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CONSTITUTIONAL CHANGE IN THE COMMONWEALTH CARIBBEAN

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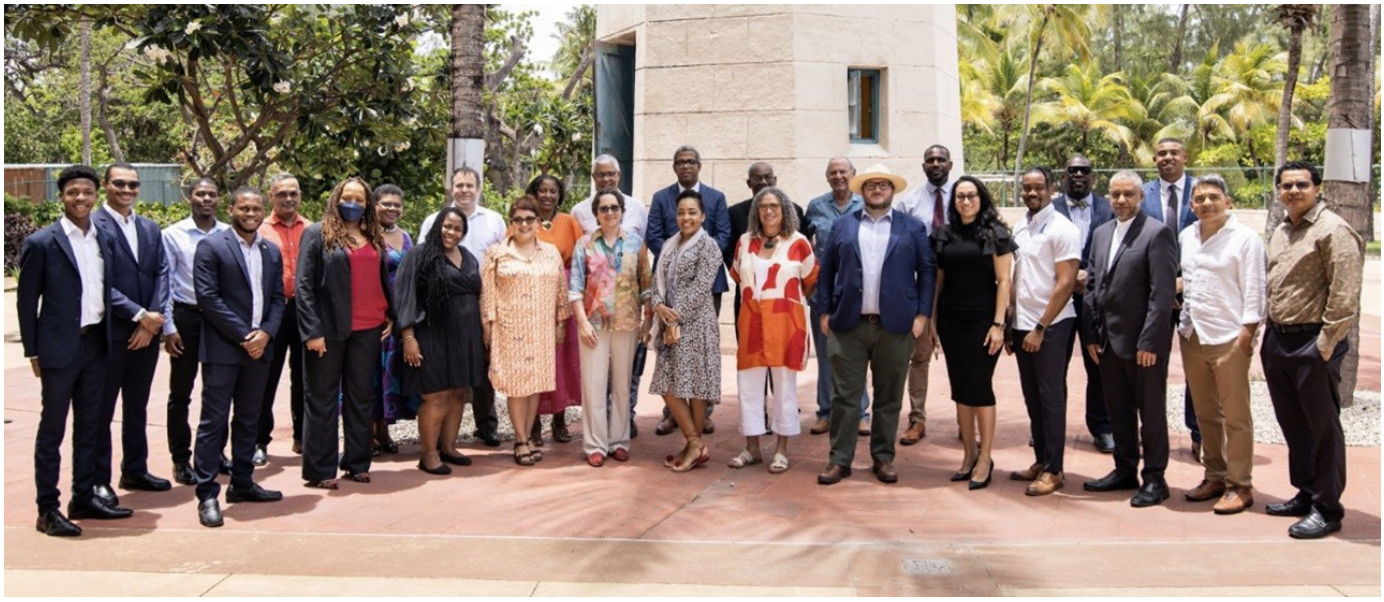
A list of the conference attendees is included for reference in Annex A. It is not possible to thank personally everyone who was involved in making the conference a success, but special thanks are due to Professor Cynthia Barrow-Giles, of UWI, for her assistance in leading and shaping the conference, and to Professor Tracy Robinson for her feedback and review of earlier drafts of this report. The conference would not have been possible without the administrative and logistical support of Camila da Rocha and Mags Peterken.



Group photo of the participants in Bridgetown Conference, June 2023, Bridgetown, Barbados. For attendance list, see p. 89.

Abbreviations

CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
ECHR	European Convention on Human Rights
FPTP	first-past-the-post
JCPC	Judicial Committee of the Privy Council
MP	Member of Parliament
UNDP	United Nations Development Programme
UWI	University of the West Indies

Contents

EXECUTIVE SUMMARY

The Commonwealth Caribbean region is characterized by relatively stable and peaceful democracies. Most countries in the region have been continuously democratic since independence. Serious constitutional breakdown (coups, authoritarian rule, civil war, etc.) has been extremely rare. Where interruptions to democracy have occurred, they have usually been brief, and democracy has been swiftly restored.

Nevertheless, the consensus at the Bridgetown Conference, and among the academic literature, is that the quality of democracy in the region is relatively low. Westminster Export Model constitutions are old-fashioned. Most bills of rights in the region are full of exceptions and often exclude newer generations of rights. These constitutions have contributed to a 'hyper-majoritarian' form of democracy characterized by exclusive two-party politics, top-down executive dominance, weak Parliaments, and few checks and balances.

Constitutional change has often been, and remains, on the agenda across the region. We are currently witnessing another round of intense constitutional review in several countries. However, most of the constitutions in the region are procedurally hard to amend, and such reviews have not, historically, led to major constitutional change. Complacency, conservatism and inertia, as well as broad public satisfaction with the status quo, have limited the scope of constitutional reform.

That is not to say all the constitutions in the region have been static, but that where constitutional reform has occurred, it has usually (with some exceptions, such as Guyana in 1980) been incremental rather than transformational. Prospects for constitutional change in the region should therefore be seen in terms of tweaks and improvements to the Westminster Model, rather than its rejection and replacement with a different, radically innovative, form of government.

In principle, there is a range of institutional reforms available to moderate the hyper-majoritarian, executive-dominant features of democracy in the Caribbean, to broaden the basis of representation, improve public participation and accountability, to limit corruption and clientelism and, overall, to improve the quality of democracy.

The menu of design choices is extensive, including such reforms as the following:

- reforming the electoral system for the lower House to increase inclusivity and to prevent clean-sweep elections;
- regulating the influence of money in politics and reducing clientelism;
- sharing control of the Order Paper;
- strengthening parliamentary committees;
- ensuring Parliament sits regularly;
- equipping and resourcing parliamentary leadership, including ensuring the impartiality of the Speaker;
- limiting the size of the 'payroll vote' (that is, the maximum number of parliamentarians who can hold ministerial office at any time);
- relaxing anti-defection provisions where these exist;
- allowing the extra-parliamentary appointment of Ministers;
- introducing fixed-term Parliaments (removing the Prime Minister's discretion on dissolution);
- introducing Prime Ministerial term limits;
- reforming the Senate;
- transitioning to a parliamentary republic (in those countries which still have a monarchy);
- making constitutional provision for local democracy;
- strengthening fourth-branch institutions;
- extending the scope of rights, including socio-economic rights;
- improving the effectiveness of the protection of rights; and

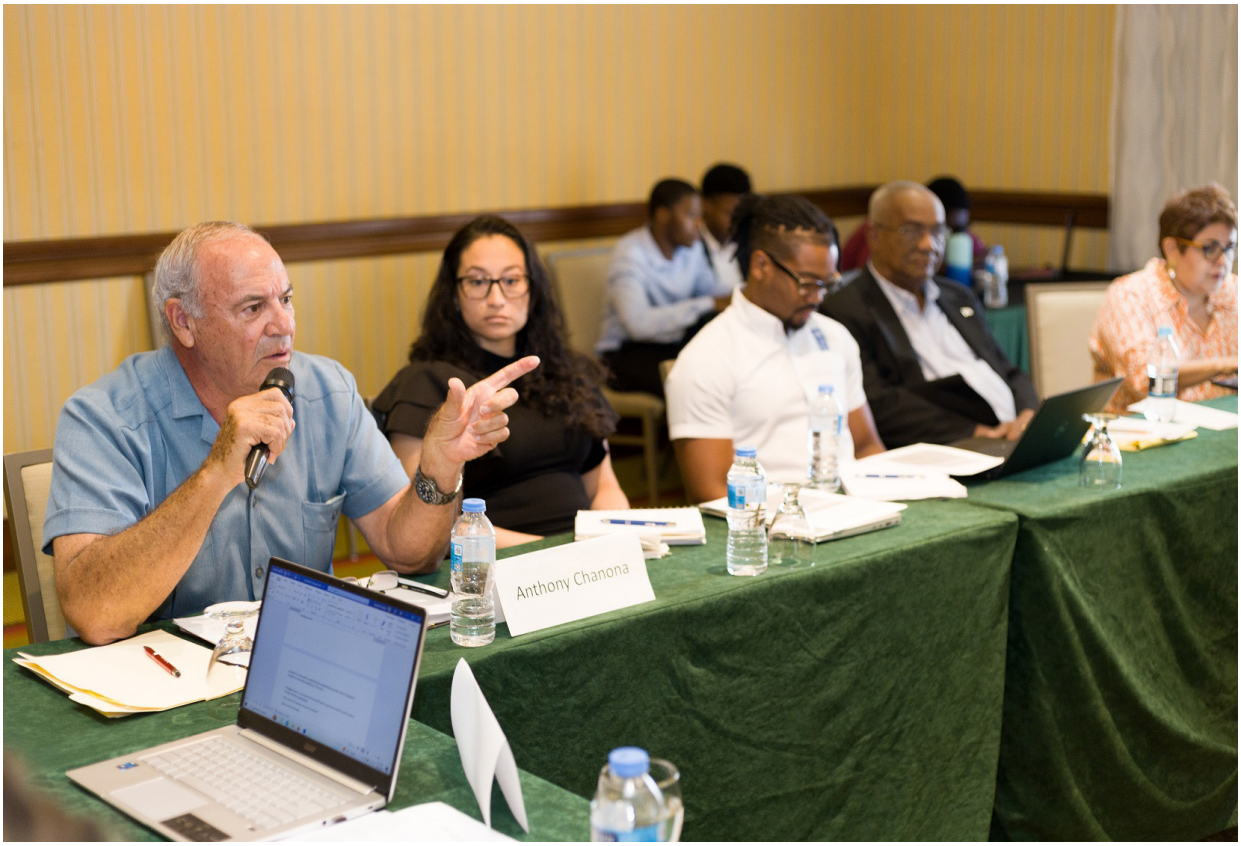
- reforming the judiciary, including transitioning to the Caribbean Court of Justice.

The difficulties—and hence the challenges for would-be reformers in the region—lie partly in the procedural obstacles that would need to be overcome, especially in those countries where constitutional change needs not only a super-majority in Parliament, but also approval in a referendum.

The political dynamics of constitutional change are an even greater obstacle: in countries with two-party politics and dominant executives, many structural reforms would either limit the power of the winning party, or open up the field to other voices, currently under-represented. Those in power under existing rules will invariably be sceptical of such changes, unless they have no option but to accept them. So far, the generally adequate functioning of institutions in the region has meant that a crisis, capable of moving powerful actors to accept such reforms, had not emerged.

At the same time, intense political competition between the two dominant parties, and a tradition of winner-takes-all politics, makes the sort of cooperative approach needed to bring about constitutional change very difficult to achieve.

These political difficulties of 'slaying the Westmonster' are discussed in more detail in section 1.3 of the report.



Anthony Chamona, Chair of the Belize People's Constitutional Commission.

INTRODUCTION

CONTEXT AND SCOPE

The Commonwealth Caribbean is a region consisting of 12 independent countries (Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago) and 6 British Overseas Territories (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos Islands). The Bridgetown Conference on Constitutional Change in the Commonwealth Caribbean, on which this report is based, focused exclusively on the independent countries, and not the British Overseas Territories. Discussion of British Overseas Territories is therefore omitted from this report, although it is noted in passing that some British Overseas Territories have seen considerable constitutional innovation in recent years and that these developments may be worthy of a separate study in due course.

From a constitutional and political perspective, these countries have important similarities. Shaped by a shared history of British colonialism, they have interlocking pasts, leaving them with common legacies of law, constitutional design, culture and political institutions.

Each of these countries is unique. Some (such as Saint Kitts and Nevis) have populations numbered in the tens of thousands; others (such as Jamaica), in the millions—although all but two would be classified as small states, and most have populations under half a million. By World Bank classifications, most are upper-middle-income countries, but some—such as the Bahamas—are high-income. Most are island states, but two (Belize and Guyana) are on the mainland of the Americas.

Nevertheless, from a constitutional and political perspective, these countries have important similarities. Shaped by a shared history of British colonialism, they have interlocking pasts, leaving them with common legacies of law, constitutional design, culture and political institutions. They remain closely intertwined, sharing intimate ties of language, music, popular culture, sport, higher education, religion and law, as well as important economic links through the Caribbean Community (CARICOM) and interregional migration. Within the legal and political elites of these countries, there is a particularly

close relationship thanks to the influence of the University of the West Indies and exposure to the jurisdiction of courts covering multiple countries (the Caribbean Court of Justice [CCJ], the Eastern Caribbean Supreme Court, and the Judicial Committee of the Privy Council [JCPC]).

These commonalities naturally encourage comparison, collaboration and the sharing of experiences, as people from across the region tackle similar constitutional issues. For these reasons non-anglophone countries in the Caribbean region—including present or former Dutch, French or Spanish possessions—are excluded from this report.

The Commonwealth Caribbean countries have not experienced many major constitutional crises of the sort that leads to coups, insurrections and foreign intervention. With the partial exceptions of Grenada and Guyana, all the independent countries of the Commonwealth have maintained an unbroken record of formal democracy since independence. Competitive elections have been held with constitutional regularity. The basic civil liberties essential to a democratic system have, for the most part, been maintained; opposition parties have been able to organize and campaign without direct oppression. Crucially, defeated Governments, on losing elections, have peacefully left office. These countries have therefore been spared the authoritarianism, state failure, chaos, bloodshed and catastrophic misgovernance that has afflicted many former British colonies elsewhere (Meredith 2005).

That said, it is all a matter of degree. There are questions about the health and quality of democracy in the region. At independence, the media landscape across the Commonwealth Caribbean was dominated by Government broadcasters with a weak commitment to political impartiality (White 1976). Public order legislation and emergency legislation have been used against political rivals. In some of the Leeward Islands, in particular, the dominant parties at independence used a variety of strategies to obstruct the opposition and keep themselves in power (DeMerieux 1986; Paget 1991). Even without such abuses of majority power, democracy in the region remains, for the most part, centralized, top-down and executive-dominated, and mostly takes the form of two-party competition for power, within clientelistic structures, and with relatively few effective means of accountability and responsibility between elections. There is doubt about the ability of their independence-era constitutions to meet the challenges of the 21st century or to match the aspirations of the people for a more inclusive and egalitarian society. These shortcomings were a major focus of the discussion at the Bridgetown Conference, as well as featuring as a recurring theme in academic literature on politics in the region (e.g. Barrow-Giles 2002; McIntosh 2002; O'Brien 2014), and are therefore central to the remainder of this report.

There is doubt about the ability of their independence-era constitutions to meet the challenges of the 21st century or to match the aspirations of the people for a more inclusive and egalitarian society.

This report is written at a time when constitutional review and reform processes are ongoing across the Commonwealth Caribbean. Committees or commissions to review the respective constitution and propose reforms have been established in Barbados, Belize, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, and Trinidad and Tobago. Even this list is not exhaustive,

as constitutional change remains a recurring issue on the political agenda elsewhere in the region, too.

Constitutions are inherently political. Therefore constitutional reforms are about politics. The political dimensions of constitutional reforms underscore the interplay between entrenched political power and the challenges to transformative change. A key lesson of such reform attempts is that all too often they confront significant procedural hurdles, particularly in systems that require super-majority parliamentary approval and/or referendums. In countries with majoritarian two-party politics and dominant executives, it is difficult to achieve reforms that will limit the power or influence of those who win under the current rules. Political actors often view reforms through the lens of self-preservation rather than systemic improvement, complicating cooperative approaches to reform. While technical advice offers neutral, expert-driven options for reform, the political role focuses on navigating power dynamics and vested interests, which often determines the feasibility of implementing proposed changes. Additionally, public satisfaction with the status quo and constitutional conservatism further limit the momentum for transformative changes. As highlighted in the Caribbean's ongoing constitutional debates, successful reforms are more likely to occur incrementally rather than through radical shifts, given the institutional and cultural resistance to large-scale change.

It is recognized that the outcome of those review processes will be determined by political considerations, including how parties see themselves as likely to gain or lose from potential reforms. The exact political dynamics are unique to each country, and cannot be dealt with here, but in general there are two recurring dynamics: between progressives and traditionalists, on issues such as the extent of rights, socio-economic and cultural issues; and between the established major parties, and other, currently marginal, political voices.

While not minimizing the importance of these political complexities and challenges, and recognizing that past attempts at constitutional reform in the Caribbean, and elsewhere, failed not because of a lack of technical knowledge, but because of politics and political considerations blocked reforms, the focus of this report is not to try to predict the outcomes of any political bargaining, but rather addressing the issues and options for reform.

Moreover, this report is mostly concerned with reforms that could be made to constitutional texts, but 'small-c' constitutional reforms—reforms to laws, parliamentary standing orders, administrative practices, etc.—are occasionally mentioned where appropriate. One of the recurring themes throughout this report is the matter of what to constitutionalize, in the 'big-C' constitution, and what to leave to subconstitutional norms.

STRUCTURE OF THIS REPORT

This report focuses on some common or recurring themes arising in relation to constitutional change in the region. The themes covered in subsequent chapters include: (a) the performance of the Westminster Model in the region and prospects for reform; (b) representation and participation, including anti-corruption measures and anti-oligarchic provisions to limit the influence of money in politics; (c) strengthening Parliaments; (d) bicameralism and Senate reform; (e) fourth-branch institutions, including Electoral Commissions, Public Service Commissions and similar non-partisan bodies; (f) republican transitions, including the roles, functions and selection of the Head of State; (g) local government; and (h) human rights, the rule of law and judicial reform, including the constitutional response to changes in culture and values surrounding rights, and the transfer of appellate jurisdiction from the JCPC to the CCJ.

Within each chapter the report moves from a discussion of the current state of affairs, through previous reform proposals, to the kinds of institutional design solutions that are, or might be, on the current agenda. The themes and considerations contained in the various sections are based on a review of relevant literature as well as discussions with regional experts, as further detailed below. These are not *recommendations,* since this report is not able to speak to the particular needs of any country, in what must be a nationally owned reform process. They are, however, a guided *menu of options* and some *points for consideration* by constitution-makers in the region as they go through the process of reviewing and reforming constitutions.

NOTE ON SOURCES AND LITERATURE

This report draws heavily on the subjects discussed and ideas presented at the Bridgetown Conference held in June 2023. The workshop was held under the Chatham House Rule, and therefore no individual participant in this workshop is cited unless they have given explicit permission to that effect. There are several references in the text to comments made in the conference by an unnamed participant.

Not every instance where a subject was raised at the conference has been directly cited; to do so would make the text tedious and unwieldy. This report is permeated by the discussions at the conference, both on the agenda and in the interstitial conversations, and where a subject is raised in this report, it is generally to be assumed that it was raised at, and that this report has been at least partially informed by, the Bridgetown Conference. Due to time constraints, however, there was no discussion at the conference of local government, and little discussion on the funding of parties and elections. The funding of parties and elections was therefore covered in a separate meeting with members of the Barbados Constitutional Reform Commission, while the discussion of local government in this report has mostly been informed by secondary sources.

Also, it was not possible in the scope of a two-day conference to go into every subject in the level of detail required by this report. Therefore, in addition to this primary reliance on the Bridgetown Conference, the report also draws upon the texts of Commonwealth Caribbean constitutions, Acts of Parliament, landmark court cases, the reports of previous national constitutional review commissions in the region and previous regional reports (such as 'Constitutional Reform in the Caribbean', published in 2002 by the Organization of American States). Further information is derived from the academic literature. The most invaluable source, consulted frequently, is *Fundamentals of Caribbean Constitutional Law* (2nd edition) by Tracy Robinson, Arif Bulkan and Adrian Saunders (2021). For broader reflections on how constitutions relate to Caribbean society and politics, Cynthia Barrow-Giles's *Introduction to Caribbean Politics* (2002) and Simeon McIntosh's *Caribbean Constitutional Reform* (2002) were constant companions in the drafting of this report, along with Derek O'Brien's *The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis* (2014). Literature on the history of the region and its colonization, decolonization and development also forms part of the background to this report—notably, *From Columbus to Castro: The History of the Caribbean, 1492–1969* by Eric Williams (1984), *The Confounding Island* by Orlando Paterson (2020) and *A History of Barbados* by Hilary Beckles (2006). The discussion in this report of the Westminster Model and its critics draws also upon comparative literature, including literature from outside the region, such as Arend Lijphart's *Patterns of Democracy* (2011). Some of this comparative literature is historical, from the 1950s and 1960s, when scholars such as Stanley Alexander de Smith (1964) and Sir Ivor Jennings (1962; 1963) reflected upon the transmission of the Westminster Model and produced what might be regarded as the canonical works in this field. This does not preclude the use of more recent comparative sources, however, where these add further insight.

Chapter 1

THE WESTMINSTER MODEL IN THE COMMONWEALTH CARIBBEAN

1.1. THE RECEPTION OF THE WESTMINSTER MODEL IN THE COMMONWEALTH CARIBBEAN

All countries of the Commonwealth Caribbean have a system of government derived from the British system that was implanted by, or copied from, the former colonial power. With the notable exception of Guyana (see below), these countries have maintained the so-called Westminster Model system. Although its definition and semantics are debated, the Westminster Model remains a convenient shorthand to describe the particular form of parliamentary system that developed during the transformation of the British Empire into the Commonwealth. Understanding the Westminster Model is key to understanding how political, legal and constitutional institutions operate in the region. It shapes those institutions, the norms, expectations and practices surrounding them, and the boundaries of acceptable reform.

The Westminster Model remains a convenient shorthand to describe the particular form of parliamentary system that developed during the transformation of the British Empire into the Commonwealth.

The Westminster Model has been defined by S. A. de Smith (1964) as 'a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he [or she] has at least substantial measure of control; in which the effective executive branch of government is parliamentary in as much as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature.' Rhodes, Wanna and Weller (2009) have noted additional core elements of the Westminster Model as including: (1) the concentration of political power in a collective and responsible cabinet; (2) the responsibility of Ministers to Parliament; (3) a constitutional bureaucracy with a non-partisan and expert civil service; (4) an Opposition acting as a recognized executive-in-waiting as part of the regime; and (5) parliamentary government with its unity of the executive and legislature.

According to Arend Lijphart (2011), the Westminster Model has been understood as a form of parliamentary democracy characterized by majoritarian elections, executive dominance, two-party politics, a unitary state and easy constitutional amendment rules. Certainly, the Westminster Model as practised in the Commonwealth Caribbean has mostly conformed to Lijphart's definition (although Saint Kitts and Nevis is federal, and some of the constitutions have quite rigid amendment rules). However, the Westminster Model can also be understood as a particular cultural–historical expression of parliamentarism derived from British constitutional traditions, but which can adapt itself to non-majoritarian institutional forms: for example, Fiji, Ireland, Malta and New Zealand use proportional representation, but are still culturally and historically within the Westminster 'family' of constitutional systems (Bulmer 2020).

The Westminster Model was deliberately chosen in the Commonwealth Caribbean at the time of independence. The extent to which this was a free choice is arguable. On the one hand, the constitution-building processes in the region were partially consensual, in as much as national elites were involved in the negotiation of the independence constitutions. On the other hand, these processes were not by any means participatory. Only parliamentary representatives and senior officials were engaged. Public debate on the substance of constitutions was minimal, with very short periods for public response: six weeks in Trinidad and Tobago, and just two weeks in Jamaica (Barrow-Giles and Yearwood 2023: 223). Even in the one instance where initial drafting was undertaken by a parliamentary joint select committee—in Jamaica—the drafting was done by a 'secret conclave' (Munroe 1972: 40), who passed their completed drafts on to Parliament for approval (Munroe 1972; McIntosh 2002: 17–19).

The precise nature of the process varied across the region. Except in Jamaica the initial drafting was undertaken by Colonial Office or Foreign and Commonwealth Office officials, in consultation with the Governor, Attorney-General and other senior officials of the country concerned. An independence conference would then be convened, at which critical constitutional design issues would be hammered out between the Government and Opposition, with the British officials alternating between veto-player and umpire depending on the issue. The draft resulting from this conference would usually be endorsed, as a perfunctory formality, by the legislature of the country about to become independent. Unlike in some other Commonwealth small island states, such as Malta, no referendums were held in the Caribbean to endorse the new constitutions. These constitutions were adopted not by the people, but by British Orders-in-Council (Dale 1993).

The British authorities set the parameters and conditions for the constitutional conferences, often with a paternalistic or condescending attitude towards Caribbean countries and their leaders.

The British authorities set the parameters and conditions for the constitutional conferences, often with a paternalistic or condescending attitude towards Caribbean countries and their leaders (Mawby 2012). For example, they typically insisted upon keeping appeals to the JCPC. While in general the British strongly encouraged and assumed the retention of Westminster Model institutions as close to the metropolitan prototype as the circumstances would

allow (O'Brien 2014), they also demanded variations when it suited them, such as insisting upon proportional representation in Guyana for essentially partisan reasons (Ishmael 2013).

Caribbean elites were already enculturated into the Westminster system before independence, such that other, more radical, alternatives were not considered. Since 1944, Jamaica had self-government under a recognizably Westminster system of responsible Cabinet government, and this arrangement was widely copied, during the 1940s and 1950s, in other countries in the region (McIntosh 2002: 9–10). Moreover, the dominant thinking at the time, among the leaders of the independence generation, was still that 'British is best', that a system of government good enough for the 'mother country' was also good enough for them, and indeed they would settle for nothing less (de Smith 1961; Trinidad and Tobago 1974). Continuity with the British progenitor was evident in the design of the political system, notably in the choice of the British first-past-the-post (FPTP) (single member plurality) electoral system for the lower House, relatively weak all-appointed Senates and—in most cases—retention of the monarchy. As then-Premier of Jamaica Norman Manley announced shortly before independence, 'We did not attempt to embark upon any original or novel exercise for constitution building' (cited in McIntosh 2002: 19). By the mid-20th century, the chief benefits of the British system were understood to be effective, efficient, responsible and responsive government. This was deemed necessary, in the post-colonial context, to enable rapid economic development and the provision of public services (Jennings 1963).

Caribbean elites were already enculturated into the Westminster system before independence, such that other, more radical, alternatives were not considered.

The depth of enculturation into democratic norms should not, however, be exaggerated. Jamaica had just 18 years of democratic internal self-government before independence—long enough, perhaps, for institutional norms to be absorbed by a political class, especially for those who had had an English legal education, but not necessarily by the general public. The longer period of political apprenticeship was served under Crown Colony rule, in which bureaucratic authoritarianism, executive dominance, cosy elite cooperation, irresponsible government and the repression of threats to the status quo were more the order of the day.

In Britain and the old dominions, the majoritarian system of government was prevented from falling into authoritarianism by a number of informal social and cultural constraints—internal party pressures (Norton 2023), tradition, self-restraint, a watchful press and thick civil society (Jennings 1962). In newly independent countries, where these informal constraints were less well developed, additional precautions were thought necessary.

Thus, the so-called 'export version' of the Westminster Model, although patterned on the British prototype, differed from the original in some substantial respects (following de Smith 1964). These were as follows:

- First, all the independent states had written constitutions, with supreme law status, that were capable of being amended only by a special procedure. Often there were two or more levels of entrenchment, with some parts

These constitutions are not just ordinary laws. They are supreme laws, having supremacy over the Acts of Parliament enacted under their authority.

of the constitution being harder to change than others. This meant the abandonment of the British principle of parliamentary sovereignty. As recognised by Lord Diplock in *Hinds v The Queen*,[1] these constitutions are not just ordinary laws. They are supreme laws, having supremacy over the Acts of Parliament enacted under their authority (McIntosh 2002: 168–172).[2]

- Second, they included judicially enforced bills of rights protecting certain fundamental civil, legal and political rights (Parkinson 2007).

- Third, they often gave formal recognition to the office of Leader of the Opposition, who was given constitutional functions and privileges, including a right to be consulted in making certain appointments to the judiciary or independent commissions (Bulmer 2021).

- Fourth, electoral systems were designed to ensure that minorities, as far as possible, would not be permanently excluded from power. This was rare in the Caribbean, with only Guyana having proportional representation imposed upon it for quite blatantly political reasons. Beyond the Caribbean other forms of inclusive representation were experimented with, including the reservation of seats for scheduled castes and tribes in India (Kashap 1994) and provision for nominated members who would virtually represent ethnic or other demographic minorities. Second chambers were established with minority-protecting veto powers. In the 1970 Constitution of Fiji, for example, the balance of power in the Senate was held by members of the Great Council of Chiefs, who represented the Indigenous iTaukei people, while the 1960 Constitution of Nigeria gave ethnic regions an equal number of seats in the Senate (Odumosu 1963).

- Fifth, these constitutions typically established what de Smith (1964) called 'neutral zones', and which we today would probably call fourth-branch institutions (Bulmer 2019b; Tushnet 2021). These institutions are intended to protect sensitive areas of public administration—the delimitation of electoral districts, the civil service and the police, the auditing of public accounts, etc.—from partisan political control or manipulation.

- Sixth, in some cases they established federal systems, or at least some constitutional division of power between national and subnational authorities; in the region, such provisions are found in Antigua and Barbuda, Saint Kitts and Nevis, and Trinidad and Tobago.

- Seventh, in many countries they recognized customary law, religious law and elements of traditional leadership. British colonial governors often relied upon such institutions as mechanisms of justice, law enforcement, peacekeeping and local administration. In many cases these institutions were then carried over into the post-colonial constitutions at the time of

[1] *Hinds v The Queen* [1977] AC 195.
[2] The supremacy of written constitutions over ordinary statutes is also a feature of the non-independent British territories, although the ultimate supremacy of these constitutions is limited to the extent that most of them can be amended by British Orders-in-Council.

independence. In the Caribbean this feature was absent (in comparison with Africa, Asia and the South Pacific), mostly because the pre-colonial society had been so thoroughly replaced by colonial rule.

- Finally, the conventional unwritten rules of parliamentary democracy were translated into formal, legally enforceable constitutional rules, defining and clarifying the relationships between the Head of State, Prime Minister, Cabinet, Parliament, courts and other governing institutions (De Merieux 1982).

Despite these important changes, the constitutions of the Commonwealth Caribbean were less innovative than in some other parts of the Commonwealth, such as Africa and South Asia. Complex mechanisms for inclusion and power sharing that were adopted in other newly independent Commonwealth states—such as Mauritius's system of guaranteed ethnic inclusion in the legislature (Constitution of Mauritius 1968: section 31(2) and First Schedule), or Fiji's mechanism for the inclusion of traditional chiefs in the Senate (Constitution of Fiji 1970: section 41) or India's retention of appointed members to represent the Anglo-Indian community (Constitution of India 1950: section 331)—find few parallels in the Caribbean. An exception is Guyana, where proportional representation was partially justified on grounds of interethnic power sharing.

1.2. HYPER-MAJORITARIANISM, EXECUTIVE DOMINANCE AND CONSTITUTIONAL CONSERVATISM

The Westminster Model might have delivered stable democracy in the Caribbean, but it has been democracy of a very limited, exclusionary, majoritarian nature.

Despite the safeguards discussed above, the Westminster Model in the Caribbean became a caricature of itself. As will be discussed below, small size accentuated the Westminster Model's majoritarian features. FPTP elections in large, geographically diverse countries like the United Kingdom tend to produce two dominant parties, but also allow space for third and minor parties to find a foothold. In short, the Westminster Model might have delivered stable democracy in the Caribbean, but it has been democracy of a very limited, exclusionary, majoritarian nature, in which power is concentrated, with few effective checks and balances, in the hands of a Prime Minister who leads the majority party in a closed two-party system (O'Brien 2014; Robinson, Bulkan and Saunders 2021).

In practice, Governments across the region are not only hyper-majoritarian but also hyper-dominant, owing to the combined effects of small Parliaments, majoritarian elections, a lack of parliamentary resources, underdeveloped committee structures and the tendency towards large Cabinets in which more than half of the total number of Members of Parliament (MPs) hold ministerial office. As was widely discussed at the Bridgetown Conference, this situation—together with passionate and intense partisanship, the enforced social proximity of small countries, weak regulation of party and campaign funding, the lack of ideological distinction between the parties and intense competition over access to resources in developing middle-income countries—can result in

a political system that runs on personal and partisan clientelism (Mohammed 2023; Vernon 2022; World Justice Project 2023).

These realities can distort how democracy works in the region. The legislative and policymaking work of Parliament can suffer. Governments may come and go on the basis of election results, but the mechanism of delegation and accountability between voters and national policy outcomes, in which elections are supposed to be pivotal, may break down if elections, rather than determining programmes for government based on an appeal to public interests, instead determine private access to public largesse.

Democratic deficits have provoked long-standing debates about constitutional change in the region. Despite these desires for change, the region is characterized by constitutional continuity.

Such democratic deficits have provoked long-standing debates about constitutional change in the region. Constitutional Commissions or Constitutional Review Commissions, with a mandate to review the performance of constitutions and to make recommendations for reform, have been established across the region since independence. While the details are obviously country-specific, the general tenor of such reports point in a consistent direction—a desire to reform, rather than abolish, the Westminster Model, and in particular a desire to mitigate its hyper-majoritarian and executive-dominated characteristics. That might typically mean broadening the basis of representation and participation, strengthening Parliaments (often including reform of the Senate), improving the neutrality and independence of fourth-branch institutions, reforming or replacing the office of Governor-General, deconcentrating power, and improving access to justice and the protection of human rights and the rule of law.

Despite these desires for change, the region is characterized by constitutional continuity. Again, the partial exceptions are Guyana (which adopted a radical socialist constitution in 1980) and Grenada (whose constitution was briefly suspended, but later restored after the US military intervention). Trinidad and Tobago adopted a new republican constitution in 1976, but it was based on the same Westminster Model principles and foundations as the independence constitution it replaced. Every other country in the region has maintained the constitution adopted at independence, either unchanged or with only minimal or moderate amendments. Belize has been somewhat innovative, having introduced term limits for the Prime Minister and Senate approval of key appointments. Jamaica replaced its original bill of rights with a new Charter of Fundamental Rights and Freedoms. Barbados has lately become a republic. Several countries have replaced the JCPC, as the apex court, with the CCJ. Yet, in general, 'there remains strong attachment to the structures, language and legal traditions of the past' (Campbell and Wheatle 2020: 278). In Saint Vincent and the Grenadines bolder changes were rejected in a referendum in 2009. Even small, quite technical, changes have been difficult to pass—as in Grenada in 2016, where a two-thirds majority requirement in a referendum makes change very difficult. The constitutional culture has been conservative across the region, with some adjustments, but little fundamental change.

The conservatism of Caribbean constitutions is also evident in their treatment of rights, which were (and in most cases remain) tightly constrained by

limitations clauses and savings clauses—a theme developed in Chapter 8 of this Report. In contrast to Africa, where bills of rights were primarily seen as means of protection for ethno-linguistic or religious minorities, and to India, where rights were seen as part of a transformative package to overcome discriminatory or exclusionary social practices, constitutions in the Commonwealth Caribbean sought to conserve existing institutions—including existing class and property relations—and did not mount a constitutional attack on the inequalities of property, education and opportunity inherited from colonial society. As Parkinson (2007: 211) notes, bills of rights in the Caribbean states tried to 'lock in the pre-independence system of government'. Barrow-Giles has therefore equated 'constitutional decolonisation' to 'false decolonisation': a mode of transition from colony to independent nation, with 'no genuine attempts to formalise a political system to that of the former colonial master', and sustained by a model of economic development that 'served to reinforce the traditional dependence of the region' (Barrow-Giles 2002: 127; see also McIntosh 2002). Thus, with the exception of Guyana's socialist constitution of 1980 and certain limited provisions (e.g. with respect to education) in Jamaica's 2011 Charter, constitutions in the region do not include socio-economic rights or even directive principles.

1.3. 'SLAYING THE WESTMONSTER': CONSTITUTIONAL STICKINESS AND OPTIONS FOR REFORM

Notwithstanding growing public awareness of, and dissatisfaction with, the limitations of the Westminster Model in a Caribbean context, attempts to replace the Westminster Model with a different, more inclusive and consensual, model of democracy have so far come to naught. This was one of the key issues with which the Bridgetown Conference grappled, and which forms a recurring theme of this report. Recommendations from Constitutional Review Commissions have led to change, but these have mostly been of 'a somewhat piecemeal nature' (O'Brien 2014: 271). 'Slaying the Westmonster' (as Matthew Bishop [2010], writing of the failed 2009 constitutional reform process in Saint Vincent and the Grenadines, called it) is harder than it looks.

Richard Albert (2017: 3) identifies three sets of reasons for the lack of reform in the region: institutional, social-political and cultural. Dealing first with the institutional reasons, high super-majority requirements, along with mandatory referendums in many countries, pose a major obstacle to constitutional amendment (O'Brien 2014: 271–74). It is notable that major changes—Trinidad and Tobago becoming a republic in 1976, Barbados becoming a republic in 2022, and Jamaica adopting its new Charter of Rights and Freedoms in 2011—took place in jurisdictions where a referendum, at least on those parts of the respective constitution, was not required. The hurdle of compulsory referendums is augmented, in most countries, by competitive two-party politics. For example, a participant in the Bridgetown Conference noted that a proposal to amend the Constitution of Antigua and Barbuda to transfer appellate jurisdiction from the JCPC to the CCJ failed at referendum because

of excessive partisanship. The Opposition did not want to let the Government have the credit for a 'win', so it mobilized supporters against the reform.

In socio-cultural terms, Albert (2017) and O'Brien (2014) also concur in identifying the absence of crisis as a block to reform. In other words, the Westminster Model democracies in the region might be hyper-majoritarian, top-down, executive-dominated and exclusive, but they also work well enough—delivering development and public services, without collapsing into authoritarianism, on the one hand, or state failure, on the other—that most people are sufficiently content with the status quo to make the thresholds to reform very difficult to clear. There is also a strong incumbency advantage. The 'winners', under the current system, might theoretically see its shortcomings and accept the principled case for reform, but the existing system serves them well, and any reform beyond the merely cosmetic could be self-denying.

Quote from Bridgetown Conference: 'How can you reform what you do not understand?'

Third, there are the cultural or attitudinal reasons for the lack of constitutional reform. Given this absence of crisis, the prevailing attitude to constitutional change in the region might best be described as cautiously conservative. Although not totally opposed to change, 'political actors are now rooted in the inherited colonial-era structures, systems and traditions entrenched or validated by their constitutions' and are wary of 'the uncertain outcomes that constitutional reform would introduce' (Albert 2017: 3). As the Forde Report (Barbados 1998) noted, minor, incremental and technical changes to the Constitution have taken place, but there has been a 'general reluctance to engage in fundamental change of the Supreme Law before the workings of the Constitution over a significant period of time have clearly convinced citizens of that need' (para. 1.17).

An additional obstacle to reform, noted by several participants at the Bridgetown Conference, is a general lack of public understanding of their own constitutions. As one participant put it, 'How can you reform what you do not understand?' The sense of the meeting was that any reform project, especially but not only where a referendum is required, would have to be preceded by an extensive civic education programme. One participant, citing polling in Jamaica, claimed that 53 per cent of the Jamaican population 'don't understand what a republican system of government is'.

Besides ignorance, there is some apathy—not necessarily political apathy in a general sense, but a specific feeling that constitutional reform is less of a priority than other, material, issues.

The only country in the region to have significantly deviated from the Westminster Model since independence is Guyana, which in 1980 created an unusual hybrid constitution with an elected executive presidency, while retaining a unicameral, proportionally elected National Assembly. The effect of that change has been to create in Guyana what one participant at the Bridgetown Conference described as 'the worst of both worlds'. Grenada's Westminster Model constitution was suspended when the Marxist–Leninist New Jewel Movement came to power in 1979, but was restored following the

US invasion of the country in 1983. Elsewhere in the region, the Westminster Model has shown remarkable longevity and resilience.

The popular culture of the Commonwealth Caribbean is increasingly being brought within the orbit of the United States, and there are occasional calls for a more US-style political system which would replace the Head of State and the Prime Minister with an elected, executive president.[3] However, the institutional, legal and political culture remains more centred upon the UK and the Commonwealth, and such moves are likely to be resisted by existing elites (in part because of loyalty to a system that has served them well, in part because of great familiarity with the flaws, as well as benefits, of a presidential system).

Where scope for constitutional reform does exist, it is likely to be at the meso- and micro-levels—that is, not wholesale change, rejecting the Westminster Model in favour of a radically different system of government, but more specific and limited reforms aimed at moderating the operation of the Westminster Model, making it more balanced, more inclusive, less hyper-majoritarian. These measures fall broadly into two categories: (a) those intended to make the political process more inclusive, participatory, consensual and accountable; and (b) measures intended to limit the abuse or misuse of power, by improving institutions that support human rights, civil liberties and the rule of law, or that promote the integrity of administrative, fiscal and electoral processes. The subsequent sections of this report examine the lines of reform which have been tried, or at least considered, in the region, along with other potential reforms that might not have previously been considered but which are ripe for further investigation.

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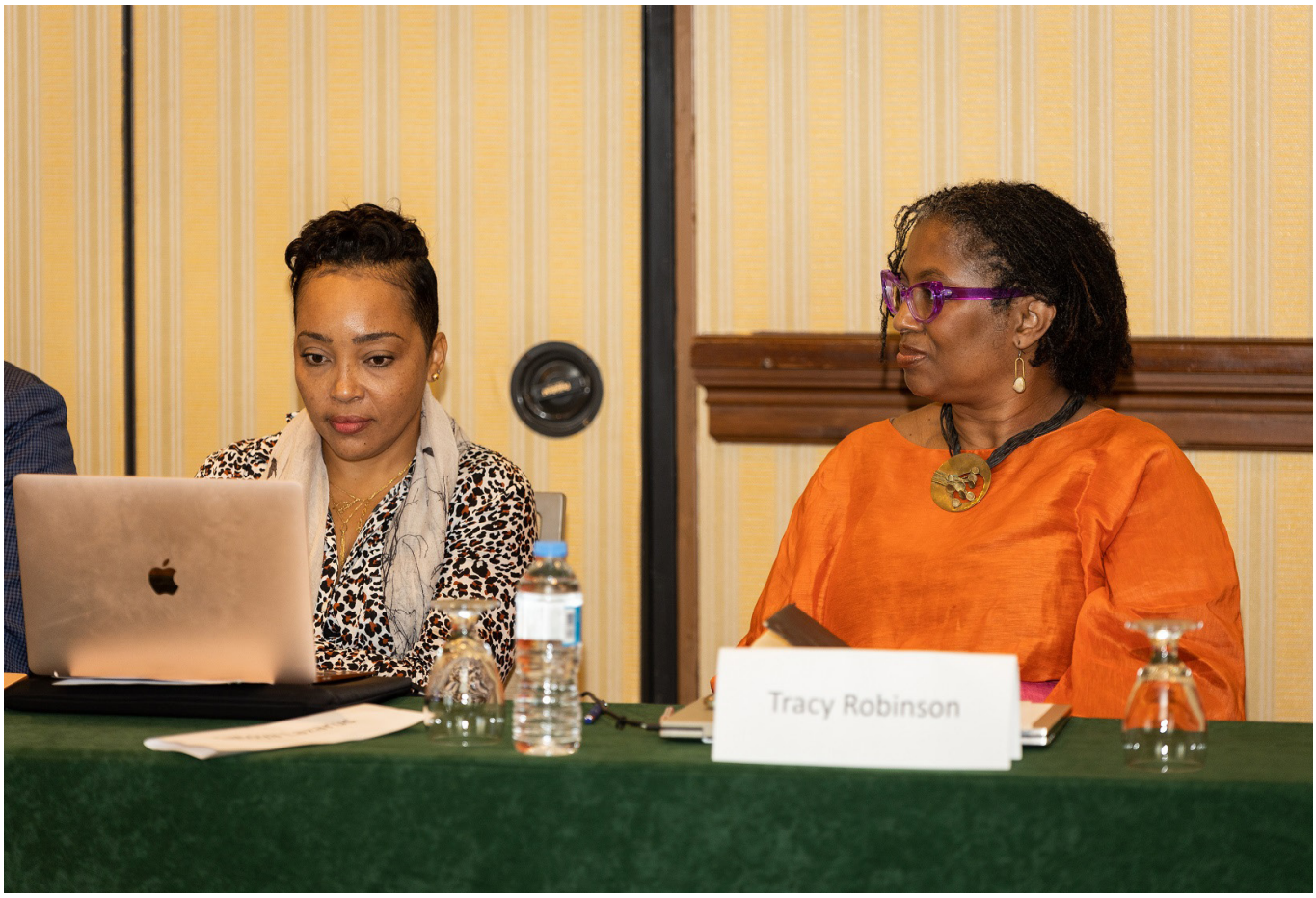
A third category of reforms are those that change the symbolic nature of a constitution, not just as an instrument of government but as an expression of national identity and values. Changes to a republic, if not accompanied by wider institutional reform, are mostly of this type. Likewise, reforms dealing with socio-cultural or policy matters, such as the constitutional recognition of the death penalty in Jamaica, or attempts to prohibit same-sex marriage at the constitutional level, might also be placed in this third category. They do not affect the system of government, but they do affect how the polity presents itself to its citizens and to the world.

An ongoing theme interlinked with all these specific reforms is the search for an underlying *philosophy* or *logic* for reform—as championed by Simeon McIntosh. McIntosh (2002) (quoted in Robinson, Bulkan and Saunders 2021: 506) argued that 'independence should be reconceptualised as having established a new constitutional tradition' which would 'seek to realise the constitutional authorship and legitimacy that did not occur at independence'. This would involve abolition of the monarchy and the establishment of a

[3] Calls for an elected executive President, along with demands for other US-influenced innovations such as recall and impeachment mechanisms, have been voiced in Jamaica. However, the report of Jamaica's Constitutional Reform Committee (2024) opted for more moderate reforms, tweaking, rather than replacing, the Westminster system.

republican Head of State, but more fundamentally it would be the telling of a new constitutional story rooted in national, not imperial, history.



L to R: Latoya Lazarus, University of the West Indies; Tracy Robinson, University of the West Indies.

Chapter 2

REPRESENTATION AND PARTICIPATION

2.1. FIRST-PAST-THE-POST ELECTIONS IN THE COMMONWEALTH CARIBBEAN

Throughout the Commonwealth Caribbean—with the exception of Guyana—parliamentary elections are held using the FPTP, or single member plurality, electoral system. Each country is divided into geographical constituencies, and each constituency elects one MP. The candidate who receives the most votes wins, even if that falls short of an overall majority. This is the electoral system established in the UK in 1885, which was inherited by former British colonies around the world.

The characteristics and consequences of the FPTP electoral system are well documented, not only in comparative literature (Lijphart 2011) but also in literature specifically on Caribbean institutions (O'Brien 2014; Robinson, Bulkan and Saunders 2021: 104): it promotes majoritarian politics, usually dominated by two large parties which alternate in office. It over-rewards winners, easily turning a thin plurality of the vote into a landslide majority of seats. This encourages 'electoral triumphalism': winning parties, with a large majority in the House, claim to speak for 'the people', even though they do not speak for all. As recognised by Robinson, Bulkan and Saunders (2021: 104), an FPTP electoral system 'can produce very distorted results', which are 'amplified in small countries'. Even if a Government wins only a small minority, strict party discipline means that it can normally 'rule with little regard to the views of the opposition'.

FPTP voting also makes it difficult for new parties to break into this duopoly because a vote cast for any but the largest or second-largest party can often be, in effect, a wasted vote. This means that politics is even more of an exclusive, winner-takes-all game than it might otherwise be. While FPTP can favour parties whose support is geographically concentrated, like the Bloc Québécois in Canada or the Scottish National Party in Scotland, it generally

An FPTP electoral system 'can produce very distorted results', which are 'amplified in small countries'.

makes it difficult for third and minor parties to make their presence felt. In large and diverse countries, with regional variations in voting patterns, the effect can be muted, as in India and the UK.[4] In a Caribbean context, where countries are small and relatively homogeneous, third and minor parties have been all but excluded from electoral politics at a countrywide level. A partial exception might be seen in Barbuda, Nevis and Tobago, where parties promoting the specific interests of those islands have maintained an electoral presence within their large polities.[5] There are also some examples of pre-electoral coalitions, making united opposition more credible: in 2010, for example, the United National Congress in Trinidad and Tobago formed the nucleus of a five-party coalition to oppose the then-ruling People's National Movement. With those exceptions any perspective that cannot be channelled through one or other of the two main parties is virtually ruled out from political debate.

At the extreme, small Parliaments in small, geographically homogeneous countries can result in clean-sweep elections, where one party wins all the seats, and the Opposition is then completely excluded from Parliament (Bulmer 2019a). This has happened several times across the region, in Barbados, Grenada, Jamaica and other countries.[6] Under such conditions the back-and-forth, give-and-take relationship between the Government and Opposition—which the Westminster Model relies upon to ensure accountability, responsibility and the choice of competing alternatives—breaks down, at least at the parliamentary, if not the electoral, level.

Moreover, these Westminster Model constitutions rely upon a Leader of the Opposition both to provide accountability within Parliament and also to provide checks and balances, and restraints on the abuse of power, outside Parliament. In many countries, the Leader of the Opposition makes key balancing appointments to institutions such as the Electoral Commission, and may have to be formally consulted in matters such as judicial appointments. The presence of appointed Opposition Senators may deny the Government the majority in the upper House needed to amend the constitution. It was clear from the Bridgetown Conference that the combined effects of the FPTP electoral system, the small size of both Commonwealth Caribbean countries and their Parliaments, and the Westminster-derived institutional design together produce an exclusive, narrow, top-down, hyper-majoritarian politics in which the winning party can accumulate near-unlimited power—although with the exception that they cannot amend the constitution in situations where a

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4 In the UK third and minor parties have, in all general elections since 1918, won an average of 20 per cent of the vote, and in only three elections (1951, 1955 and 1959) did their share of the vote fall below 10 per cent. In Barbados, in contrast, in all general elections since independence, third and minor parties have won an average of just 2.7 per cent of the vote; only once, in 1994, did that figure rise above 10 per cent. The British Parliament has never had fewer than three parties represented within it, and currently, despite the dominance of two-party politics, has nine parties represented. Barbados has only ever, since independence, had one MP who was not a member of one of the two main parties, and currently has no Opposition members at all.

5 For example, the Tobago People's Party has a majority in the Tobago House of Assembly, and thus effectively forms the third-largest party in Trinidad and Tobago, even though it is not currently represented in the Parliament of Trinidad and Tobago.

6 In Barbados in 2022, the Barbados Labour Party won all 30 seats in the House of Assembly with 69 per cent of the vote. In Grenada in 2018, the New National Party won all 15 seats in the House of Representatives with less than 59 per cent of the vote.

referendum is required or where the approval of the Opposition in the Senate is needed.

Even when an Opposition party is represented in Parliament, other factors in the Caribbean contribute to an exacerbation of the Westminster Model's majoritarian characteristics. One of these is that civil society tends to be smaller, more insular and more dependent upon links to the state than in other, larger, countries using Westminster Model institutions. As many of the participants at the Bridgetown Conference mentioned during discussions, the political, cultural, social and economic elites of these countries are small, closely interwoven, but often divided on partisan lines. This makes informal, extra-institutional checks and balances—the pushback from civil society organizations—relatively weak, which is especially true in smaller countries. It is less of a problem in larger countries, such as Jamaica and Trinidad and Tobago. In Jamaica, in particular, powerful non-governmental organizations, such as the Independent Jamaica Council for Human Rights and Citizens Action for Free and Fair Elections, provide some check against the Government.

Another challenge identified at the Bridgetown Conference is the relative lack of ideological or policy differentiation between the main parties. Despite intense interparty competition, it is hard in many Commonwealth Caribbean countries to identify exactly what the parties stand for policy-wise. This, combined with the localism baked into the FPTP system, encourages a clientelist style of politics in which MPs see their role primarily in terms of acting as a channel between the central state and their constituents—undermining their role as legislators and scrutinizers of government policy (see 2.3: Money, parties and clientelism: Pork or policy?).

2.2. **ALTERNATIVES TO THE FPTP SYSTEM**

Given the way that the FPTP electoral system distorts and narrows representation, the possibility of its replacement with a system of proportional representation, in which parties would be awarded a number of seats in accordance with the share of votes they receive, was discussed at the Bridgetown Conference. Proportional representation is not unknown in Westminster Model democracies: it is found, for example, in Fiji, Ireland, Malta and New Zealand, as well as in Guyana—the latter being the sole example of proportional representation in the region.

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The Bridgetown Conference did not discuss in detail Guyana's experience of proportional representation. However, it is worth mentioning briefly, if only to show that a proportional electoral system does not necessarily produce the kind of consociational, consensus-seeking, power-sharing politics for which it is famed. Proportional representation was introduced to Guyana in 1964 (two years before independence), on British insistence, as a way to get Cheddi Jagan out of office and smooth the path for the more moderate

Forbes Burnham to come to power (Ishmael 2013). Since then, proportional representation has been retained, but in combination with a parallel-elected executive presidency, whereby the presidential candidate of the plurality-winning party is elected. This, together with racially divided politics, has sustained a system of two-bloc competition, between blocs led by the People's National Congress and the People's Progressive Party. These characteristics make Guyana a poor predictor of how proportional representation might perform elsewhere in the region, under a parliamentary system.

Better parallels might be found in other Commonwealth small island states, such as Malta and Fiji. In Malta competitive two-party politics has continued, with only the marginal presence of third parties, under proportional representation. However, Malta's system of proportional representation, with five-member constituencies, means a third party cannot break into Parliament unless it wins about 15 per cent of the vote (Taagepera 1998). In Fiji, which has a 5 per cent national threshold (i.e. a party winning 5 per cent of the national vote will win parliamentary representation), proportional representation since 2014 has so far produced a 'two-plus-two' party system, with two major parties and two smaller parties currently in Parliament. Following the elections of 2022, a three-party coalition Government was formed. A further difference between these two countries is that Malta is ethnically, culturally, religiously and linguistically homogeneous, with a left–right politics centred on class and ideology, while Fiji is an ethnically, culturally, religiously and linguistically diverse country, with a marked interethnic aspect to its politics. This has a bearing on the extent to which we might regard each of them as predictors of what might happen under proportional representation in the Caribbean.

The debate on proportional representation for the lower or only House remains muted in the Caribbean.

The debate on proportional representation for the lower or only House remains muted in the Caribbean. The Wooding Commission Report (Trinidad and Tobago 1974: para. 207) in Trinidad and Tobago recommended a mixed form of proportional representation—although this was not adopted, having been firmly rejected by then-Prime Minister Eric Williams, who argued that stability and firm government were more important considerations (Ryan 2002: 31).

The most significant recent attempt at such a reform in the Caribbean was made in Saint Vincent and the Grenadines in 2009. As part of an omnibus reform which would have replaced the independence constitution with a new text, it would have adopted a hybrid electoral system: in addition to 17 members of the House of Assembly chosen by FPTP voting, there would have been 10 additional seats elected at large by party-list proportional representation.[7] This would have guaranteed a seat in Parliament to any party winning 10 per cent of the vote—opening the way to third and minor parties, and virtually eliminating the risk of a clean-sweep election. It would have reduced (although not entirely eliminated) the seat advantage given to the largest party. The rejection of that attempted reform cannot be attributed solely

[7] See the Saint Vincent and the Grenadines Constitution Act 2009 (passed in the House of Assembly on 3 September 2009).

to the new electoral system,[8] but it provides another example of the difficulty of reforming Westminster Model constitutions in the Caribbean, especially where a referendum is needed.[9]

Most participants at the Bridgetown Conference concluded that proportional representation would be a step too far, fundamentally changing the nature of Caribbean politics. As one participant put it, 'I don't think we will ever get to [proportional representation]: culturally, people want their MP, from their area, in Parliament and in Cabinet.' Even Simeon McIntosh (2002), who has otherwise proposed quite radical reforms, shied away from recommending proportional representation, for fear of causing fragmentation and instability; he concluded that FPTP, for all its faults, was the 'lesser evil' (McIntosh 2002: 210).

Quote from Bridgetown Conference:
'I don't think we will ever get to [proportional representation]: culturally people want their MP, from their area, in Parliament and in Cabinet.'

There was some openness among participants in the Bridgetown Conference, however, to other, more limited, reforms to the electoral system in order to overcome the worst aspects of FPTP. One such reform is to guarantee a certain minimum share of seats to the Opposition, thereby eliminating the risk of clean-sweep elections and ensuring there is always at least a sufficient Opposition presence to challenge and scrutinize Government policy and to hold the Government to account. This has been adopted in another Commonwealth small island state, Singapore, where since 1984 'non-constituency' seats have been allocated to Opposition parties. At present, there is a maximum of 12 non-constituency members in Singapore's Parliament, made up of the 'best losers' (i.e. those who came closest to being elected in a constituency). Since at the last general election 10 Opposition MPs won constituency seats, only 2 additional non-constituency seats were allocated, to bring the Opposition's number of seats up to the minimum of 12. A system along such lines was proposed, albeit on a much more limited scale, in Grenada, where a 2016 constitutional reform package would have ensured the representation of at least one Opposition MP (who would be the Leader of the Opposition). That proposal was voted down in a referendum, and in any case would have had limited effect—one lone Opposition MP simply could not take on the whole burden of scrutinizing the Government—but it shows what could be done. Adjusted to ensure a minimum core of Opposition representation, it would improve political contestation and accountability, without fundamentally changing the majoritarian logic of the FPTP system.

Another possibility is to adopt proportional representation for a wholly or mainly elected Senate (see Chapter 4). Here it is necessary to note only that such a reform is not incompatible with—nor, given the different roles of the two Houses, a full substitute for—guaranteed Opposition representation in the lower House, although it might be a useful complement to it.

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[8] The defeat of reform in Saint Vincent and the Grenadines was discussed in detail at the Bridgetown Conference, and the general view was that it failed not so much because of the substance of the reforms, but because of the political dynamics surrounding them—in particular, the Opposition not wanting to give the Government any kind of political advantage, and being willing to derail reforms rather than let the Government claim the credit for them. Thus, the Opposition mobilized its supporters to vote against the new constitution in the referendum.

[9] Although passed by the Saint Vincent and the Grenadines House of Assembly, the new constitution was rejected by the voters, being approved by just 43.71 per cent of the votes cast—far short of the two-thirds majority required.

2.3. MONEY, PARTIES AND CLIENTELISM: PORK OR POLICY?

As noted above, one of the factors limiting the quality of representation and participation in many countries of the region is a clientelist approach to politics and elections that is centred more around the distribution of resources than debates about policy. The question is whether MPs should primarily be national parliamentarians or local influence-brokers. Many citizens see their role in the voting process as an attempt to get a 'bread and butter outcome' for their constituency, rather than voting for policy or legislative change, and they expect their MPs to act accordingly. This is so deeply ingrained in the political culture of the Commonwealth Caribbean countries that it is often assumed to be inevitable in a parliamentary system; during the Bridgetown Conference, the idea of a parliamentary system where MPs represent the whole country and have no constituency duties to fulfil was met with incredulity and disapproval.

Quote from Bridgetown Conference: 'Clientelism is bad for democracy, bad for governance and bad for development.'

Of course, there is a danger in overgeneralizing; the extent of this tendency varies between countries, between socio-economic classes and educational levels, and even between individuals. Parties in Commonwealth Caribbean elections do develop policy programmes and, sometimes, offer clear policy choices. In many countries, however, ideological differences between the parties are hard to discern, and different policy platforms may reflect immediate electoral concerns rather than a consistent underlying public philosophy. That in itself does not necessarily render democracy null, but it does limit its effectiveness as a means of bringing about systemic change. In the words of one participant in the Bridgetown Conference, 'Clientelism is bad for democracy, bad for governance and bad for development. In [my country] it is carried on in broad daylight and unashamedly. At election time, the people can extract benefits; that just perpetuates the dysfunctional system.'

In some countries constituency offices are the gateway point of access to government services. They serve, especially at election time, as centres for the distribution of patronage—a government job here, a grant there (Vernon 2022). The legislative, policy-scrutinizing and accountability functions of Parliaments, which are integral to good governance, get squeezed out. MPs may have access to Constituency Development Funds—a way of channelling small sums of public money for micro-projects in a constituency. Such arrangements are a response not only to the demand by MPs for the powers to act as satraps of their local constituencies, but also to the lack of, or weakness of, local government in many countries in the region (see Chapter 7 of this report). Since these are essentially discretionary funds, control over their use is very lax, and there is always a risk of their being used in ways that curry political favour rather than in ways that best meet development goals. In Jamaica, for example, the Auditor-General's report of 2020 indicated inadequate controls over Constituency Development Fund payments and inadequate monitoring of Constituency Development Fund projects.

There is a two-way process in this clientelistic form of government: each MP is the elected head of their constituency, representing it, but also 'ruling over' it as a distributor of largesse and a broker of influence. As was repeatedly

noted at the Bridgetown Conference, MPs receive a premium in political credit if they are a Minister, not because they have a voice in national policy, but because they are in a position to deliver resources to clients. In order for such clientelism to work, however, there has to be a system of favour-based access to public resources—that is, a system in which politicians can gatekeep and can distribute public resources in return for political support, rather than as rights accessible by citizens in accordance with objective criteria. In other words, clientelism thrives where administration is weak—in the sense of being insufficiently institutionalized, abstracted and depersonalized.

A strong, impartial, securely institutionalized, professional, permanent civil service is above all an anti-corruption measure. The Northcote–Trevelyan Report of 1854, upon which British and Commonwealth civil services are based, was an attempt to root out ineptitude, patronage, graft and corruption from a system of government which had previously been notoriously corrupt (House of Commons 1854). The Caribbean Commonwealth constitutions, to varying degrees, therefore seek to preserve the impartiality and professionalism of the public service by means of independent Public Service Commissions (Robinson, Bulkan and Saunders 2021: 368). Despite these constitutional protections, it is sometimes difficult, in a small country, for the distinction between Government and administration to be maintained. Public Service Commissions can be packed by persons loyal to the ruling party, especially where one party holds office over several terms. Commissions can also be weakened in other ways—e.g. by hiring on contract rather than making appointments to the permanent civil service, or by privatizing services.

Clientelism thrives where administration is weak. A strong, impartial, securely institutionalized, professional, permanent civil service is above all an anti-corruption measure.

Elections in the region have been criticized, in the words of one participant at the Bridgetown Conference, as ‘free, but not fair’. Clientelism gives incumbents advantages over the other candidates, including greater ability to distribute patronage to their supporters. Incumbents also benefit from the Government’s ability to control public media and to determine the timing of elections (see 3.8: Fixed-term parliaments). Another factor contributing to ‘free, but not fair’ elections is party and campaign finance. This is only lightly regulated in the region. Most countries in the region require individual candidates to declare how much they have spent in their constituencies, but there is usually no requirement for political parties to declare their national expenditure. The sources of funds are also opaque. This weakens democracy by undermining the principle of equal voice; those who have the resources to pour money into politics have a better-than-equal chance of being heard. It also causes oligarchic distortion in another way, making parties and Governments more responsive to their (hidden, sometimes foreign) donors than to the people who elect them (Vernon 2022).

To a greater or lesser extent, these problems exist everywhere, but there are a range of legal and regulatory responses that can diminish the oligarchic grip on politics: this includes (a) transparency (disclosure requirements on both political expenditure and sources of funds); (b) prohibition on foreign donations; (c) prohibition on corporate donations; (d) donation caps; (e) campaign spending limits nationally as well as at the constituency level; (f)

public funding of political parties; (g) prohibition on the misuse of public resources for electoral or partisan purposes; and (h) limits on the use of media, including limits on the ability to buy airtime.[10]

Quote from the Bridgetown Conference: 'Embedding political finance law in the Constitution is important; public finances, disclosure of finances and party finance laws might reduce clientelism.'

A key question for constitution-makers is to what extent these matters are to be regulated in the constitution, and to what extent they should be regulated by ordinary law. On the one hand, it would not be appropriate for the constitution to set, for example, dollar amounts on spending limits, as any amount would soon become out of date with inflation. On the other hand, allowing these things to be set by ordinary law, which can be made and unmade by the governing majority, just opens the door to manipulation of the rules, further increasing the incumbency advantage. One solution is for the constitution to set out baselines to which no dollar figure is attached. For instance, the constitution could directly prohibit foreign and corporate donations, and could directly require political parties to publish their accounts. By way of illustration, the Constitution of Ghana (article 55) states that, 'Political parties shall be required by law to declare to the public their revenues and assets and the sources of those revenues and assets and to publish to the public annually their audited accounts', and that, 'Only a citizen of Ghana may make a contribution or donation to a political party registered in Ghana.' The Constitution of Kenya (article 92) does not prescribe such things in detail, but does establish a number of principles to be established by law. Of course, the effectiveness of such provisions depends on the willingness of the legislature to pass the necessary legislation.

It is also possible for the constitution to establish fourth-branch or similar institutions with the purpose of transforming general principles into specific regulations. Thus, for example, the constitution could make a commitment to the general principle of disclosure of donations, and then empower the Electoral Commission to set specific limits on the threshold above which donations must be disclosed. These general principles may also be used to render specific legislation or regulations justiciable. For example, it might be a general principle of the constitution that all laws and regulations pertaining to electoral, party and campaign finance should be designed to promote free, fair and clean elections, and that such laws and regulations should not unfairly advantage or disadvantage any party.

It is even possible to use fourth-branch institutions to scrutinize legislation on such matters; thus, for example, it might be a constitutional requirement that any bill for an Act of Parliament for the purpose of regulating election, party and campaign finance must be submitted to the Electoral Commission before its second reading debate, and that Parliament should not hold its second reading of the bill until after the Electoral Commission has reported upon it. This is a soft, procedural check. Unlike judicial review it does not annul any resulting law. It does, however, provide an additional level of scrutiny for such legislation, making it harder for the Government to slip changes under

[10] These responses were not discussed at length at the Bridgetown Conference, but were discussed during a follow-up seminar with members of the Barbados Constitutional Review Commission.

the radar. An example provision to this effect, drafted by International IDEA, was presented in a follow-up event to the Bridgetown Conference, and is reproduced below:

> Section 41F:
>
> - Subject to this Constitution, Parliament shall provide by law for the registration of voters, the conduct of elections, nomination of candidates, appointment of returning officers, election deposits, spending limits in campaigns, restrictions on sources of political financing, requirements to declare sources of financing, the regulation and registration of political parties, the suppression of corrupt or illicit electoral practices, and for any other purpose connected with the holding of elections and referendums.
>
> - Any law enacted under subsection (1), and any regulation, administrative rule, instruction, code of practice, or official guidance, issued under any such law, must have as its purpose the promotion of free, fair and clean elections, and must not have the effect of unfairly advantaging or disadvantaging any particular candidate or party.
>
> - Every bill for an Act of Parliament under subsection (1) shall be submitted to the Electoral Commission for comment between its first and second readings in the House of Assembly, and such a bill shall not proceed to its second reading unless the Electoral Commission has had a period of at least ninety days during which to study the bill and to report its analysis of the bill to both Houses.

These approaches—constitutionalizing the baseline prohibitions, declaring justiciable general principles, empowering the Electoral Commission or other suitable fourth-branch institution to issue regulations, and ensuring the scrutiny of applicable legislation—are not mutually incompatible. They can be combined in various ways in order to build a robust constitutional framework within which legislative and regulatory action can take place.

The Constitution of Barbados, exceptionally in the region, regulates political broadcasts and allocates broadcasting time to political parties (Constitution of Barbados [Amendment] Act 1989). However, this is at best a solution to a 20th-century problem. It is difficult to regulate micro-targeted Facebook adverts and other forms of 21st-century online campaigning.

2.4. **RECOGNITION OF POLITICAL PARTIES**

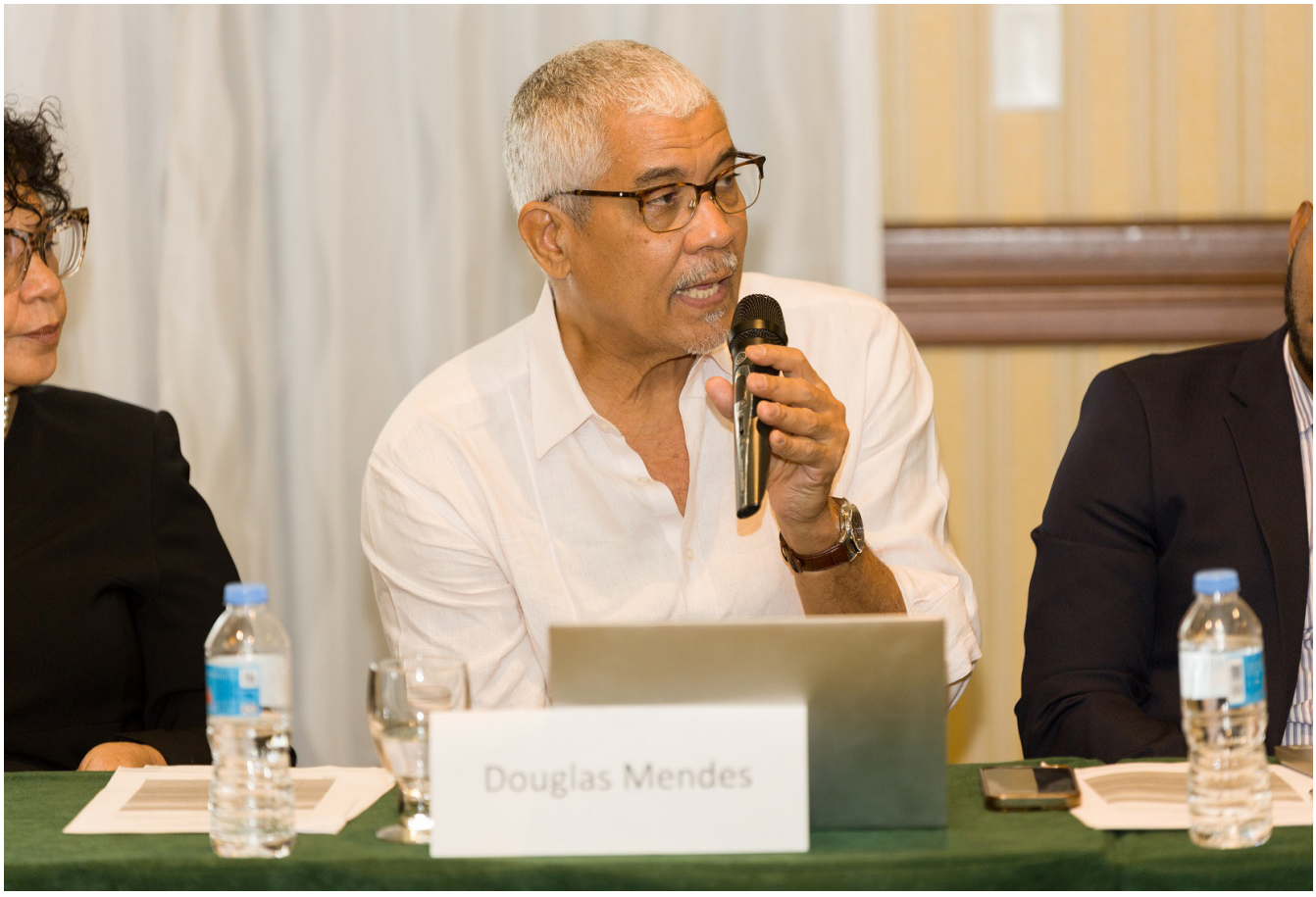
Political parties play a number of important roles in democracies. In recognition of that, parties are either recognized or regulated, in some fashion, by a majority of the world's constitutions. In addition to the question of funding

discussed above, these constitutional provisions can address a broad variety of issues, including the roles and functions of political parties, the right to form and to join political parties, and restrictions on political parties' goals and activities. As with party financing, a key question is, How much detail can, or should, be put into the constitution, and how much should be left to subconstitutional implementation?

When one party is in government, internal party democracy can be the most effective check against potential abuse of power.

In some countries (e.g. Ghana, Kenya) there may be prohibitions on ethnic, religious or regional parties. However, care must be taken with such provisions, as those restrictions could be used in an anti-democratic way, to limit political competition.

Another issue is internal party democracy. When one party is in government, internal party democracy can be the most effective check against potential abuse of power—the obvious example being the ability of the 1922 Committee to dethrone Conservative Prime Ministers in the UK. There is, however, a paradoxical relationship between internal party democracy and democracy in the country as a whole: giving more power to party members can actually disempower ordinary voters, and could result in increased polarization.



Douglas Mendes SC.

Chapter 3

STRENGTHENING PARLIAMENTS

A common element of the Westminster Model in the Caribbean is executive dominance: the ability of the executive to make policy unilaterally, with few and weak constraints upon the power of the Prime Minister and inner circle of the Cabinet. This has been associated with corruption and clientelism—which is possible only because those at the top have so much patronage to give—as well as with hasty, hurried decision making. To moderate this power, it is necessary to strengthen the role of Parliament in the political system. Westminster Model Parliaments tend to be reactive, rather than active, legislatures—that is, because the governing party controls a majority in the legislature, the legislature takes its lead from the Government, which normally determines the direction of policy. However, the extent to which this is the case varies, with some Westminster Model legislatures being stronger, in terms of their policy and legislative influence, than others. The soft powers of Parliament—not necessarily stopping Government policy, but shaping it through scrutiny, criticism and voice, and maybe altering policy through amendments—can be considerable.[11] So, aside from their expressive or representative role, Parliaments can influence policies and promote good governance.

3.1. CONTROL OF THE ORDER PAPER

Various options for strengthening Parliament exist. In a system predicated upon the balance of power between Government and Opposition, these options depend largely upon strengthening the ability of the Opposition to perform its functions in scrutinizing, questioning and overseeing the Government. That means, as a first step, ensuring an Opposition presence in Parliament, as discussed above. However, for the Opposition to be effective, much more than

[11] A recent study of the UK Parliament recognized that MPs, individually and as a House, do influence and modify Government policy (see Russell and Gover 2019).

At present, no Westminster Model constitution guarantees such time-shared control of the Order Paper, although it would not be a huge innovation to do so.

their mere presence is necessary. They also need robust procedural rules and internal parliamentary mechanisms to be able to perform their duties. One possibility, presented at the Bridgetown Conference, is to give the Opposition control of the Order Paper (that is, the agenda or order of business of the House) on certain days. As a general rule, the Government controls the Order Paper, which means it decides what is debated, as well as when it is debated and for how long. This control can be used to evade awkward subjects and to hide from scrutiny. A simple step in strengthening Parliament is to recognize 'Opposition Days' and 'Backbench Business Days', when the Opposition, or Backbench members, can decide what the House will discuss.[12] At present, no Westminster Model constitution guarantees such time-shared control of the Order Paper, although it would not be a huge innovation to do so. Putting this principle in the constitution, rather than relying solely on standing orders, protects it from attempts by the Government to evade or set aside these rules when they are not convenient.

An interesting case that highlights the problem occurred in Saint Kitts and Nevis. In April 2013, the Prime Minister lost the support of some of his own MPs, and thus lost a majority in the House. The Speaker, however, refused to place a vote of no confidence on the Order Paper. A period of five months elapsed without the vote being held. According to Ghany (2022: 12), 'This action by the Speaker brought his office into political disrepute and undermined its neutrality.' This was challenged in court. Lanns J held, in *Brantley v Martin*,[13] that there was a right, implicit in the parliamentary nature of the constitution, to have the vote held expeditiously. The judiciary was therefore brought in to solve a problem that could have been avoided if the principle of regular 'Opposition Days' had been established. Eventually, a convenient statutory solution was found, in the form of the Motion of No Confidence Act 2019. This Act requires the question of no confidence to be determined by a resolution of the National Assembly within 21 days after it has been requested.

Another option for distributing control of the legislative agenda more widely is to enable the people to introduce legislation through the form of popular initiatives. The Cayman Islands is the only Commonwealth Caribbean jurisdiction to have experimented with this procedure, and it was not discussed at the Bridgetown Conference. Beyond a glorified petition process, it is difficult to see how a popular-initiative process that might lead to legislation being passed against the will of the Government or the parliamentary majority is compatible with principles of representative and responsible government. A citizens' initiative process is quite different, in that respect, from a confirmatory referendum on a constitutional amendment at the end of the legislative process, where the people are asked only to accept or reject what Parliament has already decided. The experience of legislation by citizens' initiative in those jurisdictions where it has become a major tool of policymaking is, at best, very mixed. That said, perhaps there is merit in a glorified petition process, not as a

[12] In the UK, 20 days in each session are designated as Opposition Days; of these, 17 are reserved for the Official Opposition, and 3 are shared out between the other parties. Thirty-five days in each session are Backbench Business Days, where the agenda is decided by a cross-party committee of backbenchers.

[13] *Brantley v Martin* (St Kitts and Nevis) [2017] HC 25.

means of being able to legislate without Parliament, but as a means of placing proposals or issues for debate on Parliament's agenda.

3.2. **PARLIAMENTARY COMMITTEES**

Committees are essential to the effectiveness of Parliaments. They allow legislation to be considered in more detail, as well as providing a mechanism for the scrutiny and oversight of the Government.

Committees are essential to the effectiveness of Parliaments. They allow legislation to be considered in more detail, as well as providing a mechanism for the scrutiny and oversight of the Government. Most Commonwealth Caribbean countries became independent at a time when committees in 'the mother of Parliaments', Westminster, were relatively weak. The modern departmental select committee system, which allows members to acquire expertise in the close monitoring of a specific Government department or policy area, was not established until 1979. Before then, committees had been more ad hoc affairs. Since independence, various Commonwealth Caribbean countries have developed their own committee systems in their own ways, responding to particular national needs and circumstances. One of those circumstances is the small size of Parliaments. A small House—some in the region have as few as 15 members—will find it difficult to muster enough people for an elaborate committee system, and in such situations the House might find it easier to work as a 'Committee of the Whole House'. Even in Jamaica, which has the largest Parliament in the region, each of the select committees has to cover a swathe of the policy landscape, including the activities of several Government departments.[14]

The committees that do exist are often weak. In 2020 the main oversight committees in Jamaica, which had previously been chaired by Opposition members, were—except for the Public Accounts Committee and the Public Administration and Appropriations Committee—brought under Government control by the appointment of Government MPs to chair them. In the absence of constitutional protection for the role of the Opposition in committees, this change could be made unilaterally by the Government. However, it resulted in the committees doing very little work (Johnson 2021). Johnson (2021) blames this on the House not referring matters to the committees, but perhaps that also shows a passive, reactive attitude among the (pro-Government) committee chairs. Strong committees are able to act on their own initiative, and to launch investigations without waiting for instructions or for permission.

There is scope for the constitutional recognition and protection of committees. Malta's Constitution, for example, requires parliamentary committees to reflect the composition of the House (article 61[3]). In itself, that is scant protection because it means the Government will have a majority on every committee,

[14] According to the latest available version of the Standing Orders of Jamaica's House of Representatives, these are: (a) the Public Administration and Appropriations Committee; (b) the Internal and External Affairs Committee; (c) the Economy and Production Committee; (d) the Human Resources and Social Development Committee; and (e) the Infrastructure and Physical Development Committee. In addition, there is a Public Accounts Committee and a further six committees dealing with matters of internal organization (the Standing Orders Committee, the House Committee, and the Privileges Committee) or other general non-departmental matters (the Ethics Committee, the Integrity Commission Oversight Committee, the Public Administration and Appropriations Committee, and the Regulations Committee).

although, of course, it does at least ensure an Opposition presence and voice. Not only giving the Opposition a just proportion of committee seats but also guaranteeing them the chairpersonships of key committees would be one step further. The Constitution of Trinidad and Tobago (section 119) already enshrines the rule that the Chair of the Public Accounts Committee must be chosen by the Opposition. Such a provision could be extended to cover other major select committees. Guyana's Constitution provides that the Chairperson and Deputy Chairperson of committees must be elected from the opposite sides of the National Assembly (article 119B). Individually, such provisions may not be sufficient to ensure strong committees. Cumulatively, they may help create a constitutional framework in which the role, powers, purposes and composition of committees are protected.

Another possible option is to have, alongside the Public Accounts Committee, a dedicated but generalist and cross-departmental Oversight and Scrutiny Committee, on which the Opposition would have a majority. In a small Parliament, all Opposition members (including any members from third or minor parties) might automatically be members of that committee, which might have an explicit constitutional remit to launch investigations and enquiries on its own initiative.

All such reforms still depend, however, on having an adequate number of Opposition members in the House in the first place. Once again, the problems of clean-sweep elections and small legislatures present themselves (see 2.1: First-past-the-post elections in the Commonwealth Caribbean). They are also dependent upon adequate resources. A point made by several participants at the Bridgetown Conference is that constitutional powers for parliamentary committees are ineffective without adequate resources, staff and research support. (This theme is further developed in 3.4: Parliamentary leadership, organization and resources.)

3.3. **PARLIAMENTARY SITTINGS**

Parliament cannot function effectively if it is not sitting. Most Caribbean Commonwealth constitutions give the Prime Minister (acting through the President or Governor-General) the authority to summon and prorogue Parliament at will, with very few constraints. Taking the provisions in the Constitution of Saint Lucia (section 54) as typical, a session of Parliament must begin within 1 month of the holding of a general election, and within 12 months after the preceding session has been prorogued. There are no restrictions on the power of the Prime Minister to prorogue Parliament at will, and no mechanism by which MPs can require the Prime Minister to order the holding of a new session before the 12 months are up. The Constitution of Saint Kitts and Nevis is similar, although the time allowed from the prorogation of the previous session is 180 days (section 46).

These powers can be misused by arbitrarily proroguing Parliament or by refusing to summon Parliament for an excessively long time after it has been prorogued. Either way, the powers of summoning and prorogation, if completely in the hands of the Prime Minister, can be used to evade parliamentary scrutiny and, ultimately, to avoid facing a vote of no confidence. A combination of strict two-party systems and hyper-majoritarian election results means that successful votes of no confidence are relatively rare in the region, but problems of this nature have sometimes occurred. In 2002, for example, the Prime Minister of Trinidad and Tobago, Patrick Manning, used the power of prorogation to hold onto office without a majority after the general election resulted in an even split of seats between his People's National Movement and the United National Congress, each of which won 18 of the 36 seats (Ghany 2022: 2–3). Likewise, in May 2012 the Prime Minister of Grenada, Tillman Thomas, after a split within his Cabinet, narrowly survived a vote of no confidence, by 8 votes to 5 in the 15-seat House. Faced with another likely vote of no confidence in September 2012, Thomas advised the Governor-General to prorogue Parliament, thereby avoiding a vote. This 'politically motivated' prorogation merely seemed to 'delay the inevitable', but it did enable Thomas to cling to office for another four months, until Parliament was dissolved in January 2013 (Ghany 2022: 7).

These examples are not unique. Failure to adequately prevent abuse of the power of prorogation—or its corollary, the power to summon Parliament—is a common weakness of Westminster Model constitutions. In Tuvalu in 2013, the Prime Minister lost his majority because of by-election defeats, and clung to office by refusing to advise the Governor-General to summon Parliament.[15] In Canada in 2008, the Prime Minister prorogued Parliament in order to avoid a vote of no confidence which he feared he might lose (Heard 2008).

Failure to adequately prevent abuse of the power of prorogation—or its corollary, the power to summon Parliament—is a common weakness of Westminster Model constitutions.

A solution to the problem of a Prime Minister refusing to summon Parliament is to adopt a rule like that in the 1970 Constitution of Fiji, which allowed the Governor-General to summon Parliament at his or her discretion if requested by a petition in writing signed by one-fourth of MPs (Constitution of Fiji 1970: section 69[4]). A stronger version of that rule would remove the need for the Governor-General's discretion, and allow the Speaker to summon Parliament if requested by a significant minority (say one-third or one-quarter) of MPs. An example of the latter approach can be found in section 54(3) of the Constitution of Pakistan and section 93(3) of the Constitution of Nepal. Of course, the effectiveness of such a rule, in a Caribbean setting, might be undermined by the virtual or total exclusion of the Opposition from Parliament. If provision is made to avoid a clean-sweep election by always enabling the inclusion of at least the Leader of the Opposition, then the Leader of the Opposition might be given this power to recall Parliament, or else it could be given to a certain proportion of the Senate, such that the non-partisan Senators would hold the balance of power.

[15] *R. v Prime Minister and Minister Responsible for Elections, ex parte Sakaio* (Tuvalu) [2014].

A solution to the problem of arbitrary prorogation to avoid a vote of no confidence might be found in section 57 of the 1947 Constitution of Burma, which allowed the President to refuse a prorogation to a Prime Minister who had lost the confidence of the House; that would at least allow the Head of State, in such a situation, to require the Prime Minister to demonstrate parliamentary confidence before allowing prorogation (thus proving that prorogation is not merely an attempt to avoid losing a vote of no confidence).

3.4. PARLIAMENTARY LEADERSHIP, ORGANIZATION AND RESOURCES

A Parliament is a complex institution. It has multiple functions and various competing actors and interests within it. For it to perform any of these functions well, those actors have to be coordinated. In other words, Parliaments need leadership and organization. All Caribbean Commonwealth constitutions provide for a Speaker as the presiding officer of the lower or only House; in bicameral systems there is also a President of the Senate. These have their respective Deputies.

These presiding officers, in Westminster Model Parliaments, are not policy leaders (in contrast, for example, to the Speaker of the House of Representatives in the USA). The Prime Minister and Cabinet, not the Speaker, are primarily responsible for deciding which bills will be brought to Parliament. However, they do have an array of powers with which to affect how the House performs its tasks of scrutinizing, questioning, checking and advising the Government. For example, the Speaker can normally allow or disallow parliamentary questions to Ministers, and so either expose them to criticism or protect them from it. The Speaker may be able to accept or refuse closure motions, and so either prolong or curtail debate. The Speaker can select or reject Opposition motions and amendments, and so either enable or deny the expression of minority views in the House. The Speaker may also be able to permit or deny emergency debates on matters arising. Speakers even decide whether to call, or not to call, individual Members (see Benn 1992). If the Speaker sees his or her role as being in the service of the Government, these powers can be used to drive Government business through the House, to limit debate and scrutiny, to prevent alternative views from being heard and to minimize any embarrassment, frustration or delay to the Government. The Speaker decides on when filed parliamentary reports will be tabled, meaning the Speaker can withhold key reports that may be unfavourable to the Government—as has happened in Jamaica (Campbell 2024).

From the discussions at the Bridgetown Conference, it appears that many, if not all, Caribbean Commonwealth Speakers see themselves as part of the Government's team and not—or at most only secondarily—as impartial guardians of Parliament as such.

From the discussions at the Bridgetown Conference, it appears that many, if not all, Caribbean Commonwealth Speakers see themselves as part of the Government's team and not—or at most only secondarily—as impartial guardians of Parliament as such. If, on the other hand, the Speaker could see his or her role as being in the service of the House, and the office of Speaker could be constitutionally defined in that way, then these powers could be used

to empower the House as a forum for debate, representation, scrutiny and accountability.

As well as their functions inside the chamber, Speakers often have duties to perform outside the chamber, as official representatives of the House or as overseers of parliamentary organization. In Jamaica, for example, the Speaker nominates the Clerk and Deputy Clerk of the House (section 47[2]), sits on a Commission which assesses the pay and allowances of the Clerk and Deputy Clerk, and chairs the bipartisan committee responsible for delimiting the boundaries of constituencies (section 67). Again, these duties call for independence and non-partisanship if the House as a whole is to perform its duties as a legislative, representative and scrutinizing body. In the British House of Commons, Speakers since the 18th century have shed themselves of any party affiliation upon election, and have seen their role in terms of service to the whole House. In the Commonwealth Caribbean it has not been so. The Speaker normally retains their party affiliation, and standards and expectations of impartiality in the Chair vary between jurisdictions.

A clear constitutional statement requiring the Speaker to renounce party affiliation while in office might at least set the right expectations. The 1986 Constitution of Tuvalu, for example, contained a provision (section 106[7]) stating that, 'The Speaker shall perform his [or her] functions impartially, and has a duty to ensure that in the conduct of the business of Parliament there is a reasonable opportunity for all members present to be fairly heard.'

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Parliaments need adequate resources—a Parliament building, committee rooms, office space for Members, a parliamentary library and archives, legal and technical support for Members, parliamentary research staff and so forth. These facilities and services are limited in the Commonwealth Caribbean. Their provision is not normally a matter of constitutional design in the region. Elsewhere, however, constitutions do make reference to the provision of resources to support Parliaments in their work. As one minor example, New Zealand's Constitution Act 1986 makes reference to a parliamentary library and to the appointment of a parliamentary librarian.

One important resource is the existence of a Parliamentary Counsel's office that can help Members draft bills and amendments. Some constitutions in the region do mention such an office—the Constitution of Trinidad and Tobago, for example. It is not that the concept of a Parliamentary Counsel does not exist in the region, but rather that it is usually embedded within the Office of the Attorney-General or Ministry of Legal Affairs rather than embedded within Parliament itself. In a small Parliament with limited resources, where the Government is the main driver of legislation, it probably makes some sense to combine these functions. Even so, its effect is to strengthen the Government, not to strengthen Parliament. A separate Parliamentary Counsel, able to assist Backbench and Opposition MPs in drafting Private Members' Bills and amendments, might help make Parliament a more effective body. The effect of such a change in terms of legislative outcomes is likely to be marginal, at least initially, given entrenched deference to the leadership within

governing parties and the antagonistic, rather than constructive, attitude of many opposition parties in what is, in most cases, still a win-or-lose, zero-sum game. Nevertheless, access to adequate legal advice also hinders Parliament's scrutinizing role. In Jamaica, for example, the Speaker had to approach the Attorney-General to seek advice on the tabling of the report of the Integrity Commission and Auditor-General's reports; the Speaker then refused to share that advice with the House, arguing that the Attorney-General works for the Government, not for Parliament (Campbell 2024). An independent Parliamentary Counsel could have provided a more publicly accountable source of legal advice on behalf of the House as a whole.

To manage the staff, facilities and resources of an effective Parliament is a demanding task. Traditionally, this is performed by the Speaker and the Clerks (except to the extent that the parliamentary estate may be Crown or state property, and therefore might fall under the management of a Government department). Some countries have unified the administration of parliamentary staff, facilities and resources. Fiji has a Secretary General to Parliament, a constitutionally recognized official who is responsible for the logistical and administrative management of Parliament. Scotland has a Parliamentary Corporate Body, a cross-party body chaired by the Presiding Officer, which acts as the employer of parliamentary staff and as the owner of the parliamentary estate. Some such bodies exist within the region. Barbados, for example, has a Management Commission of Parliament, established under the Parliament (Administration) Act. These institutions may give Parliament a sense of self-ownership and self-administration, rather than seeing themselves as dependent upon the Government.

Of course, all of this costs money, and spending money on Parliament is less immediately easy to justify than spending money on development, infrastructure or public services. Yet in the long run, development outcomes may be better served by making sure that Parliament has the leadership, organization and resources necessary to do its job effectively.

Alongside the issue of resources is that of remuneration. In most of the region, MPs are not particularly well paid. This has obvious implications. Few can afford to be MPs, which makes the political process more exclusive. Once in office, MPs have every incentive to carry on with other work—as business owners or as lawyers in private practice, for example—to the potential detriment of their parliamentary duties. Being an MP is still not widely regarded as a full-time occupation, although to do the work diligently would take many more hours than a normal working week. There have even been complaints about the lack of parking for parliamentarians. That is a small point, seemingly trivial, but it says something about how the role of Parliament is considered.

Some issues of parliamentary effectiveness might be addressed, at least in outline, through robust constitutional design. Others are not easily constitutionalized.

Some issues of parliamentary effectiveness might be addressed, at least in outline, through robust constitutional design. For example, the Constitution of Trinidad and Tobago (Chapter 11) already establishes a mechanism and process for determining the remuneration of parliamentarians. Others are not easily constitutionalized. Nevertheless, they might be issues that a

Constitutional Review Commission could wish to address in its report, for action at the subconstitutional level.

3.5. **LIMITATION OF THE PAYROLL VOTE**

Strengthening the legislative, representative and accountability roles of Parliaments requires not only the empowerment of the Opposition, of Committees or even of the Speaker and the leadership staff of the House, but also the empowerment of backbenchers.[16] Backbenchers from the governing party normally support the Government and usually vote on party lines with the majority. However, because they do not hold ministerial office (i.e. they are not on the Government's payroll), they are not necessarily bound by the rules of collective responsibility to support the Government, at least not uncritically. The need to carry backbench MPs, to address their concerns, can be one of the most effective constraints upon Governments (Russell and Gover 2019). When the governing party has a loyal majority, every Opposition amendment can be defeated, and the Government's will prevails, but if some backbenchers abstain, or vote against the Government, then that majority can collapse. The voice of friendly criticism offered by Government backbenchers is a subtle, but vital, check and balance in Westminster Model democracies.

The voice of friendly criticism offered by Government backbenchers is a subtle, but vital, check and balance in Westminster Model democracies.

The shortage of such backbenchers in the Caribbean offers a further demonstration of the excessive majoritarianism and executive dominance of the Westminster Model in this context. Commonwealth Caribbean Cabinets tend to be large in relation to the number of MPs. To some extent this is simply a matter of size and scale: Parliaments in the region range from quite small[17] to very small.[18] However, Cabinets cannot be shrunk below a certain minimum size: there is a minimum number of Ministers required to cover the portfolios necessary in any independent country, regardless of its size or population. It is also, however, a matter of choice. Without an imposed constitutional limit, Prime Ministers have an incentive to appoint as many Ministers as possible, to keep MPs loyal. MPs have personal (salary, perks, profile) and political (patronage and influence) reasons to seek ministerial office. These factors can result in situations where all, or very nearly all, of a governing party's MPs hold ministerial office, and where those on the Government's payroll therefore have an automatic majority in the House, meaning that there is (without an internal party challenge to the leadership) no prospect of a Government ever being defeated in the House. The partial fusion of the executive and legislative powers inherent in the Westminster Model (Bagehot 1873) becomes a complete fusion. The Cabinet not only has the confidence of the legislative majority; it itself *is* the legislative majority. This contrasts with large Westminster Model Parliaments, where there might be, say, 300 or more MPs who support the Government; of these, about 20 to 25 will hold ministerial

16 'Backbenchers' is a term applied to all MPs, other than the Speaker and Deputy Speaker, who neither hold ministerial office nor serve as Opposition 'front bench' spokespersons.
17 Jamaica: 63 MPs and 21 Senators.
18 Saint Kitts and Nevis: 11 MPs and 4 Senators.

offices of Cabinet rank, while about 60 to 80 will hold more junior ministerial offices, or hold offices as whips or parliamentary private secretaries. Thus the payroll vote makes up no more than about one-third of the Government benches or, in general terms, about one-sixth of the whole House.

Potential solutions were discussed at the Bridgetown Conference, one of which is to limit, by constitutional amendment, the number of MPs who can become Ministers. Such rules exist in other Westminster Model constitutions. For example, article 75(1A) of the Constitution of India limits the number of persons holding ministerial office to 15 per cent of the total membership of the lower House. However, these limits are rare in the Commonwealth Caribbean region. The notable exception is Belize, where the number of Cabinet Ministers is limited to not more than two-thirds of the number of MPs of the governing party. However, this arrangement has not proven wholly satisfactory. If the governing party has a large majority, this might still be a majority of all MPs. In addition, its effectiveness is undermined by the fact that it applies only to Cabinet Ministers, and not to other Ministers not of Cabinet rank. Another provision was proposed in the 2009 draft for Saint Vincent and the Grenadines which would have limited the number of Cabinet Ministers (other than the Prime Minister) to 12, out of a total of 27, Members of the National Assembly. To limit the number of Ministers to just 15 per cent, as in India, would obviously be impractical (in a House of 30 members, that would allow just 4 Ministers). However, to limit the payroll vote to, say, one-third of the total number of MPs might be practical, except in the very smallest Parliaments of the region.

To limit the payroll vote to, say, one-third of the total number of MPs might be practical, except in the very smallest Parliaments of the region.

3.6. ANTI-DEFECTION PROVISIONS

Backbenchers may be nullified if strict anti-defection rules are introduced. These are rules that cause an MP to lose his or her seat in the House if he or she changes political party. The democratic rationale for such a rule is clear enough: it prevents Members elected under one party label, and one manifesto, from defecting—contrary to the wishes of their electors—to another party. It recognizes that people vote, in reality, for a party, not for an individual. The strictness of such rules varies. In Guyana it applies only to those members who are elected on a party list for the proportionally elected seats (article 156).

In its most extreme form, in Bangladesh, an MP need not even change party to be in peril of losing his or her seat; to merely vote against his or her own party is enough (Constitution of Bangladesh, article 70). That makes it practically impossible for Backbench MPs to hold the Government to account or to influence Government policy; they are reduced to mere 'lobby fodder'. It is hard to reconcile that with the need for a functioning Parliament.

Belize has a weaker anti-defection rule, which is invoked only if a member *resigns* from his or her party, whether to sit as an independent or to join another party; merely voting against the party should not be sufficient to cause a member to be ejected (Constitution of Belize, section 59[2][e]). Yet the

practice, according to a participant at the Bridgetown Conference, is that if a member from the governing party speaks out against the Government, they may be seen as having crossed the floor, and therefore forfeiting their seat. So if the motivating concern of constitutional reform is to moderate and constrain the worst excesses of executive dominance and hyper-majoritarianism, care needs to be taken to ensure that anti-defection provisions do not undermine the crucial balancing role of Backbench parliamentarians.

3.7. **EXTERNAL APPOINTMENT OF MINISTERS**

A more radical proposal is to appoint Ministers from outside of Parliament. Effectively, this would mean all MPs would be backbenchers. This has been proposed in some constitutional review reports. For example, the 2011 Final Report of the Constitutional Review Commission in Saint Lucia recommended that Ministers should be appointed from outside of Parliament. Parliamentarians would be eligible for appointment to ministerial office, but if so appointed would have to resign their seats in Parliament. The idea was to break the executive–legislative fusion and to 'lead to the development of professional legislators who could devote time to the scrutiny of legislation and provide oversight of the Executive through committees, while at the same time devoting themselves to the demands of their constituencies' (Saint Lucia 2011: 137).

Such proposals are not incompatible with parliamentary democracy so long as the Government gains and holds office only with the confidence of Parliament. The Netherlands is an example of a parliamentary democracy in which parliamentarians are forbidden from simultaneously holding ministerial office. However, this would be a substantial deviation from the Westminster Model, a defining feature of which is that the executive is formed by persons who are members of the legislature (de Smith 1964), such that the Cabinet is, in effect, an 'executive committee' of Parliament (Bagehot 1873). So far, no country has taken that step.

That said, the selection of *some* Ministers from outside Parliament is not wholly without precedent in Westminster Model constitutions. The Constitution of Bangladesh, for example, provides that at least nine-tenths of the Ministers must be appointed from among members of Parliament, and that up to one-tenth of the Ministers may be chosen from outside Parliament (article 56). This concession, without breaking the norm that Ministers should *usually* be MPs, does allow the recruitment of Ministers who are not parliamentarians, which might be beneficial if they have specialist skills or experience, but are unable or unwilling to be elected to the lower House. It might also help overcome the problem, noted above, of how to limit the payroll vote, while also keeping ministerial portfolios covered, in a small Parliament.

It should be noted that appointed Senates provide an alternative route to ministerial office for those unwilling or unable to face election. In Jamaica, at

least two, but not more than four, Cabinet Ministers must be chosen from the Senate (Constitution of Jamaica, section 69[3]). The Constitution of Belize likewise allows up to four Ministers to be appointed from the Senate (section 40[2]). Most other bicameral countries in the region simply require the Prime Minister, or sometimes the Prime Minister and the Minister responsible for finance, to be chosen from the lower House, while other Ministers may be chosen from the Senate, without specifying numbers.

Whether Ministers are chosen from outside Parliament or from an appointed Senate, there is a chance that ministerial appointments made from outside the lower House could simply be a means by which a Prime Minister is able to reward supporters who have been rejected by voters. To prevent this backdoor route to power, a rule prohibiting defeated parliamentary candidates from being appointed to ministerial office during the term of that Parliament might be considered. On the other hand, such appointments—which are by no means uncommon in the region—have been defended as a way to keep hold of political talent and ensure that an electoral upset in one constituency does not deprive the country of a capable Minister. Even if that argument is accepted, it is necessary to exercise caution and restraint; the abuse of this mechanism can contribute to a sense that the political class hold ordinary voters in contempt. One of the merits of the Westminster Model is that it allows a crude, but effective, means of 'throwing the rascals out'; Ministers defeated at the polls who then get back into office through extra-parliamentary appointment or a nominated seat in the Senate could undermine one of the system's democratic strengths.

3.8. FIXED-TERM PARLIAMENTS

Across the region Governments have the ability to dissolve Parliament and call a general election at the time of their own choosing. Essentially, that means one team controls the starting gun, and they can fire it when their opponents are least well prepared.

Across the region Governments have the ability to dissolve Parliament and call a general election at the time of their own choosing. Essentially, that means one team controls the starting gun, and they can fire it when their opponents are least well prepared. The Government can gear up its campaign, knowing when the election will be; others have no idea when the ruling party will call an election, and can be caught off-guard. This contributes to the feeling that elections, although free, are not fair.

A possible solution to this would be to adopt fixed-term Parliaments, with early dissolution allowed only in exceptional circumstances (e.g. if the Government loses a vote of no confidence). Experience from elsewhere shows this calls for very robust and carefully considered constitutional design if the reform is not going to be gamed or ignored.[19]

[19] In the UK the Fixed Term Parliaments Act 2011 regulated dissolution rules without regulating the other side of the equation, government formation and removal rules, resulting in confusion and paralysis. In Canada fixed election dates for federal elections were introduced in 2007, but are effectively meaningless, as the Prime Minister can still advise the Governor-General to dissolve Parliament at any time before that date. In Germany Chancellor Gerhard Schröder deliberately lost a confidence vote in 2005 in order to hold a snap election, normally prohibited under the German Constitution.

Fixed-term Parliaments can have another effect—strengthening the hand of Backbench MPs to overthrow their own Government. At present, it is very difficult for MPs of a governing party to oust their leader without triggering a general election. The precise rules are rather intricate, and do vary in detail between countries, but Jamaica is illustrative: under section 64(5) a vote of no confidence automatically results in a dissolution of Parliament; under section 71(2) and (3) a vote to 'revoke the appointment of the Prime Minister' places the Prime Minister in the position of being able to choose—either to leave office or to dissolve Parliament. Either way, MPs cannot remove a Prime Minister without risking their own seats. This can be contrasted, for example, with other Commonwealth small island states in the South Pacific, where fixed-term Parliaments and immunity from early dissolution, together with a more fragmented party system, have resulted in a higher turnover in the office of Prime Minister. In the Solomon Islands, for example, Parliament cannot be dissolved without its own consent, by resolution (Constitution of the Solomon Islands, section 73). While the very long continuance in office seen in some Commonwealth Caribbean countries can give rise to problems, not least the blurring of the state–party boundary and the politicization of the public service, excessive churn in the office of Prime Minister may also be undesirable. If fixed-term Parliaments are desired, the difficulty is twofold: on the one hand, designing rules that cannot be easily gamed, so as to nullify their effect; on the other hand, to avoid so immunizing Parliament from dissolution that Prime Ministers can be too easily overthrown.[20]

Reformers considering these matters therefore need to think carefully about how all the parts of any proposed constitutional amendment will work together—dissolution rules, Government formation and removal rules, and the electoral system. The power of dissolution at will already embodied in the Caribbean Commonwealth constitutions might exacerbate hyper-majoritarianism and executive dominance when combined with FPTP electoral systems, but could equally be an important means of ensuring discipline and coalition coherence in a Parliament elected by proportional representation.

Reformers need to think carefully about how all the parts of any proposed constitutional amendment will work together—dissolution rules, Government formation and removal rules, and the electoral system.

3.9. **PRIME MINISTERIAL TERM LIMITS**

In Westminster Model democracies, Prime Ministers do not normally serve for fixed terms. They can hold office indefinitely so long as they retain the confidence of the lower House of Parliament, and (usually) remain members of that House. To talk of Prime Ministerial 'terms of office' is nothing more than a convenient, but inaccurate, shorthand. The traditional rule is that the Prime Minister continues in office after a general election unless he or she resigns

[20] Twentieth-century British constitutional scholars typically contrasted the stability of the Government in the UK and the dominions against the instability of the Government in France, the other major Western European democracy at the time. This was largely attributed to the existence of the dissolution power in the Westminster system, which allowed the Prime Minister to stifle Backbench unrest with the threat of a general election and to appeal directly to the people over the heads of Parliament. The French Third (1870–1940) and Fourth (1946–1958) Republics, meanwhile, so limited the power of dissolution that Parliament was able to overthrow Governments with impunity (see, for example, Headlam-Morley 1928).

or is defeated on a matter of confidence. The throne speech, setting out the Government's legislative agenda and other priorities for the coming session, is normally treated as the first test of a Government's confidence and acts as a de facto vote of investiture. Some countries in the region have sought to clarify and define these rules. In Barbados, for example, the President may remove the Prime Minister from office following a general election if, as a result of that general election, it is clear that the Government will not have a majority in the new Parliament, thereby saving the rigmarole of a Prime Minister who has clearly been defeated at the polls refusing to resign and clinging on to office until they are actually defeated in the House.

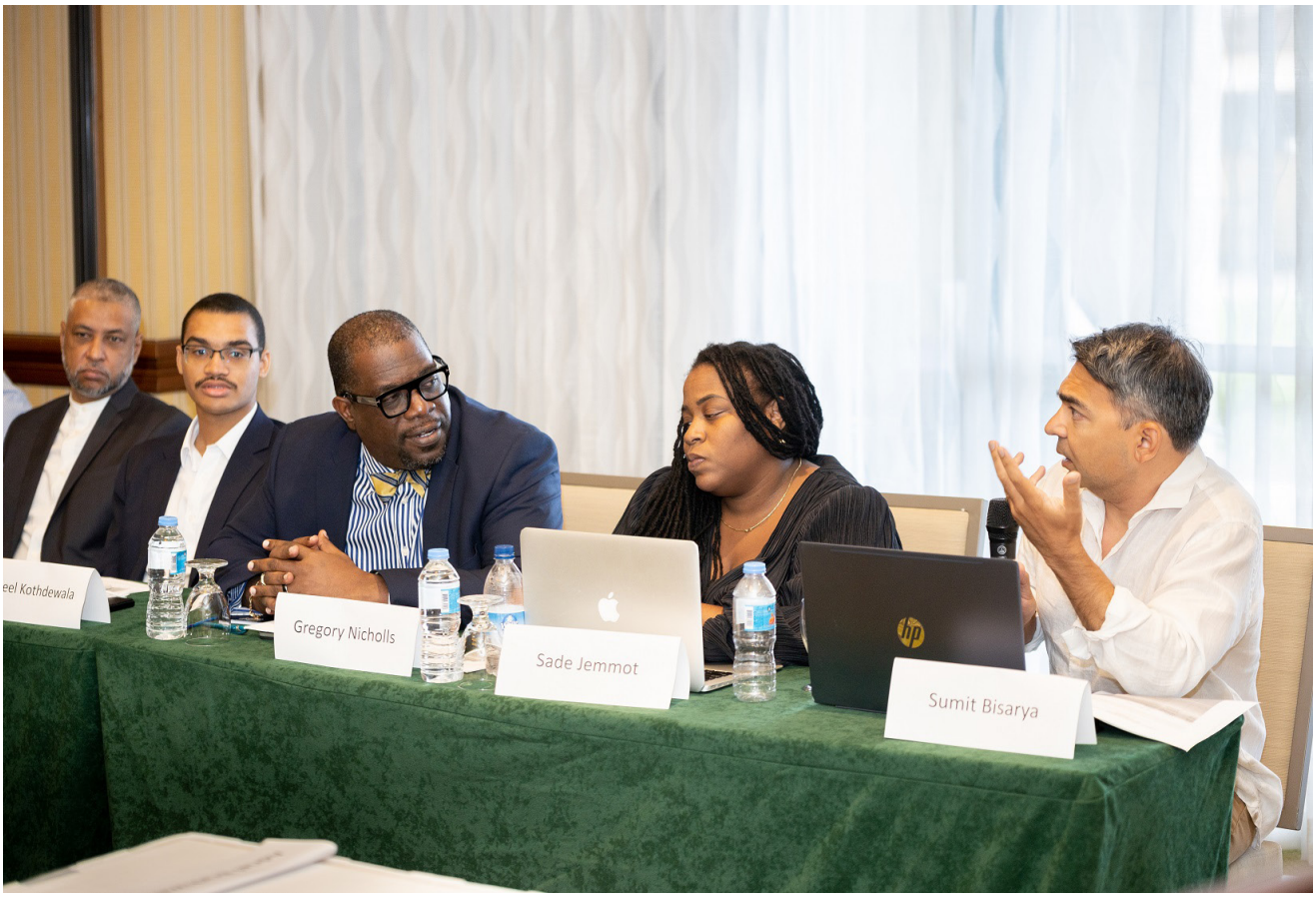
Other countries have introduced a more profound change, imposing term limits on the Prime Minister. The Prime Minister of Belize, for example, cannot remain in office for longer than the duration of three Parliaments—that is, 15 years (Constitution of Belize, section 37[2]). This rule was introduced by a constitutional amendment in 2008, despite a recommendation by Belize's 2000 Political Reform Commission against the introduction of Prime Ministerial term limits (Belize 2000: para. 8.24). A similar rule applies in the Cayman Islands, except that the Premier is limited to two consecutive terms (Cayman Islands Constitution Order, section 49[4]). Although not a standard parliamentary system, Guyana also adopted term limits for the executive President in 2001.

The question behind term limits is ultimately whether it is democratically legitimate and desirable to limit people's choice of chief executive in order to compel rotation in office.

The question behind term limits is ultimately whether it is democratically legitimate and desirable to limit people's choice of chief executive in order to compel rotation in office. What has greater effect in producing good government: (a) to make every leader electorally accountable, and to give the people a free choice to re-elect someone who has done and is doing a good job; or else (b) to limit that electoral accountability, and the people's choice, at regular intervals, in order to prevent the excessive concentration of power in the hands of a particular person, and to encourage 'new blood' to come into office? Term limits are supposed to limit the ability of leaders to entrench themselves in power, preventing the personalization of power; knowing that office must end, and that a leader must sooner or later return to a private station in life, is supposed to be a salutary check against the abuse of power over time. Against that, however, term limits may—if kleptocratic norms prevail—encourage more corruption, as leaders seek to grab what they can during the limited time available to them.

These arguments apply to Prime Ministers in parliamentary systems in much the same way as they apply to Presidents in presidential systems. Despite the fact that Prime Ministers are appointed on the basis of enjoying the confidence of the House, and not directly elected by the people, in practice there has been an increasing personalization and 'presidentialization' of the office of Prime Minister. A Prime Minister can accrue too much personal power over time. This is not an abstract question for the Caribbean. In Saint Vincent and the Grenadines the Prime Minister has been in office for five terms, and many expect him to run for a sixth. A Government in Saint Kitts and Nevis held on to power for four terms, and produced a slew of litigation as the Prime Minister sought to change constituency boundaries, and the Speaker ignored calls for a

vote of no confidence. The Dominican Prime Minister has been in office since 2004. Oppositions have weakened in these states as power consolidates in not just a party but a person. Of course, even if an individual Prime Minister is term-limited and cannot be reappointed, a Government of their party could still be returned to office under a new Prime Minister.



L to R: Khaleel Kothdiwala; Hon. Senator Gregory Nicholls; and Sade Jemmott, Barbados Constitutional Reform Commission; Sumit Bisarya, International IDEA.

Chapter 4

BICAMERALISM AND SENATE REFORM

4.1. HISTORICAL AND CULTURAL CONTEXT

Bicameralism has a long history in the Commonwealth Caribbean region. The classic form of colonial government prior to the 19th century was to replicate the model of the two-chambered British Parliament, with an elected House of Assembly (albeit elected on a narrow, race-, gender- and property-restricted franchise) and an appointed Legislative Council.

The principle of 'virtual representation by appointment' was a recurring feature of British imperial institutions, which cropped up, in various forms, throughout the Empire and in early Commonwealth constitutions.

In the 19th century, in many countries, the old bicameral structure, which had been dominated by the slave-owning aristocracy, was abolished and replaced by a more tightly controlled system of Crown Colony government: Jamaica was the pattern for this change; Barbados, on the other hand, resisted it and maintained its old representative system. The Crown Colony system was also extended to new acquisitions during and after the Napoleonic wars.

In Crown Colonies, the norm was to have a unicameral Legislative Council, consisting of a mixture of official, nominated unofficial and elected members, in varying proportions; over time, the proportion of elected members gradually increased. The official members were supposed to bring expertise and practical knowledge to bear on the legislative process and to secure gubernatorial influence over decisions. Nominated unofficial members were supposed to represent certain interests that would otherwise not be represented. The principle of 'virtual representation by appointment' was a recurring feature of British imperial institutions, which cropped up, in various forms, throughout the Empire and in early Commonwealth constitutions.[21]

[21] A particularly notorious example of use was to be found in the South Africa Act 1909: a constitutional statute that denied non-whites the right to vote, but where four Senators were appointed 'on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa'.

Taken as a whole, Crown Colony rule was a deeply authoritarian, executive-focused form of governance designed to protect imperial interests and to keep the majority populations at bay. It caused enduring discontent and political activism, which was connected closely with the 1930s uprisings against British colonialism in the Caribbean. Those uprisings led to the Moyne Commission, which led to constitutional reforms in 1944, beginning in Jamaica. In its last stages, the Crown Colony system was modified and mitigated by the gradual expansion of democratic rights and the emergence of representative and responsible government. Internal self-government was granted to Jamaica in 1944, with a wholly elected House of Representatives, and with the (ex officio) official and nominated members removed to a separate Legislative Council with limited powers (Caine 2017).

This historical perspective sets the tradition in which bicameralism in the region operates to this day: as noted in 4.2: Bicameralism in the region today, Senates in the Commonwealth Caribbean are always appointed and nowhere elected, and always have a secondary, rather minimal, role. As the Wooding Commission Report into constitutional reform in Trinidad and Tobago (1974: para. 177) noted, critically, there is in the region 'a strong tradition of government by nomination, a fear that the elected person will not be as educated or as intelligent as the nominated member and consequently will not be as capable of making decisions for the country'.

4.2. **BICAMERALISM IN THE REGION TODAY**

Eight of the independent countries in the region have bicameral legislatures (Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Lucia, and Trinidad and Tobago), as does the non-independent jurisdiction of Bermuda.

In no country in the region is there an elected second chamber. Everywhere the notion of representation by nomination prevails in the Senate. All Senators fall into one of three classes—Government Senators, Opposition Senators and Independent Senators. Government Senators are nominated on partisan grounds by the Prime Minister. Opposition Senators are nominated on partisan grounds by the Leader of the Opposition. Both are formally appointed by the Governor-General or the President, as the case may be. The Independent Senators may be appointed by the Governor-General or the President at his or her own discretion, usually after consultation with social, economic, religious, cultural or professional interests. This not only allows for some non-partisan representation in an otherwise highly partisan political system, but also gives voice, more or less directly, to those groups in the legislative process. It opens up a different dimension to representation, on what is known as a 'functional', rather than partisan or geographical, basis. However, there is some concern about who should be included, whether those appointed are genuinely non-partisan, and whether they are able to act as legitimate spokespersons for the interests they are supposed to represent. Belize is more prescriptive than

In no country in the region is there an elected second chamber. Everywhere the notion of representation by nomination prevails in the Senate.

most, requiring that the Independent Senators be appointed on the advice of: (a) the Belize Chamber of Commerce and the Belize Business Bureau; (b) the Belize Council of Churches and the Evangelical Association of Churches; (c) the Belize National Trade Union Congress and the Civil Society Steering Committee; and (d) non-governmental organizations.

The balance between Government Senators, Opposition Senators and Independent Senators varies between countries.

The balance between Government Senators, Opposition Senators and Independent Senators varies between countries. In Jamaica, for example, there are 13 Government Senators, 8 Opposition Senators and no Independent Senators. In Barbados there are 12 Government Senators, 2 Opposition Senators and 7 Independent Senators.

In all countries except Belize, the Government Senators have a thin majority over the Opposition and Independent Senators combined, enabling the Government to pass legislation through the Senate without much difficulty; however, in many cases, if the Opposition and Independent Senators combine to vote against the Government, they may veto amendments to the constitution.

The proportion of Government, Opposition and Independent Senators does not reflect election results (as long as at least one Opposition Member is elected to the lower House[22]), since the share of seats is predetermined by the Constitution. The only exception to this rule is the Bahamas, where 3 (out of 16) Senators are appointed on the advice of the Prime Minister after consultation with the Leader of the Opposition, in such a way as to ensure that 'the political balance of the Senate reflects that of the House of Assembly' (Constitution of the Bahamas, articles 39[4] and 40). Thus, the split between Government and Opposition Senators in the Bahamas can vary, depending upon election results, from 9:7 to 12:4.

In the countries composed of two distinct islands, one having some degree of recognized autonomy from the other (Antigua and Barbuda, Saint Kitts and Nevis, Trinidad and Tobago), some Senators may be appointed specifically from the smaller island. In Antigua and Barbuda, for example, there are two appointed Senators from Barbuda—one appointed on the advice of the Prime Minister, and the other on the advice of the Barbuda Council. Except for these instances, Senators in the Commonwealth Caribbean region do not have geographical constituencies (this contrasts, for example, with Canada, where Senators, although likewise nominated rather than elected, are in principle appointed on a provincial basis).

Three of the independent states have unicameral legislatures (Guyana, Saint Kitts and Nevis, and Saint Vincent and the Grenadines), as do the British

[22] If the Government wins a clean sweep of seats in the lower House (not an uncommon occurrence in the region), then no Opposition Senators are appointed.

Virgin Islands, the Cayman Islands, and the Turks and Caicos Islands. In all cases, except Guyana, these unicameral systems include nominated or ex officio members, sitting alongside the elected members, in a manner that is reminiscent of the old Crown Colony Legislative Councils, and that continues the tradition of representation without election.

The absence of elections, and the resulting lack of a democratic mandate, means that the powers of second chambers, in the jurisdictions where they exist, are usually weak. Senates have only a delaying power over ordinary legislation, and almost no effective power over 'money bills'. Even these moderate powers are unlikely to be used, given the Government's built-in majority. A majority of Senators are partisan politicians, who are kept on a tight rein by their parties. As one former Senator summed it up: 'I was told: toe the line, follow the lead.' Only when Opposition and Independent Senators combined can delay legislation (as in Belize) or can veto certain constitutional amendments (as in Barbados) does the Senate play an effective check-and-balance role.

Quote from the Bridgetown Conference: 'I was told: toe the line, follow the lead.'

Appointment is not, in itself, a bar to an effective second chamber. It depends upon the independence and legitimacy of the appointees, and it is there that the difficulty facing constitutional designers lies. As noted above, some Senates in the region include a number of Independent Senators representing social, economic, cultural or religious interests; adding such Independent Senators, where they are absent (e.g. Jamaica), or increasing their number, where they are present (e.g. Belize), may be an important reform to the appointment process.

Another possibility, from the wider Westminster family, is to create an Appointments Commission, taking the power of nomination away from the Prime Minister. In Canada, for example, appointments to the Senate had traditionally been made on partisan lines, each Government stacking the Senate with its own supporters. In 2015, Canadian Prime Minister Justin Trudeau instituted a new, non-partisan, system of appointment on merit. Since then the Canadian Senate has evolved into a non-partisan body, and has begun to flex its muscles, with a third of Government bills amended by the Senate (Dean 2022).

Another possibility is to create an Appointments Commission, taking the power of nomination away from the Prime Minister.

Independence is also promoted by security of tenure. In the UK the House of Lords has since 1999 (when most hereditary peers were removed) become a chamber constituted mostly by partisan appointment, but once appointed the members serve with security of tenure for life, or until voluntary retirement. The House of Lords has since 1999 acted with increasing confidence and autonomy (Russell 2013) and is arguably the most effective check on the Government's majority in the House of Commons (Dunt 2023). Unlike their British and Canadian counterparts, however, Caribbean Senators have no such security of tenure. They serve only for the duration of Parliament, and lose their seats at each dissolution. In most countries in the region—although not, incidentally, in Jamaica—they can even be removed and replaced, at any time, on the binding advice of the person (usually either the Prime Minister or the

Leader of the Opposition) who nominated them. Thus, they are kept on a tight rein. Partisanship, which has dissipated in the Canadian Senate and is much weaker in the British House of Lords, remains strong in Caribbean Senates.

Nomination of Senators allows for the inclusion of legitimate social, economic, professional, cultural and political interests that might not otherwise be adequately represented in a popularly elected legislature.

The tradition of favouring appointed Senators continues to shape debates about Senate reform in the region. In particular, there is still a sense that, even if there is a case for a move to a majority-elected Senate, nomination of a minority of Senators allows for the inclusion of legitimate social, economic, professional, cultural and political interests that might not otherwise be adequately represented in a popularly elected legislature. In other words, there is a concept of inclusion, representation and participation that is broader than that which depends solely upon electoral partisan politics.

Commonwealth Caribbean Senates have been criticized as 'rubber stamps', whose influence on the political process is marginal at best (O'Brien 2014). Of course, while voting on party lines limits the hard power of Senates, their soft influence may nevertheless be beneficial: according to one participant at the Bridgetown Conference, 'conventional wisdom is that the most meaningful debates on legislation, and the most useful recommended changes to bills, come from some Senates'.

Another principal function of Caribbean Senates is to enable Prime Ministers to reward loyal supporters who do not want to be MPs, or sometimes to keep in politics those who have failed to get elected to the lower House. This may have fringe benefit in allowing for the retention of talent and institutional memory. It can be useful, in a small society with a limited pool of suitably qualified and experienced ministerial candidates, for Prime Ministers to appoint people to the Senate so that they can remain in ministerial office. In Jamaica it is usual to appoint a Senator as Foreign Minister because the job entails a lot of travel, which would make it hard for the incumbent to service a constituency. Senates are helpful to Leaders of the Opposition, too. They enable leading Opposition figures, hit by the remorseless logic of defeat in FPTP elections, to find temporary harbour in the Senate.

4.3. **REFORM OF SENATES: PREVIOUS PROPOSALS**

Recognizing the weakness and apparent superfluity of existing Senates, the abolition of the Senate has featured in some constitutional reform proposals. In Trinidad and Tobago the Wooding Commission (1974) recommended the abolition of the Senate and the establishment of a unicameral Parliament, although the Government of Trinidad and Tobago did not act upon that recommendation. In Belize in 2000, the Final Report of the Political Reform Committee proposed folding proportionally elected Senators into the House, creating a semi-unicameral system with two classes of MPs. This, too, was never acted upon.

The question of Senate abolition was also raised by the Cox Report in (Barbados 1979: para. 56), and the basic arguments identified in that report still remain: whether Senates should be abolished as unnecessary and near-useless institutions, or whether they should be retained but reformed so as to enable them to do, in reality, what they are supposed to do in theory—that is, to act as a 'revisionary legislative chamber' enabling 'a means of wider participation by the citizens in the democratic processes' (Barbados 1979: para. 57). Having considered these arguments, the Cox Report recommended retention of an all-nominated Senate, with only minor changes to its composition. Most other proposals for reform, in places where Senates exist, have reached similarly moderate conclusions, accepting the principle that there should be a Senate with reviewing, revising and restraining powers, but that it should be a nominated chamber, and ultimately subordinate to the elected House.

In Barbados (1998) the Forde Report similarly recommended retaining an all-nominated Senate, albeit with provision for increased opposition representation (from two to four) and the inclusion of minor parties; however, the number of Senators chosen to represent social interests would be decreased, from seven to three (Barbados 1998: para. 9.4.1). Likewise, Jamaica's 1995 Select Committee report recommended an expansion of the all-nominated Senate to 36 seats, appointed 'to facilitate the representation of wider interests, both within the traditional two political groupings and from outside those groupings' (Jamaica 1995: para. 106). However, the details of the proposal were very conservative: the Prime Minister would appoint 20 Senators, the Leader of the Opposition would appoint 14 Senators, and the remaining 2 Senators would be either nominated by minor parties or chosen by the Head of State (Jamaica 1995: paras. 108–12). In other words, the Government would have a working majority in the Senate, but the Opposition would have enough seats to block any constitutional amendment requiring a two-thirds majority in the Senate.

Belize is the only country in the region where the Senate, following reforms in 2016, does not have an in-built Government majority: the Opposition Senators together with the Independent Senators representing socio-economic interest groups have a majority of one over the Government. This means that the Senate can act as a check on Government legislation (with the exception of money bills, which can be passed without Senate approval), as well as providing more objective oversight of certain appointments to public bodies. It is notable, however, that unlike in many other countries in the region where a super-majority in the Senate is needed for constitutional amendments, Belize gives the Senate a veto only on those constitutional amendments which concern fundamental rights, and then it is exercised by majority vote. This means that the Senate of Belize, although stronger than other Senates in the region in terms of its role in ordinary legislation, arguably has a weaker constitutional function.

Belize is the only country in the region where the Senate does not have an in-built Government majority. This means that the Senate can act as a check on Government legislation.

The examples above are not intended to be exhaustive. However, they show that a desire to reform the Senate has been a long-standing feature of the

constitutional discussion in the region, but that most reform proposals so far have been moderate rather than radical, with a general acceptance of the role of the Senate as laid out in the independence constitutions.

4.4. **PROPORTIONALLY ELECTED SENATES?**

Participants at the Bridgetown Conference discussed several ideas for Senate reform. These consistently returned to three basic concerns: (a) that Senates should be able to act as a more effective check and balance against the Government, as a House of 'sober second thought' or 'reflection and review', but without challenging the primacy of the lower House; (b) that in order to perform that check-and-balance role effectively, Senates should have a stronger democratic legitimacy; and (c) Senates should be representative and inclusive of society, expanding beyond the two main parties and allowing a range of relevant stakeholders to make their voices heard.

Interestingly, there was broad satisfaction with, and a desire to maintain, the existing powers of Senates—the power to amend and delay non-financial ordinary legislation, and the power to veto constitutional amendments. The concern was rather with changing the composition of Senates so that these existing nominal powers (which at present, given the Government's appointment of a majority of the Senators, are mostly dormant) might be more regularly exercised.

There was some interest among many—although by no means all—of the participants in the Bridgetown Conference in maintaining FPTP elections for the lower House, but introducing proportional representation for a reformed Senate.

There was some interest among many—although by no means all—of the participants in the Bridgetown Conference in maintaining FPTP elections for the lower House, but introducing proportional representation for a reformed Senate. Such a Senate might be entirely popularly elected by proportional representation, or else might have a large proportionally elected element. Proportional representation would mean that directly elected Senates would not merely duplicate the party composition of the lower House.

The introduction of a partly or wholly proportionally elected Senate might be the most effective and coherent reform to mitigate the excessive majoritarianism and executive dominance of the Westminster Model in the region, but it would be a radical step. Having two elected chambers is unusual—but not unheard of—among Westminster Model democracies. This combination of a majoritarian lower House and a proportionally elected Senate is practised in Australia, both at the federal level and in a majority of the Australian states, and has been referred to as the 'Australian Compromise' (Bulmer 2020).[23] The principle is that the lower House embodies the majoritarian principle, with a clear choice between Government and Opposition. The Senate would then embody the proportional principle, with the

[23] Such an arrangement—a majoritarian lower House and a proportional upper House—has been supported on theoretical grounds by comparative scholars such as Steffen Ganghof (2018) and Tarunabh Khaitan (2021).

inclusion of minority voices in a body performing representative, scrutinizing and restraining functions.

A proportionally elected Senate could be chosen on a national-list basis, with parties being allocated a seat on the basis of their countrywide share of the vote. That might help counterbalance the constituency-centred politics of patronage and clientelism so prevalent in the region with a politics focused more upon national issues of legislation and policy.

There was some debate at the Bridgetown Conference, both in plenary and in side discussions, about the preferred modalities of election. Should Senate seats be awarded based on the share of the votes cast in the general election (the so-called secondary mandate model)? Or should there be a separate election of Senators, which might occur either alongside general elections or at different times. Using a secondary mandate would tend to produce a Senate with a greater likelihood of a Government majority and less party fragmentation. Separate elections would result in a greater likelihood of the Government not having a majority in the Senate, especially if senatorial elections are held in accordance with a different electoral calendar, therefore as 'midterms', which often function as a protest vote against the government. There is also the question of not allowing the Senate to have *greater* democratic legitimacy than the lower House, which might happen if elections were held separately and the senatorial election were more recent than the general election. In short, the secondary mandate model is the most moderate way of transitioning to an elected Senate while also allowing the inclusion of minor parties that get a certain minimum share of the national vote. It would open up representation, and strengthen scrutiny and the operation of checks and balances, without radically deviating from established practices. In essence, the only difference would be that instead of the Government and Opposition each having a fixed quota of Senate seats, the quota of seats for the Government, Opposition and any minor parties would be determined by their share of the votes at the most recent general election.

Five particular issues arose in the discussion of elected Senates. The first concerns the role of independent representatives of socio-economic, cultural and religious interests. Many feel this role is valuable, and should be continued. One possible solution is to combine elected Senators, chosen nationally by proportional representation (whether on a secondary mandate basis or otherwise), with a certain number of independent or non-partisan members selected from those socio-economic groups.

Several participants at the Bridgetown Conference expressed dissatisfaction with the existing appointments process for Independent Senators, even while recognizing the benefit of the social partnership that they represent: Which interest groups are recognized for inclusion, and which are not? Are those chosen truly non-partisan, or do they have more or less implicit party affiliations? To address this, the process of selection could be reformed to make it more representative and to prevent improper use of the Head of State's

Several participants at the Bridgetown Conference expressed dissatisfaction with the existing appointments process for Independent Senators, even while recognizing the benefit of the social partnership that they represent.

discretion in the making of appointments.[24] Potential solutions include an independent Appointments Commission, tighter constitutional rules specifying which interests are to be represented, or even a form of electoral process enabling the interest groups to select their own representatives.[25]

The second concern is for geographical representation. Barbuda, Nevis and Tobago have separate representation in their respective national Senates. Presumably, that separate representation would have to be maintained. However, it is not clear how best to do so if the majority of Senators are to be chosen by proportional representation. One way is to divide the country into regional constituencies, but the small size of Barbuda, Nevis and Tobago means that the election of Senators from those islands would never be very proportional. Another way is to continue with the appointment of Senators on the advice of the government of those islands, and to make this additional to a national proportional representation system.

These are not, moreover, the only countries in which questions of geographic representation might arise. Elsewhere, there are geographical dimensions to politics, including urban–rural distinctions and distinctions between different islands which are not currently represented in a systematic way in their Senates. Would a single nationwide multi-member constituency for elected Senators be sufficient? Would it be possible in a small chamber to have a number of smaller multi-member constituencies without sacrificing the principle and purpose of proportionality.

Senates in the region have been more gender-balanced than elected lower Houses.

The third concern is for gender representation. Senates in the region have been more gender-balanced than elected lower Houses (UN Women 2018). One of the problems with moving to an elected Senate is that it might result in less gender balance than has hitherto been the case. Of course, ways of mitigating that exist—for example, by requiring parties, in nominating their candidates for the Senate, to have a gender-balanced, or 'zippered', list—but it is a consideration to be borne in mind.

The fourth concern is simply that a proportionally elected Senate would be a step too far. Again, the political dynamics may well be decisive—a proportionally represented Senate might give third and minor parties a threshold—a degree of visibility, legitimacy and influence—which they currently do not possess. To contemplate it, the established major parties would either have to be forced by circumstance into making such a concession, or convinced that their position is strong enough that they can make such a concession, without harming their overall political dominance.

[24] There is a case for clarifying the basis on which independent members are selected, even in an all-appointed Senate, and these comments would also apply in such situations. However, a credible, inclusive and non-partisan appointment process for Independent Senators is doubly important if there is a proportionally elected majority in the Senate, since that would mean that the independent members are more likely to hold the balance of power.

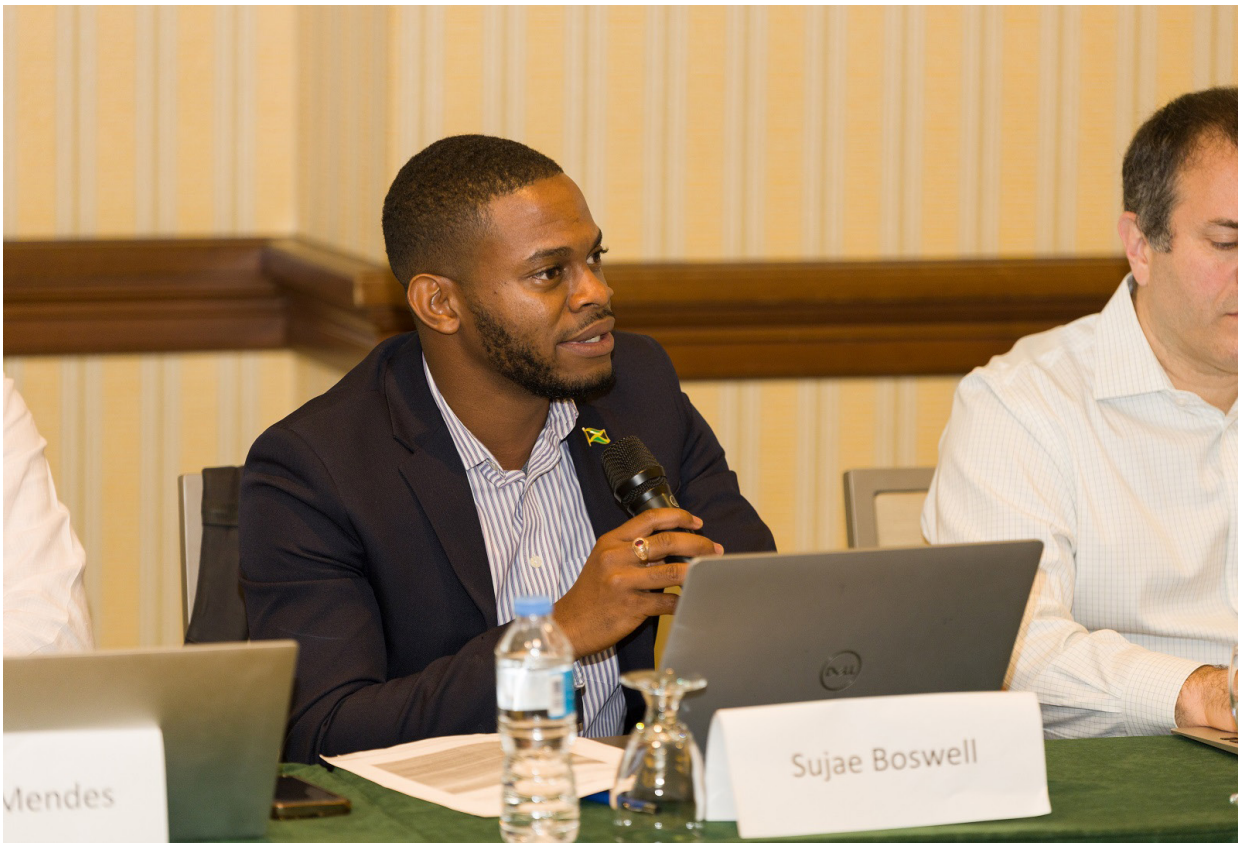
[25] Various examples of representation by interest group (so-called functional representation or vocational representation) have been tried, from time to time, in different places. From 1921 to 1933, the Senate of Malta had, in addition to some directly elected members, representation of the clergy, nobility, university graduates, chambers of commerce and trade unions (Cassar 2000). Other examples include the National Council of Slovenia, the former Senate of Bavaria (1949–1999), the Senate of Ireland, and—on a limited scale—the proposal for representatives of people with disabilities in a recent draft constitution for Gambia.

Fifthly, a proportionally elected Senate would change the existing balance and dynamic between the two Houses.

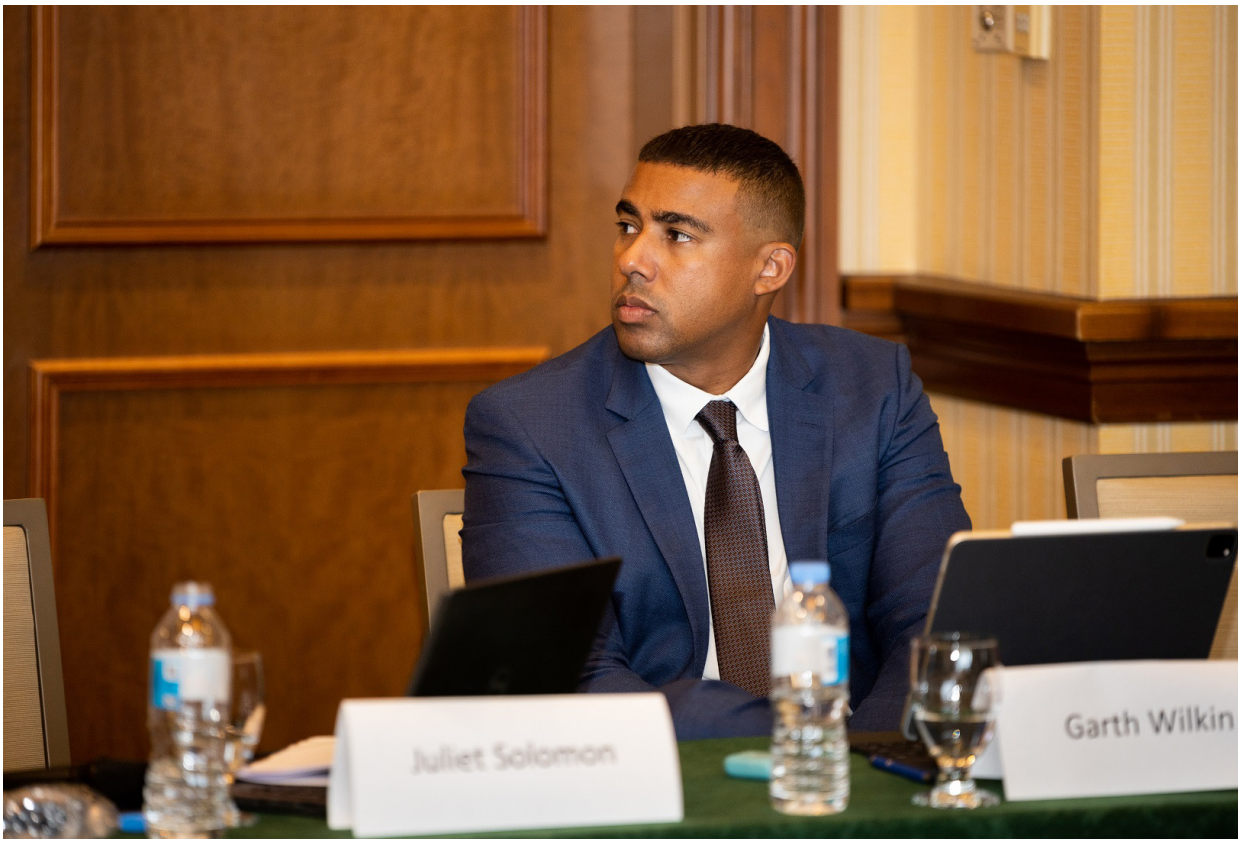
The Australian system is sometimes, on account of its strong Senate, described as a 'semi-parliamentary system' (Ganghof 2018). A crucial difference, however, is that the Australian Senate, unlike Caribbean Senates, has a full veto over legislation, which can be overturned only by a double dissolution of both Houses, including a veto over the budget. This means, in effect, that in order to govern a Government must have a majority in both Houses. This does not apply in the Caribbean, where the ordinary legislative powers of Senates are limited, and their budgetary powers virtually non-existent. It is unlikely that a proportionally elected Senate—or other reformed and emboldened Senate, for that matter—would be able to obstruct, rather than merely delay, legislation.

The National Advisory Committee on Constitutional Reform in Trinidad and Tobago, reporting in July 2024, proposed an innovative mixed solution to these issues. It proposed an expanded Senate of 55 members, 10 of whom, should be independent members nominated by the President; 5 should be members representing Tobago, nominated by the Chief Secretary and the Minority Leader in the Tobago House of Assembly; and the remaining 40 members would be elected by proportional representation with a 5 per cent national threshold (Trinidad and Tobago 2024).

There are alternatives to an elected Senate that might also broaden the representative basis of the chamber. The Report of the Constitutional Reform Committee of Jamaica, published in May 2024, recommended keeping the appointed Senate, but expanding its size, and adding three independent members from private sector, civil society, religious or cultural groups. A more innovative approach is that taken by the Thorne Commission on local government in Barbados, which has proposed the reservation of three seats in the Senate for representatives chosen by the Chairpersons' Caucus of People's Assemblies (an institution discussed in Chapter 7 of this report). One participant at the Bridgetown Conference even mentioned the possibility of sortition: having persons randomly selected from the electoral register, like a jury, to serve as a sort of 'People's House', in contrast to the elected 'Politicians' House'. These three proposals—so different in content, and ranging from moderate to radical—share a belief that, while the Senate needs to be opened up and made more representative of society, it should not be a directly elected body that merely replicates, in its political nature, the lower House.



L to R: Sujae Boswell, Jamaica Constitutional Reform Committee; Jason Gluck, UNDP.



Hon. Senator Garth Wilkin, Attorney-General of St Kitts & Nevis.

Chapter 5

FOURTH-BRANCH INSTITUTIONS AND ADVISORY COUNCILS

'Fourth-branch institutions' is a term used to denote independent commissions and officials which, standing outside the traditional three branches of government, and not possessing policymaking power, act as 'neutral guardians' (de Smith 1964) in support of the democratic constitutional order, in particular upholding the neutrality of its electoral, administrative and financial processes (Bulmer 2019b). Such institutions are a common feature of mid-20th-century Westminster Model democracy, and constitutions in the region have them in abundance. Most Commonwealth Caribbean states have a Supervisor of Elections or Electoral Commission, a Boundaries Commission (or combined Election and Boundaries Commission), a Public Service Commission, a Judicial Service Commission or a Judicial and Legal Service Commission, a Police Service Commission, an Auditor-General and an Ombudsman. Some have other bodies, such as an Integrity Commission (Belize, Saint Lucia, Trinidad and Tobago) or a Teaching Service Commission (Guyana, Saint Lucia, Trinidad and Tobago).

[Fourth-branch] institutions are a common feature of mid-20th-century Westminster Model democracy, and constitutions in the region have them in abundance.

In addition to these constitutionally embedded fourth-branch institutions, some countries in the region have additional institutions established by statute, such as a Public Defender, Electoral Commission, Independent Commission of Investigations and Children's Advocate in Jamaica. These, according to one participant at the Bridgetown Conference, are important innovations for improving the quality of governance and accountability. The Independent Commission of Investigations, for example, is headed by a Commissioner who is appointed by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition, and is responsible for conducting investigations into alleged misconduct by members of the police, armed forces and prison service—filling a gap in accountability which was not met by previous, internal, complaints procedures. Another example is the Judicial Appointments Committee in Barbados. The Constitution of Barbados has since 1974 lacked a Judicial and Legal Service Commission, and judges were appointed by the Governor-General on the advice of the Prime Minister after consultation with the Leader of the Opposition. This was controversial, since, in

the opinion of some commentators, it 'opened a door for the entry of political patronage' (Simmons 2020: 1). The gap was filled by the creation of a new Judicial Appointments Committee, with a mandate to make recommendations to the Prime Minister on appointments to the Supreme Court. However, the fact that these institutions exist upon a statutory basis means they are more vulnerable to the risk of meddling by the Government.

Quote from the Bridgetown Conference: 'Electoral commissions and other commissions must be strengthened, ensuring that these systems are independent enough to not be rigged; there must be a revision of the appointment procedures, because they are heavily Government-skewed.'

The constitutional design of fourth-branch institutions, at the time of independence, relied heavily on the assumption that the members of such institutions would be impartial, and that any deficiencies in the constitutional rules would be supplied by suitable norms of appropriate behaviour. In practice, that has not always been the case. Many such institutions are appointed on the advice of the Prime Minister, or on the advice of the Prime Minister after consultation with (but not necessarily with the concurrence of) the Leader of the Opposition. Standards of formal consultation with the Leader of the Opposition vary, but if agreement cannot be reached, the decision of the Prime Minister always eventually prevails. Other fourth-branch institutions have a mixed membership, with some members appointed on the advice of the Prime Minister and some on the advice of the Leader of the Opposition, with the former usually in the majority. In other words, one way or another the Government exercises more control over such institutions than it should. In Belize it has become standard for members of such bodies to leave office when a new Government is appointed, essentially allowing the incoming Government to put its own people in place. Rather than constraining the power of the political majority or the executive, therefore, these bodies may in fact increase it.

Jamaica's Electoral Commission has two members nominated by the Prime Minister and two nominated by the Leader of the Opposition; a further four members, one of which is the Chair, are chosen jointly by the Prime Minister and the Leader of the Opposition. These eight then nominate the Director of Elections, who is appointed by the Governor-General. This is a very balanced arrangement, but, as noted above, Jamaica's Electoral Commission is a statutory body, without constitutional entrenchment to protect it from future governing majorities. The Report of Jamaica's Constitutional Reform Committee published on 21 May 2024 recommended that the Electoral Commission be recognized and regulated by the constitution, rather than merely by statute (Jamaica 2024).

A further concern is that, even when constitutionally established, fourth-branch institutions have narrow powers, and may depend upon further statutory grants of power that are controlled by the governing majority. For example, where Boundaries Commissions have the power to report on changes to constituency boundaries, it is often the duty of the Prime Minister, not the Commission, to make a draft order, for approval by Parliament, and that draft order may, if the Prime Minister so chooses, deviate from the recommendations of the Boundary Commission's report (e.g. Constitution of Antigua and Barbuda, section 65[1]). Judicial Service or Judicial and Legal Service Commissions may be given authority only over puisne judges and parish judges, while the Chief

Justice and President of the Court of Appeal are appointed by a purely political process over which the Commission has no control.

In the same way, Public Service Commissions frequently have less autonomy when it comes to the appointment of Chief Executives or Permanent Secretaries—the senior civil servants in each Government department. The Prime Minister may either appoint them directly or has a veto over their appointments. This is to ensure that the Prime Minister can work well with his or her senior bureaucratic team, and can bring in people of talent and experience. However, it has also led to abuses, with politically connected people being parachuted into senior administrative positions that can be used to politicize the civil service; this makes it less professional and more open to clientelism, degrading governance capacity. Moreover, constitutional provisions may protect the salaries of Commissioners, but rarely the operating budgets of the Commissions themselves, which are therefore still dependent upon the governing majority to allocate the necessary funds.

At the Bridgetown Conference, there was broad support for strengthening fourth-branch institutions, and a recognition of the need to make them less pliable and more effective as upholders of the constitutional order. There was also some support for increasing the number and scope of such institutions—or, where new commissions or other institutions have already been created on a statutory basis, for embedding them into the constitution.

At the Bridgetown Conference, there was broad support for strengthening fourth-branch institutions, and a recognition of the need to make them less pliable and more effective as upholders of the constitutional order.

There are various ways in which fourth-branch institutions can be strengthened. One way is to replace the standard procedure of appointment 'on the advice of the Prime Minister after consultation with the Leader of the Opposition' with a concurrent procedure, according to which the Prime Minister and the Leader of the Opposition would have to agree upon a mutually acceptable candidate. However, that creates other difficulties. What if they cannot agree? Does the vacancy then go unfilled? There needs to be some sort of tiebreaker, and this tiebreaker cannot default to the Prime Minister ultimately having his or her own way.

Some posit the Head of State as potential tiebreaker, especially where the Head of State is a President chosen by a bipartisan process. This already exists to a limited extent in Trinidad and Tobago, where members of the Elections and Boundaries Commission are appointed by the President after consultation with the Prime Minister and the Leader of the Opposition, but not upon the advice of either of them. This arrangement works, however, only so long as the Head of State is impartial; if a party were to capture that office, they could use it to manipulate the electoral process. Across the Commonwealth Caribbean, whether in republics or monarchies, the President or Governor-General is, in effect, the nominee of the parliamentary majority and, in effect, of the Prime Minister. The only exception to this would occur in situations like that of Barbados, where a super-majority is required to elect a President, but that only becomes an effective check if the governing party lacks such a super-majority. At least in republics, the President has relative security of tenure during a fixed term of office. Governors-General serve at

the whim of their Prime Ministers, and can be dismissed. This means they are in a relatively weak position to serve as independent arbiters. It is notable that in the discussions held at the Bridgetown Conference on the pros and cons of becoming a republic, the ability to strengthen the independence and non-partisanship of the Head of State, and thereby to vest them with greater 'umpire' or 'arbitrator' powers in making certain constitutional appointments, was a recurring theme. A further concern, however, which is harder to solve constitutionally, is that even if Heads of State have the autonomy and impartiality necessary to exercise such powers, they might lack the capacity to do so, in terms of having an adequate support staff to carry out recruitment processes.

Some countries have bodies that are established solely for making non-partisan appointments to fourth-branch institutions.

Other, more complex, appointment mechanisms are possible, drawing upon practices from beyond the region. Some countries, such as Fiji, Nepal and Sri Lanka, have bodies that are established solely for making non-partisan appointments to fourth-branch institutions. In some the effectiveness of this mechanism is diluted by the composition of the body, which is constituted with a Government majority, and therefore provides little if any effective check. In Fiji, for example, the Constitutional Offices Commission consists of the Prime Minister, the Leader of the Opposition, the Attorney-General, two members appointed on the advice of the Prime Minister and one member appointed on the advice of the Leader of the Opposition. In other words, the Government has four members to the Opposition's two, rendering the body a theoretical, rather than practical, check upon the Government. Nepal, by contrast, has a Constitutional Council (Constitution of Nepal, article 284) to advise on certain appointments, which consists of the Prime Minister (as Chair), the Chief Justice, the Speaker of the lower House and Chairperson of the upper House, the Leader of the Opposition and the Deputy Speaker of the lower House; the inclusion of the Chief Justice and the Speakers (who in Nepal are expected to renounce active partisan politics while in office, although they may return to partisan politics after leaving the Chair [Dahal 2023]) is intended to introduce a non-partisan element, denying the Government a built-in majority in making appointments. In Sri Lanka, also, the Constitutional Council is constructed to deny the Government an automatic majority. It consists of the Speaker (as Chair), the Prime Minister, the Leader of the Opposition, five members jointly appointed by the Prime Minister and the Leader of the Opposition, and one member representing any third and minor parties, or independent groups, in Parliament. The Seychelles has a Constitutional Appointments Authority consisting of two members chosen by the (executive) President and two chosen by the Leader of the Opposition; a fifth member, chosen by the others, acts as a supposedly impartial chair—although in practice this has led to perverse outcomes, as the Government and Opposition have not been able to work well together, and have failed to place common institutional interests above partisan advantage.[26]

[26] This insight was provided at a workshop on the role and powers of oppositions and legislative minorities, held by International IDEA in The Hague, 2022.

An appointing body of this type, adapted for the Caribbean, could learn from these examples. The specifics might vary, but the principles can be generalized: if the aim is to preserve the non-partisan and meritorious character of fourth-branch institutions, the appointing body should be politically inclusive, but in such a way that no one party can predominate.

There is scope, whether or not such an appointing body is established, for including others beyond the Prime Minister and the Leader of the Opposition in the appointment process. For example, the Constitution of Belize (section 61A[2][c]) requires certain appointments to be approved by the Senate, in which the non-partisan Senators have the balance of power.

Provisions in the Constitutions of Kenya (Chapter 15) and South Africa (Chapter 9) defining the powers and the organization of such institutions provide further inspiration for possible reform, from ensuring gender balance on independent commissions to providing for the reporting of their activities.

Another type of institution, not technically a fourth-branch institution but somewhat similar in scope and function, is the national Privy Council (not to be confused with the Judicial Committee of the United Kingdom Privy Council, which sits in London) or Advisory Council. The chief function of such bodies is to advise the responsible Minister on the use of the prerogative of mercy (pardons) and the confirmation or commutation of death sentences. They can also have wider functions. For example, the duties of the Belize Advisory Council include, in addition to its roles in relation to pardons, recommending the removal from office of a Justice of the Supreme Court or the Court of Appeal, a member of the Elections and Boundaries Commission, a member of the Public Service Commission, a member of the Judicial and Legal Services Commission, the Auditor-General or the Director of Public Prosecutions. It furthermore acts as a board of appeal for disciplinary matters concerning public officers—a function that elsewhere in the region would normally be the responsibility of a separate Public Service Board of Appeal.

The main concern around such advisory institutions is whether they are truly independent of the Government, or whether they are merely an arm's-length (and therefore less accountable) means of exercising executive power. The Privy Council of Jamaica consists of six members appointed by the Governor-General after consultation with (and not, crucially, on the binding advice of) the Prime Minister. The Belize Advisory Council makes a division between four 'senior' and three 'other' members, with the Senior Members serving for long terms of office (until retirement at age 75), while other members serve three-year terms. This might, in principle, be an appropriate balance between long-term stability and short-term accountability. However, according to one participant at the Bridgetown Conference, it is difficult, in reality, for the Belize Advisory Council to be non-political simply because there are so few prominent non-political and non-partisan actors to choose from.

Chapter 6

REPUBLICANISM AND THE HEAD OF STATE

6.1. HEADS OF STATE IN THE COMMONWEALTH CARIBBEAN

Most Commonwealth Caribbean states are constitutional monarchies, with King Charles III as their Head of State, represented in each country by a Governor-General. Four (Barbados, Dominica, Guyana, and Trinidad and Tobago) are republics. Dominica was the only country in the Commonwealth Caribbean to become a republic immediately upon independence (in 1978). However, it was not the first republic in the region. Guyana had transitioned to a republic in 1970, and Trinidad and Tobago in 1976. Barbados followed suit in 2021. These countries followed the pattern, by then well established in other Commonwealth nations such as India, of replacing the Governor-General with an indirectly elected President, who would perform limited civic, ceremonial and constitutional functions as a symbolic figurehead. In 1980 Guyana subsequently deviated from this parliamentary model, adopting a hybrid form of government with an executive President. However, Guyana remains the exception; all other countries in the Commonwealth Caribbean region have remained strictly parliamentary, whether under monarchical or republican forms.

In the Caribbean constitutions the powers of the Governor-General or President have been constrained since independence by written constitutional laws which codify and enforce conventions.

Unlike in Australia, Canada and New Zealand, where the power of the Governor-General is mostly constrained by unwritten constitutional conventions inherited from British practice, in the Caribbean constitutions the powers of the Governor-General or President have been constrained since independence by written constitutional laws which codify and enforce those conventions. The general rule is that the Governor-General or President acts upon the advice of Ministers—'advice' being a term of art which means the Minister, and not the Governor-General or President, is the one making the decision, and the one who assumes responsibility for it. Exceptions to this general rule, in situations where the Governor-General or President may exercise what is known as a 'reserve' or 'discretionary' power, in accordance with their own deliberate

judgment (in some cases after consulting others), are strictly defined in ways that both limit and legitimate their exercise (Twomey 2018; O'Brien 2014).

However, softer norms, such as the assumption of the political neutrality of the Governor-General or President, were not explicitly inscribed in these constitutions, and have sometimes been violated in practice (for example, by an incoming Government dismissing the Governor-General and appointing another with party ties to the new Government). Although performing a vice-regal (or, in the case of Presidents, quasi-regal) role (Kumarasingham 2020), Governors-General and Presidents in the region are not just substitute monarchs. They are also successors to previous Governors. Unlike the monarch they do not have their own repository of traditional legitimacy; they sit within, and not above, the dense networks of political, business and social connections in Caribbean countries. It is easy for a constitutional text to confer upon the Governor-General or President the powers of a constitutional Head of State; it is much harder to confer the authority and aloof impartiality of a monarch.

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Dissatisfaction with the role played by Governors-General and Presidents in the region centres on this lack of impartiality. In the context of hyper-majoritarianism, intense two-party competition and executive dominance, the Governor-General or President is often dependent upon the Prime Minister, and therefore has little ability to assert their own line, even in the performance of those functions where, at least on paper, they have 'reserve' or 'discretionary' powers. This is particularly the case for Governors-General, who can be removed, quite arbitrarily and for political reasons, by the Prime Minister, whereas Presidents normally serve for a fixed term and cannot be dismissed at will. For example, in Trinidad and Tobago (sections 35 and 36), removal of the President requires specified reasons, an investigation and a report by a judicial tribunal, and a two-thirds majority vote in both Houses of Parliament in a joint session.[27] In practice, however, Presidents in Trinidad and Tobago have usually aligned politically with the dominant majority in Parliament at the time of their appointment.

The political vulnerability of Governors-General could, of course, be rectified by reforms short of republicanism, such as making the Governor-General serve for fixed terms, and requiring misconduct (or other sufficient stated cause) to remove the Governor-General. The Constitution of the Solomon Islands (section 27[3]), for example, provides that the Governor-General serves for a term of five years, renewable once, unless removed from office by the King 'in accordance with an address from Parliament supported by the votes of at least two-thirds of all the members thereof, for misbehaviour or for such other cause as may be prescribed by Parliament'. A proposal submitted by the Grenada Monarchist League (2024) calls for the creation of a Privy Council of Grenada, consisting of the Prime Minister, the Leader of the Opposition, the Minister

The political vulnerability of Governors-General could be rectified by reforms short of republicanism, such as making the Governor-General serve for fixed terms.

[27] However, it would also be possible to grant such security of tenure to a Governor-General (see Constitution of the Solomon Islands, section 27[3], which provides for a five-year term for the Governor-General, subject to removal by a two-thirds majority vote of Parliament for 'misbehaviour or for such other cause as may be prescribed').

responsible for Carriacou and Petite Martinique, the Chair of the Public Service Commission, the senior resident member of the High Court of Grenada, and two members appointed by the Governor-General after consulting the Prime Minister and the Leader of the Opposition. They propose that this body, rather than the Prime Minister, should advise the King on the appointment and removal of the Governor-General.

6.2. **THE REPUBLICAN DEBATE**

One of the major differences between the parliamentary monarchies and parliamentary republics of the Caribbean is that in the former the functions and the authority of the Head of State are divided between two people—the Governor-General, who is present, and who actually performs those functions (in terms not only of formal constitutional duties but also diplomatic, civic and social engagements), and the monarch, who has the authority of being Head of State, but who is not present, and who resides elsewhere, across the Atlantic, in the centre of the former colonial power. The Governor-General opens Parliament, assents to Acts of Parliament, and appoints and dismisses the Prime Minister and most other officials of the Crown. The monarch's face is, in many places, on the stamps and the banknotes, but royal authority is entirely notional. The only real action taken by the monarch is to appoint and dismiss the Governor-General on the binding advice of the Prime Minister. In practical terms, all functions of the Head of State are directly assigned, by the Constitution and the law, to the Governor-General.

Republicanism is the desire to complete decolonization at the symbolic, and therefore at the psychological, level.

This symbolic monarchical link is occasionally seen in a positive light, as integral to, and expressive of, national identity, rather than opposed to it. In general, nevertheless, this disjuncture between the constitutional reality of independence and the constitutional symbolism of continued connection with a colonial British past may be regarded as a sign of the incompleteness of the decolonization project; it is a continuation of the late colonial experience into the post-colonial era. Late British colonialism, according to the Barbadian writer George Lamming (cited verbally at the Bridgetown Conference; see also Lamming 1983: xii–xiii), was 'not a physical cruelty' and was 'almost wholly without violence'. There was 'No torture, no concentration camps, no mysterious disappearance of hostile natives, no army camped with orders to kill'. Instead, argues Lamming, the Caribbean 'endured a different kind of subjugation. It was the terror of the mind, a daily exercise in self-mutilation', which was a 'breeding ground for every uncertainty of self'. Republicanism, in this context, is the desire to complete decolonization at the symbolic, and therefore at the psychological, level.

Focusing on the purely mechanical, constitutional aspects of the office, the British late-colonial constitution-maker Sir Ivor Jennings (1963) remarked that, 'A republic is a gesture, like putting on a dinner jacket.' From that purely institutional perspective, that might well be the case; as noted above, the roles, functions and powers of a Governor-General and a non-executive President

in the region are practically very similar, although, as noted above, there is a slight tendency (traceable to the Wooding Commission Report and evident in Trinidad and Tobago, for example) to give Presidents somewhat wider discretionary appointment powers. However, it is an important gesture, a gesture that gets to the heart of national identity and the healing from the colonial past. It reflects the need for what the Jamaican scholar Rex Nettleford (1979) called 'smadditisation'—the desire to be recognized as a 'somebody' rather than a 'nobody'.

Until recently there had been little movement towards republicanism in the region since the 1970s. Some previous Constitutional Review Commission reports had shied away from recommending a republican solution. For example, the 1979 Cox Report noted that the monarchy had been 'a realistic and useful arrangement devised to meet our requirements on assuming independence' (Barbados 1979: para. 27) and suggested that 'to preserve unity in our society, and to respect the sensibilities of our traditionalists, the question of adopting a Republic should be approached with caution' (para. 30). A similarly cautious approach was taken in Belize, where the Political Reform Commission reported that 'the Commission reached neither consensus nor majority decision on the details of a recommendation on the issue of replacing the British monarch as the Head of State of Belize', and therefore was unable to make any recommendation on this issue (Belize 2000: para. 7.13).

Jamaica's 1995 report (para. 92) did recommend transition to a republic, 'with the Head of State being the President, who would be above purely partisan politics and be given additional powers of appointment'. It further recommended that a candidate for President be nominated by the Prime Minister in consultation with the Leader of the Opposition and confirmed by a two-thirds majority in both Houses of Parliament (paras. 93–95). Yet this recommendation has not been acted upon, and the question of whether, and how, Jamaica will become a republic is still to be settled in the current (2023) constitutional review process.

These examples are not meant to be exhaustive. They merely indicate that becoming a republic is a long-standing question, which is not always easy to answer in the affirmative. One participant at the Bridgetown Conference expressed their scepticism by asking: 'How does becoming a republic make a difference in our lives? How does it change our identity? Does it result in broader socio-economic changes?' Part of the difficulty is the high amendment thresholds. Abolishing the monarchy is always, across the region, an entrenched provision with the highest amendment threshold. Sometimes, as in Belize, this is a three-fourths majority vote in Parliament: given the combination of electoral system and two-party politics, this may be achievable even without Opposition support if the Government has a big enough majority. More often, a referendum is needed, and this can provide an insurmountable obstacle. Indeed, all the countries that have become republics in the region so far have been countries where a referendum on the question was not required. In the words of one participant, 'The debate is not about whether we should become

Quote from the Bridgetown Conference: 'How does becoming a republic make a difference in our lives? How does it change our identity? Does it result in broader socio-economic changes?'

a republic—there is a consensus for that—but there needs to be a public consultation that is broad, not just a handful of people.'

There is an ongoing tactical debate as to whether it is wiser to attempt to decouple the republic question from wider constitutional reforms—that is, to aim, in a first round of reforms, for a minimal, formulaic change to a republic, with the republican issue being voted upon in isolation, and then to consider other, more substantive, reforms. This approach has been taken successfully by Barbados, but, again, no referendum was required. Decoupling the republic question from other reforms is not, however, a surefire answer. Where this has been attempted elsewhere—for example, in Tuvalu in 2008—the republican proposal has been rejected.

Public support for a republic is not universal. According to an Ashcroft Poll published in May 2023, 64 per cent of people in Saint Vincent and the Grenadines took the view that 'the monarchy is a valuable force for stability and continuity', whereas 36 per cent took the view that 'the monarchy is part of the colonial past and has no place in my country today'. In the Bahamas those figures were 43 per cent and 57 per cent respectively. The same poll puts support for the monarchy at or above half the population in Saint Vincent and the Grenadines (61 per cent), Saint Lucia (56 per cent), Jamaica (52 per cent), Saint Kitts and Nevis (52 per cent) and Belize (50 per cent). The Bahamas again comes out as the most republican realm in the region, with just 30 per cent support for keeping the monarchy, against 58 per cent support for a republic (Lord Ashcroft Polls 2023).

A recurring question is whether becoming a republic makes a difference in people's lives. Does it really change people's identity in a region where national pride is constructed upon things like music, food and sporting achievement? Does it improve people's social and economic well-being? As one participant at the Bridgetown Conference put it, 'The reason why there isn't a move to a republic is because the poor are worried about eating; the middle class—they are worried about being able to afford a house; the younger people are distracted by other things. The only people who are passionate about it are the older generation who were involved in the independence process.'

Quote from the Bridgetown Conference: 'How can we ask people to accept a republic if they do not understand it?

There is also a sense of a lack of understanding of what a republic means. The Commonwealth Caribbean now exists, at least as far as the younger generation are concerned, in an American-dominated, rather than British-dominated, cultural environment. While elites understand that a parliamentary republic is by no means incompatible with a Westminster Model democracy, the general public might not have such a clear idea of what a republic entails, and might see becoming a republic as a move to a more American system. As another participant at the Bridgetown Conference noted, 'How can we ask people to accept a republic if they do not understand it?'

Perhaps the most telling observation to arise from that Conference on the issue of the republic, however, came from a member of the Barbados Constitutional Review Commission, who noted that despite the change to

a republic having been achieved without a referendum, not a single public submission to the Commission was in favour of going back to the monarchy.

6.3. **REPUBLICAN INSTITUTIONAL DESIGN**

If there is a commitment to becoming a republic, various constitutional design issues then arise. How will the President be chosen—by the people in a direct election, by Parliament, or by some other process or institution? How long will the President's term of office be—four years, five or longer? Should there be a possibility of re-election, and if so should the President be limited to two terms? What should be the qualifications and disqualifications for the office? On what grounds, and by what process, can the President be removed from office? Finally, what powers will the President have—the same powers, as nearly as practicable, as those of the former Governor-General or additional powers? If the President is granted additional powers, will these be used as an occasional check on the power of the Prime Minister, or will the President assume a more executive role, replacing the Prime Minister as the effective Head of Government?

The question of presidential powers is perhaps the easiest to answer, as there seems little political appetite for (although some public curiosity about) an executive, policymaking President. Most republican proposals in the region have suggested a President either with precisely the same powers as the former Governor-General or only slight increases in power, falling well short of an executive leadership role. Such slight increases might include allowing the President to make certain appointments to the judiciary or fourth-branch institutions on a discretionary basis. The 1995 Final Report of the Joint Select Committee on Constitutional and Electoral Reform in Jamaica, for example, recommended that the Chief Justice, President of the Court of Appeal, members of the Electoral Commission and some members of the Judicial Service Commission and the Police Service Commission, currently appointed by the Governor-General on the advice of the Prime Minister after consulting the Leader of the Opposition, should instead be appointed by the President after consulting the Prime Minister and the Leader of the Opposition; in other words, the actual discretionary, decision-making power over such appointments would shift from the Prime Minister to the President (Jamaica 1995: para. 45). This is similar to the situation prevailing in Trinidad and Tobago, where members of the Electoral and Boundaries Commission (section 71), four members of the Advisory Committee on the Power of Pardon (section 88), the Ombudsman (section 91), the Chief Justice (section 102), three members of the Judicial and Legal Service Commission (section 110), the Auditor-General (section 117) and the members of the Public Service Commission (Section 120) are appointed, ultimately, at the discretion of the President.

Most republican proposals in the region have suggested a President either with precisely the same powers as the former Governor-General or only slight increases in power, falling well short of an executive leadership role.

This shifting of power from the Prime Minister to the President may be seen as part of a general attempt to deconcentrate power and reduce executive

dominance; it does not give the President an executive or policymaking role exactly, but it does give the President a heightened responsibility for maintaining the institutional integrity of the state. However, this approach needs to be considered with caution. If the President is neutral, impartial and broadly respected and trusted by both sides of the House, it might be a reasonable solution. If the presidency becomes politicized, however, then obvious dangers may arise. In Trinidad and Tobago the President is elected by a majority vote of both Houses of Parliament joined as an Electoral College (sections 28–31). This may not be an effective check on majority power.

Upon transition to a republic, it might be helpful to tighten up points in the constitution that are currently left open to constitutional interpretation or ruled by unwritten conventions.

Upon transition to a republic, it might be helpful to tighten up points in the constitution that are currently left open to constitutional interpretation or ruled by unwritten conventions. For instance, many countries in the region allow the Governor-General to assent to, or to withhold assent from, legislation passed by Parliament. There are two schools of thought on whether the Governor-General can ever actually withhold assent—some arguing that no real discretion exists, and others, including former Governor-General Sir Fred Phillips, arguing that they can exercise independent judgment in asking the relevant authorities to reconsider legislation if they think it is seriously flawed, and that they have the option to resign if they really cannot bring themselves to assent to legislation. In transitioning to a republic, it might be worth removing even the potential ambiguity of the constitution on this point. The Constitution of Malta (article 72), for example, removes this discretion, stating that when a bill having been passed by Parliament is presented for assent, the President 'shall without delay signify that he assents': the *shall* makes the President's act compulsory; *without delay*, while not setting a firm time limit, implies the absence of a so-called 'pocket veto' arising from the President's inaction. Of course, this still allows a President who wants to make a statement to resign rather than to sign.

In contrast, some see a strengthening of the Head of State's veto power as a potential new check and balance against overly powerful Prime Ministers. Singapore, where a directly elected President with veto powers has been grafted onto a parliamentary system, is an example of this approach. However, for the reasons set out below, this can be a risky solution. If the desire is to check the legislative dominance of Prime Ministers, other measures, such as reform of the Senate or strengthening Parliament, as discussed elsewhere in this report, might be more effective, with less risk of politicizing the Head of State and compromising its unitive role.

Whether in terms of appointing or veto powers, the retention of a non-executive, ceremonial, figurehead Head of State is useful only so long as it remains a non-partisan office, and therefore as a symbol of unity and of public authority that transcends party allegiances. This impartiality is possible only because the role is so limited and mostly ceremonial. There is little incentive for the political class to capture or manipulate the office because its powers are so few and so rarely exercised. This impartiality is, moreover, what gives a Head of State the authority to act as a constitutional umpire in situations where a reserve or discretionary power has to be exercised—as, indeed, Heads

of State have had to do, in various crises, around the Caribbean region. Having a ceremonial office above parties which strives to maintain its neutrality can be beneficial, especially in small societies, with deep partisanship and dense social networks. Ultimately, in Westminster Model democracies, the Head of State is the one to judge the calls: is the Prime Minister 'out' or 'not out'? Their discretionary powers are few but vital. The more a Head of State descends into the fray of partisan politics, the more they forfeit their own authority, and the less effectively they can act when they really need to.

That said, non-executive Heads of State, while standing above party politics, can have some influence behind the scenes. The Head of State must ultimately be bound by formal ministerial advice, but before that advice is tendered, they may privately ask pointed questions along the lines of, 'Are you sure that is wise, Prime Minister?' (Torrance 2023). A Head of State should not attempt to shape policy or to impose their view on Ministers, but they can perhaps help to ensure that policy is shaped carefully, and that the views of Ministers have been properly considered before being acted upon.

If a Head of State is to perform these functions, they must be chosen in a manner that is likely to select a candidate who combines non-partisanship with good judgment and long experience of public affairs. This tends to favour indirect, rather than direct, election. All three unambiguously parliamentary republics in the region have a President who is elected—or really, rather, appointed—by Parliament. It is notable, however, that the National Advisory Committee on Constitutional Reform in Trinidad and Tobago (2024) recommends moving away from this model and towards either a directly elected (although still non-executive) President or a President chosen by an expanded electoral college that would include members of local councils as well as parliamentarians.

All three unambiguously parliamentary republics in the region have a President who is elected—or really, rather, appointed—by Parliament.

Dominica and Barbados have a bipartisan selection model designed to encourage consensus between the Prime Minister and the Leader of the Opposition. In Dominica if the Prime Minister and Leader of the Opposition agree, the President is appointed without a vote; if they do not agree, then a majority in the House of Assembly (in effect, the Prime Minister) decides (Constitution of Dominica, section 19). In Barbados, in contrast, if the Prime Minister and the Leader of the Opposition concur in the nomination of a President, the nomination is put before a joint session, and is put to a vote in both Houses if any member of either House objects to the nomination; a President can be chosen only by a two-thirds majority vote in each House. If the Prime Minister and the Leader of the Opposition do not agree, then a contested election may be held (in which a candidate may be nominated by any 10 MPs), but again a two-thirds majority in both Houses is needed to elect (Constitution of Barbados, section 32, as amended by the Constitution [Amendment] [No. 2] Act 2021). In principle, this arrangement should normally ensure a bipartisan selection process, and therefore a politically impartial President, but FPTP elections may produce super-majorities for the largest party that fail, in practice, to constrain majoritarian power. On the other hand, the Constitution of Barbados does not provide for a deadlock-breaking

mechanism; if these rules were in force in a situation where one party did not have a two-thirds majority, and where the Government and Opposition could not agree on a new President, an impasse might be reached which could spiral into a constitutional crisis.

The May 2024 Report of the Constitutional Reform Committee in Jamaica is similar in principle. It recommends that a candidate for President should be nominated by the Prime Minister after consultation with the Leader of the Opposition, and then confirmed by a two-thirds majority in both Houses, with voting by secret ballot. However, if the Prime Minister and the Leader of the Opposition do not agree, then they may each nominate a candidate, and Parliament votes to decide between them, again by secret ballot, but by majority vote (Jamaica 2024).

The design of such deadlock-breaking rules requires careful thought because, in the absence of agreement, the deadlock-breaking mechanism can become the de facto means of selection. In other words, if a President is to be elected by a two-thirds majority vote, but in default of that an absolute majority suffices, then in effect the President can be chosen by an absolute majority, and the two-thirds requirement might become little more than a procedural fiction.

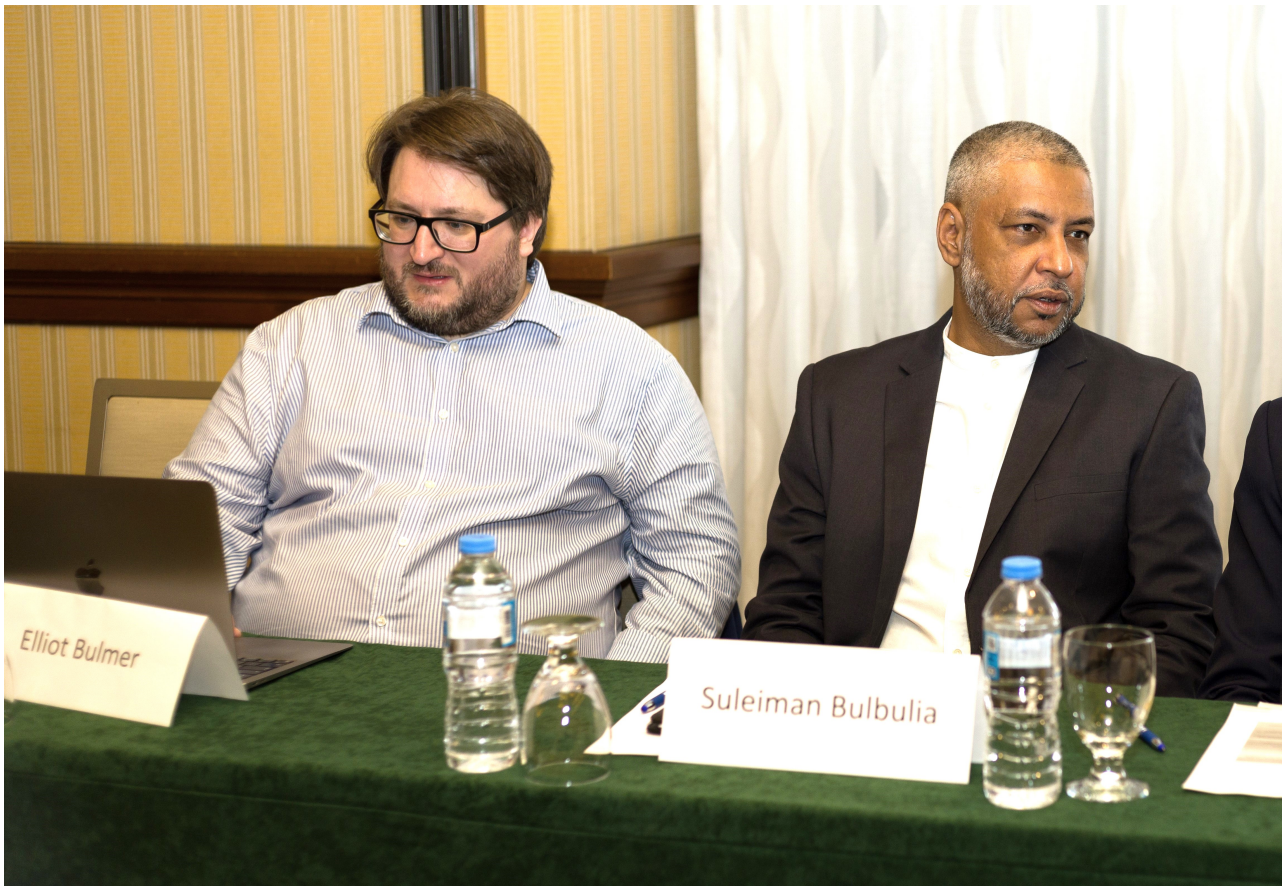
Deadlock-breaking rules must meet two criteria: they must break the deadlock, and they must still, nevertheless, give an incentive to compromise in order to avoid the deadlock in the first place.

Deadlock-breaking rules must meet two criteria: they must break the deadlock, and they must still, nevertheless, give an incentive to compromise in order to avoid the deadlock in the first place. Deadlock-breaking rules that remove decision making from both sides, and allow neither side their preferred choice, are often better, therefore, than deadlock-breaking rules that allow the majority, or the Prime Minister, to prevail. It might be wiser, for example, if a cross-party agreement or a two-thirds majority cannot be reached to transfer the nomination of the President to another body entirely—for example (and this is purely for illustrative purposes, not a recommendation), to a committee consisting of the Chief Justice, the Chairperson of the Public Service Commission and the President of the Senate.

If the President's term of office coincides with, or is shorter than, the electoral cycle, then the tendency may be for the President to be closer to the incumbent Government (as noted above, this has often been the case in Trinidad and Tobago). Longer terms increase the chance that a President will have been chosen before the incumbent Government takes office, and will therefore be more independent. However, this does depend on the electoral rules: a genuinely cross-party election process may mitigate the effects of short terms, just as a long term of office may mitigate the effects of a majoritarian election process.

Finally, the mechanism for the removal of the President must be considered. Having a constrained constitutional process for the removal of the President, limited to specified grounds of incapacity or serious misbehaviour, increases the independence of the office. If these rules are too permissive—that is, if they allow a President to be removed too easily—then, regardless of the selection

process, the President will be overly dependent on the Prime Minister or the current parliamentary majority. This is a problem in the region as regards Governors-General, several of whom have been unceremoniously dismissed by the Prime Minister for partisan reasons. It was a flaw in the Australian 1999 republican proposals, which, while establishing a fairly robust bipartisan election mechanism, would have allowed the Prime Minister to dismiss the President at will. The exact rules vary in detail, but the usual practice is to make the President removable by a resolution of Parliament upon the report of some tribunal set up to examine the President's conduct. In Barbados the tribunal consists of the Chief Justice and three other judges from Commonwealth countries other than Barbados—the international dimension injecting a degree of impartiality into the proceedings—and the decision to remove the President must be made by a two-thirds majority in each House (Constitution of Barbados, section 34D).



L to R: Elliot Bulmer, International IDEA; Suleiman Bulbulia, Barbados Constitutional Reform Commission.

Chapter 7

LOCAL DEMOCRACY

Most states have at least two levels of government, with a division of functions, powers and responsibilities between central and local government. In many democratic countries, local government plays a crucial role in service delivery, in the management of resources and public spaces, and in promoting economic and social development. Much of the public infrastructure that makes life liveable—well-maintained local roads, clean streets, unblocked drains, local buses, schools, libraries, clinics, garbage recycling and so on—is normally or primarily handled at a local level.

Even small countries, if they are democracies, typically have elected local government.

This is not, however, universally the case across the Commonwealth Caribbean. It is true that most countries in the region are small—whether defined by land area or population. However, even small countries, if they are democracies, typically have elected local government. Malta, for example, is smaller in land area than both Barbados and Grenada, but has 68 elected local councils, whose existence is recognized in the Constitution (article 115A) and which have statutory powers over a range of functions, including leisure centres and libraries, planning and playgrounds, road maintenance and refuse collection. In contrast, Barbados and Grenada have no such elected authorities, all services being delivered through national ministries.

The consequences of this lack of local democracy for service delivery, at the level of practical policymaking and administrative efficiency, are beyond the scope of this report. However, its constitutional and political consequences must be noted. In a context of hyper-majoritarian politics, characterized by executive dominance and clientelism, the absence of local democracy can exacerbate the winner-takes-all nature of political contestation. There are no consolation prizes, where a party might, for example, fail to win Government office but retain control of the mayoralty of the capital city. There is no scope for new parties to develop themselves at a local level, and demonstrate their capacity and reliability, before trying to break in to the rigid two-party system at the national level. Moreover, the weakness or absence of local democracy places more pressure on MPs to prioritize their constituency

roles: with no mayor to speak up for them, people naturally look to their MP to address local issues. This local lobbying takes up much of an MP's time, to the detriment of their legislative and policy roles, which in turn contributes to the weakness of Parliament as an institution. Creating local democracy where it is absent and strengthening it where it is weak may therefore be part of a balanced constitutional response to some of the Westminster Model's flaws in the region. On the other hand, the experience of Jamaica suggests that partisanship in local government may intensify political clientelism and corruption, creating 'baby brothers' of patronage to support national political networks. Effective and efficient local government requires more than just replication on a local scale of the top-down, two-party, executive-dominated politics at the national level.

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In terms of existing local government arrangements, Commonwealth Caribbean countries can be divided into four broad categories. First, there are those like Barbados and Saint Lucia which currently have no democratically elected local government at all. However, it was not always so. From 1909 to 1959, there was a system of local government in Barbados, with vestries elected in each of the 11 parishes, under the chairmanship of the Rector. In 1959 (before independence) the parish vestries were abolished, and three district councils were created; those in turn were abolished in 1969 (Barbados 1979: paras. 2–3). In Saint Lucia local authorities do exist, but local elections have been suspended since 1979. Instead, under the Constituency Councils Act 2012 (section 5), local councillors are appointed by the Minister with responsibility for local government. It is notable that these councils exist at the *constituency* level, and that their functions are mostly either consultative (i.e. advising the Minister on programmes and projects to benefit the constituencies, and acting as a point of liaison between constituents and the ministry) or else consist merely of the implementation of tasks assigned and delegated by the Minister.

The second category consists of countries where elected local government exists, but where it is established only on a statutory basis. This includes Belize and the Bahamas. Belize, under the Town Councils Act, establishes seven town councils which are elected by the people and have real powers: they are not merely consultative bodies but democratic institutions of local government with the ability (albeit within the constrained, strictly municipal, scope of their powers) to make policy decisions. In addition to the seven towns, there are two cities—Belize City and Belmopan—with elected city councils established under separate statutes. Belize also has a system of village councils, with more limited powers, in rural areas. In the Bahamas a system of district councils was established by the Local Government Act 1986; some of these are unitary authorities, whose members are directly elected by the people; the others are top-tier authorities whose members consist of delegates chosen indirectly by town committees.

The third category consists of countries where local government is constitutionally recognized for a particular part of the national territory but not for the whole. Examples include Antigua and Barbuda, Grenada, Saint Kitts and

Nevis, and Trinidad and Tobago. The scope and scale of this constitutional recognition varies greatly. Saint Kitts and Nevis is essentially a two-part federation, with Nevis having—the symbolism of the terminology is important—not merely a council but a Legislative Assembly, with a range of constitutionally protected powers. This includes the power to hold a referendum on independence, which Nevis did in 1998.[28]

In Trinidad and Tobago, likewise, the Constitution recognizes the existence of the Tobago House of Assembly. Strictly speaking, Tobago has a form of constitutionally entrenched devolution rather than federalism, since the legislative powers of the Assembly are prescribed not directly by the Constitution but by an Act of Parliament. These powers are set out in the Fifth Schedule to the Tobago House of Assembly Act 1996 (as amended), and include some important aspects of policy, such as customs and excise, education, highways, health services, infrastructure and public utilities. This arrangement has not been unchallenged, with Tobago's leaders pushing for more autonomy, and several bills for constitutional amendment to increase the powers of Tobago being proposed—although so far, without being passed. Trinidad and Tobago has, as well as constitutionally recognized autonomy for Tobago, a system of democratic local government across the country, on a statutory basis, with 14 local authorities under the Municipal Corporations Act 1990.

Other examples of constitutionally protected special autonomy are weaker. The Constitution of Antigua and Barbuda establishes a Barbuda Council with limited powers. Its powers are set by an Act of Parliament (Barbuda Local Government Act 1976), but that Act cannot be amended except with the consent of the Barbuda Council (Constitution of Antigua and Barbuda, section 123). No such safeguard exists for the Council of Carriacou and Petit Martinique in Grenada, whose existence is constitutionally recognized but whose powers can be unilaterally changed by the Parliament of Grenada without the consent of the Council (Constitution of Grenada, section 107).

Finally, the fourth category consists of those countries where local government is recognized in the constitution across its territory, and not only in relation to one part of it. Guyana has the most detailed local government provisions in its Constitution, devoting a whole chapter of the Constitution (Chapter VII) to the organization of local and regional councils in a two-tier structure. Jamaica, since an amendment in 2011, has also recognized local government at a constitutional level, although the Constitution sets out only general principles, and leaves all the details of the composition and powers of local authorities to be determined by ordinary Acts of Parliament (Constitution of Jamaica, section 66[3]–[5]). The principal unit of local democracy in Jamaica is the parish, of which there are 12, alongside the Kingston and St Andrews Municipal Corporation, which is a combined authority for Jamaica's capital city. In contrast to Malta, where the frequency of local elections was written

[28] Although more than 60 per cent of votes cast were in favour of independence, this fell short of the two-thirds majority needed to become independent.

into the Constitution in order to comply with the European Charter on Local Government, local elections in Jamaica have been repeatedly delayed by the Government, which shows the inherent weakness of a merely statutory, rather than constitutional, arrangement in any system where the executive dominates the law-making process.

From this brief survey of the actual and constitutional state of local government in the region, several issues of interest to potential constitutional reformers arise. First, in those countries where elected local government does not exist, would it be beneficial to create it? Second, where elected local government already exists, or is to be created, should it be written into the constitution or kept on a merely statutory basis? In regard to the second question, both the substantive and expressive functions of a constitution ought to be considered. Putting local government into the constitution might substantively alter and increase the powers that local government possess. It might, as a minimum, protect and entrench local government institutions that would otherwise be vulnerable to encroachment by the national Government. This would depend on how much prescriptive detail is put into the constitution. Even if that detail is minimal, as in Jamaica, does the recognition of local government in the constitution nevertheless have an expressive effect—legitimizing local government as an integral part of the democratic system? Does constitutional recognition of local government help shift the discourse away from a focus on merely local administration and service delivery (important though that is) to a broader commitment to local democratic participation and empowerment? On the other hand, putting excessive detail concerning the organization of local government into the constitution means that these things become more difficult to change when the need arises.

Does the recognition of local government in the constitution nevertheless have an expressive effect—legitimizing local government as an integral part of the democratic system?

Perhaps the most interesting recent contribution to these debates on local government is that provided by the Commission on Local Governance in Barbados (Thorne Commission 2021), which recommended the establishment of 21 People's Assemblies across Barbados, of which 8 would be designated as municipal assemblies. Their powers would be marginal, and mostly advisory, acting as a mechanism of local input into, and supervision over, national decision making, rather than as an autonomous tier of government. However, the system of People's Assemblies would culminate in a Chairpersons' Caucus, a body representing the People's Assemblies collectively to oversee and scrutinize public administration and service delivery. This is a very novel institution—not really a forum for local government coordination, but a separate institution representing the people outside of the parliamentary process. The closest parallel in a Commonwealth small island state is the National Assembly of civil society representatives which was proposed in the 2012 draft constitution for Fiji—but that was never adopted.

Chapter 8

HUMAN RIGHTS, THE RULE OF LAW AND JUDICIAL REFORM

8.1. THE JUDICIARY AND JUDICIAL APPOINTMENTS

All countries in the Commonwealth Caribbean have a judiciary shaped by English Common Law and by the patterns of British colonialism. Judges are, therefore, normally chosen from among practising attorneys of considerable experience who, once appointed to the bench, expect to serve with security of tenure during good behaviour. Formal constitutional rules of judicial independence are well established throughout the region, although the extent to which judicial appointments are insulated from political pressures varies.

Most countries have a Judicial Service Commission established in the constitution, which is supposed to be the lynchpin of judicial independence. However, these institutions leave much to be desired. Most Judicial Service Commissions are very small, with little internal diversity.

Informal norms also support the principle of judicial neutrality and independence; this is deeply ingrained in the training and professional socialization lawyers receive. However, it is more difficult to sustain this in small, closely knit societies, where political, legal and business elites are densely overlapping. There is little anonymity or social distance for judges at the national level, although there is some more anonymity for region-wide judges. Given the small size of the elite, former judges in the Caribbean may frequently be called upon to serve in a variety of other roles—as members of Commissions, sometimes as Senators—and so may move, with greater ease and regularity than elsewhere, between judicial, administrative and political roles.

Debate on reform of the judiciary in the region has largely been focused on these issues of recruitment, appointment, neutrality and independence. Most countries have a Judicial Service Commission established in the constitution, which is supposed to be the lynchpin of judicial independence. However, these institutions leave much to be desired. Most Judicial Service Commissions are very small, with little internal diversity. Most are composed of ex officio senior judges, official members (e.g. the Chair of the Public Service Commission) and representatives of the legal profession. There is a noticeable lack of lay members representing the wider public interest or civil society. These weak,

small, not fully institutionalized bodies can be dominated by the Chief Justice. They are underfunded, lack a permanent secretariat, do not have transparent recruitment and selection procedures, and are not routinely required to report on their activities to Parliament. Moreover, while constitutions in the region typically set out minimum legal qualifications or experience for judges, appointing bodies are not constitutionally required to consider other criteria for appointment. This contrasts with some more recent Commonwealth Constitutions. For example, the Constitution of Kenya (article 166) requires judges to be of 'high moral character, integrity and impartiality', while that of South Africa (article 174) requires judges to be not only 'appropriately qualified' but also 'a fit and proper person' for the role. It also contrasts with the Caribbean Court of Justice Agreement, which provides (article IV-11) that 'in making appointments to the office of Judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society'. Similar criteria might usefully be incorporated at a constitutional level into national judicial appointment processes.

Even with these limitations, it is a concern that senior judges are usually excluded from the purview of the Judicial Service Commission. In Jamaica, for example, members of the Supreme Court and Court of Appeal are appointed by the Governor-General on the advice of the Judicial Service Commission, but the Chief Justice and the President of the Court of Appeal—who are members of the Judicial Service Commission, with the Chief Justice as Chair—are appointed by the Governor-General on the advice of the Prime Minister after consultation with the Leader of the Opposition (Constitution of Jamaica, section 98). In effect, therefore, the neutrality of the appointment process is compromised. In Barbados, all members of the Supreme Court are appointed by the President on the advice of the Prime Minister after consultation with the Leader of the Opposition (Constitution of Barbados, section 81), although, as noted in Chapter 5, there is now a statutory Judicial Appointments Committee with responsibility for making recommendations to the Prime Minister.

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The following reform efforts could involve strengthening Judicial Service Commissions: (a) increasing the scope of their appointing powers to include the highest judicial offices; (b) creating an autonomous leadership (for example, having a Chair of the Judicial Service Commission who is not also the Chief Justice); (c) broadening the membership of Judicial Service Commissions to include more non-judicial members—not only members of the legal profession but also lay members representing the general public—to disrupt the 'clubbiness' of the bench; (d) and establishing stronger Codes of Practice to regulate the behaviour of judges.

There is also an increasing emphasis on improving the efficiency and effectiveness of the judiciary. Since independence, with economic development and social change, there has been an expansion in the role of the courts and an increase in their number. Specialist lower courts, such as family courts, sexual-offences courts, commercial courts, firearms-offences courts, industrial courts, etc., have expanded. There have been some steps across the region

towards a more professional process of court management and caseload management, and initiatives in mediation and restorative justice, but progress has been patchy. It has become usual for the Attorney-General or Minister of Justice to work hand in hand with Chief Justices on 'justice improvement' or 'judicial capacity-building' projects, which, while understandable, has huge potential for conflicts of interest.

The stagnation of judicial salaries is a common cause of dissatisfaction. Salaries have not kept up with inflation and rising living costs, and successful lawyers can make more money in private practice than on the bench.

The stagnation of judicial salaries is a common cause of dissatisfaction. Salaries have not kept up with inflation and rising living costs, and successful lawyers can (although this is not unique to the Caribbean) make more money in private practice than on the bench. Judges may hop between jurisdictions—working in other countries in the region—in search of better pay or prospects. This can, however, result in a judicial career being 'a hustle', rather than judges enjoying the security and permanence that should be associated with the bench. Such a disjointed career can produce a pension shortfall, meaning that retired judges, if not in the possession of a private income, are forced to go back to work, competing for employment as temporary judges or as members of various boards or commissions. This intensifies judicial dependence upon political patrons who can provide access to such opportunities. Increasing judicial salaries and pensions is one solution. It would be rare for this to be constitutionalized, but there is no theoretical reason why it could not be. Any fixed sum would soon become out of date, but the constitution could establish a process for periodic review and specify criteria by which judicial salaries are to be determined.

8.2. THE CARIBBEAN COURT OF JUSTICE

Reliance on transnational appellate courts is a notable feature of Commonwealth Caribbean judicial systems. Most countries in the region, after independence, chose to retain the JCPC as their final court of appeal. The JCPC, established in 1833, was the highest appeal court of the British Empire. It sits in London and its membership, in practice, overlaps with that of the UK Supreme Court. Having the highest appeal court for a Caribbean country sitting in London might be regarded as a diminution of national sovereignty; it can be portrayed as a sign—along with retention of the monarchy—of the incompleteness of decolonization in the region. On a more practical level, it makes access to justice slow and expensive.

In response to these concerns, the CCJ was established in 2005, by a CARICOM treaty, to take over the functions of the JCPC as a final appellate court for the region. So far five countries—Barbados, Belize, Dominica, Guyana and most recently Saint Lucia—have signed up to it. It is remarkable that so comparatively few of the countries in the region have made this shift. What the countries accepting the CCJ's appellate jurisdiction have in common is that they did not require a referendum to amend their national constitutions in order to abolish appeals to the Privy Council and to transfer jurisdiction to the CCJ. Attempted reforms in countries where referendums have been held on such

changes—Antigua and Barbuda, Grenada, Jamaica,[29] and Saint Vincent and the Grenadines—have so far failed.

One of the reasons for slowness in making this change from the JCPC to the CCJ is sheer historical inertia. Cases making it all the way to the JCPC are so rare—Saint Kitts and Nevis, for example, has not sent an appeal to the Privy Council in four years—that it is not a major issue, nor a major vote winner, one way or another. That said, the small volume of cases should not diminish their significance. In Saint Kitts and Nevis, in particular, the JCPC has been hailed as 'a saviour', in the words of one participant at the Bridgetown Conference, for the case[30] that resolved an impasse on constituency boundaries for the 2015 general election.

The theoretical subordination of national legal systems to a post-imperial court does not excite passionate opposition or harm a sense of national pride. Therefore, it is the sort of anomaly that might make little sense in theory, but which is so unobjectionable in practice as to be easily ignored. Where it can be slipped through without a referendum, there is relatively little objection, and so it can pass, but when a referendum is needed, there is relatively little enthusiasm, and so it cannot muster the votes required.

The other major reason for reluctance to change is *perceived* impartiality. Given the intense polarization and partisanship of politics in many Caribbean countries, their dense, interlaced, political, legal and commercial elites, and doubts about the effectiveness of existing institutions in protecting judicial independence from both formal and informal pressures, some litigants feel that a bit of distance from proceedings is advantageous in the interests of justice. As one learned participant at the Bridgetown Conference put it, the prevailing attitude among ordinary people is sometimes, 'I'd rather take my chances with the white man'. The counterargument to this is that English judges, sitting in London and unfamiliar with Caribbean customs, habits and values, might lack the contextual knowledge needed to make good decisions, or else are predisposed to take certain approaches which might be out of keeping with public opinion in the Caribbean on issues such as the death penalty. Moreover, as one participant noted, 'The CCJ is no longer at the experimental stage; it can provide top-quality justice. We have confidence in the independence of that court from the Governments of the nations it serves.' One institutional pillar of this trustworthiness is the CCJ Trust Fund, which insulates the CCJ and its judges from dependence on the budgetary vagaries of the signatory states. Another is the Regional Judicial and Legal Services Commission, which unlike its national equivalents is a relatively large (11-member) and balanced Commission, which includes academic and lay members, and which is not under the control of any particular country or institution.

Quote from the Bridgetown Conference: 'The CCJ is no longer at the experimental stage; it can provide top-quality justice. We have con idence in the independence of that court from the governments of the nations it serves.'

[29] It has been argued that a referendum on the CCJ Agreement was not necessary in Jamaica, and that a two-thirds majority in both Houses would have been sufficient (Jamaica Information Service 2012).

[30] *Brantley and others v Constituency Boundaries Commission* (St Kitts & Nevis) [2015] UKPC 21.

The transfer of jurisdiction from the JCPC to the CCJ remains on the agenda of constitutional reform processes in the region.

The transfer of jurisdiction from the JCPC to the CCJ remains on the agenda of constitutional reform processes in the region. This is motivated in part by a concern that the JCPC might become too intrusive, especially on issues where prevailing Caribbean norms and public attitudes diverge, in a more conservative direction, from those of London. However, these positions are not static. Privy Council jurisdiction can be more conservative, such as upholding marriage inequality in Bermuda and the Cayman Islands, while public opinion in some Caribbean countries may be liberalizing. It is difficult to disentangle these various factors in trying to assess which court is likely to give the desired result. In any case, it remains to be seen whether such a change will clear the referendum hurdle in those countries where it is necessary.

The other regional court of note is the Eastern Caribbean Supreme Court, which serves the Eastern Caribbean countries of Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines, as well as the non-independent territories of Anguilla, the British Virgin Islands and Montserrat. Its judges, other than the Chief Justice, are appointed on the advice of a Judicial and Legal Services Commission, of which the Chief Justice is the Chair; two of the other four members are effectively chosen by the Chief Justice, and the Chief Justice has influence in the choice of the remaining two members. This is a very closed process (Supreme Court Order 1967). However, the international nature of the Eastern Caribbean Supreme Court, and its legal basis in a colonial Order-in-Council, means that reforming the appointment process would be difficult; no country subject to that court could achieve such reforms in isolation, but only by the agreement of all.

8.3. SUBSTANTIVE CONTENT OF RIGHTS

Moving on to the substantive rights guaranteed by Caribbean Commonwealth constitutions, it is possible to identify three broad approaches. The first approach is to adopt what has been termed the 'neo-Nigerian' model (Parkinson 2007). This is an adaptation, with only minimal modifications for context, of the European Convention on Human Rights (ECHR). This approach was first adopted in the Nigerian Constitution of 1960, and later spread across many parts of the Commonwealth as part of the standard Lancaster House template often used by Colonial Office drafters.[31] This approach sets out rights in quite specific terms, with detailed limits and exceptions. Most constitutions in the region handle rights in this manner.

The second approach might be termed the 'Canadian' approach, inspired originally by the Canadian Bill of Rights Act 1960. This sets out rights in broad, general terms, without specific limitations clauses. In the case of Trinidad and Tobago, the exemplar of this approach, Parliament can override rights

[31] Lancaster House is a London mansion, now in the possession of the British Foreign, Commonwealth and Development Office, which was often used, between the 1950s and 1970s, for hosting independence conferences.

by means of an Act of Parliament passed by a three-fifths majority in both Houses, but only 'to the extent reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual' (Constitution of Trinidad and Tobago, section 13). This gives, in contrast to the 'neo-Nigerian' approach, more discretionary power to both Parliament *and* the courts.[32]

The third approach is a hybrid approach that borrows from different jurisdictions. This approach can be seen in Jamaica (post-2011) and Guyana (post-1980). The Jamaica Charter of Fundamental Rights and Freedoms is particularly interesting because of the way in which it added some new substantive rights that were missing from the old neo-Nigerian model, while also entrenching a conservative view of human rights. Thus, the Jamaica Charter strengthened the rights of political participation, including a more explicit right to vote; it included some socio-economic rights, such as the right to education and the right to a healthy environment; it widened standing and narrowed the previous general savings clause (see below). But it also recognizes only male and female genders and excludes the possibility of same-sex marriage. It protects existing laws on sexual offences, abortion and obscene publications from judicial review. It reverses the landmark *Pratt and Morgan* decision[33] by constitutionally permitting and protecting the death penalty—even if a prisoner spends a long time on death row before the sentence is carried out. In other words, the Jamaica Charter of Fundamental Rights and Freedoms is designed to prevent courts using it to advance progressive policy causes.

Across the region, legal, political, academic and public debates on rights focus on a number of key recurring themes—the death penalty (whether or not to allow it), socio-economic rights (whether or not to include them), sex-based, gender identity and sexual orientation rights (whether, broadly, to take progressive or conservative lines on these issues), and, to a lesser extent but perhaps increasingly, climate and environmental rights. While not ignoring those hot-button political issues, the discussions at the Bridgetown Conference, in common with much of the academic literature, made a more general complaint against the narrowness of rights protection, especially in countries adhering to the neo-Nigerian model or ECHR-based model. Those older bills of rights typically feature restrictive 'savings clauses', which prevent the judicial review of old colonial laws on the statute books before independence. The prevailing doctrine since *Director of Public Prosecution v Nasrallah*[34] was that the independence constitutions did not create additional rights, but merely sought to protect existing rights from future encroachments

Older bills of rights typically feature restrictive 'savings clauses', which prevent the judicial review of old colonial laws on the statute books before independence.

[32] The question of what is 'reasonably justifiable' may be discerned using the De Freitas test. This assesses: (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) whether the measures designed to meet the legislative objective are rationally connected to it; and (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective (*De Freitas v Permanent Secretary of Ministry Of Agriculture* (Antigua and Barbuda) [1999] 1 AC 69.

[33] *Pratt and Morgan v Attorney General of Jamaica and another*, Jamaica, 1993, UKPC 1.

[34] *Director of Public Prosecution v Nasrallah* (Jamaica) [1967] 2 AC 238.

(DeMerieux 1986). Gradually, Caribbean jurisprudence has moved away from this position, and it is now regarded as having been repudiated (Robinson and Bulkan 2017), but still the legacy of a narrow interpretation of rights endures in the region. Moreover, certain rights are usually missing from Caribbean Commonwealth constitutions, such as an explicit right to vote and the right to trial by jury. There was a widespread desire among the participants in the Bridgetown Conference to strengthen these rights, narrow savings clauses and increase access to constitutional justice.

Jamaica is an interesting example because its Charter reform in 2011 engaged directly with many of these issues. Jamaica shows how constitutional reform can face two ways: expanding the protection of fundamental democratic rights, while also taking a socially conservative, or even reactionary, stance on issues such as the death penalty and same-sex marriage. Similar recommendations arose from the Report of the Saint Lucia Constitutional Review Commission (Saint Lucia 2011: 93–99), which recommended no change on the issue of same-sex marriage or the criminalization of homosexual activity in public; on the other hand, it did recommend the extension of the non-discrimination clause to include 'gender' as well as 'sex', and stated that discrimination on the basis of sexual orientation was unacceptable, although it recommended that the latter be addressed by means of ordinary legislation. The Report of the Barbados Constitutional Review Commission (Barbados 1998: 35) likewise recommended the extension of the non-discrimination clause to include 'gender', but not 'sexual orientation'.

It would be a mistake to assume that public opinion in the region is universally conservative on issues such as gender recognition, same-sex marriage and other socio-cultural concerns.

It would be a mistake to assume that public opinion in the region is universally conservative on issues such as gender recognition, same-sex marriage and other socio-cultural concerns. In many countries there is an active lobby of LGBTQIA+ advocates who are calling for change to existing discriminatory practices, as well as strong women's movements campaigning for gender equality. Despite judicial conservatism and the limits placed upon judicial activism by savings clauses, historical anti-sodomy laws have been invalidated in landmark cases in Belize and Guyana (Campbell and Wheatle 2020), and more recently elsewhere in the region. It is not the existence of a conservative consensus of opinion on such matters but rather the erosion of that consensus that motivates certain actors—chiefly the churches and other religious groups—to mobilize in favour of constitutional provisions that would prevent losing more ground, through ordinary legislation, to secular progressives.

Yet movements in the direction of religious establishment have hitherto been limited. While there have been successful attempts, as in Jamaica, to lock in the status quo on particular policy matters of interest to religious conservatives, there has so far been no sustained call for the declaration of a Christian state in the body of the Constitution. In some countries references to Christianity, or more general religious references, can be found in the preamble (Once again Guyana, which declares itself to be secular, is the outlier).

This relative reticence to establish religious identity in the body of the constitution—it was not raised by any of the participants at the Bridgetown

Conference—is in contrast to Commonwealth small island states in other parts of the world, such as Malta, Samoa and Tuvalu, which do contain such provisions. Some countries in the Caribbean region also have significant religious minorities, including Hindu, Muslim and Rastafari communities, as well as those practising pre-colonial religions such as the Mayan revivalists in Belize, who are likely to resist such moves.

8.4. SOCIAL AND ECONOMIC RIGHTS

With the notable exception of Guyana—and, to the limited extent noted above, Jamaica—constitutions in the region do not feature social and economic rights. Many Commonwealth constitutions of similar vintage to those in the Caribbean made provision for socio-economic rights through non-justiciable Directive Principles, but these too are absent in the region, except, again, in Guyana.

This does not mean, however, that the Caribbean Commonwealth constitutions encode a laissez-faire politics. Indeed, the preambles of several of them make extensive claims of orientating the state towards economic and social justice. Rather, the absence of social and economic rights displays a prevailing preference, at the time of constitutional formation, for policy choices to be determined by ordinary parliamentary politics, and not prescribed by the constitution. There is a fear that, if socio-economic rights are made justiciable, the state may be asked to do impossible things. As one participant at the Bridgetown Conference put it, 'Can everyone be given a right to housing? Do we have that capacity?' The failure of the state to live up to those expectations may cause a loss of legitimacy (against this, it might also be argued that the failure of the state to 'deliver the goods' may cause a loss of legitimacy, even if not constitutionally enshrined). There are various constitutional design solutions, in the framing of rights, to address these fears, such as a commitment to the 'progressive realization' of rights and to the delivery of a 'minimum core' of rights. There was some interest at the Bridgetown Conference in experiences of such approaches elsewhere in the Commonwealth, particularly from Fiji, Kenya and South Africa.

Quote from the Bridgetown Conference:
'Can everyone be given a right to housing? Do we have that capacity?'

It remains to be seen whether the current wave of constitutional reform will include socio-economic rights. The Report of the National Advisory Committee on Constitutional Reform in Trinidad and Tobago, reporting in July 2024, recommends the constitutional recognition of certain economic and social rights, including: (1) the right to education; (2) the right to clean air, water and a healthy environment; (3) the right to health care; (4) the right to adequate housing and sanitation; (5) children's rights; and (6) certain cultural rights. In addition, it proposes a more extensive and ambitious list of Directive Principles, ranging from recognition of the place of the steelpan in national cultural identity to a commitment to good government and impartial administration (Trinidad and Tobago 2024). Early indications from the Barbados process suggest some interest in that direction, but at the time of

writing it is not known whether these rights will be included, and if so in what form. What is clearer, however, is that legal conservatism in the region is strong, and an attempt to install a strong set of socio-economic rights would, in much of the region, provoke considerable opposition. Some opposition would come from legal conservatives, concerned about both theoretical and practical questions, such as enforceability and the risk of excessive politicization of the judiciary. It was noted at the Bridgetown Conference that, in South Africa, some in the African National Congress had also, initially, been sceptical about socio-economic rights, for the same reasons, but that these objections were overcome during the constitution-making process, in part because of the influence of international law.

Some opposition would also come from economic elites, including international corporations, concerned with the effect of social and economic rights upon labour laws and the regulation of private resources. In particular, lines are being drawn on third- or fourth-generation rights, such as land rights, environmental rights, water rights and the rights of nature. In economies where extractive industries—such as the bauxite industry in Jamaica—have played an important role, such rights get to the heart of the relationship between citizen, state, environment and economy.

8.5. **RIGHTS UNDER INTERNATIONAL LAW**

In addition to the rights guaranteed by national constitutions, human rights and civil liberties might also be protected by international agreements to which a country is a party. For example, most countries in the region have ratified the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities (UN Treaty Body Database n.d.).

Courts in the region show a trend of recognizing international human rights treaties in how they interpret national laws and constitutions.

In the region traditional British models of 'dualism' apply to the reception of international law, meaning that the Crown or Government can conclude treaties which are binding on the state, but these do not have effect in domestic law unless adopted by an Act of Parliament. However, this traditional understanding is changing. The region is moving towards 'creeping monism', in which courts in the region show a trend of recognizing international human rights treaties in how they interpret national laws and constitutions (Waters 2007: 628). The Constitution of Guyana (article 39) specifically requires that courts take international law into consideration in interpreting fundamental rights, and it incorporates—'with awkward results', in the words of one participant at the Bridgetown Conference—seven treaties. In Belize the Interpretation Act requires that courts take treaty obligations into consideration in their interpretation of legislation, including the Constitution.

8.6. **HUMAN RIGHTS COMMISSIONS**

In many countries, Human Rights Commissions are crucial in promoting the implementation of human rights and civil liberties. They are non-judicial forums which do not adjudicate on rights disputes in particular cases but educate and inform the public about human rights, raise awareness, and monitor and report upon the human rights situation in a country. In some countries Human Rights Commissions may have the authority to receive complaints about alleged abuses of human rights, to conduct investigations and to bring legal action on behalf of persons whose rights are alleged to have been infringed.

Constitutionally recognized Human Rights Commissions are rare across the region, at least in the independent countries (they exist in Bermuda and the Cayman Islands). The exception to this lack of constitutionally recognized Human Rights Commissions is Guyana, which has several such bodies established under section 212G of its Constitution: a Human Rights Commission, a Women and Gender Equality Commission, an Indigenous Peoples' Commission and a Rights of the Child Commission. The Constitution of Guyana makes extensive provision for the roles, powers and duties of these Commissions. However, opinions and perceptions were divided among the participants at the Bridgetown Conference on the effectiveness of these institutions in Guyana's executive-dominated polity. In particular, the main Human Rights Commission has never been operationalized.

In some countries, statutory bodies perform these roles. Jamaica has an Office of the Public Defender, whose remit is closer to that of an Ombudsman, but does intersect with some human rights issues in terms of access to natural justice and fair treatment in relation to the public authorities. The Equal Opportunities Commission in Trinidad and Tobago, likewise, has a limited jurisdiction, but was seen by one participant at the Bridgetown Conference of at least partially filling that gap.

Two participants at the Bridgetown Conference also highlighted the role of non-governmental organizations in some countries in defending, and advocating for, human rights. However, these organizations lack the status, the funding, the powers and the official recognition that would be expected of a constitutionally established Human Rights Commission.

Chapter 9

CLOSING REMARKS

This report has identified the main issues of constitutional reform in the Commonwealth Caribbean region—how the existing constitutions work, what the pressures, demands and proposals for change are, and what principles and design options constitution-makers might wish to consider. No specific change is here recommended. It is not the place of International IDEA or UNDP to say, in the abstract, what any particular country should or should not do. These decisions are national decisions, which must arise from national political processes, rooted in national democratic deliberation. As noted several times in this report, constitutional decisions are, in essence, political decisions; the opportunities for, impetus of, and limits upon, constitutional reform all depend upon political calculations.

It is possible to reform Caribbean Commonwealth constitutions in ways that meet public and political demands for a broader, more inclusive, more balanced political system without going against the grain of inherited institutions.

Nevertheless, it is hoped that this report provides an overview of the constitutional problems facing the region, and a menu of potential constitutional options that may provide a solution to those problems.

The fundamental problems are those of the Westminster Model, especially as applied to small countries. It produces a simple and robust, if rather crudely majoritarian, form of democracy. Yet the good news is that, in a context still quite attached to that tradition, it does not seem necessary to abandon the inherited Westminster Model. The problems of hyper-majoritarianism, executive dominance, weak Parliaments, insufficient checks and balances, centralization and relatively weak rights protection can potentially be addressed, through some of the ideas outlined in this report, within the framework of the Westminster Model. It is possible to reform Caribbean Commonwealth constitutions in ways that meet public and political demands for a broader, more inclusive, more balanced political system without going against the grain of inherited institutions.

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About the partners

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The Commonwealth Caribbean is experiencing a new wave of constitutional change, with constitutional review and reform on the political agenda in many countries across the region. This report from International IDEA and UNDP examines the agendas for change, the salient issues across the region and the options for reform.

Informed and inspired by a conference hosted by International IDEA and UNDP in Bridgetown, Barbados, in June 2023, the report enables the sharing of experiences and the cross-pollination of ideas from across the region. It brings together the perspectives of Commonwealth Caribbean constitutional scholars and leading practitioners of constitutional change, including government ministers, other senior parliamentarians, members of constitutional reform commissions or committees, and international advisors from UNDP and International IDEA.

This report will be useful to anyone involved in these constitutional review and reform processes, whether governmental, intergovernmental, non-governmental or academic.

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