

Constitutional Review in the Caribbean

Avril Anande Trotman-Joseph*

Abstract

Guyana, South America, is a former colony of Britain and the only English-speaking country in South America, but has more in common with its English-speaking Caribbean neighbours. Constitutional reform and resulting constitutional amendments were precipitated in 1999-2000 by civil unrest following national elections and dissatisfaction by the major opposition with the outcome of an election characterized by ethnic differences between respective supporters of parties backed by followers of traditionally Indian, African and Amerindian origin. This process was a brokered effort to ameliorate the national dissatisfaction and an opportunity for civil society representatives and political representatives of the unicameral House of Parliament to work together in recommending electoral and constitutional reform. The outcome was the radical reform and modernization of the constitutional entrenchment of the modern concepts of international human rights law. In this regard Guyana is ahead of the other sister nations of the Caribbean, CARICOM grouping in terms of constitutional advancements. However, the political will to realize far-reaching electoral and governance reforms, as well as the effective implementation of the entrenched human rights reforms, still lags behind, despite the amendment of the constitution, the appointment of several commissions and the establishment of a parliamentary oversight committee tasked with continuous constitution review.

A. Introduction

Constitutional review and reform has been prevalent in the English speaking Caribbean in the last decade and therefore very topical among Caribbean politicians, legal jurists and civic minded citizens alike. These processes in the region, along with the onset of the Caricom Single Market and Economy and the corollary Caribbean Court of Justice, have reminded many Caribbean lawyers that although constitutional law is a staple of the curriculum of every university law degree, it is an area of law often left on the back burner by the busy private attorney, except perhaps where needed for an esoteric point in the criminal court on the rights of the accused to a speedy trial, or by way of the occasional challenge of the decision of a magistrate, judge, public officer or Minister by way of the prerogative writ for judicial review of administrative/judicial action. The more weighty legal chal-

* Avril Anande Trotman-Joseph is presently a law partner with the firm of Joseph & Joseph in Saint George's, Grenada. She is an OAS and UNIFEM Consultant in the Caribbean; she serves on the Board of the Caribbean Institute of Leadership and as Deputy Chairperson of Grenada's Integrity and Anti Corruption Commission.

lenges were left to the senior lawyers with a predilection to lofty constitutional matters and the hard working state counsel, considered learned in defending the actions of the state's Ministers, officials and public authorities when submitted to the scrutiny of judicial review. The ongoing constitution reviews present a window of opportunity to Caribbean States which usually come on an average of every twenty years.

The following discourse will look particularly at the recently concluded constitution review process of Guyana, with some reference to the ongoing processes of constitutional review in Antigua and Barbuda, Grenada, passing reference to constitutional reform in Barbados and recent constitutional developments in Trinidad and Tobago. However, I trust that this discussion of some of the dynamics of constitutional review would be helpful not only to jurists but also to persons who are still presently engaged in some capacity in the process of constitution reform or review.

B. Constitutional Reform in Guyana

The formation of the Constitution Reform Commission of Guyana had its genesis in the 'Herdmanston Accord' which was brokered by CARICOM, when an agreement was reached by the politicians of the two major Guyanese parliamentary parties following civil unrest in Guyana in the aftermath of the country's 1998 general elections. This agreement comprised a menu of measures including an abridged term of office for the ruling party and the commencement of constitutional reform.

As a result of this process, the writer was elected by the national women's organization as their representative to serve on the Constitution Reform Commission of Guyana in 2000. Indeed it was a humbling experience and it had a profound impact on both my personal and professional life and thinking. Although I had spent a lot of time educating women on their rights and protections afforded by the law, and had explored the advocacy of their socio-economic and socio-political rights, prior to this I had only spoken to their constitutional rights in general terms.

Therefore, it was with some trepidation but also with eager excitement that I entered the arena of constitutional and political dialogue in this historic 'Herdmanston' experiment of politicians and civil society representatives working together on reviewing the relevance of the nation's constitutional arrangements.

C. The Guyana Constitution Reform Commission 2000

During the reform process, I indeed learned more of the relevance of women's rights, but also of the applicability of quotas, affirmative action and the application of tokenism with regard to women in parliament. I came to understand that empowerment was a twofold process, one of educating women and also finding

Avril Anande Trotman-Joseph

the platforms for their meritorious inclusion in public offices, national commissions, boards and parliament itself, and the mainstreaming of women's rights in the context of gender equity and equal opportunity at the level of the state's operations.

The advocacy focused on the context that although women were entitled to all the same constitutional guarantees as their male counterparts, the reality was that it was determined in preparation for the Commission's work, that women were less knowledgeable about their rights, less empowered and definitely underrepresented in the decision making of the State and private sectors. This was the context within which representations were made that although women made up a little over half of the nation's population, they remained largely defined as a vulnerable group requiring the inclusion of their rights premised on clear principles of protection from discrimination and affirmative action.

I. Advocating for Women's Rights

It was interesting that many of the other civil society representatives on the commission including the representative of the Hindu religion, the farmer's representative, the Bar Association, and many of the politicians of the two major parliamentary parties were lawyers. The writer, had never before experienced firsthand the semantics and manipulative approaches of politicians and parliamentarians. It was challenging to convince the other 19 members of the commission that although Guyana had some non justiciable provisions contained in Chapter two of the Constitution of the Cooperative Republic of Guyana, which provided for the equal rights of women in society and many admirable pieces of legislation which favoured women's rights already, including the Equal Rights Act, the Matrimonial Property Act, the Family Dependents Act, the Married Women's Property Act, the Domestic Violence Act and the controversial Medical Termination of Pregnancy Act, these rights should be included in a proposed amended constitution as inalienable, justiciable and enforceable rights.

From day one I began my advocacy with Hillary Clinton's famous quote: "Human rights are women's rights and women's rights are human rights".

International and regional conventions and guidelines were relied upon to highlight the importance and relevance of women and gender rights to modern constitutional thinking. These included: The Universal Declaration of Human Rights, the Convention on the Elimination Against Discrimination Against Women, International Labour Organisation Conventions with respect to women's working conditions and employment, the Caricom Charter for Civil rights, the United Nations Beijing Platform for Action, and the Belem do Paro convention, among others.

Indeed, as anticipated, the first argument faced was that Guyana already had many pieces of legislation which were already favorable to women's rights. I maintained that these were not entrenched at the level of the constitution and that there were, in fact, many issues including electoral issues with regard to the

representation of women in parliament that needed to be addressed by the constitution of a modern state.

In fact, the said Chapter Two of the 1980 Constitution of the Cooperative Republic of Guyana, did make many rhetorical declarations which were lofty and admirable with regard to women's rights, but unenforceable by the courts of law. Many submissions to the Commission by women's organizations addressed this and suggestions were made that some of these provisions should be declared guiding principles which set out the guidelines which the state should achieve, while others felt that they should all be incorporated into the Bill of Rights or the Fundamental Rights provisions of the Constitution. The National Commission for Women, for example, submitted that the concept of women in decision making and women's reproductive rights should be included as constitutional provisions and rights. Further, they submitted that a woman's right to equal pay for equal work, the provision for non discrimination, should be amended to include discrimination on the basis of one's sex and/or gender and that these should be included as justiciable provisions and fundamental rights.

It was also suggested that maternity and paternity leave, and protection against gender violence should be included. The rationale was that the ordinary legislation could be changed much more easily than if women's rights were enshrined in constitutional provisions, especially those that conferred rights which required a two thirds majority and in some instances a referendum, to make changes to them.

Another important platform for amendment of the constitution from the women's rights perspective was the need to change the 'chauvinistic language contained in the existing constitution. A powerful quote relied on in this regard was the extract from Thornton's article in the 1988 *Commonwealth Law Bulletin*:

Language is a guide to social reality. It powerfully conditions all thinking about social problems and processes. For this reason it is argued that language that excludes females or gives unequal treatment to males and females contributes to the perpetuation of a society in which women are regarded by many men and women as lesser beings. Such language is referred to as sexist language.

I also proposed that the simple language approach to the drafting of modern constitutions should be adopted, so that the average person, even children, could understand what is written about their constitutional rights.

Another controversial topic I was expected to introduce was the concept of the 60:40 ratios with regard to women's involvement in national decision making. Knowing the potential controversy that this concept could raise, I laid the ground work in the course of presentations to the Commission that women's representation in parliament should be proportionate to the ratio of their composition of the population. In Guyana this was over 50% of the population.

Avril Anande Trotman-Joseph

There was one angry outburst from a politically-appointed male commissioner, who anticipated this submission and began to attack me on the premise that he thought that I had already put it on the table. In the end it was another male commissioner who raised this issue and I was able to address this concept in the context of Guyana's ratification of the Beijing Platform for Action.

In the course of my advocacy, I had to achieve a balance between being strident and feminine, but in a way that ensured that my advocacy was not lost in aggression, nor advocated in a way that I was viewed as indeed being the weaker sex in this academic and politically charged exercise.

During consultations for public hearings I also had to anticipate the cultural and religious norms and perceptions about women's roles in society and at home, and address these so that men were not challenged with the discourse, and women would be comfortable and want to identify with the concepts advanced.

These hearings revealed that women thought that their rights were limited to issues such as maintenance of their children or alimony, often unaware of the existing legislation protecting their rights. This process was one which took me places I had never been before, for example the Waakenaam and Leguan islands on the Essequibo River. Also the Commission's work took me into the Headquarters of the parliamentary parties in an effort to convince them that the importance of women's rights was significant enough to be included in justiciable provisions of the Supreme law of Guyana. During this time, I came to understand the importance of multimedia outreach and going to the people in their habitats as an important aspect of the strategy required for effective advocacy.

Fortunately, the sponsorship by the NDI inter alia of a consultant to the Commission with regard to women's rights, Professor Kathleen Mahoney, also helped raise my own awareness and that of the members of the Commission on the importance of women's rights at the level of the constitution. Funding was also given to keep me networked with a large number of women leaders and advocates to help me achieve my goal.

II. Advocating for Children's Rights

While on the Commission I ended up being tasked with the responsibility of advocating for children's rights, much to the despair of some of women activists who did not want women's rights to be lumped with the reproductive issues of children's rights. But it was the national reporting on this area of advocacy that resulted in UNICEF asking me to advise on lobbying parliament to ensure that children's rights were included in the amended constitution. The principles applied in this area of advocacy, were very similar to women's rights. In the end the rights of children were comprehensively included in the amendments to the constitution.

However, it is my thesis that at the end of the present round of review and reform in Guyana although on the one hand the Parliament of Guyana showed a

commitment to its citizens' social, economic and human rights and freedoms, they sacrificed another opportunity for real constitutional changes which may lead to a more inclusive political system of governance in an ethnically diverse and often politically divided society and they avoided dealing with these real issues which required constitutional re-engineering. Perhaps this conservative approach may be best described as a holding pattern, but it did not hold true to many of the platforms of parliamentary parties whose manifestos promised to engage in comprehensive constitutional reforms of the political and electoral systems, once they were in power or parliament. Fortunately, the resulting amendments put in place a system of ongoing recommendations on the constitution by a special Parliamentary Select Committee, so that review and reform would not have to wait for another decade or two to be jumpstarted again.

However, the appointment of constitutionally appointed committees on women, children, human rights, racial equality and other issues has been a positive outcome of this process although their implementation was not realized until some time after the process had been completed. Legislation was also passed to address the requirement that the lists of all parties contesting national elections must contain at least one third women. Failure to do this resulted in some political parties being disqualified from participation in the last general elections. Also, legislation was passed to allow for the reception of international conventions into domestic legislation.

D. Sharing the Guyana Experience

I have since participated in an OAS sponsored program and lectured to women's representatives in Grenada, St Kitts and Antigua and Barbuda on this opportunity to entrench their rights at the constitutional level.

The women of Antigua lobbied vigorously in this regard, as well as advocated to encourage the election of more women to parliament on an island where no woman has ever been elected to parliament. Their efforts bore fruit with the election of the first elected woman in government and government also appointed a woman as the current President of the Senate among other female senators and a female Governor General.

I. Constitution Reform in Grenada

In Grenada, the civil society groups including the Human Rights Associations made submissions to the Constitution Review Commission in 2003. However the young people of the Coalition on the Rights of the Child made a landmark presentation, themselves requesting that children's rights be included in proposed amendments to the constitution of Grenada. They demanded that the rights of the child be taken into account in the constitutional review process. Uniquely the presentation was made by children on their own behalf giving true meaning to the Convention on the Rights of the Child with respect to provisions to foster the expression of the child. They relied on Article 12 of the said Convention ratified

Avril Anande Trotman-Joseph

by Grenada, which provided that in effect children have a right to be consulted on all national decisions which affect them. They requested the inclusion of a Chapter on Children in the Constitution and highlighted the fact that the existing Constitution does not regard children as specifically important. In this regard, they expressed concerns with the language of the constitution as not being child friendly and further that the language was not gender friendly. They relied on the constitutions of South Africa, Malawi, Brazil, Guyana and Mozambique which contain provisions with respect to children's rights. Further they made the case for the inclusion of a provision on the sanctity of the family, juvenile rights, free primary to secondary education, health care for children up to ten years old, and subsidized care for children up to eighteen. They requested a children's Ombudsman be appointed to safeguard their rights.

II. Some Challenges of Regional Constitution Review Commissions

Persons who serve on the constitution review commissions must be prepared to spend long hours grappling with serious political, national security and economic issues and should be carefully chosen for their areas of expertise or be representative of key stakeholder groups in society, less they be ineffective.

Controversial and or evolving political, electoral and fundamental rights issues should be addressed. For example, the issue of the inclusion of provisions against discrimination based on sexual orientation, age and gender. The sexual orientation issue is one which tourist based Caribbean states will have to contend with, as this year USD 8.8 billion of the American tourist dollars spent was by gays and lesbians who have started a boycott of some of the Caribbean islands as a result of homophobia allegedly aimed at these gay tourists on some Caribbean islands.

III. Political Will, Insufficient Public Education and Resulting Lack of Public Interest

States contemplating constitution reform must have a serious approach to this exercise and go beyond paying lip service to this process. It should be treated as an important national project with a strategy which accounts for timelines and specific outputs and feedback expected. There must be a sufficient allocation of funds for the requirements of such process. There must be the political will and the opinions of the citizenry must be garnered and encouraged during public hearings and multimedia feedback.

IV. Lessons Learnt During the Guyanese Constitution's Review Experience

Commissions' Secretariats must be equipped to carry out extensive research on existing constitutions and constitutional learning. This will require legal counsel assigned to the commission and the appropriate equipment and technology for internet and data base research.

Umbrella civil society organizations, gender affairs departments, community and religious-based organizations and media et al, should be encouraged to participate and be educated through the wide distribution of Constitutions, summaries and appropriate orientation to allow the average citizen to participate in the process.

In Guyana much effort was made to sensitize the public about the constitution and the areas in need of review, with public relation firms being hired for a multi-media approach to encourage public participation. This approach necessitated the Commission reviewing the proposals of several public relations companies and discussing indigenous ways of reaching citizens of rural communities. Each of Guyana's ten regions had an opportunity to address their constitutional concerns. Commissioners were on nightly call-in television and radio programs for several months, educating national viewers on the Constitution and relevant issues, as well as taking their questions.

A website was helpful in reaching Guyanese emigrants, requesting and receiving their submissions. A secretariat was staffed by professionals, whilst writers and editors were hired to complete the final reports intended for transmission to Parliament for their deliberation.

Existing Conventions and treaties ratified by all or some of the states in the Caricom region such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the American Convention of Human Rights, the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child and the Caricom Charter of Civil Rights, can all be relied upon to make the case for the entrenchment of rights at the level of the constitution. The topical Millennium Goals should also be added to this list.

Creating strategic alliances is very important to this process. Some alliances may be temporary or partial with other interest groups, but must be pursued by the advocate or representative of a particular interest group represented on the Commission.

Networking by NGOs and civil society groups with other local, regional and international groups is advised. For example, the women of Antigua and Barbuda, St Kitts and Nevis and Guyana have begun such a partnership with respect to constitutional reform and political empowerment.

The structured and strategic lobbying of parliament by stakeholders and interest groups is invaluable in realizing constitutional change and represents a modern approach and expansion to the concept of governance, including the notion of inclusiveness.

The importance of following up and passing the baton was a lesson learnt by me. By agreeing to appropriate recommendations for editors and writers who were to prepare the final report, I ensured that the report sent to Parliament was accurate, gender neutral and gender friendly in its presentation. A female attorney was also part of the legal drafting team to finalize constitutional amendments and women's groups and activists kept up the lobby on Parliament long after I had signed off on the report of the Commission which was transmitted to parliament. This approach is highly recommended to advocacy groups during the constitutional reform process.

Avril Anande Trotman-Joseph

A rights-based approach to constitutional reform also opens up other potential sources of funding for the process including such donors as CIDA, OAS, NDI, UNICEF and UNDP for example, who are concerned with entrenching the rights of various stakeholders including women, children and indigenous people, as a vehicle to good governance, empowerment and economic development.

V. What Has the Constitutional Reform of Guyana Delivered for the Vulnerable Groups of Society Five Years Later?

There is an absence of data signifying the real benefits. But the most immediate was the amendment to the Elections Act requiring the lists of parties to include one third of the persons to be women on their list of persons to contest in national and regional elections.

There have been no class action suits or landmark legal actions claiming discrimination on the grounds of race, gender or challenge to the failure to include sexual orientation as a class of persons who are not oriented to mainstream sexual behaviour in the courts.

However, traditionally the Guyanese courts have made many pronouncements on constitutional rights in the area of labour rights and the right to freedom of association, for example, and have never shied away from making awards of damages when citizens have sought redress. Perhaps this has set the tone. Maybe the citizens are content with the existing constitutionally appointed ombudsman, the Ethnic Relations Commission and other commissions on women's and human rights which are being implemented to ensure that all of these rights and protections are recognized and legislation is revised where necessary.

The NGO and civil society community have been inspired by these constitutional rights-based advances and advocacy groups such as the Guyana Human Rights Association, the Guyana Bar Association, the Guyana Association of Women Lawyers, as well as organizations advocating for the East Indian and Afro Guyanese ethnic groups such as GIHA, ACCDA and the Amerindian Peoples Association, for example, have been invoking the constitutional standards and expectations in their advocacy, in the areas of the observance of the rule of law, national security and land rights.

E. Conclusion

It is opined that a rights-based approach to constitutional review/reform, can pique the interest of the average citizen. It is more media friendly and can therefore encourage the media to grasp the notion of the constitution through the human rights issues, for example, and once they understand these underlying principles, they can begin to grasp the more complex issues of political and economic rights and other constitutional arrangements.

Concerns with a patriarchal approach to legislative drafting of the constitutions and legislation in our region should be addressed. I remain convinced that our legislative language should be gender neutral. For example, why should the first female Chancellor in Guyana, a country where just over half of its population are women, be referred to by the constitution as 'he'? In most of our Caribbean states, a female Minister of Labour, for example, is expected to exercise 'his' discretion.

The time has come for the constitutional re-engineering of the Westminster constitutions of this region, which are becoming dated in the face of the onset of a Caricom Single Market and Economy and the implementation of the correlated Caribbean Court of Justice and globalization which has impacted the socio-economic rights of Caribbean citizens.

Guyana has always been constitutionally adventurous since its 1980 constitution declared that Guyana was a co-operative Republic with an Executive President as head of state, replacing the traditional representative of the British monarch as head of state. More recently Barbados began a national discourse with a view to adopting a Republican constitutional arrangement. Trinidad and Tobago which had already also adopted a more limited Republican constitutional arrangement with a ceremonial President, and recently, its previous Prime Minister Patrick Manning has placed on the national agenda the fact that his government now wishes to adopt a constitutionally entrenched Executive President to his country's structure of government, similar to that of Guyana. He was quoted in the Curtis Williams story contained in the 30 October 2005 edition of the Sunday Guardian as saying, "Trinidad and Tobago must have an executive President, and is calling on the PNM to work hard towards winning a constitutional majority to effect the change."

Constitutional thinkers can only speculate as to whether the real motive is to centralize power or to aspire to the constitutional power of the dominant US, or admiration for their South American neighbours who have adopted a Presidential system. However, since the PNM lost the last general elections in Trinidad and Tobago in 2010, it remains to be seen what approach the incumbent People's Partnership Government will adopt with regard to constitutional reform.

More recently the holding of Caricom sponsored meetings of Heads of government and leaders of opposition parties in Castries, St Lucia foreshadows a creeping 'consciousness' that the existing constitutional arrangements may be inimical to the evolving and inclusive standards of good governance in the region and the need for more inclusive forms of governance.

Taking a hard look at the effectiveness of the Westminster Constitutions adopted by the Commonwealth Caribbean states, it may be mooted that the winner takes all system is a de facto system of 'tyranny of the majority'. But for all this, no submissions are being made en masse to regional constitution review commissions that would require that the system be fundamentally changed.

Avril Anande Trotman-Joseph

It is the considered opinion of the writer that politicians often do not want to seriously address the limitations of the existing regional constitutions as they all hope to seize power and enjoy the existing constitutional privileges at the expense of the opposition. It is only when an incumbent political party is out of power that these constitutional privileges are seen as deficiencies and they begin to agitate for constitutional reform. Alternatively, if the desire is for more state control and executive power, the incumbent Government may take the lead on constitutional reform with a view towards achieving this.