



**THE BAHAMAS CONSTITUTIONAL
COMMISSION**

**The Bahamas Constitution:
Options for Change**

Title Page Information

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COMMISSION**

**THE BAHAMAS CONSTITUTION:
OPTIONS FOR CHANGE**

Prepared for the Commission

by

The Commission's Secretariat

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**Printed in The Bahamas by the Government Printing
Department
Industrial Park, Soldier Road,
c/o P.O. Box N-7147
Nassau, The Bahamas**

ISBN 976-8108-69-X

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PREFACE

The Bahamas gained its independence from Great Britain on 10th July 1973. Thirty years on, the 1973 Independence Constitution remains fundamentally unaltered. Sufficient time has elapsed, therefore, to justify a review of how the existing provisions of the Constitution have served us.

Accordingly, the Constitutional Commission was appointed on 23rd December 2002, under our joint chairmanship. The broad mandate of the Commission is to carry out a comprehensive review of the Constitution of The Bahamas and to consider the method of amending the current Constitution or adopting a new one. Specific objectives of the review include the strengthening of the fundamental freedoms and civil and political rights of the individual, and critically examining the structure of executive authority.

The appointment of a broad-based Commission comes at a time when there is global recognition of the need for increased involvement of civil society in the process of democratic governance. Yet, public participation in constitutional reform—or indeed any kind of policy formulation and implementation—is only possible if appropriate mechanisms are in place for increased attention to civil education.

This booklet forms the cornerstone of our public education campaign. It contains basic information about the Constitution and questions to start citizens thinking about reform possibilities. Above all, it has been prepared with a view to deepening public knowledge of the Constitution and to stimulate public interest and debate on constitutional issues.

It is hoped that Bahamians living in The Bahamas and abroad take full advantage of the opportunity to participate in this exercise. Your voice in this national conversation is vital if the end-product of our work is to accurately reflect the aspirations and expectations of Bahamians for constitutional development.

Finally, the Commission wishes to thank the many persons and organizations who have contributed to the publication of this booklet, in particular the Commission's Secretariat and Mrs. Velma Newton, Law Librarian, University of the West Indies, Cave Hill Barbados, who provided reference material from the Barbados constitutional review process.



Paul L. Adderley



Harvey Tynes, Q.C.

**Chairmen
Constitutional Commission**

July 2003

Note from the Secretariat

The aims of this booklet are threefold: (i) to summarize and simplify the major provisions of the Constitution; (ii) to highlight some of the perceived deficiencies in the Constitution; and (iii) to alert readers to possibilities for amendment and reform. The greatest challenge for the Secretariat has been achieving simplicity without sacrificing essential content, while at the same time treating the areas in sufficient detail to facilitate a critical review. Our goal has been to make this document as non-technical as possible, but at times it has been necessary to refer to legal concepts or cite important cases by way of illustration or explanation. Effective constitutional reform requires an understanding of the principles underlying our system of government. Thus, explanation of those principles is provided where necessary. The questions for consideration listed at the end of each chapter are not meant to be exhaustive, but are only intended to serve as a starting point for the constitutional debate. This booklet might contain errors in fact or explanation, or omissions. Our hope is that such flaws, where they exist, will be brought to light during the public consultation process.

CHAPTER 1

General Features of the Constitution

The Nature of the Constitution

A constitution is the system or body of principles according to which a state is constituted and governed. It establishes the nature of the state, the character of its government and distributes governmental functions among the various organs of government. Importantly, it regulates the way in which government may exercise its powers in respect of citizens. Many, such as The Bahamas Constitution, grant fundamental rights to individuals. A constitution may be contained in a single document, such as ours, or it may be a collection of laws and customs (e.g., the British Constitution).

The constitutional system of The Bahamas is a constitutional monarchy, which simply means that a 'monarch' or sovereign is Head of State. A defining feature of this system is that it encompasses a mainly ceremonial head of state (in our case Queen Elizabeth II) and an executive head of government, the Prime Minister. The system of government established is the Westminster system of Parliamentary Democracy, so called because it is modelled on the form of government developed in England and practised at the 'Palace of Westminster'—the seat of the British Government. As a matter of definition, a parliamentary democracy is one in which only persons who are members of Parliament (the Senate or House of Assembly) and, therefore, accountable to Parliament, may be appointed to ministerial office.

The Bahamas Constitution contains many provisions nearly identical to those found in the Constitutions of the Commonwealth Caribbean. Even the layout of the document is similar. It begins, after a Preamble, by establishing the state and declaring the constitution as the supreme law. Then, there is a chapter that deals with how citizenship is determined and another that defines fundamental rights and freedoms of the individual. Another chapter sets out how government is to be organized and makes provisions for the various organs of government, including the office of the Governor General, the Executive (i.e., ministers and cabinet), the Legislature and Judicature. There follows provisions for the Public Service, finance and miscellaneous matters (e.g., interpretation).

One feature of the West Indian constitutions that has become a subject for review is the manner in which they were brought into being. They are generally contained in a schedule to a legislative order made by Her Majesty in her capacity to legislate for dependent territories on constitutional matters. In the case of The Bahamas, that order is *The Bahamas Independence Order* (Great Britain S.I. 1973, No. 1080) made under the authority of the *Bahama Islands (Constitution) Act 1963*. It should be noted, however, that The Bahamas gained independence not by its 1973 Constitution, but by an Act of the United Kingdom Parliament (*The Bahamas Independence Act 1973*). That Act provided that after 10th July 1973, Her Majesty's Government would no longer have responsibility for The Bahamas, which was to have full responsible status within the Commonwealth. Together, the Independence Act and Order form the essentials of independence.

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Questions for Consideration

1. Should the Constitution of The Bahamas remain a United Kingdom Order or should it be a document enacted by the Bahamian Parliament and people?
2. Should the Constitution be amended in its current form, or should it be replaced and superseded by an entirely new document?

Notes

CHAPTER 2

The Preamble

Introduction

A preamble is the section at the beginning of a constitution (or a statute) explaining the reasons for its enactment and its objectives. The preamble to a constitution typically contains commemorative and exhortatory recitations, a declaration of the aims and aspirations of the people and the fundamental principles of nationhood. While it is not strictly a part of the Constitution, the courts may grant some weight to a preamble in interpreting the Constitution. Some constitutions expressly provide that the principles stated in the preamble may be used as an aid to their interpretation.

The Preamble

The Preamble to the Constitution of The Bahamas commences with a commemoration of the “rediscovery” of The Bahamas in the New World and declares the following principles to be vital to guaranteeing the freedom of its people: self-discipline, industry, loyalty, unity and “an abiding respect for Christian values and the rule of law”. It then professes the supremacy of God and a belief in the fundamental rights and freedoms of the individual.

This is followed by the proclamation of a free and democratic nation founded on spiritual values, in which persons are not to be enslaved or bonded to anyone, or have their labour exploited, or live in deprivation. Finally, the Preamble declares the

creation and unity of The Commonwealth of The Bahamas under God.

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Questions for Consideration

1. Does the Preamble adequately capture the aspirations of Bahamians?
2. Is the reference to “Christian” values exclusive of or discriminatory to other religions or beliefs?
 - 2.1 Does this conflict with the fundamental rights provision in the Constitution that establishes freedom of religion?
3. Should the Preamble be amended to replace the reference to “Christian” values with a general, inclusive term such as ‘religious’ or ‘moral’ values?
4. Should the Constitution provide for the Preamble to be used as an interpretation aid?
5. Are the references in the Preamble to “Slave”, “Bondsman” and “Rediscovery” necessary in a modern society, or are they relics of the past?
6. Should the Preamble include directive principles of state policy or developmental principles (e.g., such as the duty of government to promote public health, education, etc.)?
7. Should the Preamble be left as is?

Notes

CHAPTER 3

The Constitution as Supreme Law

[Chapter I: The Constitution]

Introduction

Chapter I declares the State of The Commonwealth of The Bahamas to be a sovereign democratic one. It also contains what is known as the 'supreme law clause'. This provides that the Constitution is the supreme law and if any other law is inconsistent, so much of the law that is inconsistent is bad law. Simply put, the supremacy of the Constitution means that Parliament and all the other organs of government must obey the Constitution, both in making laws and in executive action.

Notwithstanding the wording of the supreme law clause that an inconsistent law "shall, to the extent of the inconsistency be void", the true legal position is slightly different. An 'unconstitutional' law remains valid until it has been declared invalid by the Supreme Court or another competent court. This is so because there is a presumption that an Act of Parliament is valid. However, such a declaration can only be made when the law is challenged by a person whose interests are affected by the law or where a constitutional question is referred to the Supreme Court from an inferior court (e.g., a Magistrate's Court).

Questions for consideration

1. Currently, only persons who are or will be affected by legislation can mount a constitutional challenge to such legislation. Should this right be granted to other persons or organizations to allow them to bring an action on behalf of other citizens?
2. Should the Supreme Court be given the power to review legislation by its own motion for constitutional conformity?

Notes

CHAPTER 4

Citizenship

[Chapter II: The Constitution]

Introduction

The ability of a state to confer citizenship upon an individual is an expression of its sovereign status in international law. Citizenship, which denotes officially belonging to a state, confers certain benefits as well as imposes obligations. The citizen is entitled to the diplomatic protection of the state, is able to travel by virtue of a passport issued by the state, may freely reside, work and carry on business in the state, and may take part in government. On the other hand, he comes under the legal jurisdiction of the state, owes permanent allegiance to the state and is expected to carry out incidental duties of citizenship (e.g. paying taxes, etc).

Acquisition and transfer of Nationality

In general, persons become citizens of a country by (i) birth within state territory; (ii) descent from a national; (iii) registration; (iv) naturalization; (v) operation of law (i.e., adoption or marriage); or some combination of these methods. The Constitution does not speak to all of these; other provisions concerning nationality are contained in various legislation. These include the *Bahamas Nationality Act*, Ch. 190, the *Legitimacy Act*, Ch. 130, the *Immigration Act*, Ch. 191, and the *Adoption of Children Act*, Ch. 131 (Statute Laws of the Bahamas, Revised Edition of 2000).

The first articles of Chapter II are transitional articles dealing with questions of nationality of persons born in the former colony of The Bahamas or with parental links to The Bahamas before independence.

Citizenship gained before Independence

Transitional Provisions

Three categories of persons are dealt with under these provisions: (i) those who automatically became citizens on 10th July 1973; (ii) those who became citizens on the 9th July 1974; and (iii) those who were entitled to register as citizens at independence. Falling into the first category are: (a) persons born in the Bahamas who are citizens of the UK and Colonies; (b) the children of *male* UK citizens born in the Bahamas (even if the father died before independence); and (c) UK citizens registered in The Bahamas. In the second category are persons who gained UK and Colonies citizenship under the *British Nationality Act* 1948, as a result of naturalization in The Bahamas. In the third category are persons with Bahamian status at independence (formerly called 'belongers'), and the spouses of men who became (or would have become but for death) automatic citizens. The right to register is subject to national security and public policy considerations, and in some cases requires renunciation of any other nationality and swearing of allegiance to The Bahamas.

It should be noted that these provisions are now mainly of historic interest, as the first two categories closed at the date of independence, or shortly thereafter. Furthermore, it would be rare to now find anyone eligible under the third category, considering that 30 years has elapsed since independence.

Citizenship gained after independence

Citizenship by Birth/Descent

Citizenship may be acquired by birth in The Bahamas if either parent is a citizen. A person born outside of The Bahamas may also become a citizen if at the date of birth their *father* is a citizen by birth in The Bahamas. A woman generally cannot pass on her nationality to her child. The one exception is that an unwed mother who is Bahamian by birth may pass on her citizenship to a child born outside The Bahamas by virtue of Article 14 (1). That Article interprets all references to "father" to include "mother" in respect of illegitimate children.

Citizenship by Registration

Provision is made for the registration of the following:

- (a) a person born in the Bahamas to foreign parents (application to be made at 18 years of age and within 12 months);
- (b) a person born to married parents outside the Bahamas if his mother is a citizen (also at 18 years of age and before 21);
- (c) a *woman* who has married a Bahamian citizen.

The entitlement to registration is subject to national security or public policy considerations, and renunciation of the citizenship of any other country.

Additional Provisions

Additional provisions for the registration of Commonwealth citizens or British protected persons (i.e., with status conferred by the 1948 *British Nationality Act*) or for the naturalization of aliens are contained in the *Nationality Act*. Stipulations require

roughly 10 years of residence or government service for six years, good character, knowledge of English, and an intent to reside in The Bahamas permanently or enter into or continue in Government service.

Loss of Citizenship

As has been stated, the capacity to grant citizenship is within the private jurisdiction of the state. Therefore, it may revoke such citizenship. Under the Constitution, deprivation may be made by the Governor General in cases of dual nationality where a person voluntarily acquires another citizenship or exercises rights exclusively accorded to citizens of another state. Also, a person may renounce Bahamian citizenship at 21 if he has citizenship of another country or intends to acquire citizenship of another country. Parliament is also able to legislate for the acquisition and deprivation of citizenship in specified cases. An example of such legislation is the *Nationality Act*, which provides for the loss of citizenship in the following circumstances: where persons have been convicted of treason or other serious crime; where they have been disloyal to The Bahamas; where they have engaged in business transactions with an enemy with whom The Bahamas is at war; or where they have done anything to prejudice the safety or public order of The Bahamas.

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Questions for consideration

1. The citizenship provisions are perceived to reflect a male gender-bias by treating women differently and less favourably than men in their ability to transmit citizenship to their spouses, their children, and in respect of the conditions attached for the

registration of their children born outside The Bahamas. For example:

(a) The Bahamian male born in The Bahamas is able to pass on citizenship automatically to his offspring, whether born overseas and whether legitimate or not; a legitimate child born overseas to a Bahamian female only has an entitlement to register **at** age 18, and then only provided the child renounces any other nationality and subject to the usual national security and policy considerations.

(i) Should the child of a Bahamian married female have the same constitutional entitlement to citizenship as the child of a married (or single) Bahamian male?

(b) The right of the spouse of a Bahamian male to register as a citizen by virtue of her marriage is protected by the Constitution; there is no corresponding *constitutional* right for the spouse of a Bahamian woman to register as a citizen. (The foreign spouses of Bahamian women have to rely on the *Nationality Act* to be registered.)

(i) Should there be a similar Constitutional right in respect of Bahamian females who marry foreign men?

(ii) Alternatively, should the existing Constitutional provisions that permit the foreign wife of a Bahamian man to acquire citizenship be removed? Should such spouses be subject to the same conditions for registration as

currently apply to foreign male spouses of Bahamian women under the Nationality Act?

(iii) **Should there be a minimum residency period before the foreign spouse of a Bahamian male or female can be eligible for registration as a citizen? If so, how long should it be?**

2. Should citizenship be conferred upon a child born in The Bahamas to parents with no ancestral connection to The Bahamas?
3. Should the spouse of a Bahamian male (or female, by virtue of the *Nationality Act*) be entitled to register as a citizen only during the subsistence of the marriage and not if the parties are divorced or legally separated prior to the application for citizenship?
4. Should persons who are eligible to be registered as citizens at age 18 and who fail to do so within the prescribed period (one year, or before age 21, as the case may be) lose their entitlement? Should the waiting period of 18 years for registration of a person born in The Bahamas to non-Bahamian parents be changed, especially where the person may be stateless in the interim?
5. The current required residency period for registration or naturalization as a citizen of the Bahamas (which does not apply to the female spouse of a Bahamian male) is approximately 9 years. Is this too long?

6. Should Bahamian citizens be allowed to voluntarily acquire the nationality of another country (if the laws of the other country permit) while still retaining Bahamian citizenship? (Note: dual citizenship is already permitted in circumstances where such citizenship is automatically acquired (e.g., by marriage or birth in a territory, as contrasted with the case where an adult voluntarily elects to acquire another nationality.)

7. The Minister responsible for Nationality and Citizenship has a personal discretion with respect to the grant or refusal of an application for registration or naturalization. He is not required to give any reasons for his decision, nor is his final decision subject to review or appeal.

(i) Should the Constitution limit the powers of the Minister and require him to give reasons and subject his substantive decision to judicial review or appeal?

Notes

CHAPTER 5

Fundamental Rights and Freedoms

[Chapter III: The Constitution]

Introduction

One of the most important features of the independence Constitution is that it sets out basic rights that are due to every *person* in The Bahamas. These rights may be enforced against the government and (in several cases) other citizens through the courts. The fundamental rights provisions are patterned on the *1953 European Convention on Human Rights*, which drew on another international human rights charter, the *1948 Universal Declaration of Human Rights*. This 'bill of rights' is contained in Chapter III, and occupies articles 15 to 31. The physical space allotted to these rights is an indication of their importance within the constitutional scheme.

Fundamental Rights and Freedoms

The Chapter begins with a preambular or general article (15), which grants the following rights to persons regardless of race, place of origin, political opinions, colour, creed or sex:

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and

- (c) protection for the privacy of his home and other property and from deprivation of property without compensation.

These rights are subject only to the limitations that they do not prejudice the rights and freedoms of others or actions taken in the public interest. Although there is no definition of the “public interest”, the meaning of this term is ultimately determined by the courts, as a person may challenge actions taken by the Government on this ground. The courts have held, however, that with respect to the citizen, justice must be done and must be seen to be done for an act to properly be in the public interest.

Specific (enumerated) rights are then set out in detail, along with the circumstances when Government may legitimately interfere with these rights and even suspend or abrogate them. The specific rights granted or protected are as follows:

- The right to life (art. 17)
- Protection from slavery and forced labour (art. 18)
- Protection from arbitrary arrest and detention (art. 19)
- Protection of the law (art. 20)
- Privacy of home and other property (art. 21)
- Freedom of conscience (art. 22)
- Freedom of expression (art. 23)
- Freedom of assembly and association (art. 24)
- Freedom of movement (art. 25)
- Protection from discrimination (art. 26)
- Protection from deprivation of property (art. 27)

Enforcement of fundamental rights

Wherever fundamental rights have the force of law, there are provisions that provide for their enforcement. Article 28 is the provision that allows individuals to apply to the Supreme Court for redress if any of the rights mentioned in articles 16-27 *has been* infringed, *is being* infringed or *is about* to be infringed. It should be noted that, by virtue of this provision, a person may apply to the courts in advance if a right is likely to be infringed. Additionally, the enforcement provision only refers to Articles 16-27; Article 15 is omitted. This is noteworthy, as it is arguable whether preambular articles like 15 create enforceable rights, as opposed to only declaring rights worthy of protection.

Abeyance of rights during emergency

Another provision which merits separate mention is article 29. This provides for certain fundamental rights to be overridden in times of war, or when the Governor-General has declared a state of emergency. The initial duration of the period of emergency is 14 days, but it may be extended for six months by a resolution of each House of Parliament. The rights affected are those under Article 19, most of Article 20 and 21-26, inclusive. Article 19 provides for the protection of persons detained under emergency measures, requiring their cases to be reviewed by an impartial tribunal at their request, and subsequently at three-month intervals. The removal of any fundamental rights during emergency periods is subject to the condition that the measures taken by the government are "reasonably justified" as a response to the emergency or war.

The emergency provisions must be read in conjunction with the *Emergency Powers Act* (Ch. 34), which amplifies the powers of the Governor-General when a proclamation of emergency is in force. They

include the power to make regulations for, among other things, the detention and restriction of the movement of persons, the taking possession of and acquisition by the Government of property other than land, the search of any premises and for amending any Act or suspending its operation.

Saving of existing laws

Article 30 exempts all pre-independence laws from constitutional scrutiny under certain of the fundamental rights provisions—Articles 16-27. This means that such laws cannot be challenged simply for inconsistency with those provisions, because the laws existed before the Constitution came into being. Importantly, however, Section 4 of the Independence Order requires that existing laws be interpreted in such a way as to bring them in conformity with the Constitution, and recent Privy Council cases suggest that this clause should have priority over the savings clause in matters of fundamental rights.

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Questions for Consideration

1. “Sex” is listed as a ground of discrimination in Article 15, but is omitted from the particular article dealing with discrimination (art. 26), which means that the Constitution does not explicitly prohibit discrimination on the ground of sex. Article 26 also excludes from protection discrimination in matters of personal law (adoption, marriage, divorce, burial, devolution of property on death) and discriminatory laws “reasonably justified in a democratic society”.

Should “sex” as a ground of discrimination be included in Article 15? Also, should the exemption granted personal laws be removed? Can laws that discriminate against an entire class (e.g., women) be justified in a democratic society? (Note also, that Parliament decides what is reasonably justifiable in a democratic society, although this might be challenged in a court.)

2. Should the protection against discrimination be extended to include additional categories such as *age, language, sexual orientation, disability* and *certain diseases* (e.g., HIV/AIDS)?
3. Should the right to freedom of speech be extended to include a free press?
4. Should the right to life extend to that of a foetus, except in clearly defined circumstances (e.g., such as when the life of the mother is endangered)?
5. Should the death penalty, which is authorized by Article 16 of the Constitution, be abolished? Alternatively, should an alternative method of execution be considered?
6. If the death penalty is retained, should the benchmark established by the Privy Council of 4½ years (in *Pratt & Morgan v. Attorney General for Jamaica, 1993*), provided the state acted in good faith in processing the appellant’s case, operate as a constitutional safeguard against delay amounting to inhuman and degrading treatment?
7. Should a member of the public (or institution) acting in good faith, be able to approach the

court for enforcement of a fundamental right on behalf of a person or class of persons who, because of poverty or disability or social or economic disadvantage, cannot approach the court for relief (i.e., a provision for public interest litigation)?

8. Should the savings clause, which protects certain pre-independence laws from challenge even if they are at odds with the Constitution, be removed?
9. Should citizens have the right of judicial review of the actions of the executive taken during periods of emergency (e.g., for arbitrary detention)?
10. Should the fundamental rights be of universal application within the Bahamas? (For example, members of a foreign armed force lawfully in The Bahamas are exempt from the protection of the fundamental rights and freedoms provisions for anything done to them by virtue of their country's service (military) law.)
11. Should the right to vote be included as a fundamental right of citizens?
12. Should there be defined limits on the ability of the Executive to suspend or rescind fundamental rights in periods of emergency? And, should the role of the courts in protecting such rights be strengthened?

Notes

CHAPTER 6

The Governor-General

[Chapter IV: The Constitution]

Introduction

In The Bahamas the Queen is the Sovereign and is titular Head of State. This is not stated in the Constitution, but is implied by a provision that vests the executive authority of The Bahamas in Her Majesty. Because the Queen is resident in England, her functions are carried out by a representative—the Governor-General. The functions of the Governor-General in an independent country are quite different from those of the former Royal Governors. The Royal Governor was a real chief executive, who exercised executive authority delegated by the Sovereign through various legal instruments. On the other hand, the role of the Governor-General is largely, though not exclusively, ceremonial.

The office of Governor-General

The Constitution provides that executive authority may be exercised on behalf of Her Majesty by the Governor-General, either directly or through subordinate officers. Though formally appointed by Her Majesty to serve during “Her Majesty’s pleasure”, the Governor-General is in reality appointed on the advice of the Prime Minister, which means that the Governor-General is legally removable at will by the Prime Minister.

Chapter IV of the Constitution also contains provisions for the appointment of an Acting Governor-

General where the office of Governor-General is vacant or where he is absent or unable to perform his functions, and for the appointment of a Deputy to the Governor General. Acting Governors-General are designated by Her Majesty (in reality the Prime Minister), and candidates for the office include the Chief Justice and President of the Senate, if no other person has been designated or is available. With respect to Deputies, they are appointed by the Governor General, acting on the advice of the Prime Minister, and are standing appointments. Thus, the appointment of an acting Governor-General does not arise where there is a subsisting deputy.

In the capacity of the Queen's representative, the Governor-General performs largely ceremonial functions, some of which are as follows: the keeper of the Public Seal, which is affixed to instruments of state; the appointment of senior public-service officials; the granting of national honours; Commander-in-Chief of the Armed Forces (e.g., conferring of commissions and deployment of armed forces overseas); and assenting to legislation. In addition to these ceremonial functions, the Constitution confers various powers specifically on the Governor-General, which are examined in the Chapter on Executive Powers (Chapter 8).

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Questions for Consideration

1. Should The Bahamas remain a monarchy headed by the English Sovereign, or should The Bahamas become a Republic within the Commonwealth?
- 1.1 Should The Bahamas remain within the Commonwealth, which recognizes the Queen as Head of that organization?

2. If the office of Governor General is retained, should that person be invested with increased powers (e.g., such as the power to appoint offices of state like the Chief Justice, President of the Court of Appeal, and members of the permanent Service Commissions, subject to Parliamentary confirmation)?
3. Should the Chief Justice and, in default, the President of the Senate, be eligible to serve as Acting Governor-General, when to do so might create a conflict-of-interest with their substantive offices?
4. Should sufficient and suitable deputies to the Governor General be appointed to eliminate the possibility of the Chief Justice and President of the Senate serving as possible substitutes for the Governor General?
5. If The Bahamas becomes a Republic, should the Queen be replaced as Head of State by a President?
6. Under a republican system, should the Head of State be an elected President similar to the President of the United States (Head of State and Head of Government) or should he be a ceremonial President with powers similar to those exercised by the Governor-General?
7. How should the Head of State be chosen if:
 - (a) he is both Head of State and Head of Government?;
 - (b) he is a ceremonial Head of State?

Notes

CHAPTER 7

Parliament

[Chapter V: The Constitution]

The Bahamas has a 'bicameral' Legislature, which means it is made up of two main chambers. The first is a nominated or appointed Senate (the upper chamber) and the other is an elected House of Assembly (the lower chamber). Although it is common to speak of Parliament as if it consisted of the two Houses only, strictly speaking Parliament consists of Her Majesty the Queen, whose representative is the Governor General, and the two Houses. Parliament has the general direction to make laws for the peace, order and good government of The Bahamas.

The Senate

The Senate, or Upper House, consists of 16 members appointed by the Governor General. *Nine* are appointed on the advice of the Prime Minister, *four* on the advice of the Leader of the Opposition and *three* on the advice of the Prime Minister after consultation with the Leader of the Opposition. It is notable that in the appointment of the three senators on consultation, the Prime Minister is to ensure that the political balance of the Senate reflects that of the House. Senators have no security of tenure; Government-appointed senators can be removed at will by the Prime Minister if they rebel or 'cross the floor' (defect to the Opposition) to make way for others more disposed to Government's views.

With respect to its legislative function, the powers of the senate are unusual and consist mainly of delaying powers. In the case of money bills (which do

not include taxation bills as defined in the constitution), these powers are restricted (art. 60), and the Senate can only recommend amendments for the consideration of the House of Assembly. Other bills, including taxation bills, may be delayed by the Senate for a maximum period of approximately 15 months. If the Senate disagrees with a Speaker's certificate that a Bill is a Money Bill of some kind, the Speaker is nevertheless required to act in accordance with the advice of the Attorney General.

To qualify for appointment as a senator a person must be a Bahamian citizen, age 30 or more, be resident for a year preceding appointment, be of sound mind, solvent, not under any sentence of death or court sentence in excess of 12 months and not have any undisclosed interest in a government contract. The proceedings of the Senate is presided over by a President or Vice-President (in his absence) who are elected by the Senate. It should be noted that the Supreme Court has original and exclusive competence to hear questions related to the appointment or vacation of a Senator's seat.

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Questions for Consideration

1. Should the Senate be abolished?
2. Should the composition and the manner of selection of Senators be changed to provide them with security of tenure?
3. Should the number of senators be increased to provide for broader national representation?
4. Should senators be elected and given greater powers? If elected, should it be on the basis of

proportional representation? If appointed, should it be on the basis of the percentage of votes polled by their Party during general elections?

House of Assembly

The Constitution provides for the House of Assembly to comprise at least 38 members, though this number may be increased on the recommendation of the Constituencies Commission. This Commission reviews the number of boundaries of the constituencies into which the Bahamas is divided at intervals of not more than five years. The membership of the House was increased from 38 to 43 in 1982, to 49 in 1992, and was reduced to the current membership of 40 in 1997. Distribution of seats in the House is determined by a report of a Constituencies Commission, which is to be approved by the House of Assembly. The Speaker is elected by the House from among its members and has only a casting vote (i.e., his vote only counts when there is a tie).

The members of the House are known as "Members of Parliament" (MPs). The eligibility criteria for election are similar to those for a senator, except that the age requirement is less (21 years or more), the person cannot be a current senator, nor have any undisclosed interest in a government contract. Members of Parliament may vacate their seats by any of the following ways: automatically on the dissolution of Parliament; by resignation; by long periods of absence; by ceasing to be a citizen; if he becomes interested in any government contract without disclosing such interest; and if any of the factors disqualifying him from election as an MP in the first place arise subsequent to his election.

The Constitution also provides for an Election Court, composed of two Justices of the Supreme Court or a single Justice and the Chief Magistrate or a Stipendiary and Circuit Magistrate, to hear and determine questions relating to the election of a member of the House of Assembly or the vacation of his seat. Where a member vacates his seat prior to dissolution of the House, a by-election must be called within three months to fill the vacancy.

Members are elected by universal suffrage in secret ballots on the basis of a simple majority. The Government is drawn from the party that wins the majority of seats in the House, called the 'first-past-the-post' system. In other words, the party that wins the majority vote may still end up with a minority of seats in the House and out of the government.

The introduction of Bills in Parliament

The Constitution provides that a member of either House may introduce any Bill (a private members' Bill), propose any motion for debate or present any petition to the relevant House, which must be debated and disposed of in accordance with the rules and procedures of that House. Thus, as a matter of law, every member has the right to introduce a Bill, though they are, invariably, introduced by members of the Government. However, there are restrictions in the case of money and taxation bills. For example, the House of Assembly can only debate a money or taxation bill on the recommendation of the Cabinet; and the Senate cannot of its own motion debate such a bill unless it has been sent from the House of Assembly.

Delimitation of Constituencies

A Constituencies Commission is established by virtue of Article 69 to review the number and boundaries of the constituencies and report to the

Governor-General. This report is laid before the House of Assembly. The composition of the Commission is as follows: the Speaker of the House (Chairman); a Justice of the Supreme Court (appointed by the Governor-General on the advice of the Chief Justice); two members of the House of Assembly (appointed by the Governor-General on the advice of the Prime Minister); and another member of the House (appointed by the Governor-General on the advice of the Leader of the Opposition). The Prime Minister is required to lay any recommendations made by the Commission before the House for its approval, but he is able to make modifications to those provisions.

Parliamentary Privilege

According to Article 53, Parliament itself determines the privileges, immunities and powers of the Senate and House of Assembly. These privileges are not defined in the Constitution, but are amplified by the common law and legislation, i.e., the *Powers and Privileges (Senate and House of Assembly) Act, 1969* (Chapter 8). The most important of these privileges is freedom of speech, derived from Article 9 of the 1689 (English) Bill of Rights, which states that freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Additionally, no civil court process may issue against any member of Parliament while the Senate or House is sitting.

While the speeches of Members of Parliament are absolutely privileged, communications from members of the public to Members of Parliament are only covered by 'qualified' privilege. Qualified privilege offers a defence to defamation actions, providing the communication was not made maliciously or spitefully.

Dissolution of Parliament

The Prime Minister may at any time advise the Governor General to dissolve Parliament, and as a matter of course this must be done every five years. Election must be held within 90 days of the dissolution of the House. However, if the Bahamas is at war, the life of Parliament may be extended for up to twelve months at a time, for a maximum of two years. If a state of emergency occurs during a dissolution of Parliament, the Governor General may recall Parliament until the date of the next elections.

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Questions for Consideration

1. Should members of the House of Assembly be chosen on the basis of proportional representation (i.e., the number of Members be determined by the percentage of votes polled nationally), as opposed to the first-past-the post system (i.e., the party that wins the majority of seats)?
2. Should the Prime Minister have the power to dissolve the House of Assembly at any time?
3. Ought the life of the House of Assembly be for a fixed term and general elections set for a fixed date?
4. Should the power of the Prime Minister to modify the report of the Constituencies Commission be removed or restricted to purely technical amendments?
5. Should the Constitution provide a method for the removal of members of the House of

Assembly? Should there be an impeachment procedure for certain offices of state?

6. Should there be an Independent Boundaries Commission composed of persons who are not members of the House appointed by the Governor General /President, after consultation with the Prime Minister and Leader of the Opposition?
7. Should the tenure of the Prime Minister be limited to two consecutive terms?
8. Should there be any difference in the age criterion for Members of the House (21) and Senators (30)?
9. The absolute privilege of free speech in Parliament permits citizens to be defamed without redress. Should members of Parliament not be subject to the jurisdiction of the courts whenever their activities impinge on the rights of others?
- 9.1 Should the public be given the right by the Constitution to have recorded in the proceedings of the House their defence against attacks by members?
10. Should members of the House of Assembly be required to disclose publicly their assets with appropriate penalties for failure to disclose?
11. Ought the Constitution provide for the House of Assembly to prescribe the amounts and limits on election expenditure, and impose restrictions on the sources of contributions?

12. Ought the control of political broadcasting be under an independent Boundaries Commission or some other body? If not, how should it be controlled?

Notes

CHAPTER 8

Executive Powers

[Chapter VI: The Constitution]

Introduction

The executive branch of government comprises two separate persons and bodies: a Head of State who embodies and represents the entire nation and a Cabinet of Ministers, one of whose members is by law (or practice) above the other members and Head of Government—the Prime Minister. This may be contrasted with the United States Presidential system, where the President is both Head of State and Head of Government.

Cabinet is responsible for managing public affairs on behalf of the people and is accountable to their elected representatives in Parliament. This creates a system of 'responsible' government, which means that Ministers are individually and collectively responsible for the conduct of public affairs to Parliament. In this respect, Parliament has the ability (in theory) to call for the dismissal of a Minister or the entire government by the ultimate sanction of a no-confidence resolution.

Executive powers

Executive powers are set out in Chapter VI, Articles 71-92. This chapter proclaims that the executive authority of The Bahamas is vested in Her Majesty, and may be exercised on her behalf by the Governor General or subordinate officers. The vesting of executive authority in Her Majesty is mainly

notional; real executive authority is exercised by the Cabinet and Prime Minister. However, the position of the Governor-General in the independent monarchies is such that he exercises some substantive executive powers. Additionally, some of the prerogative powers of Her Majesty (i.e., powers traditionally held by the Monarch) have been stated in the Constitution as rules. For example, as a matter of convention the Prime Minister in England keeps the Queen informed about the Government. This is translated into the Bahamian Constitution as a rule of law that *requires* the Prime Minister to keep the Governor-General informed concerning the general conduct of the Government.

Cabinet

Article 72 establishes a Cabinet for the Bahamas, which is given "the general direction and control of The Bahamas" and which is made collectively responsible to Parliament (see explanation above). Cabinet consists of the Prime Minister and at least eight other Ministers, one of whom must be the Attorney General. Ministers are appointed by the Governor-General, acting on the advice of the Prime Minister, from either House of Parliament. A maximum of three Ministers may be appointed from the Senate, one of whom may be the Attorney General. Ministers serve at the pleasure of the Prime Minister. They are required to demit office either on a revocation of their office or if, for any reason other than dissolution, that person ceases to be a member of the House from which he was elected. Importantly, Ministers automatically demit office when the Prime Minister loses his, even if there is no change in the party in power (art. 74(3)(a)).

The appointment of the Prime Minister may be revoked by the Governor-General if a no-confidence resolution is taken by the House of Assembly and he does not within seven days either resign or advise the

Governor-General to dissolve Parliament to enable fresh elections to be held. His tenure is also subject to him remaining a Member of the House of Assembly.

Executive Powers of the Governor General

As has been noted, the position of the Governor General in our constitutional system is not only as the representative of a non-resident ceremonial Head of State. He is vested with important executive functions that he carries out in his own right, and not on behalf of the Queen. In the exercise of the executive authority conferred by the Constitution, the Governor-General almost always acts on advice, and the persons or body giving the advice varies with the nature of the act in question.

Even where he is required to act on the recommendation of a person or authority, the Governor-General has the power of "referral back". This means that he may request a reconsideration of the original advice or recommendation. Where he is only required to consult with any person or authority, he is not obliged to act in accordance with the advice or recommendation given.

Certain actions of the Governor General are shielded from scrutiny by the courts. Article 79(4) provides that where he is required to exercise any function on advice, or recommendation, or with the concurrence or consultation with any person or authority, whether he has done so or not "shall not be enquired into in any court". Such provisions, which attempt to oust the jurisdiction of the courts with respect to certain executive functions, are called "ouster clauses". Note, however, that in a recent appeal case from Jamaica (*Neville Lewis et. al v Attorney-General of Jamaica* [2001] 2 A.C. 50.), the Privy Council held that notwithstanding such a clause, the Court would exercise judicial review of such

matters, especially where the fundamental rights of the individual were concerned.

Acting on advice

A synopsis of the advisory bodies and the functions carried out by the Governor-General acting on their advice or recommendation is as follows:

A. The Cabinet or Ministers directed by the Cabinet

This is the normal mode for executive acts of the Governor-General, except where otherwise provided by the Constitution.

B. The Prime Minister

- The appointment and removal of Ministers (art. 73)
- The appointment of acting or temporary ministers (art. 76)
- The appointment of nine senators (art. 39)
- The dissolution of Parliament (art. 66)
- The appointment of an Acting Chief Justice (art. 95)
- The suspension from office of the Chief Justice (art. 96) or President of the Court of Appeal (art. 102)
- The appointment of one member of the Public Service Board of Appeal
- The appointment of the Secretary to the Cabinet (after consultation with the Public Service Commission) (art. 113)
- Appointment of police officers of and above the rank of Assistant Commissioner of Police (after consultation with the Police Service Commission) (art. 119)

- The appointment of Parliamentary Secretaries (art. 81)
- The appointment of a Deputy Governor-General (art. 34)
- The appointment and removal of principal foreign service officers (art.111)
- The appointment of a tribunal to investigate whether the question of the removal of the Chief Justice or President of the Court of Appeal ought to be referred to the Privy Council (arts. 96, 102)
- The appointment of a tribunal to investigate the removal of the Commissioner of Police and Deputy Commissioner (art. 120)
- The extension of the office of a justice to enable him to complete outstanding work (art. 96)
- The appointment of a tribunal to investigate the removal of the Chairmen of the various permanent commissions (art. 126)

C. The Prime Minister after consultation with the Leader of the Opposition

- The appointment of the Chief Justice (art. 94)
- The appointment of the President and Justices of the Court of Appeal (art. 99)
- The appointment of three senators (art. 39)
- Extension of the retirement age for Justices of the Supreme Court (65 to 67) (art. 96) and Court of Appeal (68-70) (art. 102)
- The appointment of the Public Service Commission (art. 107)
- The appointment of two members of the Judicial and Legal Services Commission (art. 116)
- Appointment of the Commissioner of Police and Deputy Commissioner of Police (art. 119)

D. The Leader of the Opposition

- The appointment of four senators (art. 39)
- The appointment of one member of the Constituencies Commission (art. 69)

E. Other persons or bodies

- The appointment of ordinary Justices of the Supreme Court (on the advice of the Judicial and Legal Services Commission) (art. 94)
- Power to pardon (on the advice of the Advisory Committee on the Prerogative of Mercy) (art. 90)
- The appointment of three to five members of the Advisory Committee on the Prerogative of Mercy (art. 91)
- The suspension from office of Justices of the Supreme Court (on the advice of the Chief Justice) (art. 96)
- The suspension from office of Justices of Appeal (on the advice of the President of the Court of Appeal after consultation with the Prime Minister) (art. 102)
- The appointment of the Chairman of the Public Service Board of Appeal (on the advice of the Chief Justice) and two other members of that Board (one on the advice of the Prime Minister and the other on the advice of union representatives) (art. 114)
- The appointment of one member of the Judicial and Legal Services Commission (on the advice of the Chief Justice) (art. 116)
- The appointment of the Auditor General (on the recommendation of the Public Service Commission after consultation with the Prime Minister) (art. 136)

- The appointments of Permanent Secretaries or Heads of Government Departments (on the recommendation of the Public Service Commission after the Commission has consulted the Prime Minister) (art. 109)
- The appointment of a tribunal to investigate whether the question of the removal of ordinary justices and justices of appeal should be referred to the Privy Council (Chief Justice and President of the Court of Appeal, after consulting the Prime Minister) (art. 96, 102)
- The appointment of a tribunal to investigate the removal of the ordinary members of the permanent commissions (after consultation with the Chairman of the Commission concerned) (art. 126)

Acting in his own discretion

Appointment of the Prime Minister and Leader of the Opposition

In carrying out certain functions, the Governor-General acts in his own discretion or in his "own deliberate judgment". The most important of these functions are the appointment of the Prime Minister (art. 73) and Leader of the Opposition (art. 82). In the simple case, the Governor-General appoints as Prime Minister the leader of the party which commands the support of the majority of the members of the House. If, however, the leadership of the majority party is being disputed or no party commands the support of the majority of the House, he then appoints as Prime Minister the member of the House "who, in his judgment, is most likely to command the support of the majority of members of that House".

Article 82 establishes the office of the Leader of the Opposition, and provides for similar powers of appointment as pertain to the office of Prime Minister.

In appointing a Leader of the Opposition, the Governor-General appoints the member of the House of Assembly "who, in his judgment, is best able to command the support of the majority of the members of the House in opposition to the Government". Failing this, he appoints the member who, in his judgment, commands the support of the largest single group of members in opposition to the Government and who are prepared to support one leader.

There are similar powers to revoke the appointments of the holders of these offices. For example, he may revoke the Prime Minister's appointment if a no-confidence motion is carried against him and the Prime Minister does not resign or advise dissolution of the House within seven days. The Leader of the Opposition may be removed if in the judgment of the Governor-General, that person no longer commands the support of the majority of opposition members.

Thus, it may be seen that with respect to the appointment of the Prime Minister and Leader of the Opposition in the extraordinary case, the Governor-General has a real capacity to determine the holder of those offices. Also, despite the difference in terminology used with respect to appointing a Prime Minister (i.e., the person *most likely* to command) and Leader of the Opposition (i.e., the person *best able* to command) there is no real practical difference between these formulations.

A brief note should also be made concerning the requirement for consultation between the Prime Minister and Leader of the Opposition. The Constitution provides that if the Leader of the Opposition does not concur with the Prime Minister after consultation, the Governor-General may once refer the matter back to the Prime Minister. He is required, however, to act on the Prime Minister's advice in the second instance.

The Governor-General also acts in his "own deliberate judgment" when carrying out the following duties (see art. 79):

- The appointment of the Prime Minister and Acting Prime Minister in specified circumstances
- Appointment of the Leader of the Opposition and Acting Leader of the Opposition in specified circumstances
- The prorogation and dissolution of the House of Assembly in specified circumstances
- The removal of a Justice of the Supreme Court or Justice of Appeal from Office as provided for in the Constitution
- The appointment, removal and discipline of his personal staff.

Prerogative powers

Other powers granted to the Governor General are those which historically have been in the "prerogative" of the Sovereign. In such cases, the Governor-General acts "in Her Majesty's name" and on her behalf. The most important of these powers is the power to assent to legislation and the power of pardon. Although the conventional position is that the Sovereign invariably assents to legislation validly passed by both Houses, as written in The Bahamian constitution this rule has a slightly different twist. It provides that when he is required to assent, the Governor-General may assent or signify that he *withholds* assent, which suggests that the Governor-General can refuse to assent to legislation (e.g., if he thought it unconstitutional).

Turning to the powers of pardon, the Governor-General has the following powers in respect of convicted persons: (i) to grant a full or conditional pardon; (ii) to grant a respite from the execution of a

sentence (either indefinite or for a specified period); (iii) to substitute a lesser form of sentence; and (iv) to remit the whole or part of any sentence. In carrying out these functions, the Governor General is required to follow the advice of a Minister, who is Chairman of the Advisory Committee on the Prerogative of Mercy, and whose duty is to advise on such matters. In addition to the Minister who is chairman (normally the Minister responsible for National Security) other members of the Committee include the Attorney General and three to five members appointed by the Governor-General.

Attorney General[†]

This chapter also creates the office of Attorney-General and empowers him to institute criminal proceedings, to take over and continue proceedings, and to discontinue criminal proceedings at any point before judgment is given. In addition to being the chief legal officer of the Crown, the position of the Attorney General is that he is the person responsible for conducting public prosecutions on behalf of the state. Although the power to conduct criminal proceedings may be delegated to subordinate officers, the Attorney General retains the power to discontinue trials (i.e., enter a *nolle prosequi*). The Constitution contemplates that the dual role of the Attorney General, as a Minister of Government and a member of the Cabinet and state prosecutor, might leave him subject to undue political influence. It attempts to compensate for this by providing that in the exercise of his functions the Attorney-General is not to be subject to the direction or control of any other person or authority.

† Note

Article 78, which establishes the office of the Attorney General, is now 'revised' to transfer much of the

powers of the Attorney General in respect of criminal prosecutions to a constitutional Director of Public Prosecutions (art. 92A-C). However, as the revised provisions had not been brought into force at the time of publication, the above narrative is based on the original provisions of Article 78.

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Questions for Considerations

1. Should the 'ouster clause', which prevents the courts from reviewing certain actions of the Governor-General be amended or removed?
2. What executive powers of the Prime Minister should be limited or removed?
3. Should the responsibility for prosecutions remain with the Attorney General, or should they be vested in a constitutionally-appointed Director of Public Prosecutions (as the new provisions seek to do)? Ought the decisions of the Director of Public Prosecutions in respect of the conduct of prosecutions be subject to judicial review?
4. Should the Prime Minister have the ability to appoint three Ministers from the Senate?
5. The Constitution does not specify the requisite majority to carry a vote of no confidence in the Prime Minister. Should this be specified?
6. Should there be a definition of "Office of the Prime Minister"?

7. Should the office of Parliamentary Secretary be abolished and replaced with the office of Deputy Minister?

Notes

CHAPTER 9

The Judicature

[Chapter VII: The Constitution]

The provisions dealing with the legal system establish a three-tier system: the Supreme Court, a Court of Appeal and the Judicial Committee of the Privy Council, as a court of final appeal. The remuneration of Justices of the Court of Appeal and the Supreme Court are a charge on the consolidated fund and cannot be diminished while they are in office.

The Supreme Court

The Constitution provides for a Supreme Court to be a superior court of record and to have such powers as conferred by the Constitution or "any other law". It is important to note that rather than creating any new institutions, the Bahamas Independence Order 1973 merely provided for the Supreme Court and Court of Appeal in existence prior to independence to continue, though as reconstituted under the provisions of the new Constitution. However, the powers of the Courts were substantially augmented, as they acquired the capacity for judicial review of legislation and for redress for violations of constitutionally-guaranteed fundamental rights. The Justices of the Supreme Court are the Chief Justice and as many other justices as Parliament prescribes. The office of Justice cannot be abolished while there is someone serving in that capacity.

Appointment, Tenure and Removal of Justices

As has been noted in the Chapter on Executive Powers, the Chief Justice is appointed by the Governor-General on the advice of the Prime Minister after consultation with the Leader of the Opposition. All of the other justices are appointed by the Governor-General on the advice of the Judicial and Legal Services Commission. Where the office of Chief Justice is vacant or for whatever reasons the CJ is unable to perform his functions, an Acting Chief Justice may be appointed by the Governor-General, this time on the advice of the Prime Minister alone. Acting ordinary justices are appointed in the same manner as the substantive appointments.

Justices of the Supreme Court may hold office until they are 65, although this age may be extended upwards to 67 by the Governor-General acting on the advice of the Prime Minister after consultation with the Leader of the Opposition. Additionally, a justice may also have his time in office extended to enable him to complete any outstanding work, by permission of the Governor-General acting on the advice of the Prime Minister.

A Justice of the Court may only be removed after a complex process that involves referral of the matter to the Privy Council. The Chapter provides that a Justice may only be removed from office for "inability to perform the functions of his office (whether arising from infirmity of body, or mind or any other cause) or for misbehavior". The procedure outlined in the Constitution for their removal is as follows:

(i) The Prime Minister (in the case of the Chief Justice) or the Chief Justice after consultation with the Prime Minister in the case of ordinary Justices must represent

to the Governor-General that the question of the removal of the Justice ought to be investigated.

(ii) The Governor-General then appoints a tribunal, which investigates and recommends to the Governor General whether the question of removal should be referred to the Privy Council. The composition of the tribunal is three members (current or retired justices) appointed by the Governor-General acting on the advice of the Prime Minister if the Chief Justice is being investigated, and on the advice of the Chief Justice in respect of other justices.

(iii). If the tribunal recommends a referral, the Governor General then refers the question to the Privy Council.

Once a tribunal has been appointed to hear such a case, the Governor-General (acting on the advice of the Prime Minister in the cases of the Chief Justice) or acting on the advice of the Chief Justice after consultation with the Prime Minister, may suspend the Justice from performing the functions of his office.

The Court of Appeal

This Chapter establishes a Court of Appeal in the same manner as the Supreme Court and also provides for it to be a superior court of record. It is composed of a President, the Chief Justice in his capacity as head of the Judiciary (although he only sits by invitation) and other Justices as are prescribed by Parliament. The office of a Justice of Appeal cannot be abolished while there is someone in that office. The provisions also provide for a Court of Appeal to be shared between the Bahamas and other Commonwealth countries (e.g., at one point the Bahamas and Belize shared a Court of Appeal). Appeals from the Supreme Court to the Court of Appeal may be made as of right

(i.e., without the leave of any court) in respect of Article 28, which relates to the enforcement of fundamental rights and freedoms. Other appeals are normally made with the leave of the court.

Appointment, tenure, removal

The President and other Justices of the Court of Appeal are appointed by the Governor General on the advice of the Prime Minister after consultation with the Leader of the Opposition. Where the office of the President of the Court of Appeal is vacant or for whatever reasons the President is unable to perform his functions, an Acting President may be appointed by the Governor-General, this time on the advice of the Prime Minister alone; acting ordinary Justices of Appeal are appointed in the same manner as the substantive appointments. Justices of Appeal hold office until 68, which may be extended to age 70 by the Governor-General acting on the advice of the Prime Minister after consultation with the Leader of the Opposition. The provisions for the removal of Justices of Appeal are basically the same as those outlined for the Justices of the Supreme Court, except that the initial representation to the Governor-General is made by the Prime Minister in respect of the President of the Court of Appeal and by the President of the Court of Appeal or the Chief Justice, after consultation with the Prime Minister, in respect of the other Justices of Appeal.

Appeals to the Privy Council

The Constitution provides for appeals to be made to the Judicial Committee of Her Majesty's Privy Council from decisions of the Court of Appeal. Such appeals may be made automatically in the case of fundamental rights and freedoms and with the leave of the Court of Appeal in other cases. Parliament may

legislate for another court to replace the Privy Council as the final court of appeal for the Bahamas.

Note

1. The Judicial Committee of the Privy Council is the final court of appeal for those Commonwealth states that have retained the appeal to Her Majesty in Council (or the Judicial Committee, in the case of the Republics that still subscribe to this court). The Committee consists of Lord Justices of Appeal and occasionally senior Commonwealth judges. The Lord Justices of the Privy Council also sit in the House of Lords, the United Kingdom's highest court. Although the Privy Council is a part of the UK Government, when its Judicial Committee sits it functions exclusively as a court.

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Questions for Consideration

1. A crucial role in the appointment and removal of the senior members of the Judiciary is played by the Prime Minister.
 - (i) Is this consistent with judicial independence and the principle of separation of powers?
 - (ii) Should the power of the Prime Minister to appoint or remove senior members of the Judiciary be abolished? If so, what procedure should be adopted for the appointment and removal of such persons?

2. Is there a rationale for the Prime Minister being required to consult with the Leader of the Opposition on the appointment of the Chief Justice or President of the Court of Appeal but not on the appointment of persons to *act* in these offices?
3. Should appeals from The Bahamas to the Judicial Committee of the Privy Council be retained? If not, should another appellate court replace the Privy Council?
4. Should the Judicial and Legal Services Commission have a say in the decision to extend the tenure of judges who have attained the mandatory retirement age? (This is currently done by the Prime Minister, after consultation with the Leader of the Opposition.)
5. Should the appointment of judges be subject to the approval of Parliament?
6. Should the Constitution provide protection and grant security of tenure to Magistrates, as it does for Judges?
7. The separation of powers between the Judicature and the other organs of government (the Legislature and the Judicature) is implicated in the Constitutions and will be enforced by the courts (per Lord Diplock in *Hinds v R*, 1980). However, should there be a provisions declaring such a principle?
8. Should judges hold lifetime appointments?
 - 8.1 Alternatively, should the existing mandatory retirement age for judges be extended?

9. Should there be a special division of the Supreme Court to hear constitutional challenges?

Notes

CHAPTER 10

The Public Service

[Chapter VIII: The Constitution]

This chapter contains detailed provisions dealing with public officers, and attempts to ensure impartiality in their appointment and the protection of their tenure in office. This is achieved by the establishment of a Public Service Commission (art. 107). In addition to the Public Service Commission, there are provisions establishing other permanent Commissions to carry out functions relating to particular areas of the public service. They are as follows: the Public Service Board of Appeal (art. 114); the Judicial and Legal Service Commission (art. 116); and the Police Service Commission (art. 118).

The Public Service Commission

This consists of a Chairman and between two and four other members, all of whom are appointed by the Governor General acting on the advice of the Prime Minister after consultation with the Leader of the Opposition. The power to make appointments to public offices and to remove and exercise disciplinary control of public officers is vested in the Governor-General, acting on the advice of the Commission. However, the situation is different with respect to the appointment of senior public officers, such as Permanent Secretary or Head of a Government Department, either originally or on transfer. In original appointments of this nature, the Commission is required to consult with the Prime Minister before advising the Governor General. When such persons

are being transferred at the same salary, the Governor General acts on the advice of the Prime Minister, though there is a requirement for him to consult the Commission.

Exempted from this requirement for consultation with the Commission are senior foreign service appointments. The power to appoint a person as an Ambassador, High Commissioner, or the principal representative of the Bahamas to foreign countries or representatives to international organizations vests in the Governor-General, acting on the advice of the Prime Minister. Appointments or transfers of persons to other offices which are required to be overseas and to offices in the Ministry of Foreign Affairs are done by the Prime Minister.

The office of Secretary to the Cabinet is also established as a public office, and he is appointed by the Governor-General acting on the advice of the Prime Minister, who consults the Commission.

Public Service Board of Appeal

Article 114 establishes a Board of Appeal to hear appeals of public offices in respect of whom disciplinary decisions have been taken by the Governor-General. The board has the power to affirm or set aside the decision of the Governor-General, and acts by majority. The Board regulates its own procedures, and may exempt certain levels of officers from the right of appeal, except when it involves their removal from office. The membership of the Board comprises the Chairman, who must be a current or former holder of high judicial office (appointed by the Governor-General on the advice of the Chief Justice), and two others members (one appointed by the advice of the Prime Minister and the other appointed on the advice of a body representing the interests of public officers).

Members of either House of Parliament are excluded from membership.

The Judicial and Legal Services Commission

The main function of this body is to appoint the members of the Judiciary (see discussion in the Chapter on the Judicature). Generally, this body advises the Governor-General on the appointment, removal and exercise of disciplinary control over persons acting in the capacity of judicial office (which includes the legal officers in the Attorney General's office). It is composed of the Chief Justice, who is its Chairman, another Justice (or Justice of Appeal) appointed by the Governor-General on the advice of the Chief Justice; the Chairman of the Public Service Commission; and two other persons appointed by the Governor General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. Only persons who hold or have held high judicial office are qualified for appointment to this Commission, and again Members of Parliament are excluded.

The Police Service Commission

The primary function of this Commission is to advise the Governor General with respect to the appointment, removal and exercise of disciplinary control over certain classes of officers. The appointment of the Commissioner of Police and Deputy Commissioner is made by the Governor-General on the recommendation of the Prime Minister, after consultation with the Leader of the Opposition. With respect to officers of or above the rank of Assistant Commissioner (and below Deputy Commissioner), appointments are made on the recommendation of the Prime Minister, after consultation with the Police Service Commission. Thus, the Commission only has general control over the appointment of officers of or

above the rank of Inspector and below that of Assistant Commissioner. The removal of the Commissioner of Police or the Deputy can only be done by the Governor-General on the advice of a tribunal consisting of persons with high judicial training appointed to investigate the matter by the Governor-General. Such a procedure can only be initiated by the Prime Minister, who also advises the Governor General to suspend the person from office (subject to reinstatement) during the investigation.

The removal or discipline of officers of or above the rank of Assistant Commissioner of Police is done on the advice of the Commission after consultation with the Prime Minister. Other ranks are dealt with by the Governor-General acting on the advice of the Commission. Certain powers of discipline are also vested in the Commissioner of Police over certain categories of officers.

Pensions

The matter of public service pensions receives special mention in the Chapter on the Public Service. Article 122 protects the pension rights of public servants in force at the relevant date from being reduced by any later law. The power to grant such awards, other than those payable as of right by law, or to withhold, reduce in amount or suspend any award payable, is vested in the Governor-General. In making such decisions, he acts on the advice of the appropriate Service Commission.

The pensions of persons in the office of Justice of the Supreme Court or Court of Appeal or the Auditor-General may not be withheld or modified on allegations of misbehaviour, unless such persons have actually been removed from office as a result.

Provision is also made for appeals to be made to the Public Service Board of Appeal from decisions of

the various Service Commissions affecting pension benefits. The Commission is required to act in accordance with the decision of the Board after its consideration of the case.

There are also miscellaneous provisions regulating the procedure of the various commissions and outlining the procedure for the removal of members of the Commission from office. The substantive reasons for removal are the same as those relating to Justices—inability to exercise the functions of office (whether from infirmity of mind or body) or for misbehaviour. In all cases, removal requires the establishment of a tribunal (convened by the Governor General at the instance of the Prime Minister with respect to the various Chairmen or the Chairmen in respect of ordinary members) of persons of high judicial office. Members may also be suspended by the Governor General (pending reinstatement) on advice pending the outcome of the hearings.

Offices not forming part of the Public Service

The following offices are not a part of the Public Service: all political offices, the office of the members of the Public Service Commission and permanent commissions; the offices of the Department of Tourism or other offices specified not to be public offices for the purpose of the constitutional provisions, members of boards, committees or similar bodies established by law, the offices of Justices of the Supreme Court and Court of Appeal (except for the provisions relating to pensions) and the personal staff of the Governor General.

Note

Acts have been passed and brought into force which establish the office of Parliamentary Commissioner

(Art. 70 A-C) and a Teaching Service Commission (121 A-B). They have been excluded from discussion in this booklet because the constitutional standing of such amendments is not settled.

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Questions for Consideration

1. Despite the attempt of the Constitution to ensure impartiality in the appointment of public officers, very senior public appointments are determined by the Prime Minister. Should the Prime Minister's powers be curtailed with respect to such appointments?
2. Should the Prime Minister have exclusive competence to determine diplomatic appointments, or should such nominations be subject to confirmation by the House of Assembly?
3. The provisions relating to the Police Service Commissions, which provide for the removal of the Commissioner and Deputy Commissioner do not specify the grounds on which such persons may be removed. Should such grounds be specified?
4. Should the Royal Bahamas Defence Force, which is a post-independence national institution, be established as a security force in the Constitution? Similarly, should the office of Commander Defence Force be constitutionally protected, similar to that of the Commissioner of Police and his Deputy?

5. Should an Integrity Commission be established as a permanent commission to ensure high ethical standards are observed in the public service and to investigate alleged breaches?
6. Should the office of Ombudsman be established and entrenched to allow for the better protection of the rights of citizens?
7. Is there a need for the Constitutional Office of Contractor-General in The Bahamas (i.e., an office responsible for monitoring the award and implementation and for guarding against impropriety in the award of government contracts)?
8. Should the duties of Permanent Secretaries be defined in the Constitution?
9. Although the decisions of the Public Service Commission may be appealed to the Public Service Board of Appeal, the proceedings of the Commission cannot be enquired into by any Court. Should the conduct of the Commission be subject to judicial review?
10. Should the method of appointment of the Service Commissions be revised and their composition enlarged to reflect a wider cross-section of civil society?

Notes

CHAPTER 11

Finance

[Chapter IX: The Constitution]

Consolidated Fund

The penultimate Chapter of the Constitution deals with national finances. It establishes a Consolidated Fund into which is to be paid all Government revenues (e.g., monies from taxes, duties, various fees paid for licenses, etc.) The Minister of Finance is also required annually to prepare annual estimates of revenue and expenditure for public services to be paid out of the Consolidated Fund during the next financial year and an Appropriations Bill, which details under various heads the aggregate amounts proposed to be spent on public services. These must be laid before the House of Assembly. Parliamentary authorization is necessary before any money can be spent out of the Consolidated Fund.

Further, individual draw-downs from the central fund may only be made under a warrant issued by the Minister of Finance. However, if for “justifiable reasons” the Appropriations Bill does not come into operation before the beginning of the financial year, the Minister of Finance may by warrant authorize payments out of the Fund, subject to subsequent approval by the House. For the purposes of the budget, the Constitution prescribes the financial year as the period beginning 1st January in any year (i.e., the calendar year). This has been altered by Parliament by the *Financial Administration and Audit (Amendment) Act 1992* (No. 42 of 1992), to mean a period of 12 months beginning on the 1st July in any year.

Provision is also made for the establishment of a Contingencies Fund, from which advances for unforeseen expenditure may be made, subject to its replacement. The salaries of the following persons are also protected, are a charge on the Fund and cannot be reduced after their appointments: the Governor General, Justices of the Supreme Court and Court of Appeal, the Auditor-General, the members of the permanent commissions and the Public Service Board of Appeal.

Office of the Auditor General

The financial provisions also establish the office of Auditor-General as a public office. He is appointed by the Governor-General on the recommendation of the Public Service Commission, after consultation with the Prime Minister. This office is included in many of the modern Constitutions to ensure the proper expenditure of public funds. Towards this end he is empowered to make annual audits of all departments and offices of the Government, extending to the Senate, House of Assembly, the Supreme Court, the Service Commissions and the Magistrates' Court. The results of such audits are to be reported and laid before the House of Assembly for debate and examination by the Public Accounts Committee of the House. The accounts of the Auditor-General office are audited and similarly reported on by the Minister of Finance.

To ensure impartiality and to shield him from any interference in the performance of his duties, the Auditor-General is granted security of tenure similar to that of members of the Public Service Commission and his removal is subject to the same conditions. In the same way it attempts to insulate the functions of the Attorney General, the Constitution provides that in the performance of his duties the Auditor-General is not subject to the direction or control of any other person

or authority. The powers and functions of the Auditor General are enlarged in the *Financial Administration and Audit Act*.

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Questions for Consideration

1. Should the Public Accounts Committee be a body established by the Constitution or legislation, as opposed to a House Committee?
2. Should this body have the authority to engage the services of accounting or technical experts?
3. Should the Prime Minister have the authority to initiate an investigation of the conduct of the Auditor-General? If not, should anyone have this power and, if so, whom?
4. Should the Auditor-General be given the power to audit the accounts of all bodies or corporations that receive money from the Consolidated Fund?

Notes

CHAPTER 12

Interpretation

[Chapter X: The Constitution]

This is the final chapter of the Constitution and it is contained in a single article (137). The purpose of the interpretation section is to explain terminology used in the Constitution or expand on them. It is not necessary to consider the definitions dealt with in this Chapter, as they are for the most part self-explanatory.

For the purposes of interpreting the Constitution, the applicable Act is the *Interpretation Act of The Bahamas* (Statute Law of the Bahamas Islands, Revised Edition 1965, C. 180), and its amendments, as this was the interpretation law in force when the Constitution came into being (section 13 of art. 137). Finally, as has been noted, attention must be directed to s. 4 of the *Independence Order*, which requires existing laws to be interpreted with “such modifications, adaptations, qualifications and exceptions that might be necessary to bring them in conformity with [the Constitution]”.

Constitutional interpretation is also guided by principles derived from the common law. One of the most significant of these cases is *Minister of Home Affairs v. Fisher* (1980), where the Privy Council said that, unlike ordinary legislation, a Constitution should be interpreted liberally and not restrictively.

Questions for Consideration

1. Should the Constitution reconcile the conflict between the savings clause (Art. 30) and section 4 of the Independence Order by expressly providing (similar to the supreme law clause) that the laws saved by Article 30 should only be applied to the extent that they are not inconsistent with the Constitution?
2. Should the current Interpretation Act (*Interpretation and General Clauses Act (Ch. 2)*), apply to the interpretation of the Constitution?

Notes

CHAPTER 13

Constitutional Amendment

The procedures for amending or altering the Constitution are to be found in Article 54 of Chapter V under the head Parliamentary Powers. They have been extracted and treated separately here because of their general importance to the area of reform.

Entrenchment

Ordinary legislation is passed by a simple majority vote of the members of a House present (subject to quorum requirements) and voting. Most Constitutions guard against their provisions being lightly changed by entrenching all or most of its provisions. Entrenchment is the device used to protect some or all of the provisions of a Constitution from change by the ordinary legislative process. Bills seeking to alter some or all of the provisions of the Constitution entail the observance of requirements that do not have to be met for the passing of other legislation. There are three main types of entrenchment devices used in the Bahamian Constitution, and generally a combination of all three must be observed to effect change. They are itemized below.

1. Special Formulae

Special formulae for changing the Constitution are of two kinds in the Bahamas: (a) declaration of intent; and (b) certificate of compliance.

A. *Declaration of intent*

Any Act of Parliament that intends to amend the Constitution must state so. For example, Art. 54 (5) provides that “No Act of Parliament shall be construed as altering this Constitution unless it is stated in the Act that it is an Act for that purpose.” In other words, the Constitution cannot be amended by implication—the process whereby a later act that deals with the same subject matter as an earlier act may supersede that earlier Act. An example of such a declaration is as follows: “This Act shall have effect for the purpose of the alteration of the Constitution.”

B. *Certificate of Compliance (art. 63(3)).*

Wherever a special parliamentary majority is required, as is the case with many of the provisions of the Constitution, a Bill must not be presented for assent unless it is accompanied by a certificate from the relevant House (the Speaker in the House of Assembly and the President of the Senate) certifying that the requisite parliamentary majority has been met. In cases where a referendum is required, a certificate is required from the Parliamentary Registrar certifying that the required electoral majority has been attained.

2. **Special Parliamentary Majority**

There are two levels of special parliamentary majorities required in the Bahamas: (i) a two-thirds' majority; and (ii) a three-quarters' majority. The parliamentary majority required to amend an article depends on the relative importance attached to that article by the Constitution (see below).

3. Referendum requirement

The alteration of many of the provisions of the Constitution requires approval by a simple majority of persons qualified to vote in general elections voting in a national poll on the question of whether the alteration should be made (i.e., a referendum). This is the highest of all entrenchment devices, and it means that a Bill can be rejected by the citizens even if it has met all the other specifications and passed both Houses of Parliament.

Entrenched and Specially Entrenched Provisions

The provisions of the Constitution of the Bahamas are protected at two levels: those that are said to be entrenched (ordinarily) and those that are specially entrenched. Entrenched provisions require a two-thirds' majority and referendum to be changed; those that are specially entrenched require a three-quarters' majority and referendum. These articles are enumerated at article 54, but a summary analysis of the Constitution reveals how this distinction is made. Entrenched provisions are those dealing with matters such as the establishment of the office of Governor-General; the Public Service Commissions; Finance (including the Auditor General), etc. The specially entrenched provisions are those dealing with areas such as the Supreme Law Clause; Citizenship; Fundamental rights and freedoms; the Executive authority of the Governor-General; the composition and powers of Parliament; and the Judicature. Note that of the **137** articles of the Constitution, **40** are entrenched, **61** are specially entrenched, **three** are entrenched or specially entrenched by application to other provisions, and all **104** of these protected articles require a referendum. In addition, sub-section (6) of section 5 of the Independence Order is specially entrenched and

sections 8, 9, 12, sub-sections (3), (4) and (5) of section 13 and section 16 are entrenched.

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Questions for Consideration

1. Entrenchment devices in Caribbean constitutions, including that of the Bahamas, are extremely complicated. Should these be simplified?
2. Does the requirement to submit so many of the articles of the Constitution to a referendum place an unjustifiable fetter on Parliament and occasions undue public expense?
3. Should the referenda requirement be retained only in respect of articles that directly affect the citizen (i.e., fundamental rights and freedoms, etc.)?
4. Should the Constitution provide for a referendum on any other matter that Parliament would like sent to referendum?

Notes

CHAPTER 14

General Principles

This section deals with general principles that are not included in the Constitution but which are of general importance.

International Law

The Constitution of the Bahamas, as do most of the Caribbean Constitutions, pass over matters of international law in silence. Other constitutions (e.g., the USA, many European countries) normally approach this subject from two aspects: (i) they declare the relationship between international law and national law; and (ii) they expressly regulate the treaty-making power.

With respect to the relationship between international law and national law, there is a difference between general principles of international law and treaties or conventions. The common law position, which applies in the Bahamas, is that general principles or customary rules of international law are automatically the law of the land and may be enforced by the courts without more. Thus, declaring this relationship at the Constitutional level merely states the law.

On the other hand, treaties that have been signed and ratified by the state will bind the state at international law, but remain unenforceable by the local courts until they are made a part of the local law. The usual way in which treaties are brought into Bahamian law is by the passing of an enabling Act (to which a schedule is attached containing the provisions of the treaty to be enacted) or by implementing legislation

adopting the provision of the treaty. This practice could also be given constitutional expression.

Considering the growing importance of international law and its increasing intrusion in areas once the domain of national or municipal law, perhaps the Constitution should address these matters.

Note

In the Westminster system, treaty-making power has historically been within the prerogative powers of the Sovereign as Head of State. Perhaps for this reason it has been left unregulated by the Constitution. At international law, the Head of State is vested with full powers for the purposes of treaty-making. We know that the Governor-General only acts with the advice of the executive with respect to his powers. However, there is an interesting constitutional question as to whether, if only as a matter of theoretical law, Her Majesty may conclude a treaty on behalf of the Bahamas.

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Questions for Consideration

1. Should the Constitution define the relationship between international law and national laws?
2. The adoption of international conventions and accession to external conditions can impose onerous demands on small states. Should the actions of the Executive in such matters require the approval of Parliament prior to assent and ratification?

ENDNOTES

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