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for the Eradication of Colonialism: goals and expected accomplishments

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STATEMENT

BY

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Modernizing a British Colonial Constitution: Limitations and Possibilities

I make this presentation under three heads: Process, Product and Prospect.

Process

About 1834, English poet Lord Tennyson wrote of “sober-suited” freedom and of England as:

A land of settled government

A land of just and old renown

Where freedom slowly broadens down

From precedent to precedent.

The modernization of constitutions in British Overseas Territories (BOTS) cannot brook this conservative, Victorian spirit of snail-paced evolution. It is almost a decade since the Montserrat Constitutional Commission reported and to date, implementation is still adrift. Cayman received its new document in 2009; and Anguilla’s is still inconclusive. Perhaps this is not necessarily a bad thing; perhaps it reflects lengthy negotiations in good faith by partners in a spirit of mutual respect. But given the global impatience for democracy, the Tennysonian temper and tempo are unacceptable today.

To the credit of the British, it was they who took the initiative. It must be observed though that as early as 1992, the Lavity Stoutt British Virgin Island (BVI) government passed a resolution for constitutional review whose object would be full internal self-government with Bermuda as model. Three notions were to underpin constitutional advancement as the British perceived it. It had to denote partnership, it was to emanate from popular consultation and it was to be modern.

In practice, both the partnership and the consultation were qualified, in spite of the rhetoric of the pivotal 1999 publication, *Partnership for Progress and Prosperity: Britain and the Overseas Territories*. One was always suspicious of this partnership of ‘unequals’. Elton Georges then Deputy Governor of the BVI noted, referring to my remarks at a Wilton Park conference in the UK: “There was no answer to Dr. Fergus’ pointed observation that the word was a fig leaf to

give an illusion of parity of the parties in an intrinsically hugely asymmetrical relationship” (2003). It soon became evident that the British set parameters for the consultation unilaterally when they issued a Check-list in 1999. In its own words, it indicated “standards to which OTs should seek to strive, obligations which they should strive to meet and expectations of Her Majesty’s Government (HMG) in key areas of constitutional modernization”. In fact, the possibility of enhancing the governor’s legislative and executive powers, were implicit in the document. David Taylor a former OT Governor held that the powers of governors needed to be increased to enable them to deal with certain circumstances including contingent liabilities. So the consultation as well as the outcome was to an extent managed by the metropolitan partner. This approach has to change in the third decade.

If constitutional modernization means anything, it denotes greater self-government and democratization. Colonialism with its idea of client state and subordinate people is inherently undemocratic. So to attain any respectable modicum of modernization, there has to be a dramatic reduction of the democratic deficit represented in particular by the powers of the governor vis-à-vis the power of the people’s elected representatives.

The power of the governor was certainly an issue among BOTs. Speaking for civil society in Anguilla in 2003, Dr. Phillis Flemming-Banks was critical of the quality of partnership which allowed HMG to impose legislation on Anguilla against the popular will and give the Governor inordinate executive power. In 2002, Chief Minister (CM) of the British Virgin Island (BVI) Ralph O’Neale expressed his hope that any constitutional review would lead to a reduction of the Governor’s powers. This is understandable because he had, he said, appointed a committee to examine the possibility of independence. Although his successor, Smith was less forceful, he at least wanted the constitutional commissioners to consider a possible reduction of the powers of the Governor. CM Missick of the Turks and Caicos Islands (TCI) also wanted a reduction of gubernatorial powers. He never really accepted the thinking that the Governor’s over-mighty powers were the only means of guaranteeing good governance and safeguarding obligations for contingent liabilities. There was obvious consensus in this aspect of democratic thinking. The British, on the other hand, held that the Governor’s reserved powers over external affairs, defense and security cum-police, the public service and international finances (in some cases)

were sacrosanct. The modernization model was flawed from the outset. The power of the governor has to be specifically placed on the agenda in the new decade.

Product

That there has been some peripheral alteration in the power of the governor is due to somewhat enlightened negotiation buttressed by education and agitation. In Montserrat, Opposition politicians and opinion leaders have criticized the British government over some provisions or lack thereof in the draft constitution, and the local government for supposedly hastening the reform process without adequate popular consultation. On the latter, opinions are divided.

In the new and emerging constitutions, the governor is allowed to delegate certain aspects of external affairs (especially regional) to elected Ministers. He is allowed to assign responsibility for his special responsibilities to Ministers who will act on his behalf. There are, however, nice distinctions between the mandatory 'shall' and the optional 'will', and between what obtains for individual territories. In the case of the BVI and the Cayman Islands the Governor shall delegate European Union matters pertaining to national interest. Montserrat does not enjoy this privilege. There is thus potential for power sharing but even this limited potential depends to a large part on the willingness, whim or benevolence of particular governors.

In Montserrat, the section on fundamental rights and freedom is savagely criticized by both lawyers and lay persons. Terms such as "anti-democratic" "absolute power... "concentrated in a person", "draconian and dictatorial powers" "undesirable" "bad government" "alarming powers" "unfettered right" were used in the critical analysis of the Draft Constitution (Fergus, 2010; Mitchell, 2010). And now for an example. Mitchell, a Queen's Counsel from Anguilla, felt for a start, perhaps with an element of exaggeration, that the draft constitution proposes the concentration of power in the hands of the Governor and this tended towards "arbitrary and one-man rule." (Mitchell, 2010:1)

In too many cases is he subject to the oversight of a distant eye in the person of the Secretary of State. Section 17 allows the Governor to declare a state of emergency and make regulations without the advice of cabinet. This is deemed anti-democratic; and the provision dealing with detained persons including the possible period of detention without trial is said to be draconian

and dictatorial and violates the rule of law; the absence of a Freedom of Information Act suggests bad government, it is held. Then the right to freedom of expression was said to be diluted when a key phrase “reasonably justifiable in a democratic society” was omitted from the relevant provision. And that infamous phrase “not to be inquired into by any court of law” which exempts the governor from legal scrutiny was roundly and rightly condemned “as undemocratic and reminiscent of the days of the British Raj.” There needs to be safeguard against possible abuse of power by the governor, it was held. These perceptions of thoughtful persons need to be taken into account in the modernizing of the constitution. Consultation has to be more than a buzz word.

There is more however at issue in constitutional advancement than the governor’s discretionary powers. The introduction of National Security Councils (Advisory in Montserrat) offers another opportunity for some power-sharing and in the case of Cayman there is the involvement of civil society in governance. Unfortunately, this does not obtain in BVI and Montserrat; but in the latter singularly, a member of the Opposition is included, giving the Council a more pleasing democratic countenance. What becomes evident in these constitutions is the lack of uniformity even when cultural peculiarities are not at stake. This probably reflects the fact that modernization did not emanate from any overarching philosophy of society – a society of a people on the way out of slavery, theoretical emancipation and classical colonialism.

A number of other valuable innovations that augur well for the future are contained in the new documents with variations across Territories. These include complaints commissioners or ombudsmen to protect citizens; electoral commissions independent of political control, advisory committees on the prerogative of mercy whose advice the Governor can ignore; deputy governors who are belongers and enhances the idea of self-government; and, in the case of the Cayman Islands, provision for referenda, and the limit of the tenure of CMs to two successive terms, as obtains in the United States of America.

Some of the most obvious changes have to do with nomenclature. Territories now have legislative assemblies rather than councils; cabinets instead of executive councils; and premiers instead of Chief Ministers. These give the constitution a more modern ring and a more democratic face, but in reality the changes are partly cosmetic and not all systemic. For instance,

the premier is not the same as that position given to those islands which gained statehood in association with Britain under the 1967 West Indies Act; and the cabinets fall short of the Bermuda pattern where the premier presided, and not just in the Governor's absence. These changes are in part sweeteners to disguise the pill of enduring gubernatorial authority.

There has been movement in the constitutions but not modernization as conceived in this paper. As I have written elsewhere: "The Cayman Islands can justifiably claim constitutional modernization having leapfrogged from a decided aversion to a ministerial system and a virtual nineteenth century constitution (Kersell, 1987; Williams, 1970) to cabinet and premier and perhaps, even more important, to a sometimes radical posture" (Fergus, 2008 p.15).

Prospect

Because colonialism is inherently undemocratic, to modernize constitutions in the British context means pushing the envelope of gubernatorial power to the extent compatible with the UK's international responsibility for the colonies. It is worth noting that governors still have power to initiate legislation in certain circumstances. There is no reason why this and other glaring elements of authoritarianism should not be removed through a mixture of agitation and negotiation in good faith. There is no good reason why what is termed the 'Ouster of Court' whereby the Governor is immune to inquiry by the court regarding his action in certain situations, should continue. In fact, acts done by the Crown or its representatives purportedly under the prerogative may be held to be *ultra vires* by the courts according to legal authorities (de Smith, Street, H. & Brazier R. eds. 1986); and the exercise of wide discretionary power is controllable by law and the court (Wade H.W.R. 1961).

All of these undemocratic elements need to be collated and strong advocacy made jointly by all of the Territories. One is not necessarily suggesting any divide and rule conspiracy, but there is still strength in numbers; and the regional organizations to which the BOTs belong should add their voice, while the UN Decolonization committee play a serious educative role reinforced by occasional visits. Indeed with the co-operation of the metropolitan governments, the UN may wish to take advocacy a step further. It can become an interlocutor among non-self governing Territories, the administering powers and the C-24, with a view to building mutual trust and

confidence, as they move forward. This could take the mode of informal dialogue at the UN which can generate progressive action and possible movement on tough issues such as “reserved powers”. At any rate there will be greater understanding of each other’s position among the key stakeholders.

One of the dangers of neither fish nor fowl modernization, is that it can lead to a false complacency of accomplishment and or even stasis. The warning in my 2007 Paper is still relevant: “and it is to be hoped that the stop at this new plateau of comfort will not dull the desire to the promised land of autonomy” (Fergus, 2007:7). BVI CM, Dr. Orlando Smith may well be justifiably euphoric when he noted that his country had “achieved 95 per cent of the proposals for a modern constitution for the people of the BVI.” But this may well be because their proposals were conservative and their concept of “modern” limited. He welcomed, for example, the fact that the premier shares with the Governor the power to set the agenda of cabinet without fear of a veto “thus allowing your elected leaders to get on with your business unhindered.” This obtained in practice in Montserrat before the excursion into modernization. For the new decade we must isolate real gains from cosmetic ones. After the euphoria, there needs to be the realistic recognition that there are still miles to go on the road to self-rule.

A modern colonial constitution in the twenty-first century should be linked to a time table for, or road map to independence. For the British, it seems to be all or nothing. This is the only way one can interpret the uncompromising announcement of Secretary of State, Bill Rammell to BOTs ministers in 2003: UK was not bound by the UN General Resolution of 1960 on independence, integration and free association. In this new decade, there needs to be a thawing in this position. The Montserratians were the only people to seriously call for Free Association in their constitutional commission report. This may have been because the British had made it abundantly clear that that position was not on the agenda. This status should now be put back on the programme as unfinished business in the pursuit of real modernization.

Some may think it arrogant of Montserrat with its 5000 souls and financial dependence on UK coffers, for the time being, to be aspiring to a radical change. But then modernization without radical change is a contradiction. And the British are too honorable a people and too enlightened a government to hold back a people’s advancement because of the fortunes of a colony

precipitated by an unprecedented natural disaster. Thankfully, they are assisting with vital infrastructure and development projects which should help to transform the economy and produce a threshold of economic respectability from which independence can be launched. But in human development thought, no country is too poor to afford democracy, especially an overseas Territory. That said, the economy of the BOTs must also be put on the agenda for development through a partnership approach. The administering power not only has educative and political roles in the modernization process, but also an economic one. If modernization is to have meaning, constitutional change must not be considered as an independent variable only, especially among the poorest of the poor.

Conclusion

There have been changes to the constitution of the BOTs in the Caribbean; but these are not of the scope and depth to justify the term modernization. It is to be hoped that appetites have been whetted for change – change rooted in some overarching vision of social advancement. What would be tragic is for such changes that have occurred to induce the complacency of people who have supposedly arrived. It remains my view that the journey out of slavery is never really truly ended unless the people are free in the sense of exercising sovereignty in their own land; and the overseas Governor no longer has the power to dispose of crown land. The very notion of crown land in that sense should be anathema in the twenty-first century.

In the present situation, the UN Decolonization Committee has a role – an educative and advocacy one. In discharging this role, however, they need to partner with civil society and there are vibrant and influential groups in these Territories. Such activity as there is, must have an indigenous stamp; and the activities could be even more effective if forces are joined across the region. This includes the Organization of Eastern Caribbean States (OECS) and CARICOM of which Montserrat is a member. The quest now has to be for more meaningful constitutional change.

If I were to itemize in phrases, notions to guide the new agenda, they would be:

- the powers of the Governor

- political education in local institutions
- education by the UN Decolonization Committee
- advocacy of community groups
- advocacy by the UN Decolonization Committee in partnership with civil society
- UN as interlocutor building trust and confidence among principle players
- UN presence through visits
- support from regional organizations
- economic development
- termination of the governor's power to initiate legislation
- amendments to the sections on fundamental rights to ensure maximum protection from anything resembling arbitrary power
- free association as an agenda item
- freeing the administering power from unsavory charges

I end as I began with a poem – this time my own: “Constitution Plan”

References

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