Constitutional Referendum: Correcting an Historical Error

Part 3

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The best rationale why **sex** should be added to Article 26 of the Constitution as a prohibited category of discrimination by any law, as the fourth bill provides, is offered Mr. Justice Brennan of the United States Supreme Court in the case **Frontiero v. Richardson,** 411 U.S. 677 (1973):

> **"[Our] Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. . . It is true,**

of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational instructions, in the job market and, perhaps most conspicuously, in the political arena. Moreover, since sex, like race and national origin, is an immutable characteristic, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility'."

Since sex, like race, is **an immutable characteristic**, Article 26 of the Constitution should be amended to prohibit the making of any law that discriminates against any person

either of itself or in its effect on the basis of sex. That is what the fourth bill is about. It is not about sexual preference which is an entirely different ground, as demonstrated by the Privy Council in the case **Nadine Rodriguez v. Minister of Housing et al** (2009) UKPC 51. As a matter of constitutional practice, discrimination on the basis of sex, meaning treating a woman more or less favourably than a man, is treated differently than the ground of sexual preference. In fact, Bill #3 removes the discrimination against unwed Bahamian men who is prohibited from passing his citizenship to a child born to a foreign woman. Therefore, the issue of sexual preference or sexual orientation should not be imported into the fourth Bill before the House of Assembly, as it is neither a ground proposed by the Constitutional Commission nor a part of the fourth bill before the Parliament.

As we approach the referendum on the 6th July, we should learn some lessons from the relentless efforts of the

United States to remake its Constitution to correct omission of the past and to reflect changing circumstances, contemporary expectations of its citizens and evolving international obligations. The Constitution of the United States, adopted in 1789, is the oldest written constitution in our hemisphere. As a living document, the United States' Constitution is given new meaning and vitality under ever-changing conditions through Supreme Court decisions and formal amendments. It extends its protection to all persons in the territory of United States, citizens rich and poor as well as aliens. In establishing a national government, the United States' Constitution sets up three branches and provides mechanisms for them to check and balance each other. It balances central federal authority with dispersed state reserved power. It protects the citizenry from the government and gives the power of judicial review to the judicial branch of government.

The imperfect nature of the original United States' Constitution is very apparent from a brief historical review. In 1789 when the Constitution was founded, African Americans were still in slavery and, as legally defined property, were not considered as full citizens. However, there has been a continuous process of correction and remediation, through constitutional amendments, judicial decisions, legislation and executive measures to create a more perfect democracy in the United States, as the society moved from an agrarian to an industrialised nation and assumed international obligations under international humanitarian law.

The first Ten (10) Amendments of the United States Constitution were passed in 1791. The 13th Amendment, adopted in 1865 immediately after the Civil War, abolished slavery. The 14th Amendment, adopted in 1868, gives citizenship to all persons born or naturalized in the United States and guarantees due process and equal protection of

the laws to all persons in the United States. Bahamians who have children in the United States, such as the parents of Sir Sidney Poitier, were and are the beneficiaries of this provision. The 15th Amendment, adopted in 1870, guarantees the right to vote irrespective of race, colour or previous condition of servitude. Up until 1971, the United States Constitution had been amended **26 times.**

Similarly, our sister Caribbean countries have also been trying to bring their constitutions in line with the shared expectations and aspirations of their contemporary societies.

Constitutional reviews have been undertaken and amendments proposed or effected, for example, in Barbados, Belize, Dominica, Grenada, Guyana, Jamaica and Trinidad & Tobago. Guyana and Trinidad & Tobago have totally replaced their independence constitutions. Two week ago, the Parliament of Trinidad and Tobago passed the Constitution (Amendment) Bill 2014 to limit the Prime Minister to two terms, to recall parliamentary representatives

outside scheduled national elections and for a run-off poll in any constituency where contestants fail to secure more than 50% of votes cast.

After 40 years of constitutional practice in The Bahamas, it is now time that we correct the discrimination against women in our Constitution and to ensure that the Constitution conforms to the demands and expectations of contemporary Bahamian society and the evolving humanitarian norm of non-discrimination.

Further, one way of avoiding the recurrence of such historical errors in the future, as occurred in 1972, is to adopt recommendations #28 of the CEDAW Committee which requires that "**The State Party [The Bahamas} adopt temporary special measures, such as quotas . . . to increase the number of women in political office and public life and decision-making positions."** Beyond the Referendum, I recommend that we implement affirmative measures to remediate the lack of female representation in

the top public offices in The Bahamas. It was the lack of consultation with women and the absence of female representation at the Constitutional Conference that allowed subject discriminatory provisions to be inserted into the Constitution in 1972. Therefore, we need to ensure that more women are represented, commensurate with the Bahamian population, in the Parliament and Cabinet so that we have the benefit of the collective wisdom of all of the Bahamian people inform the making of public policy in the future.

The removal of these remaining vestiges of discrimination against women, contained in our Constitution, is not only the responsibility of Bahamian women. I assume that no Bahamian man would want his mother, wife, sisters or daughters to be disadvantaged in a democratic Bahamas. Therefore, all Bahamian men have a duty to safeguard the human rights of every person in The Bahamas, including the right of women to equality of treatment, by voting in favour of

the four Bills, as amended in the legislative process, on the 6th November.

The template of the Bahamian suffragettes should inform us during the upcoming referendum. The powerful lesson of that template was summed up brilliantly by Janet Bostwick when she said that "**Women suffragettes showed us that, in order to bring about significant change, we must accept sometimes that the cause is bigger than the individual, than a party, than any of the things which divide and separate us and that much can be accomplished when we unite."**