the principle of a Judiciary independent of the control of the Executive and Legislative branches of government.
  
- 88.** It has long been realised that the Magistracy is an indispensable element of the system of justice in a constitutional democracy. Indeed, it has been the case for a very long time that the vast majority of cases – both criminal and civil – are heard and determined at the level of the Magistrate's Court. It is at this level that the vast majority of our citizens directly engage with the justice system of our democracy. And, sadly, it is the Magistrates' Courts that are most vulnerable and susceptible to executive/political interference.

- 89.** Bringing the Magistracy under the direct control of the Judiciary is therefore presumed to have very positive consequences. For one thing, there is the positive psychological impact on the Magistrates themselves, who would rightfully see themselves as members of the Judiciary, rather than as civil servants. And along with this would come all the accoutrements of office such as the security of tenure and the proper emoluments, thereby leading to a self-portraiture as being worthy of those things that speak to the dignity of the office.
- 90.** In sum, there is likely to be an enhancement of the quality of the Magistracy since the appointment of Magistrates would be through the Judicial and Legal Services Commission; the Magistracy would, more likely than not, attract persons with stronger qualifications; and, above all, the ambition of Magistrates to ascend to higher judicial offices will no longer be stymied by the fact that it is bureaucratically difficult for one to move from the Public Service to the High Court or Court of Appeal. The net result of the proposed change might well be the overall enhancement of justice in Grenada.
- 91.** The Review Commission has correctly observed that an independent Judiciary is an indispensable institutional requirement of good democratic governance and the Rule of Law. For it is the Judiciary which is principally responsible for the legal enforcement of the democratic constitution. It is the Judiciary which is the principal expositor of the law of the constitution and the ultimate protector of the fundamental rights and freedoms of the citizenry, through the practice of judicial review.
- 92.** In recognition of this signal importance of the Judiciary to good democratic governance in Grenada, the Review Commission has made the following recommendations:

- (a) That the State provide adequate resources which should include proper staffing and a good working environment to the Judiciary so as to enable it to function at the highest efficiency and independence.
- (b) That the executive arm of Government should not interfere with the judicial process through any act or omission which may frustrate the execution of justice.
- (c) That all final judgments of the Courts against the government should be honoured promptly.
- (d) That the present system of appointing the Chief Justice and the Judges of the High Court and Court of Appeal be retained. There should be no extension thereafter.
- (e) That the Judges of the High Court should be allowed to serve up to the age of 72 years and the Judges of the Court of Appeal up to 75 years. There should be no extension thereafter.
- (f) Magistrates should have their tenure of service up to age 75 years with no extension thereafter.
- (g) That all matters relating to the Judicial System should be included in the Chapter on Judicial Provisions.
- (h) That the name of the Court in Grenada should be changed from “The Supreme Court of Grenada and The West Indies Associated States” to “The Eastern Caribbean Supreme Court.”
- (i) That Magistrates and Judges and their families should be given greater constitutional protection.
- (j) That Grenada should retain the Privy Council as its final appellate Court until the citizens are made fully aware of the jurisdiction of the Caribbean Court of Justice and vote on it in a referendum.
- (k) That the State offer greater assistance to the Legal Aid Office so as to enable it to grant legal assistance to a larger number of persons needing such assistance.



- 93.** The Drafting Committee however respectfully observes that the Independence Constitution does not describe the Judiciary as one of the constituent organs of the State, in the way it describes the Cabinet and the Legislature. This is a signal failing of the Constitution; and the Committee, in re-drafting the Text has sought to give pride of place to the Judiciary, alongside the Executive and the Legislature.
- 94.** Also, having regard to pending plans to incorporate the OECS Magistracy as an integral part of the Eastern Caribbean Judiciary, the Committee thought it best to include the Magistrates Courts in the description of the Judiciary in the new Constitutional Text.
- 95.** Finally, the inauguration of the Caribbean Court of Justice, some four years ago, was a watershed event in the development and self-realization of the Commonwealth Caribbean. The Committee therefore thought it an anomaly that Grenada should embark upon a thorough review and re-drafting of its Constitution and leave intact the practice of appeals to the Privy Council as our final court of appeal, rather than joining with our sister jurisdictions in the Commonwealth Caribbean in installing the Caribbean Court of Justice at the apex of our Judiciary, as our Final Court of Appeal. After all, Grenada is one of the constituent powers establishing the Caribbean Court of Justice, and it is already part of the Original Jurisdiction of Court. It is therefore a fitting act in the exercise of its sovereign powers that Grenada should remove the British Monarch as its head of state, and its Judicial Committee as the Country's final appellate tribunal.
- 96.** Accordingly, the Chapter on the Judiciary has been thoroughly rewritten to give full account of the judicial organs of the State and to strengthen the foundational terms of the Judiciary, in order to ensure its independence as the indispensable institutional condition for the successful discharge of the duties of its office in the governance of the State.

- 97.** The Review Commission was charged under Term of Reference (viii) “to consider, advise and make recommendations respecting the consolidation of the police and prison services under a single Commission of Law Enforcement.”
- 98.** The Commission, having considered the submissions made by various persons, including a Commissioner of Police, has recommended the establishment of two separate Commissions – one for the Police Service and the other for the Prison Service. The Commission has further recommended that
- (a) The Chairman [of each Commission] to be appointed by the Head of State acting in his or her own deliberate judgment.
  - (b) One member to be appointed by the Head of State acting on the advice of the Prime Minister.
  - (c) One member to be appointed by the Head of State acting on the advice of the Leader of the Opposition.
- 99.** The Commission further recommends that the members of each Commission should serve for a term of three (3) years in each instance.
- 100.** With regard to the possible consolidation of the police and prison services under a single Commission, the Drafting Committee respectfully cautions careful consideration of the fact the Police, Fire and Prison Services share common characteristics as disciplined forces. They also have common interests in regard to civil defence and public security. On this view, the Committee strongly recommends that we consider the substantial gains to be had in efficiency and coordination among those services, which are often required to act in concert. Therefore, for efficiency in the organisation and operation of those services, it is recommended that they be brought under a single Commission – the Protective Services Commission.

## THE PUBLIC SERVICE

**101.** The Public Service is that body of public officers who are responsible for the administration of virtually every aspect of government in Grenada. They are expected to provide facts and expert opinions to assist Ministers in the formulation of policy. They also constitute the administrative machinery for carrying out policy. As such, they are deemed to hold their appointments on merit, independent of partisan political favours. Indeed, the overarching principle concerning the administration of the Public Service requires that appointments and promotions in the Service are based on a merit system that is insulated from political influence and one which is designed to secure a Service that is efficient, politically neutral and dedicated to the extension of opportunity to all. It was therefore for the purpose of ensuring impartiality in matters of appointments, promotions, transfers and discipline that the Public Service Commission was created.

The Review Commission has quite correctly placed great emphasis on the critical role of the Public Service in the governance of the Country. After all, the Public Service – public administration – is an integral part of the fabric of good democratic government. A highly educated Public Service is responsible for implementing and carrying into effect the policies of government for the benefit of the Country as a whole. However, it bears emphasis that members of the Public Service are not the employees of the Government of the day. Rather, they are employees of the State; and, as such, they must discharge the duties of their office impartially and with integrity. Therefore, notwithstanding that they are advisors and agents of Government, members of the Public Service should enjoy that measure of independence that would allow them to give advice to the Ministers of Government without fear or favour, for good governance. It is therefore not surprising that Barbados, Great Britain, and New Zealand, which have been identified by a U.S. political scientist as the near-perfect prototype of the

parliamentary model of government, have, among other things, very strong and very highly educated public services.

**102.** The Review Commission has therefore made certain recommendations regarding the Public Service Commission, which, it is hoped, would redound to the strengthening of the independence and impartiality of the Public Service on the whole. Among other things, the Commission has recommended:

- (a) That the appointment of the Members of the Public Service Commission should be as follows:
  - i) The Chairman to be appointed by the Head of State in accordance with the advice of the Prime Minister and the Leader of the Opposition.
  - (ii) Two members to be appointed by the Head of State on the advice of the Prime Minister after he had consulted with the appropriate representative bodies and received their consent to such appointment.
  - (iii) Two members to be appointed by the Head of State one on the recommendation of the Prime Minister and the other on the recommendation of the Leader of the Opposition.
  - (iv) The Public Service Commission be appointed to serve for a term of three (3) years in each instance but may be eligible for re-appointment.
- (b) That the Public Service Commission should retain the traditional functions and powers of appointment, promotion, transfer, discipline and removal of public officers as presently vested in it by the Constitution.
- (c) That the provisions relating to the establishment and powers of the Public Service Commission remain entrenched in the Constitution.

**103.** Finally, with regard to The Public Service Board of Appeal, the Review Commission has recommended that the pertinent Sections of the Constitution pertaining to the functions of the Board and the conditions and processes for the removal of its members should remain unaltered. However, in the interest of establishing the appearance of impartiality in its composition, the Public Service Board of Appeal should consist of:

- (a) one member appointed by the Head of State, acting in his or her own deliberate judgment, who shall be Chairman;
- (b) one member appointed by the Head of State, acting in accordance with the advice of the representative body for the Attorneys-at-Law;
- (c) one member appointed by the Head of State, acting in accordance with the advice of the appropriate representative bodies; and should be a retired public officer.

## **FINANCE**

**104.** The Review Commission has correctly placed overriding importance on the proper management of the Nation's revenues, given that it is absolutely impossible to speak of good governance in the administration of the Country, and to achieve any measure of social and economic development, without money. It is common knowledge that, for all intents and purposes, money is the life-blood of any democratic country and of its ability to achieve effective and efficient governance. It is therefore of the utmost importance that the Nation's coffers be managed with the highest degree of integrity, transparency and accountability by those to whom the management of the Country's finances is entrusted.

**105.** A key office in the management of the Country's revenues is that of the Director of Audit, charged with the responsibility of auditing the accounts of all public bodies, agencies, institutions, offices and departments and all statutory bodies or other enterprises owned or controlled by or on behalf of the State. It is therefore

necessary that the office be vested with such independence as to allow the Director to discharge the duties and responsibilities of the Office without fear or favour.

**106.** The Commission, in recognising the central importance of the Office of Director of Audit in this regard, has endorsed the following recommendations:

- (a) The Director of Audit should audit the books and report on his/her findings publicly in a timely fashion. That duty should be meticulously done leaving no stone unturned. Such focused attention to detail will leave no room to stray into prosecutorial entanglements. This is the duty of the Attorney General who should be obliged to bring swift justice to those who violate the public trust on the report of the Director of Audit.
- (b) The Director of Audit must be given power to investigate any wrongdoing or discrepancies within any department of Government and prosecute those responsible.
- (c) Provisions should be made for publication or disclosure to the public of all expense accounts of all parliamentarians, diplomats and public servants at home and abroad. This should be made at intervals of six months.

**107.** And, in addition to the foregoing, the Commission has recommended the following:

- (a) In keeping with S. 82(4) of the Constitution there should be no delay in the presentation of annual accounts to Parliament. Any delay may obstruct the accountability and transparency of the Government for the management of public moneys as required by the above section.
- (b) The Section of the Constitution requiring Ministers of Government to divest themselves of directorships and shareholdings in any commercial transactions should be strictly adhered to.

- (c) In the event of civil disorder or natural disasters provision should be made for the extension of time for the presentation of the Estimates of Revenue and Expenditure to Parliament.

**108.** Further, regarding the appointment of the Director of Audit and the character of the Office, the Commission has stated:

- (a) That the provisions in the Constitution with respect to the appointment of the Director of Audit should remain unaltered.
- (b) That the powers of the Director of Audit should be increased to enable him/her to initiate legal actions against persons found wanting in their accountability in the management of the business of the State.
- (c) That the Constitution provide for the Director of Audit to report directly to Parliament through the Speaker of the House and not through the Minister of Finance.
- (d) That the Director of Audit be given full autonomy over, and be made accountable for, the finances allocated to his/her department and which were approved by Parliament.
- (e) The Director of Audit should have complete authority in dealing with the personnel of his/her department.
- (f) The Director of Audit should not be required to seek approval to travel overseas on audit duties.

**109.** However, it bears emphasis that a fundamental principle of our constitutional government is that Parliament controls the financing of governmental activity, having regard to the fact that all governmental expenditures must rest on legislative authority. It is also a fundamental principle of our system of parliamentary democracy that Cabinet, the executive authority, virtually controls Parliament, the legislative authority. In order, then, that in this context we may achieve the overriding objectives of integrity, transparency and accountability in the management of the Nation's revenues, the Chapters on Finance and the

Director of Audit must be re-drafted with the utmost care. In particular, as is noted above, the Office of Director of Audit must be vested with such measure of independence from both Cabinet and Parliament, so as to allow the Director to discharge the duties and responsibilities of the office without fear or favour. For, to repeat, the Director of Audit is responsible for the auditing of the accounts of all public bodies, agencies, institutions, offices and departments and all statutory bodies or other enterprises owned and controlled by or on behalf of the State.

- 110.** In acknowledgement of the wisdom of the recommendations of the Review Commission, the Drafting Committee has addressed the critical issues of the appointment and tenure of office of the Director of Audit, and of the circumstances under which he or she may be removed from office. And, further, in order that the Director may discharge the functions of the office with accuracy and efficiency, the office must be provided with adequate staff, the members of which must be highly qualified public servants.

## **CITIZENSHIP**

- 111.** The Review Commission has presented a very thoughtful discussion on the constitutional Chapter on Citizenship, and has made the following recommendations:
- (a) That the Constitution should make provisions prohibiting the sale of Grenadian Citizenship and passports under the Economic Citizenship Programme which demean and devalue Grenadian Citizenship.
  - (b) That all the names of persons obtaining Citizenship by registration and naturalization be published in the Government Gazette on a timely basis.
  - (c) That Grenada continues to recognize dual citizenship of its citizens.
  - (d) That Section 9(6) of the Citizenship Act be amended to provide for the person against whom “deprivation of citizenship” order is made to have



representation on the Committee of Inquiry appointed by the Minister to look into that order.

- (e) That the right to citizenship other than by birth and descent should be thoroughly reviewed with the aim of instituting stringent measures for obtaining such citizenship.
- (f) That the waiting period for making application for citizenship by marriage should not be less than three (3) years.

**112.** It is beyond dispute that citizenship is of central importance to an individual, giving him or her a sense of place or belonging, and, above all, bestowing on him or her all rights and privileges of equal citizenship, including the right to stand for and to hold public office. In view of this, the Drafting Committee was careful to pay scrupulous regard, in re-drafting this Chapter, to the recommendations of the Commission, particularly in regards to the circumstances under which an individual may acquire Grenadian citizenship and, also, the circumstances and conditions under which that citizenship may be taken away from him or her.

**113.** The Committee was also mindful of the language quoted by the Commission from the Report of the 1985 Constitution Review Commission, regarding the recognition of dual citizenship for Grenadians who have migrated to metropolitan countries, such as the United Kingdom, Canada, and the United States, to work and live, and have had to apply for citizenship in these countries. It bears emphasis that the Independence Constitution understandably makes references to persons who were citizens of the United Kingdom and its Colonies and of Commonwealth countries on the day (February 7<sup>th</sup> 1974) the Constitution came into force. Related to this is the question of a person's right to stand for and to hold public office in Grenada, where that person holds both Grenadian and Canadian citizenship, say.

**114.** In an effort to make for a fairer disposition among Grenadians holding dual citizenship and, equally important, in order not to deny very accomplished

Grenadians the opportunity to serve in public offices, including the Parliament of Grenada, the Committee supports Belize's position, referred to in the Report of the Review Commission. Belize would allow a citizen who holds dual citizenship to stand for and to hold public office.

115. This may be easily accomplished in our case by laying down the indispensable conditions by which a person holding dual citizenship may stand for and hold public office in Grenada. For example, that individual must hold dual citizenship with another constitutional democracy; that is say, a country with which Grenada shares the fundamental values of democratic governance: the 'original' right of the people to participate, 'in some nonfictively attributable sense', in the choice of the Fundamental Law for their governance; in the right to vote in openly contested elections for those persons who would occupy their representative-governmental offices; and, above all, a State that pays the highest regard to the Rule of Law and to the basic human rights of its citizenry; rights which are enforceable through the practice of judicial review by an independent judiciary. The Constitution may also state the number of years the returning national must be resident in Grenada before he or she may stand for and hold public office.
116. In light of the foregoing, and in order to have a language more easily comprehensible by the citizenry, the Committee has opted for a complete re-drafting of the Chapter on Citizenship.

## **LOCAL GOVERNMENT**

117. The Review Commission has given due recognition to the fact that a system of local government is one of the principal instruments for the development of deliberative and participatory democracy in a democratic society. It is an effective mechanism for encouraging the citizenry's active engagement in their local affairs and, also, in all matters of national and international importance. It is also a very effective means of holding parliamentary representatives, Cabinet Ministers, and

other government officials accountable for the stewardship of their offices. In the round, an effective system of local government can be a signal contribution to good democratic governance.

**118.** In recognition of the importance of a system of local government, the Commission has made the following recommendations:

- (a) That some form of Local Government be introduced in Grenada, Carriacou and Petite Martinique.
- (b) That the three pieces of legislation on Local Government passed in 1995 by the Parliament, namely the District Councils, Act #16 of 1995; the St. George's Borough, Act #19 of 1995; and the Carriacou and Petit Martinique County Council, Act #20 of 1995 be revisited with a view to having them promulgated and form the basis for the institution of a system of local government for Grenada.
- (c) That lengthy discussions be held with the citizens of Grenada, and in particular, with the residents of the areas in which it is proposed that Local Government be introduced prior to its introduction.
- (d) That a full scale public education programme on Local Government be instituted well in advance of its introduction.
- (e) That the re-establishment of Local Government in the State should be deeply entrenched in the Constitution.
- (f) That the Constitution provides for a Local Government Representative to sit in the Nation's Parliament, and be given the portfolio of Minister for Local Government Affairs.
- (g) That Section 107 of the Constitution makes it mandatory that there should be a Council for Carriacou and Petite Martinique; which Council shall be the principal organ of Local Government in those islands and such Council should have such membership and functions as Parliament may prescribe. Steps should be taken to implement this mandatory provision in the Constitution.

**119.** The Committee strongly endorses the view that a local government system is one of the principal vehicles through which ordinary citizens may have a voice in shaping the policies that affect their lives. It provides an appropriate forum through which citizens may air their grievances and engage one another in public deliberations and discussion on matters of both local and national concern. The question therefore remains as to the form, jurisdiction and scope of the local government system to be established. The Committee cautions that, having regard to the fact that a system of local government for Carricou and Petite Martinique and for Grenada as a whole would add substantially to the administrative cost of governance, we would be well advised to consider a system that comports with the level of economic development of the Country.

#### **MISCELLANEOUS**

**120.** This Chapter of the Constitution addresses a variety of issues, such as procedures for amending the Constitution and the Entrenched Provisions; and the Prerogative of Mercy, among others. The Review Commission has added the question of a constitutional Office of Ombudsman, and has accordingly recommended that the Constitution be amended to make provisions for the establishment of the Office of Ombudsman.

**121.** With regard to the amending of the Constitution, the Commission has given careful thought to the submissions received and has recommended that the constitutional procedures for amending the entrenched provisions of the Constitution should remain unaltered.

**122.** And regarding the Prerogative of Mercy, the Review Commission, after careful consideration of the submissions received on the matter and of the pertinent constitutional provisions, 'did not see any justification for recommending any amendment' to the Constitution.

**123.** It bears repeating that the Drafting Committee has given careful consideration to the recommendations of the Review Commission and has been as faithful as it possibly can in the re-drafting of the Constitution. However, regarding the Office of Ombudsman and, possibly, an Integrity Commission, the Committee is of the view that such matters be addressed by ordinary legislation since this would allow for easy amendment as the need arises.

## **FOREIGN AND INTERNATIONAL RELATIONS**

**124.** In an earlier Chapter of this text dealing with the Executive, we have noted that, among other things, it falls within the purview of the executive authority of the State to secure the nation's survival; represent it to the world; conduct its relations with foreign nations; and command its armed forces. In the British Westminster tradition, the conduct of international relations would have been treated as one of the prerogatives of the Crown.<sup>11</sup> However, having regard to the fact that, in reality, the Crown is lacking in day-to-day governmental authority, it is understood that the true executive body – the Cabinet – has succeeded to such prerogatives. Otherwise put, it is said that the Crown now exercises those prerogatives on the advice of the Cabinet. This therefore means that the Executive, the Cabinet, has the power to make treaties and enter into foreign relations with other nations without the necessity of parliamentary authority; that is to say, there is no legal requirement that Parliament give its approval to either the signing or the ratification of a treaty.

**125.** In Grenada and the rest of the Commonwealth Caribbean, following the Westminster model, it is the practice that the Government (the Cabinet) negotiates and concludes all treaty relations with other countries, sign international conventions and protocols, without the formal and legal approval of Parliament. However, it is also clearly understood that these treaties, conventions and protocols do not become part of the domestic law unless they are expressly enacted into local law by the Parliament. This has led, in some cases involving the

international human rights conventions, that the State has denied certain obligations to its own citizens under a treaty or convention, to which it is a signatory, on the grounds that it has not yet enacted the instrument in question into its domestic law.

- 126.** It is therefore fitting, that in this current exercise of re-drafting the Constitutional Text, we should give special regard to this issue in order to strengthen the participatory role of the Parliament and, by extension, that of the people of Grenada, in the conduct of our foreign and international relations. The positive result of a careful articulation of the methods and procedures for the making and ratification of treaties etc. in the Constitutional Text would help to remove all doubt as to the obligations that we have or have not undertaken. This can only redound to the benefit of the citizenry of Grenada.
- 127.** We have broadly stated the practice under the Westminster-style constitution. We now note briefly the US practice, which stands in sharp contrast to that of the British and that of many of the former colonies, which have remained parliamentary, rather than become presidential, democracies.

It should be noted at the outset that, under the US Constitution, the President is both head of government and head of State. It is therefore inevitable that the Presidency, the executive authority under the Constitution, would play a critical role in the making and ratification of treaties. The Constitution clearly empowers the President to make treaties, but only with ‘the advice and consent’ – the approval – of a two-thirds majority of the Senate. In sum, it is understood in American jurisprudence that a treaty negotiated and, with the consent of two-thirds of the Senators present, ratified by the President, must “be regarded in courts of justice as equivalent to an act of the legislature ...”<sup>12</sup>

**128.** This conclusion, as Professor Laurence Tribe has observed, is said to derive from the language of the supremacy clause of article VI, section 2 of the Constitution, which states:

This Constitution and the Laws of the United States, which shall be made in pursuance thereof; and all Treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land  
.....<sup>13</sup>

**129.** In sum, then, it is the understanding that a treaty, properly concluded, automatically becomes part of the domestic law of the United States. However, as Professor Tribe has observed, some treaties may be so drafted as to require congressional action before they have domestic legal entailments. A treaty which requires the appropriation of funds, for example, cannot be self-executing, given that subsequent congressional appropriation of funds is required.<sup>14</sup>

**130.** Further complications may also arise. For example, what happens when a conflict arises between a valid treaty and a valid act of Congress? Should the last expression of the sovereign will prevail? That is to say, should legislative enactments that conflict with prior treaty obligations be given effect by the Courts? Similarly, should a treaty be treated as superseding an earlier act of Congress?

**131.** Tribe emphasises that such situations hold only where the treaty is self-executing. For, where the treaty is not self-executing, the statute remains the law of the land until legislation is enacted implementing the treaty.<sup>15</sup> The earlier statute then becomes superseded by the later statute, rather than the treaty itself. Of course, ‘a treaty cannot change the Constitution or be held to be valid if it be in violation of that instrument.’<sup>16</sup>

**132.** It is conceded that a treaty is one of the principal instruments for effecting foreign policy goals and conducting international relations. Therefore, we are well

advised to pay careful attention to the way we treat with the treaty making power of Grenada in the new Constitutional Text. The question remains as to the model we should wish to follow.

- 133.** In the interest of good governance and to resile from the practice of Caribbean governments signing on to international treaties, conventions and protocols, etc., without the treaty obligations ever being enacted into domestic law, it is proposed that a procedure that requires a two-thirds vote of approval in the National Assembly, say, prior to the treaty being signed, would be essential. The question however remains whether, depending on the nature of the treaty, supplementary legislation might be required specifying the provisions of the treaty which would become part of the law of Grenada and which provisions would not. This is especially important in those circumstances where sections of a treaty might impinge on individual rights, or contravene existing laws.
- 134.** However, notwithstanding the major premise, recited above, that a treaty cannot change the Constitution or be held to be valid if it be in violation of that instrument, the question arises as to how we would treat with a conflict between a treaty and the Constitution, where, in the case of a special savings clause in the latter, say, an existing law may preserve a practice which is in violation of a critical fundamental right. In this instance, where it is the Constitution itself with the offending clause, should the treaty be struck down, notwithstanding that it is the one on the side of justice and not the Constitution? One plausible response is that the treaty remains valid and the conflict between the two instruments be resolved in adjudication. That is to say, the Constitution should be interpreted to fulfil its fundamental purpose as an instrument of justice.
- 135.** What has become patently obvious is that a special Chapter in the new Constitutional Text, sufficiently detailing all matters attending on the treaty making powers of the State, is required.



## **GRENADA'S ENTRY INTO POLITICAL UNION WITH OTHER JURISDICTIONS IN THE COMMONWEALTH CARIBBEAN**

- 136.** This issue of Grenada's entering into political union with other jurisdictions in the Commonwealth Caribbean must also be addressed, though not in the same Chapter on Foreign and International Relations. For such endeavor, whether to form a loose confederation of States or to form a new nation-State, a federal republic, say, is transformative in nature, in that, it results in a change in the sovereignty and, possibly, the character of the State. This is obviously way beyond the mere making of an international treaty or signing on to an international convention. Rather, it entails the reconstituting of the Nation-State into a different political entity. This is not to say that this transformation may not be achieved by a series of treaties; witness, for example, the 'creation' of the European Union, which is the result of a series of Treaties among the member-States. Another classic example in modern history has been the 'creation' of the State of Great Britain, through 'Acts of Union' between England and Scotland in 1707.
- 137.** What the foregoing underscores, we believe, is that Grenada could not, and should not, undertake to enter into any form of political union with other countries in the Commonwealth Caribbean, if that does not entail the full involvement of the Parliament and people of Grenada. In other words, one should think that political union in our parliamentary democracy would be initiated by the Executive (the Cabinet); however, the matter should be fully debated in Parliament and approved by, at least, a two-thirds majority vote in the National Assembly and, possibly, by a two-thirds majority of the popular vote in a public referendum, before there can be any union with other jurisdictions.
- 138.** The foregoing would seem to be the only plausible way given that political union would likely have far-reaching implications for issues of citizenship, governance, sovereignty, etc.

## CONCLUSION

- 139.** In summary, we hereby reaffirm that this enterprise upon which the sovereign people of Grenada, Carriacou and Petite Martinique are embarked is nothing less than a re-constitution of their polity, in order to strengthen the foundational terms of their political order and, above all, to give to their Fundamental Law, once and for all, in the words of the poet, ‘a local habitation and a name’. For, we are ever mindful of the fact that the Independence Constitution, which we have received from Britain, and under which we have existed these past thirty-plus years, will forever bear the taint of political illegitimacy, since we were not the *authors* of that Text. Now, in an act of self-definition, we undertake this solemn task of re-writing our Fundamental Law and re-constituting our polity, in order to give full expression to our sovereignty as a politically independent sovereign nation.
- 140.** Put differently, we have extended the meaning of constitution reform to embrace the idea of constitutional re-founding through our collective engagement in an inscriptive politics, whereby we have sought to determine for ourselves the changes we should wish to make to both text and polity, and, in particular, to ensure that the document that has emerged at the end of that process would bear our *name* as the authoritative expression of our collective *voice*. And, further, to remove any element of doubt in this regard, we have determined that this document must be *enacted* and *signed* into *law* by the people of Grenada, Carriacou and Petite Martinique in a popular referendum. For, with each ballot cast in favour of the new Constitutional Text, the citizen would indeed be appending, metaphorically speaking, his or her signature to the Text. Then, in the final act of inscription, the Parliament of Grenada will convene as the duly elected Constituent Assembly of the People to lend, in their behalf, whatever further legal formalities may be required to make the Constitutional Text the Fundamental Law.

**141.** The process described is an expression of the central republican idea that sovereignty rests in the great body of the people and, in the exercise of their sovereign power, the people may choose to re-write a constitution of their choice and to *enact* that constitution into *law* in a popular referendum. It is this republican idea that is invoked here, in this enterprise of constitution reform, to argue for the replacement of the entire constitutional document with a new one. This is to underscore the fact that constitutional change, in this instance, is distinct from the formal amendment process spelt out in the Independence Constitution. To repeat, then, the legislative process entailed in this exercise is secondary, in that the Parliament sits, not in its ordinary legislative capacity, but, rather, as the duly elected Constituent Assembly, acting on behalf of the sovereign people, to lend the requisite legal formalities to what they (the people) have already sanctioned in the public referendum.

**142.** We have sought to give formal expression to the republican idea of the Constitution in the re-drafted Preamble in the new Constitutional Text:

We the People of Grenada, Carriacou and Petite Martinique, with the assurance of God's Blessings, and in this solemn exercise of our Sovereign Constituent Power, do hereby re-enact and ordain this Basic Law as the Constitution of the Commonwealth of Grenada, in order to secure for ourselves and our Posterity, the Rights, Liberties and Freedoms that are constitutive of the moral ideal of Human Dignity; to provide for and to promote good democratic governance of our Tri-Island State; and to provide for the Common Good and for the General Welfare of all our People.

## ENDNOTES

- <sup>1</sup> Frank Michelman, 'Constitutional Authorship', in *Constitutionalism : Philosophical Foundations* 64 (Larry Alexander ed. 1998).
- <sup>2</sup> Jed Rubenfeld, *Freedom and Time : A Theory of Constitutional Government* 169 (2001).
- <sup>3</sup> David A.J. Richards, *Foundations of American Constitutionalism* 92 (1989).
- <sup>4</sup> Susan W. Tiefenbrun, 'On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh' 11 *Cardozo Studies in Law and Literature* 35, 38 (1999).
- <sup>5</sup> See Judith A. Best, 'The Presidency and the Executive Power' in *The Framing and Ratification of the Constitution* 334 (L.W. Levy & D.J. Mahoney eds. 1987).
- <sup>6</sup> *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).
- <sup>7</sup> Judith A. Best, *supra* note 5, at 213.
- <sup>8</sup> See G.W. Carey, *The Federalist* 132 (1989).
- <sup>9</sup> Erwin Chemerinsky, *Interpreting the Constitution* 40 (1987).
- <sup>10</sup> Maurice Grinton, 'Judicial Independence in the Post-Independence Caribbean : Ethic or Mere Principle?' 14 *W.I.L.J.* 1, 4 (1990).
- <sup>11</sup> See Peter Hogg, *Constitutional Law of Canada* (3<sup>rd</sup> ed. 1992).
- <sup>12</sup> Laurence H. Tribe, *American Constitutional Law* 225 (2<sup>nd</sup> ed. 1988).
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.* at 226.
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.*