

# The Theory and Mechanics of Transitioning to Independence – The Independence Conference, the Constitutional Conference and Subsequent Commission(s)

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## **I INTRODUCTION:**

The scope and focus of this Paper is to highlight the issues, amongst others of course, upon which Bermuda, having first received an affirmative vote for Independence, will base its transition to Independence. (This doesn't, however, prevent the Government of the day to be PROACTIVE and to make investigations earlier).

Endemic in that transition, of course, is the narrower consideration of what form the "Independence Constitution" will take. Will, depending on what position the Government of the day has adopted or put to the people, the Independence Constitution be REPUBLICAN or MONARCHICAL in form and substance? Will, if REPUBLICAN, there be an EXECUTIVE or NON-EXECUTIVE President? How will constitutional amendments be effected? Will the Senate be ELECTED or APPOINTED? How many SENATORS will there be and HOW Chosen? How much of the 'new' constitution will be local, 'home-grown' or autochthonous? Will the name BERMUDA and all of its PARISHES be changed to reflect or relate to the population and if so, how will this be constitutionally effected? And finally, who will be a citizen and would dual or multiple citizenships be permitted?

These, and other, questions would be the subject(s) of an Independence Conference at which, at a minimum, Government members, members of the Opposition and perhaps other interested parties, together with the relevant personnel of the U.K. Foreign and Commonwealth Office, would be in attendance. The latter party would be wholly responsible for the mechanics of effecting and giving full expression to the concept of Independence, for example, the Bermuda Independence Act (BIA), the requisite Order in Council (OIC) and other decolonizing legal and constitutional accoutrements.

In summary, an Independence Conference could include a discussion of broad topics which will include a discussion concerning a separate Constitutional Conference or Commission. It is indeed quite possible (depending on the urgency of the matter) to conduct simultaneously or concurrently, an Independence Conference and a Constitutional Conference although the accepted and usual practice appears to be to keep the two mutually exclusive and to run the Constitutional Conference/Commission subsequent or sequential to the Independence Conference once constitutional essentials or arrangements

have been stabilized or have become solidified. These are the broad areas that concern this Paper. An Independence Conference will deal with every aspect, topic and area affected by a move to Independence, including, in principal, the model of Government and it's constitution. A Constitutional Conference will deal more particularly with the selection of a Constitutional Commission, the drafting or framing of the constitution itself and of ascertaining it's acceptance(plebiscite or otherwise) by the people affected by it etc.

## **II THE THEORY AND JUSTIFICATION FOR INDEPENDENCE:**

The U.B.P. Government on pages nine (9) and ten (10) of it's Discussion Paper entitled "Independence For Bermuda" presented by the then Premier the Hon. Sir John H. Sharpe, KT, C.B.E., J.P., M.P. to Parliament on the 15<sup>th</sup> day of July, 1977; had the following to say on the justification for Independence:

"It is often argued that Bermuda is effectively as independent now as it would be if it were nominally and constitutionally independent, and that it is in effect better off. Also the question is often asked – Independence from what or from whom? The answer is that with independence Bermuda would be free of the limited constraints which can now be imposed upon it by the United Kingdom.

Support for Independence is most likely to stem from considerations of national confidence and pride in self sufficiency. For example, a Bermuda (not British – my emphasis) National Anthem, a national flag, and other emblems of statehood would be a source of national pride and satisfaction to a people with aspirations to run their own affairs. In the event of independence Bermuda would at once assume full responsibility for all the powers of a Sovereign State, including those reserved under the present Constitution, to the United Kingdom Government, viz external affairs, defence, internal security and the Police".

Clearly, in the absence of assuming these kinds of responsibilities to ourselves, which are presently left to another Independent Government four (4) thousand miles away, how can it be claimed that we are SELF-GOVERNING? How can we claim to have internal government, when the Governor, the Queen's representative, can withhold the Queen's assent and effectively VETO any and all local laws passed through Bermuda's bicameral legislature? In short, under Bermuda's present Constitution, one man, the British Governor, can stop or overturn 'law' that was debated upon, consented to and passed by forty-seven (47) Bermudian legislators constituted by the Senate and the House of Assembly.

Sir Kenneth Roberts-Wray on pages 248 and 249 of a book, whose foreword was written by Lord Denning, the Rt. Hon. Master of Rolls, entitled, "Commonwealth and Colonial Law," commented on these matters in the following manner when considering Lord Durham's celebrated Report produced in 1839 as a result of an investigation into armed uprisings in upper and lower Canada in 1837 and 1838.

Lord Durham reported that the root cause of the trouble was the so-called "Representative system," under which only the lower House of the Legislature, being elected, represented "the people," the upper House being nominated, and the Executive consisting of the Governor with official and unofficial advisers selected and appointed by him either with or without instructions from the Sovereign. This system, which still survives in Bermuda (1839 until 1968- my emphasis) has its obvious weaknesses."

Roberts-Wray went on to say that Lord Durham provided the solution for these weaknesses in his own words, as follows:-

"Every purpose of popular control might be combined with every advantage of vesting the immediate choice of advisors in the Crown, were the Colonial Governor to be instructed to secure the cooperation of the Assembly in his policy by entrusting its administration to such men as could command a majority, and if he were given to understand that he need count on no aid from home in any difference with the Assembly that should not directly involve the relations between mother country and the colony."

Roberts-Wray's view of Lord Durham's solution was that, "here we have the seed of responsible government, carrying with it internal self-government. Nowadays (1966, when the book was printed and Bermuda had its 1966 Constitutional Conference) that is the last stage before complete independence and it is comparatively short-lived....At its inception, responsible government still left ultimate control with the United Kingdom in matters affecting relations and the mother country, matters defined by Lord Durham: the constitution, foreign relations, trade, and the disposal of the public lands. This control could be exercised through the United Kingdom Parliament, reservation of Bills for the Queen's assent, the "veto", disallowance of local laws and the general executive authority of the Governor, acting under directions from the United Kingdom."

Bermuda, is the anachronistic, but nevertheless modern-day expression and quintessential example, of Lord Durham's "solution" for responsible self-government. Bermuda has had 'responsible (self or internal) government" since 1968, approximately thirty-seven (37) years. Sir Roberts-Wray thought such a government before Independence would be 'short-lived.'

Accordingly, from an objective point of view, politically, economically, socially and constitutionally Bermuda is well poised to transition to Independence as the third richest country in the world.

### **III THE MECHANICS OF THE TRANSITION:**

The transition from dependency to Independence is not simply a reversal of all of the legislative legal and constitutional machinery utilized to create a dependency. Although, of course, for as seamless a transition as is possible, this reversal may take place. This difficulty is largely rooted in the fact that democratic principles have evolved, people's political experiences and consciousness have evolved and, of course, the world has moved on from the time when a given country was colonized. And so, the Country is not simply being returned to its former state when it transitions to Independence. It might be that a given country is reversing the process and procedure that created it as a dependency, but at the same time, it is also 'transitioning forward' to take into account its modern day, new found status as an Independent nation in an emerging world. It is moving both backward and forward at the same time. This part of the Paper, in brief form, will attempt to illustrate this phenomenon.

Bermuda's Constitution is in fact an Order in Council (OIC) and Statutory Instrument scheduled under the Bermuda Constitution Act 1967, an Act of the Westminster U.K. Parliament. That Constitutional Order provides, amongst other matters, that the U.K. Parliament can amend or revoke the Bermuda Constitution without consultation with the Bermuda local government. It also stipulates that any local laws that are repugnant to British law will be disallowed. Accordingly, the Bermuda Constitution Act 1967 and the OIC and Statutory Instrument as a result of this Act, will have to be repealed, abolished and replaced, with a Bermuda Independence Act (BIA) and Constitution reflecting the model or form of Government (Republican or Constitutional Monarchy) adopted by the Government of the day, before transitioning to Independence. The UK Government, once notified by the Bermuda Governor and the officials at the Foreign and Commonwealth Office, will convene an Independence Conference as soon as possible after it is clearly ascertained that it is the will of a substantial majority of the

Bermuda electorate and the will of the Bermuda Government to proceed to Independence.

If a move to Independence is affirmed and confirmed at this Conference then there may be a series of Constitutional conferences and the possible establishment of a Constitutional Commission (locally or with the UK) to frame and draft a Constitution for an Independent Bermuda. The Bermuda Constitution Act 1967 will have to be invoked and the Order in Council upon which the Bermuda Constitutional Order 1968, which forms Bermuda's Constitution, will have to be revoked and replaced by a Bermuda Independence Act which will describe how Bermuda will govern itself. This is a rough approximation of the process, procedure and mechanics of the legal, administrative, constitutional and political machinery of decolonisation.

All indicia of control, such as Royal Instructions, the recalling of the Governor and his secretariat etc., would have to be effected and removed, on or before Independence Day. In Sir Kenneth Roberts-Wray's words, "To give independence involves no more and no less than erasing (all) marks of dependence" (p. 260). To throw off the "cloak and mantle" of dependency. Unlimited or unrestrained legislative freedom must be secured whereupon it would not matter whether local laws or treaties with foreign countries were repugnant to the U.K. or not. In all of these matters, Her Majesty's U.K. Government will be intimately involved and wholly responsible for effecting same from the day of the Declaration of Independence, the framing and adoption of the Independence Constitution, to the day of the "lowering of the Union Jack."

#### **IV THE CONCLUSION:**

It is clear from the above, that the transition from dependency to Independence is a meticulous, time-consuming and serious business. A business to be undertaken by a serious, meticulous, intelligent, mature and patient population.