THE CHALLENGES FOR MINISTERIAL RESPONSIBILITY POSED BY PARLIAMENTARY REQUIREMENTS FOR SPECIAL MAJORITY LEGISLATION : The Effect of the Canadian Bill of Rights Model for Human Rights in Trinidad and Tobago

by
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Presented at the 14th Workshop of Parliamentary Scholars and Parliamentarians, Wroxton College, Wroxton, Oxfordshire, United Kingdom 27th – 28th July, 2019

The constitution of Trinidad and Tobago requires that any legislation that may infringe upon human rights provisions must be subjected to a three-fifths majority vote in both Houses of Parliament for successful enactment. These provisions were first introduced in the 1962 independence constitution which adopted a suitably modified version of the Canadian Bill of Rights 1960.

When the founding fathers of the Trinidad and Tobago independence constitution met in April 1962 at The Queen's Hall Conference in Port-of-Spain, the Government accepted a proposal from Hugh Wooding, then President of the Bar Association of Trinidad and Tobago, to replace the Bill of Rights that was in the draft constitution with a Bill of Rights based on the Canadian Bill of Rights 1960.

That modified model established the formula of a three-fifths majority vote in both Houses of Parliament whenever Parliament wishes to legislate in a manner that will infringe human rights. Effectively, what that innovation by Wooding did in 1962 was to place the doctrines of Cabinet and Ministerial responsibility at the mercy of the Opposition in Parliament whenever the government did not have a three-fifths majority in its own right in the House of Representatives.

Only some governments that were formed since 1991 did not have the required number of MPs in the House of Representatives to attain that three-fifths majority without compromises across the aisle.

All governments from 1962 to 1991 enjoyed majorities in excess of three-fifths in the House of Representatives.

For those governments that do not control a three-fifths parliamentary majority, ministerial responsibility is made subject to parliamentary control in a manner that leaves the government with the responsibility for the legislation, but does not permit the government to have its way as with other simple majority legislation.

INTRODUCTION

The introduction of the Canadian Bill of Rights 1960 model, suitably modified, came about as a consequence of proposals advanced by the Bar Association of Trinidad and Tobago at the Meeting of Commentators on the Draft Constitution for independence at The Queen's Hall conference in Port-of-Spain over the period 25 - 27 April, 1962. The President of the Bar Association at that time, Mr. (later Sir) Hugh Wooding made a plea at the Queen's Hall Conference for the adoption of the Canadian Bill of Rights 1960, suitably amended, to replace the model fashioned after the European Convention on Human Rights that was included in the Draft Constitution for Trinidad and Tobago's Independence.

Mr. Wooding said, inter alia :

Surely if we find that the principle or the form or the contents of the Canadian Bill of Rights is such as can be acceptable generally, we can adapt it to circumstances. We can surely adapt the thing as at the present time this Draft Constitution has taken a number of its provisions from precedents which have gone before. We have adapted things, amended them, added certain things, deleted certain things, and in the same way we can take the Canadian Bill of Rights and adapt them to suit us, and I do not see why we should be limited to choosing the Canadian Bill of Rights as it is or refusing to consider it altogether. I put forward, on behalf of the Bar Association, that it should be taken as a model, and it should be used as a means whereby we can help to shape our thinking in the matter, modifying it to the extent that may be necessary, and remembering also that this Canadian Bill of Rights is something which came into existence in 1960 and forms no part of the Constitution of Canada. [1]

The proposals advanced by Mr. Wooding and the Bar Association of Trinidad and Tobago were considered by the Cabinet, together with other proposals made at the meeting. The Chairman of the Queen's Hall Conference made the following statement at the commencement of the proceedings on Friday 27 April, 1962 :

I am happy to be in a position to inform you, on the authority of the Cabinet, that your written comments and your suggestions made in this Hall have received preliminary consideration. Further detailed consideration will of course be given to them but already certain decisions have been taken. These decisions are that at the Joint Select Committee to begin on Monday the Government representatives will propose :.....(c) the substitution for Chapter II of a Bill of Rights along the lines of the Canadian Bill of Rights with appropriate modifications including the introduction of safeguards. (Applause). [2]

This extract from the verbatim record of the Queen's Hall Conference is crucial to an understanding of how Trinidad and Tobago deviated from the modified version of the European Convention on Human Rights 1950 and adopted the model of the Canadian Bill of Rights 1960 for its Bill of Rights in its independence constitution. That change was retained throughout the Joint Select Committee that considered the revised draft constitution (30 April-16 May, 1962) as well as the Marlborough House Conference in London that considered the independence constitution for Trinidad and Tobago (28 May-8 June, 1962).

The Government followed through on its commitment that was announced at the Queen's Hall Conference. The following is recorded in the Minutes of the Joint Select Committee of the Legislature that considered the revised draft constitution for independence as follows :

3. Chapter II

Dr. Williams presented to the Committee a draft preamble and proposals for a declaration of Fundamental Rights based on the Canadian Bill of Rights which he proposed should be included in the Constitution to the exclusion of Chapter II. [3]

This policy change to adopt the Canadian Bill of Rights 1960 model was significant, especially since it was laid by the Premier, Dr. Eric Williams, himself. The draft Bill that was prepared by the Joint Select Committee had only five clauses in what was Chapter One in the Second Schedule of the draft.

The critical words that were included in that draft at section 4 read as follows :

4.(1) An Act of Parliament to which this section applies may expressly declare that it shall operate notwithstanding the provisions of this Chapter and any such Act shall, if it so declares, operate and have effect accordingly.
(2) An Act of Parliament to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all members of that House. [4]

This draft was considered at the Trinidad and Tobago Independence Conference at Marlborough House in London during the period 28 May – 8 June, 1962 under the chairmanship of the Rt. Honourable Reginald Maudling, MP, Secretary of State for the Colonies.

The Marlborough House Conference 1962

The delegations that attended the Marlborough House Conference on the Independence Constitution for Trinidad and Tobago were as follows :

UNITED KINGDOM
The Rt. Honourable Reginald Maudling, MP (Chair)
The Hon. Hugh Fraser, MP
Mr. D. Williams
Mr. J.A. Peck
Mr. J.E. Whitelegg
Mr. L.B. Walsh-Atkins
Mr. S.J.G. Fingland
Sir Charles Dixon

TRINIDAD AND TOBAGO
Dr. E. Williams
Mr. G.A. Richards
Mr. W.J. Alexander
Dr. R. Capildeo
Mr. A. Sinanan
Mr. T. Hosein
Sir P. Hobson
Mr. J. Rojas
Mr. M.T.I. Julien
Sir L. Constantine
Mr. E.E.I. Clarke
Mr. J. Lewis
Mr. S.C. Maharaj
Mr. L.F. Seukeran
M. P.G. Farquhar
Mr. O. Mathurin

According to record of the second meeting of the conference held on Monday 28 May, 1962 at 3.00pm, the following is noted between Mr. Ellis Clarke, Constitutional Adviser to the Cabinet, and Mr. Tajmool Hosein, Opposition Member of Parliament, from Trinidad and Tobago :

Preamble and Chapter I – Bill of Rights

MR. CLARKE said that, to satisfy local feelings, particularly among the religious groups, the first and second chapters of the first draft, dealing respectively with citizenship and "Bill of Rights" provisions, had been transposed. The Bill of Rights chapter had been re-expressed on the model of the Canadian provisions, which differed from the normal Colonial Office model by giving a rather general statement of fundamental rights instead of a detailed list with specific provision for exceptions. The Canadian form gave parliament a blanket power to over-ride basic rights but required it to make an express public statement on any occasion when it proposed to use that power. Local opinion preferred the new formulation.

The Bill of Rights provisions were entrenched to the extent that a three-fifths majority in each House of the Legislature was needed to alter them. [5]

The official record of the meeting records the contention between the Government and the Opposition delegations on this point as follows :

MR. HOSEIN then made a statement on behalf of the Opposition.

Chapter I

They regarded the provisions regarding human rights as inadequate. Unlike the previous draft constitution, the new one contained no provision for the enforcement of human rights. In addition, the procedure for declaring a state of emergency was not defined, nor was the procedure for overriding entrenched provisions in the constitution. A citizen detained during a state of emergency should have the right to have the reasons for his detention determined either by a specially constituted tribunal or by a regular court : this was the procedure recommended by the Conference on the Rule of Law held at Lagos in 1960. He understood from Mr. Clarke that it had not been his wish to revise this part of the previous draft, but that he had been influenced by the views of others, including the Bar Council : but the Council's recommendation had been that the majority for over-riding an entrenched clause should be three-quarters of both chambers, not three-fifths. This was a point which the proposed legal committee might consider. [6]

While these discussions and negotiations were underway at Marlborough House, there was absolutely no consideration being given by either side to the likely effect that such an approach to legislation that may infringe human rights could have on the doctrines of ministerial responsibility.

Under the prevailing Westminster conditions at the time, Ministers would pilot legislation through Parliament for which they are responsible. That premise has remained to this day and is a fundamental concept of Westminster-style governance.

Trinidad and Tobago was seeking to adopt a constitution that would have represented a suitably modified version of the Westminster model. However, a main variant was being included in the Bill of Rights that was being adjusted to permit Parliament to legislate in a manner inconsistent with human rights provisions by virtue of a special majority in both Houses of Parliament. The debate about the size of that majority was about to undergo another alteration in the negotiations as can be seen in

the record of the proceedings for the Seventh meeting of the Conference on 4 June, 1962:

Paragraph 3

(i) *Draft Constitution, Chapter I (Bill of Rights)*

MR. PECK introduced the report of this matter.

MR. HOSEIN explained that the Opposition delegates had been prepared to accept an amended version of the draft constitution on condition that the entrenchment provision (Section 4(2)) was altered to provide that a two-thirds majority, instead of the proposed three-fifths majority, of all members of each House of Parliament was needed to carry a change. This suggestion had not found favour with Government delegates and he therefore proposed that consideration should be given to substituting for the present draft an entirely new Bill of Rights based on Chapter VI of the Southern Rhodesia (Constitution) Order in Council, 1961. He would be circulating a fresh memorandum on this. [7]

The Opposition delegation to the conference was now prepared to abandon the Canadian Bill of Rights model and was seeking to adopt the Southern Rhodesian model. The obvious sticking point here was the size of the parliamentary majority to override the human rights provisions. The Opposition was not in agreement with the three-fifths majority proposal as they had compromised from a three-fourths majority to a two-thirds majority and now were prepared to ditch the Canadian Bill of Rights proposal because the three-fifths majority was too low a threshold for infringing human rights.

What was still not being discussed was the impact of any special majority on the doctrines of ministerial responsibility which would be affected by any imposition of a special majority for the enactment of legislation that would infringe human rights.

At the ninth meeting of the conference, the following is recorded :

THE PARLIAMENTARY UNDER-SECRETARY OF STATE invited Mr. Hosein to explain the changes which he had proposed in the Bill of Rights…

MR. HOSEIN said that he had a number of objections to Chapter I of the existing draft constitution. His main point was that the rights there listed were not, on his understanding, properly enforceable at law. Secondly, he was anxious that the courts should have power to decide whether action under the emergency provisions was justified. Thirdly, he considered that existing laws should not immediately be superseded by the new provisions, but that there should be a period of grace. Fourthly, he felt that the majority required to approve a suspension of the Bill of Rights provisions during a period of emergency should be greater than two-thirds of all members of each House. Fifthly, more than a simple majority should be required to extend the duration of a declared period of emergency. There should also be an appeals procedure (such as that proposed in the original draft constitution) for persons detained during a period of emergency; and there should be a provision guaranteeing to every citizen the protection of the law (on the lines of section 19 of the original draft). Since these points could not satisfactorily be covered by amending the existing draft, he had proposed in his memorandum a new draft based on the Southern Rhodesian constitution…. [8]

This had now become a serious matter for the conference to address as the Opposition was moving away from a position of consensus to one of disagreement on the issue of human rights by proposing to substitute the Southern Rhodesian constitutional provisions. As the controversy rose, the following is recorded :

SIR ORBY MOOTHAM said that the Southern Rhodesian provisions like those of the Colonial Office model, differed from the Canadian pattern adopted in the present Trinidad and Tobago draft in that it enumerated a series of rights, specifying in relation to each the circumstances in which the right concerned could be derogated. It was thus a fuller expression of rights than that in the Trinidad draft. The Southern Rhodesian provisions differed from the original Trinidad draft (and from the Colonial Office model) in three respects. Firstly, they allowed existing legislation to be prolonged indefinitely; secondly, they did not provide for freedom of movement; and thirdly, they limited the power of Courts to decide whether a given right could properly be derogated for reasons of defence, public safety, public morality or the like, by enabling a Minister to issue a certificate stating that the derogation in question was necessary, and why. The Courts could then consider only whether the Minister's statement required justification by proof of the circumstances alleged in it. Against this, the normal Colonial Office model set no limit to the power of the Courts in relation to emergency legislation. [9]

The effect of Mr. Hosein's intervention to seek the withdrawal of the Canadian Bill of Rights model for the Human Rights Chapter of the Trinidad and Tobago independence constitution and to replace it with the Southern Rhodesian model had the effect of introducing a consideration of judicial review of the decision of Parliament to legislate in a manner inconsistent with the human rights provisions of the constitution.

This was clearly acknowledged by Sir Orby Mootham (a member of the United Kingdom delegation) and led to Mr. Ellis Clarke introducing such an amendment into the draft. This outcome is recorded as follows :

MR. CLARKE said that it was a necessary feature of Bills of Rights provisions both to express a guarantee of certain rights and to provide the Government with power to override these rights in certain circumstances. A Bill on the Colonial Office pattern had proved unacceptable to very many Trinidad and Tobago citizens (although he personally disagreed with them) because it was felt that, where the circumstances in which rights might be derogated were specified, the implication was that the Government intended to derogate from the right in question. In his view, the Southern Rhodesian provisions would be objectionable in the same way as those of the original Trinidad and Tobago draft and would, in addition, be further objectionable because of the limitation on the power of the Courts.

In recognition of Mr. Hosein's points, however, he proposed certain amendments to the existing Chapter I (in addition to the points provisionally agreed by the Conference at their seventh meeting, conclusions (2) and (3)). He proposed –

(a) Section 3(b) should read "may be passed during a period of public emergency and which is expressly declared to have effect only during this period of such emergency except in so far as it may be shown not to be reasonably justifiable."

(b) Section 4(1) should be amended by the addition at the end of the words "except in so far as it may be shown not to be reasonably justifiable."

These amendments would mean that emergency legislation could be enacted only after an emergency had begun and that emergency measures could be challenged in the Courts.

He further thought that litigation on such matter should be allowed to be carried, as of right, through the Court of Appeal to the Privy Council.

MR. RICHARDS said that the Trinidad Government were committed to a Bill of Rights on the Canadian pattern but they accepted the changes proposed by Mr. Clarke including the proposed Appeals procedures.

SIR PATRICK HOBSON agreed.

The Conference agreed –

(7) Chapter I of the draft Constitution should be on the Canadian pattern.

(8) To accept the amendments noted T.C.I. (62) 7th meeting, conclusions (2) and (3), and the further amendments proposed by Mr. Clarke to provide for appeals to the Privy Council……MR. PECK said that he understood that the intention of the Trinidad Government in amending section 2 was to make it clear that the Courts would have power to declare that Acts contravening the provisions of sections 1 and 2 were invalid.

The Conference –

(10) Confirmed this understanding. **10**

This was a major development in crafting a Bill of Rights for Trinidad and Tobago. Mr. Hosein's tactic of proposing the Southern Rhodesian model instead of the Canadian Bill of Rights 1960 model led the Trinidad and Tobago Government delegation to insist on the Canadian model. However, they made significant amendments that introduced the concept of reasonable justifiability as a condition for Parliament to legislate in a manner inconsistent with the human rights provisions (sections 1 and 2 of the draft Bill) coupled with judicial review on these grounds of reasonable justifiability that would include an appeal process that would reach as far as the Judicial Committee of Her Majesty's Privy Council.

The discussion went in the direction of introducing judicial review on the ground of reasonable justifiability and never once looked back at the issue of ministerial responsibility. Any government policy sanctioned by the Executive branch and given expression in legislation that may, in the opinion of ministers in the Executive branch, be inconsistent with the human rights provisions of the constitution would now be subject to (i) a special three-fifths majority in both Houses of Parliament, (ii) judicial review of any such legislation on the ground of reasonable justifiability, and, (iii) an appeal in the courts as far as the Judicial Committee of Her Majesty's Privy Council.

The Political Effect of the Amended Canadian Bill of Rights 1960 Model

Ministers would now have to make a determination whether any draft legislation that they would propose to the Cabinet for approval and to Parliament for enactment would (i) require a certificate requiring enactment with a three-fifths majority for any possible infringement of human rights, and (ii) whether it could be regarded as being reasonably justifiable should there be any legal challenges after enactment.

The final wording of the relevant provisions in the Trinidad and Tobago independence constitution read as follows :

5. (1) An Act of Parliament to which this section applies may expressly declare that it shall have effect notwithstanding sections 1 and 2 of this Constitution and, if any such Act does so declare, it shall have effect accordingly except insofar as its provisions may be shown not to be reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual.

(2) An Act of Parliament to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House. [11]

The same wording was retained after the independence Constitution was repealed and replaced by a republican Constitution in 1976. [12] The only changes were that sections 1 and 2 from the independence Constitution were replaced by sections 4 and 5 in the republican Constitution.

The system of government that was introduced in 1962 and retained in 1976 was based on the Westminster-Whitehall model. The features of this model have been discussed by this author elsewhere. [13]

The doctrines of collective responsibility of the Cabinet to Parliament and individual responsibility of Ministers to Parliament apply in the Westminster-Whitehall model in much the same way that they apply at Westminster.

However, Ministers in Trinidad and Tobago always have decisions to make whenever they propose legislation that may have the impression that such legislation may infringe fundamental human rights and freedoms.

The composition of the House of Representatives is a function of the will of the electorate, while the composition of the Senate is based on a fixed arithmetic which does not provide for a three-fifths majority for the Government. There are government senators, opposition senators and, independent senators which means that, in the absence of any consensus between the Government and the Opposition, the Government will have to persuade members of the independent benches in the Senate to support such legislation.

In the post-independence period, every Parliament that assembled after a general election between 1962 and 1986 had a government majority in excess of three-fifths. However, after the 1991, 1995, 2000, 2001, 2002 and 2015 general elections, there was no three-fifths majority available to those governments to support any legislation that sought to infringe fundamental human rights and freedoms.

The decision to attach a certificate or not attach a certificate that would indicate the intention of Parliament to legislate in a manner inconsistent with the human rights provisions of the constitution is an important ministerial decision.

The Ministerial Risk of Excluding the Three-Fifths Certificate

Any government can bring legislation to Parliament to infringe any of the enshrined rights and freedoms in the Constitution. In doing so they must decide whether there is a requirement for a three-fifths majority in both Houses of Parliament which usually provides a passport to legislate notwithstanding the existence of those rights and freedoms. The backstop in this arrangement is the judge who can ultimately decide that such a requirement for a three-fifths majority ought to have been included by Parliament when the legislation was being enacted or by making a determination that the legislation that was enacted is not reasonably justifiable in its attempt to infringe fundamental human rights and freedoms.

The Maxi Taxi Act 1979 [14] that was enacted minus the three-fifths majority and did not include the preamble confessing inconsistency with sections 4 and 5 of the Constitution and had no certificate authenticated by the Clerks in either House confirming the required three-fifths majority provides an example of ministerial delinquence.

On 19 May, 1992, Mr. Justice Aeneas Wills sitting in the High Court in the matter of Curt Mendez and the Transport Commissioner and the Attorney General [15] held, inter alia, as follows :

By virtue of the provisions of Section 13 of the Constitution supra there is nothing to show that it was an Act which had been declared to have effect even though it was inconsistent with Section 4 of the Constitution. I therefore find that the enacting power of the Legislature was not exercised in accordance with the terms of the Constitution from which it derives its power. In the result, I find that sections 6, 7 & 12(f) are null and void and of no effect. That is to say they are unconstitutional. [16]

In this case, it was the error of the Minister in not attaching a certificate and failing to seek a three-fifths majority in Parliament which did not legislate in accordance with section 13 of the Constitution where deprivation of property was concerned led to unconstitutionality being inflicted upon the Maxi-Taxi Act in 1992 when Curt Mendez challenged its validity.

Mr. Justice Wills went further to say in his judgment as follows :

Should these sections and regulations be excised from the Act, would the Legislature have enacted what survives without Sections 6 and 7 or Section 12 ? I think not. Moreover I think the Act would be unworkable. In the result –

(1) *I declare that the Maxi-Taxi Act Chapter 48 : 53 is unconstitutional, null and void and of no effect…..* [17]

This outcome led to Parliament having to enact a new Maxi-Taxi Act within a couple of weeks of the previous one being declared unconstitutional for failure to include the preamble of intended infringement and the certificate for a three-fifths majority.

The Parliament that assembled after the 1991 general election did not have a government majority that could have attained a three-fifths special majority to enact a new Maxi Taxi Act. In the circumstances, there was discussion and compromise between the Government and the Opposition and a new Act came into force shortly after this judicial decision.

The then Government had served notice of appeal of the decision of Mr. Justice Wills, but it had a much larger problem on its hands. It had to enact a new Maxi Taxi Act in order to regulate a part of the transportation system that suddenly had no legislation to govern it.

For the first time under this particular constitutional requirement, a government would have to reach across the aisle to the opposition as its 21 MPs were not enough to pass the legislation because, with the Speaker coming from outside, in a 36 member House the size now became 37 and they would need the support of 23 MPs.

The bill to re-enact the Maxi-Taxi Act was passed in the Senate on Thursday 28 May, 1992 with the favourable votes of 23 senators which was a mix of those government and independent senators who were present and five abstentions from those opposition senators who were present.

On the following day, the bill was brought to the House of Representatives and the government commenced by seeking to take it through of all its stages that day. Later in the proceedings, it emerged that if the government were to agree to an opposition demand for certain amendments, then the opposition would vote for the bill. The House was subsequently adjourned to 1.30pm on the next day, Saturday 30 May at 1.30pm.

There were obviously discussions overnight between the government and the opposition which resulted in the House not commencing its sitting until 6.25pm on the following Saturday evening.

The government had made concessions to the opposition and there was such overwhelming consensus that the House was actually adjourned by 6.50pm with the remaining debate, committee stage and final vote all being taken within that twenty-five minute time frame. The opposition abstention in the Senate the day before had turned into a positive vote by all 33 MPs present in favour of the bill with no abstentions or negative votes. The House of Representatives amendments were agreed by the Senate on 2 June, 1992 and the President assented to the legislation on 12 June, 1992.

The political consensus was achieved, however, it was ministerial responsibility that had to be adjusted to alter the policy of the Government to suit the wishes of the Opposition in order to furnish the country with a new Maxi Taxi Act in 1992.

This is a significant deviation from the Westminster practice of ministerial responsibility where there is an expectation that the Opposition will have its say and the Government will have its way. In Trinidad and Tobago, that is not the case in situations where the Government does not have enough MPs in the House of Representatives to have a three-fifths majority.

Ministerial Removal of the Three-Fifths Majority Requirement during Debate

In respect of the Miscellaneous Provisions (Marriage Act) 2017, [18] the Attorney General took a decision at the committee stage of the Bill to withdraw the clause that contained the requirement for a three-fifths majority and the preamble that confessed that the Bill was one that sought to infringe fundamental human rights and freedoms.

The Bill was effectively raising the legal age for marriage from 16 to 18 and it had been laid in the Senate with a clause that imposed on it a requirement to secure a three-fifths majority because of ministerial recognition that it could possibly infringe fundamental human rights and freedoms.

This was an assertion of ministerial responsibility taken by the Attorney General to alter his original position during the debate in the Senate. He officially made the change during the committee stage of the consideration of the Bill and it is recorded in the Hansard for the Senate as follows :

Question proposed*: That clause 3 stand part of the Bill.*
Madam Chairman*: There is an amendment as circulated by the Attorney General.*
Mr. Al-Rawi*: The proposal is to delete clause 3. Consonant with the submissions made during the wind-up, I indicated that the Government's intention is to propose the deletion of the preamble, the certification clause and the clause by which we require a three-fifths majority. The preamble and certification clause come at the end of the committee stage by order of process and the first opportunity to clean up as indicated is to delete clause 3, which is to remove the language to say that the "Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution".* [19]

The Bill was passed by the Senate with a simple majority on 17th January, 2017 and was sent to the House of Representatives where it was also passed with a simple majority on 9th June, 2017. It received presidential assent on 22nd June, 2017. There have been no legal challenges against this Act since its enactment and up to the time of writing.

However, this approach by the Attorney General reflects the fact that ministers can take risks to exclude the preamble and the certificate for a three-fifths majority if they feel confident enough in the departmental and other advice that they may receive. The calculated risk is that there will be no legal challenge after enactment or the belief by ministers that the State can win such a legal challenge in the courts if tested.

Ministerial Removal of Potential Infringement Clauses during Debate

Another approach adopted by ministers during debate on a Bill in the Parliament has been to remove potentially dangerous clauses from the Bill that may infringe human rights if they were left in together with the removal of the preamble and the certificate requiring the three-fifths majority. This happened in respect of the Income Tax (Amendment) Act 2018. [20] In this case, the Government was unable to secure the support of the Opposition during debate on the Bill in the House of Representatives and decided to strip the Bill of all potentially offending clauses at the committee stage of the proceedings on the Bill in order to water it down and remove its vulnerability to legal challenge.

The actual process that emerged at the committee stage of this Bill in the House of Representatives resembled a virtual cat and mouse game because the Government was not certain that the Opposition would support the legislation. The following excerpt from the Hansard captures these moments :

Bill committed to a committee of the whole House.
House in committee*.*
Madam Chairman*: Minister of Finance, are we ready? Clause 1 ordered to stand part of the Bill. Clause 2. Question proposed: That clause 2 stand part of the Bill. "Delete clause 2."*
Mr. Imbert*: Madam Chairman, we have circulated an amendment to clause 2 which simply deletes it.*
Mr. Al-Rawi*: Madam, would you permit me just to ask a question squarely of the Leader of the Opposition through you? Before we consider amendments, which we have circulated, is the Opposition willing to support the Bill in its current form, because we have not received any amendments from the Opposition? Nothing has been circulated so we have nothing to tell us that you have any complaint with the Bill as it relates to the clauses. So, Madam Chair, could I just ask that question of the Leader of the Opposition? Is there any support for this Bill in its full form?*
Mrs. Persad-Bissessar SC*: We have shared our concerns, repeatedly shared our concerns with respect to the provisions of the Bill, prior to what you are seeking to now amend. We have shared those concerns, and we will share our concerns as we do the clauses with the new provisions—the new amendments that have been bought forward, one of which is this clause 2, which is to remove the constitutional clause.*
Mr. Imbert*: So you want to leave it? You want to leave it, the constitutional majority?*
Mrs. Persad-Bissessar SC*: I am saying, we will share clause by clause. The AG asked me, do I support the Bill in its entirety before amendments. I said, we have shared our concerns repeatedly with respect to that and the answer is no.*
Mr. Al-Rawi*: Okay. Thank you.*
Mrs. Persad-Bissessar SC*: So now you want to remove that, proceed. I mean, you are the boss.*
Mr. Imbert*: I think you have made it clear that you are not supporting the Bill.*
Mrs. Persad-Bissessar SC*: Yes, we did make that very clear.*

***Mr. Imbert**: Right, I am glad you have clarified that you are not supporting the Bill.*
***Mrs. Persad-Bissessar SC**: In its current form we are not supporting it.*
***Mr. Al-Rawi**: Thank you, Madam Chair. Having not heard from the leader in the debate, I just wanted it on the record. Thank you.*
***Mr. Imbert**: So, Madam Chairman, under those circumstances, since we on this side do not have 26 votes, we are seeking to delete clause 2, the constitutional requirement.*
***Madam Chairman**: Okay. So the question is that clause 2 be deleted.* [21]

What emerged after this is that the Leader of the House proposed that the removal of clause 2 of this Bill be deferred until the end of the consideration of the rest of the Bill. As the committee stage proceeded, the Government stripped the Bill of key clauses and at the end of the committee stage they returned to the removal of clause 2 which they did. The Bill was then passed with a simple majority, however, its most critical elements that may have constituted an infringement of the Bill of Rights were removed.

This tactic employed by the Minister of Finance, Colm Imbert, and the Attorney General, Faris Al-Rawi, with assistance from the Leader of the House, Camille Robinson-Regis, attempted to guage whether the Opposition would support the individual clauses of the Bill during the committee stage. Based on how those deliberations went, the Ministers would know whether to leave the three-fifths majority requirement intact or remove it. In this case, they removed it.

The reality is that the Government's policy turned on the whim and fancy of the committee stage deliberations with the Opposition. Whatever the Opposition said would determine whether the Bill would pass with its more severe provisions or whether the backup plan would have to be implemented to water down the Bill. The latter prevailed.

The Bill was taken through all of its stages in the Senate in the format that it came from the House of Representatives on 4th December, 2018. It received presidential assent on 11 December, 2018.

On Thursday 6 December, 2018, the following report was recorded in the Newsday newspaper in Trinidad and Tobago in a report by Sean Douglas :

THE Senate overwhelmingly passed the Income Tax (Amendment) Bill 2018 late Tuesday night, despite rejection by the Opposition. All nine independent senators, most of whom were appointed last month, voted for the bill.
Last Friday, the bill emerged from the House of Representatives in a watered-down version, that the Government said no longer needed a special majority for its passage, but which the Opposition had likewise rejected. The House passed it by a simple majority.
In the Senate, the bill was passed by 24 votes "for" – comprised of Government and independent senators – to the Opposition's six votes "against."
The Government has claimed the country's financial system was jeopardised by any delay in passing the bill that facilitates TT's compliance with a European grouping – the Global Forum, but the Opposition argued the bill threatens people's constitutional rights by the exposure of their tax details. [22]

This media report captures the essence of the standoff between the Government and the Opposition. It essentially underscores the fact that ministers have to have two policies when they go to Parliament with Bills that require a three-fifths majority that the Government does not enjoy in the House of Representatives. One policy for if they

get the support of the Opposition and the other policy for if they do not get the support of the Opposition.

The latter is never known to the public and will only be revealed at the time of the committee stage of the proceedings on a bill. What ministers will go to Parliament with will be their publicly advertised statements on their intentions. They will never telegraph their backup plan as part of the debate.

However, when they get into difficulties with the Opposition on the floor of the House in the committee stage, they can rapidly adopt a backup plan that was never publicly advertised before and seek to blame the Opposition for having to make last minute changes. All of this was never considered by the framers of the constitution in 1962.

Alteration of Ministerial Policy through Government-Opposition Consensus

The enactment of legislation by consensus between the Government and the Opposition where the three-fifths majority requirement is satisfied across the aisles in the parliamentary chamber usually happens when there is an alteration of ministerial policy through compromise with the Opposition.

One of the tactics that has been employed by the Opposition in order to arrive at such a consensus is to request the use of a Joint Select Committee of both Houses of Parliament which permits the disagreements to be ironed out away from the glare of publicity.

In this way, both sides come closer together and are able to support a joint position which renders the final vote a certainty to cross the threshold of the three-fifths majority.

A very good example of this in recent times was seen in the debate over the Tax Information Exchange Agreements (United States of America) Act 2017. [23] The Bill for this Act was laid for First Reading in the House of Representatives on 9 September, 2016 and the Second Reading was commenced on 23 September, 2016. There then followed some gymnastics between the Government and the Opposition with the main disagreement being that the Bill should be sent to a Joint Select Committee for consideration. The Opposition wanted this and the Government did not.

The Government persisted with moving forward on the Bill and took it as far as the committee stage in the House of Representatives on 12 December, 2016. However, the problem that the Government faced on that day was the absence of all Opposition MPs from the Parliament Chamber in protest at the prior suspension of two of their MPs at the previous sitting.

That meant that the Bill would not have received the required three-fifths majority. When the House resumed after the Christmas recess on 6 January, 2017, the Bill was referred to a Joint Select Committee which had to report by 3 February, 2017.

This is recorded in the Hansard as follows :

The Minister of Finance and Acting Minister of Energy and Energy Industries (Hon. Colm Imbert)*: Madam Speaker, I seek your leave under Standing Order 68 to move a Motion before the House.*

Madam Speaker*: Minister of Finance, could you just particularize under Standing Order 68 what—[Interruption]*

Hon. C. Imbert*: Before we resume the committee stage, I would like to move a Motion with respect to that matter. Standing Order 68(3), sorry.*

***Madam Speaker**: That will be a Motion to withdraw the Bill from the Committee as a whole, to a Joint Select Committee? That is the nature?*
***Hon. C. Imbert**: Yes, Madam Speaker. [Desk thumping]*
***Madam Speaker**: Members, may we have a little order please. I would like to invite the Leader of the House and the Chief Whip to just approach the Chair to discuss this. [Members approach the Chair]*
***Madam Speaker**: Minister of Finance. Hon. Minister, it has been agreed that you will not be allowed more than 10 minutes and the other side will not be allowed more than 10 minutes, with no more than five minutes to reply. Minister of Finance.*
***Hon. C. Imbert**: Thank you, Madam Speaker. Madam Speaker, in accordance with Standing Order 68(3),I beg to move that the Tax Information Exchange Agreements Bill, 2016, be withdrawn from the Committee of the whole and be referred to a Joint Select Committee—[Desk thumping]—and that this Committee be required to report by February 03, 2017. This would give, after the Senate names its Members which we expect to happen next week, the Committee 21 days to resolve this matter which is more than adequate.* [24]

Having regard to the international significance of this Bill, the Government had no choice but to agree to a Joint Select Committee which they were attempting to avoid, but they had no options. The Opposition knew that the Government had to pass this legislation because it was time-specific in relation to the requirements set by the United States Department of the Treasury.

The Government had made several amendments to the Bill in the original committee stage on 12 December, 2016, but they could not continue without the support of the Opposition because a three-fifths majority was required. The Joint select Committee met and their report was subsequently debated and on 23 February, 2017, the House of Representatives voted 39-0 among MPs present and voting out of 41 MPs to unanimously support the Bill.

In the Senate, the Bill went through all of its stages on 7 March, 2017 and received the support of 23 Senators present and voting with one abstention by an independent Senator (out of 31 Senators).

The Bill received presidential assent on 20 March, 2017 and was proclaimed on 6 July, 2017 as it was a Bill that was deemed to come into effect by proclamation.

In this situation, the policy of the Government was significantly altered by having to be submitted to a Joint Select Committee of Parliament. The alteration of the original policy that was made public on 9 September, 2016 was significantly altered on 12 December, 2016 in the committee of the whole House in the absence of any Opposition MPs and then that revised Bill was withdrawn from the committee of the whole House and sent to a Joint select Committee where further changes were made.

This had the effect of passing the political will of the Government through a parliamentary filter that was controlled by the wishes of the Opposition and what came out on the other side was a completely different Bill than had previously been unveiled in September 2016.

However, the key ingredient here was Government-Opposition consensus which is rare in the Westminster-Whitehall model in the Commonwealth Caribbean, far less the Westminster model in the United Kingdom. The ministerial policy was changed according to the wishes of the Opposition.

Conclusion

The creation of an independence constitution for Trinidad and Tobago in 1962 had as one of its highlights the introduction of a Bill of Rights into the constitution. The original draft constitution that had been published for public comment in February 1962 was changed after the Queen's Hall Conference in April 1962. The Joint Select Committee of the Legislature formally received a revised Bill of Rights based on the Canadian Bill of Rights 1960 when they met in May 1962. The Government went to the Independence Conference at Marlborough House in May/June 1962 with a policy position that they wanted to introduce the Canadian Bill of Rights 1960 suitably modified.

What has been revealed from the confidential discussions at Marlborough House between the United Kingdom delegation and the delegation from Trinidad and Tobago is that the Opposition forced significant changes to the Canadian Bill of Rights model during the negotiations that (i) established the need for Parliament to accept a confession from the Government that its legislative intent was to infringe human rights, (ii) settled the need for a three-fifths majority to infringe human rights in legislation, (iii) introduced the concept of reasonable justifiability for challenging such legislation in the courts, and, (iv) introduced the facility for having appeals on these matters to the Judicial Committee of Her Majesty's Privy Council.

The primary concern was the enforcement of the protective provisions and considerable discussion was devoted to the methods by which this could have been accomplished. What was completely overlooked was the impact that these provisions would have on the doctrines of ministerial responsibility to Parliament.

Jowell and Oliver provide a useful definition of individual ministerial responsibility in the Westminster model :

The classic version of the doctrine is that ministers are responsible to Parliament for all that happens in their departments, though they will only be regarded as culpable in respect of their own decisions or failures. They must give an account to Parliament, and they are expected to make amends if something has gone wrong. [25]

This classic version was the version that would have applied in 1962 and still applies today in Trinidad and Tobago. The political impact of the requirement of a three-fifths majority for any legislation that could be deemed to be inconsistent with the human rights provisions is a major concern for individual ministerial responsibility.

The fist decision that must be made is whether or not the legislation would require a three-fifths majority. If such a majority is deemed necessary, the Bill will be laid in Parliament to reflect that its intention is to infringe human rights and a three-fifths majority is required. Recent practice has shown that during the debate, ministers may decide to remove the requirement at the committee stage, either on its own or in conjunction with other clauses that may expose the legislation to a likely legal challenge on the ground of reasonable justifiability.

These determinations all have to do with the Parliament and the accountability of the Executive branch to Parliament. Where there is consensus, ministers would have had to alter their policies because of the political impact of the wishes of Parliament. Where there is no consensus, ministers may either have decided to take the risk to remove the three-fifths requirement alone or remove the requirement along with other

clauses in the legislation that may make the legislation vulnerable if enacted with those clauses and no three-fifths majority.

The checks and balances built into the system of government are such that ministerial responsibility is checkmated by the three-fifths majority requirement if ministers belong to a government that was not blessed with a three-fifths majority by the electorate in the House of Representatives.

Governments in Trinidad and Tobago in 1991-95, 1995-2000, 2000-2001, April-August 2002, 2002-2007, and 2015 to today, did not possess a three-fifths majority. In the circumstances, ministerial responsibility was made subject to parliamentary control in a manner that would have left the government with the responsibility for the legislation, but would not have permitted the government to have its way as with other simple majority legislation.

It is only in the post-1991 period that this phenomenon has emerged. All governments from 1962 to 1991 enjoyed majorities in excess of three-fifths and their only major challenge was to convince enough members of the independent bench in the Senate to vote for such legislation, if there was no consensus between the Government and the Opposition.

At the same time, some opposition MPs have suggested that the Government has been dictatorial in withdrawing certain clauses from legislation in the face of the absence of support from Opposition MPs, when in fact the Opposition had got their way by forcing the Government to back down on their original proposals.

Whenever a government is forced to back down, the narrative of government dictatorship is antithetical to what has actually happened. There is no dictatorship because the opposition have had their way.

The founding fathers of the Trinidad and Tobago independence constitution may not have realized that they actually empowered Parliament against the Executive when they decided on this particular mechanism without ever discussing it.

The bigger picture is that the Canadian Bill of Rights 1960 model has had a significant impact upon the power of Parliament over the Executive by virtue of its inclusion, suitably modified, of the Canadian Bill of Rights 1960 in the constitution of Trinidad and Tobago.

The dominance of the Executive over Parliament in the Westminster model has been altered in Trinidad and Tobago in favour of Parliament by virtue of the application of a suitably modified version of the Canadian Bill of Rights 1960 in its independence and republican constitutions.

END NOTES

1. Verbatim Notes of Proceedings of Meeting on Draft Constitution held at Queen's Hall, Port-of-Spain, 25th to 27th April, 1962 (Trinidad : Government Printing Office, 1962), p. 60.

2. Verbatim Notes of Proceedings of Meeting on Draft Constitution held at Queen's Hall, Port-of-Spain, 25th to 27th April, 1962 (Trinidad : Government Printing Office, 1962), p. 186.

3. Report of the Joint Select Committee to consider Proposals for an Independence Constitution for Trinidad and Tobago, House Paper No. 2 of 1962, 11th May, 1962, p. 69.

4. Report of the Joint Select Committee to consider Proposals for an Independence Constitution for Trinidad and Tobago, House Paper No. 2 of 1962, 11th May, 1962, Appendix I.

5. UK National Archives, CO1031/3305, Trinidad and Tobago Independence Conference 1962, T.C.I. (62) 2nd Meeting, 28th May, 1962, 3.00pm, p. 1.

6. UK National Archives, CO1031/3305, Trinidad and Tobago Independence Conference 1962, T.C.I. (62) 2nd Meeting, 28th May, 1962, 3.00pm, p. 4.

7. UK National Archives, CO1031/3305, Trinidad and Tobago Independence Conference 1962, T.C.I. (62) 7th Meeting, 4th June, 1962, 10.30am, p. 1.

8. UK National Archives, CO1031/3305, Trinidad and Tobago Independence Conference 1962, T.C.I. (62) 9th Meeting, 6th June, 1962, 3.30pm, pp. 4-5.

9. UK National Archives, CO1031/3305, Trinidad and Tobago Independence Conference 1962, T.C.I. (62) 9th Meeting, 6th June, 1962, 3.30pm, p. 5.

10. UK National Archives, CO1031/3305, Trinidad and Tobago Independence Conference 1962, T.C.I. (62) 9th Meeting, 6th June, 1962, 3.30pm, pp. 5-6.

11. The Trinidad and Tobago (Constitution) Order in Council 1962, S.I. 1962/ No. 1875, Second Schedule, s. 5.

12. Trinidad and Tobago, Act No. 4/1976, The Schedule, s. 13.

13. See Hamid Ghany, *The Commonwealth Caribbean : Legislatures and democracy*, in Nicholas Baldwin (Ed.), Legislatures of Small States : A comparative study (Oxford and New York : Routledge, 2013), pp. 23-34.

14. Trinidad and Tobago, Act No. 48/1979.

15. Trinidad and Tobago Supreme Court, HCA No. 342 of 1992.

16. Trinidad and Tobago Supreme Court, HCA No. 342 of 1992, p. 16.

17. Trinidad and Tobago Supreme Court, HCA No. 342 of 1992, pp. 16-17.

18. Trinidad and Tobago, Act No. 8/2017.

19. Trinidad and Tobago, Hansard, Senate, 17th January, 2017, p. 160.

20. Trinidad and Tobago, Act. No. 18/2018.

21. Trinidad and Tobago, Hansard, House of Representatives, 30th November, 2018, pp. 158-160.

22. Trinidad and Tobago, Newsday, 6th December, 2018 accessed on 13th July, 2019 at https://newsday.co.tt/2018/12/06/independent-senators-back-income-tax-bill/

23. Trinidad and Tobago, Act No. 4/2017.

24. Trinidad and Tobago, Hansard, House of Representatives, 6th January, 2017, p. 38.

25. Jeffrey Jowell and Dawn Oliver (Eds.), The Changing Constitution (Oxford and New York : Oxford University Press, Seventh Edition, 2011), p. 172.