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**Constitutionalism in Belize:
Lessons for the Commonwealth Caribbean?**

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Introduction

The Belize Constitution, like most Commonwealth constitutions, is based on the eponymous Westminster model of parliamentary democracy. In terms of the structures of governance they created, the Commonwealth constitutions substantially mirrored Westminster's. In using the term "Westminster model", one is mindful of S.A. de Smith's caution that "the Westminster model will never be a term of art, and the political scientist may also prefer to handle it circumspectly"¹ as well of Professor Carnegie's repartee "that when we speak of Westminster model constitutions, we are not being lawyers or even political scientists. We are at best being poets."² To avoid issues of constitutional taxonomy, the label "Westminster model" is used here simply to describe those Commonwealth constitutions which reproduced the essential features of parliamentary democracy as it obtained in England at the time of their independence, described by Prof. Fiadjoe as the "barest bones of the 'Westminster model'."³

These bare bones included: a ceremonial head of state who is the Queen's representative, a legislature with at least one chamber democratically elected by the people, an executive of Cabinet ministers accountable to the Legislature, safeguards for an independent judiciary, an office of Leader of the Opposition and a public service. But there were also some key differences. Commonwealth constitutions, unlike the old Westminster constitution, contained clauses declaring the supremacy of the written constitution and had entrenched bill of rights which, together, sourced the principle of separation of powers and the tool of judicial review.

By the time of the promulgation of the Belize Constitution in 1981, the Commonwealth already had twenty-plus years of experience with Westminster-style constitutions, starting with Ghana which became independent in 1957. While in many Commonwealth African countries there had been, by 1981, fundamental departures from the Westminster model⁴, in the Caribbean countries and Pacific Islands of the Commonwealth, there was little that could be termed as fundamental change.⁵ Caribbean judiciaries⁶ had already begun shaping the region's constitutional

¹ SA de Smith, 'Westminster's Export Models: the Legal Framework of Responsible Government', (1961-1963) I J of Commonwealth Political Studies 2.

² AR Carnegie, 'Floreat the Westminster Model? A Commonwealth Caribbean Perspective', (1996) 6 Carib. LR 1, 12.

³ AK Fiadjoe, 'The Westminster Transplant in the Commonwealth Caribbean-Some Pertinent Issues', (1987) 11 WILJ 64.

⁴ Ghana for example had introduced a republican form of government by 1960 and a one-party system by 1964.

⁵ See, generally, Dale, 'The Making and Remaking of Commonwealth Constitutions' (1993) 42 ICLQ 67.

jurisprudence through such cases as *Thornhill v Attorney General*,⁷ *Collymore v Attorney General*,⁸ *DPP v Nasralla*,⁹ *Minister of Home Affairs v Fisher*,¹⁰ *Hinds v R*¹¹, *Maharaj v AG*,¹² and a number of other cases.

Thus, when Belize attended the constitutional conferences in London in the months leading up to independence, it had the benefit of the Commonwealth's two decades of constitutional experience to guide it. In terms of the drafting of its constitution, Belize could avoid some of the deficiencies that had been exposed in the working of the Westminster transplant in the Caribbean, if not the Commonwealth. In terms of interpreting the Constitution, the Belizean judiciary, with the benefit of the Caribbean's twenty years of constitutional adjudication, could help to exorcise the spectre of hesitancy and conservatism that haunted the region's early constitutional judgments.¹³ The lateness of its independence¹⁴ therefore presented Belize with an opportunity to make a strong and early contribution to the defining of a distinct Caribbean jurisprudence.

The framers of the Belize Constitution introduced some significant alterations to the Westminster transplant model which, as will be shown, assisted the judiciary in expanding the frontiers of Caribbean constitutional interpretation. But the advancement of constitutionalism in Belize was not the exclusive province of the judiciary. Unlike many legislatures throughout the Commonwealth, the Belizean Legislature was proactive – even aggressive – in discharging its role of developing the Belize Constitution. Since the enactment of the Belize Constitution in 1981, the Legislature has amended the Belize Constitution six times.

This paper illustrates that by these amendments the Belizean Legislature, regardless of the degree of its consciousness of this philosophical truth, grasped the fundamental importance of constitutional reform as an equally important (if not more efficient) process, alongside adjudication, for ensuring that the Constitution remained true to its purpose. Prof. McIntosh makes the point that

⁶ Including the Judicial Committee of the Privy Council which was established as the court of final resort in Caribbean Constitutions.

⁷ [1980] 2 WLR 511.

⁸ [1970] AC 538.

⁹ (1967) 10 WIR 299; [1967] 2 AC 238; [1967] 3 WLR 13.

¹⁰ [1980] AC 319.

¹¹ [1977] AC 195

¹² [1978] 2 WLR 902

¹³ Leighton Jackson's "*Fi ni law: The Foundations for the emergence of Caribbean jurisprudence: Whither the doctrine of precedent?*" (unpublished) 2007 provides an engaging –if withering – account of the region's tentative and formalistic approach to constitutional interpretation.

¹⁴ Jamaica got its independence in 1962, Trinidad and Tobago in 1962, Barbados and Guyana in 1966. Even St. Lucia and Dominica pre-dated Belize, gaining their independence in 1979 and 1978, respectively.

constitutional reform – the amending of a democratic constitution according to its own terms – aims to make changes to the constitution “that experience reveals to be required by justice or the general good, in order to strengthen the political values to which the society has committed itself.”¹⁵ The values to which the Belizean society committed itself can only be found in one place, that is, the preamble of the Belize Constitution which states that the people of Belize:

desire that their society shall reflect and enjoy [certain] principles, beliefs and needs and that their Constitution should therefore enshrine and make provision for ensuring the achievement of the same in Belize.”

The principles, beliefs and needs referred to include faith in human rights, the dignity of the human person, the equal protection of children, respect for the principles of social justice, belief in a meritocracy, democracy, the rule of law and that the resources of the community should be so distributed as to subserve the common good. Based on this, the framers of the Belize Constitution were then tasked, in the preamble of the very Constitution to “make provisions for ensuring the achievement” of those principles, beliefs and needs in the body of the Constitution. But a society does not remain static. While the framers of the Belize Constitution devised a set of core structures and institutions for the achievement of the people’s aspirations, there had to be appropriate mechanisms to ensure that those structures and institutions were able, despite the passage of time, to remain relevant.

The Belize Constitution therefore gave the judiciary, through the process of adjudication, the power to ensure that the Constitution has continuing relevance, regardless of the times. Through the process of constitutional reform, the Legislature was given the power to introduce changes to the Constitution to achieve, as Prof. McIntosh put it, “the most appropriate ends or purposes for which the text was constructed.”¹⁶ This paper makes the case that as the Belizean judiciary interpreted the Constitution, and as the legislature introduced reforms, what emerged in Belize was a symbiotic, mutually re-enforcing dynamic between the Judiciary and the Legislature. This was an actualization of roles implicitly envisioned for them under the Belize Constitution to ensure its own resilience. It is worth mentioning that four of the six constitutional amendment acts were based either on recommendations of a broad-based political reform commission or manifesto promises of political parties. The point here is that much of Belize’s constitutional reforms emanated from a process of

¹⁵ SCR McIntosh, *Caribbean Constitutional Reform-Rethinking the West Indian Polity* (2002) at 54-56.

¹⁶ *Ibid*, p 54.

consultation with the people, creating a kind of popular constitutionalism that runs contrary to the thinking that the Judiciary is the primary or superior source of constitutional vision and development. This dynamic for constitutional development produced some results worthy of emulation elsewhere in the Commonwealth.

It is axiomatic that constitutionalism begins with the readiness of citizens to challenge governmental action and insist upon adherence to constitutional government. For the purposes of this paper, some cases that might properly be termed as judicial review cases will also be examined since the principle that decision-makers must act within their lawful powers is nothing more than a technical derivative of the broader constitutional norm of the rule of law. Two years after independence in 1981, litigation to compel compliance with the Constitution was decidedly underway in Belize. *Card v AG*¹⁷ established that the Head of State had no powers under the Constitution to discipline public officers, a function that resided exclusively with the Public Service Commission. The late Chief Justice of Belize, Sir George Brown, remarked that this decision “demonstrated ... that no one was above the law, not even the Executive Head of State, the Governor-General...”¹⁸ *Smith v AG*¹⁹ and *Carr v AG*²⁰ followed in quick succession, both re-enforcing the paramountcy of access to the courts for the purpose of securing compliance with the Constitution.

The role of the preamble in constitutional interpretation

It was *Belize Alliance of Conservation NGOs²¹ v Department of the Environment and Belize Electricity Ltd.*²² that became the *cause célèbre*. The Department of the Environment, charged with ensuring environmental compliance, had granted approval for the electric company to build a massive hydroelectric dam in the pristine rainforest of Belize. An association of environmental NGOs challenged the *vires* of the process all the way to the Privy Council. It is noteworthy that the *locus standi* of the NGOs to challenge the process was never an issue and the Supreme Court readily embraced as fundamental the citizen’s right to challenge decisions affecting the public interest that

¹⁷ 1 BzLR 270; BZ 1983 SC 15.

¹⁸ 1 Carib L R 540.

¹⁹ 1 BzLR 275; BZ 1983 SC 16.

²⁰ 1 BzLR 281; BZ 1983 SC 12.

²¹ This alliance of NGOs called “BACONGO” brought this action on the principle that the dam was bad for Belize. Environmental NGOs are particularly strong and active in Belize.

²² [2004] UKPC 6; (2004) 64 WIR 68, PC, Bze.

might breach the rule of law. In a 3-2 decision, the Privy Council found that the process of obtaining environmental approval had complied with the country's environmental laws. But in a passionate dissenting judgment Lord Walker of Gestingthorpe was of the view that the last minute disclosure before the Board that crucial geological reports as to the integrity in the dam design had been withheld from the decision-making body was enough to quash the approval. He said:

Belize has enacted comprehensive legislation for environmental protection and direct foreign investment, if it has serious environmental implications, must comply with that legislation. The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment)... The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design before the project is approved and before work continues with its construction.²³

The dissenting opinion is interesting. Lord Walker framed what was a technical environment case squarely as a case about respect for the rule of law. While the majority preferred to view the process as “a political decision about the public interest”, Lord Walker felt that the geological error in the Environmental Impact Assessment considered and approved by the Department of the Environment vitiated the approval. His dissent manifests a punctilious regard for the over-arching pre-eminence of the rule of law. Although the point was not taken before any of the courts, the requirement in the preamble of the Belize Constitution that there be policies of the state “which protect the environment” – a requirement absent from the preambles of most Caribbean constitutions – could arguably have provided the normative basis for Lord Walker's dissent. There could have been some attractiveness to the reasoning that the inclusion in the preamble of the Belize Constitution of a requirement that “policies of state protect the environment” signaled that the framers of the Belize Constitution intended that environmental policies be especially scrutinized for compliance with the rule of law.

In contrast, *Cal, Teul and Others v AG*,²⁴ better known as the Maya land rights case, is notable for the open prominence accorded to the preamble of the Belize Constitution in the reasoning of the Chief Justice of Belize. The case also raised before the Supreme Court the unprecedented issue of determining whether the protection from deprivation of property extended to cover customary

²³ Supra.

²⁴ (2007) 71 WIR 110 (SC, Belize).

land tenure of the Mayan people, the indigenous inhabitants of Belize. This issue, litigated often enough in other parts of the Commonwealth, was a novel one for the Caribbean.

The case was a test case brought by villagers from the two Mayan villages of Santa Cruz and Conejo.²⁵ In essence, their argument was that, by failing to demarcate and recognize the boundaries of their lands and by continuing to issue leases, grants and concessions over their lands, the government had failed to respect their customary land rights which were based on traditional land use and occupation of the Mayan people dating back before the time of British settlement of Belize. They contended that the government by its actions – and inactions – had breached several of their constitutional rights, namely, their right to life, to not be deprived of property and to not be discriminated against. They also contended that there was a breach of section 3 – the opening section of the Bill of Rights – which set out the omnibus rights, namely, the right to “life, liberty, security of the person and the protection of the law”.

After finding that there exists, in southern Belize, Maya customary land tenure and that the villagers of Santa Cruz and Conejo had proprietary interests in land, the question for the Supreme Court then was whether such interest constituted “property” protected under the Constitution. The starting point in the reasoning of Chief Justice Conteh was the preamble to the Belize Constitution which provided that:

Whereas the people of Belize ... (a) affirm that the Nation of Belize shall be founded upon principles which acknowledge ... faith in human rights and fundamental freedoms ... (e) require policies of state which protect ... the identity, dignity and social and cultural values of Belizeans, including Belize’s indigenous peoples ...

The Chief Justice said that:

The starting point here, I think, is the preamble of the Belize Constitution which by an amendment ... now makes explicit reference to the collective group to which the claimants undoubtedly belong, namely, the indigenous peoples of Belize.

Relying on Lord Bingham’s judgment in *Patrick Reyes v R*,²⁶ in which he advocated that “a generous and purposive interpretation is to be given to constitutional provisions protecting human rights” and that a court is “required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the

²⁵ They were backed by organized local indigenous organizations as well as powerful international indigenous rights organizations.

²⁶ [2002] UKPC11; (2002) 60 WIR 42, PC, Bze.

progress of a mature society”, the CJ concluded that the Maya’s right to land based on customary land tenure formed:

a kind or species of property that is deserving of the protection the Belize Constitution accords to property in general. There is no doubt this form of property, from the evidence, nurtures and sustains the claimants and their very way of life and existence.

It is difficult to take issue with the prominence accorded to the preamble by Conteh CJ. It was the Legislature, after all, the elected representatives of the people, which, by a constitutional amendment of 2001, introduced a specific reference to “Belize’s indigenous peoples” in the preamble, requiring that policies of state protect them. The case was not appealed by the government. The notion that the preamble plays an important role as the normative or philosophical basis for interpreting the constitution should be applauded. The extent to which issues of ethnicity, gender and minorities should be given recognition is topical in constitutional reform discourse in the Commonwealth. As recently as June of 2008, for example, the High Court of South Africa declared that South African Chinese People fall within the ambit of the definition of “black people” in section 1 of the Employment Equity Act of 1988 and in the Broad-based Black Empowerment Act of 2003.²⁷ This might at first blush appear an improbable conclusion. But the improbability of it is only skin deep. This is a good example of a judiciary eschewing the kind of formal and legalistic approach to interpretation famously proclaimed by Lord Wilberforce in *Minister of Home Affairs v Fisher*²⁸ and bemoaned by Leighton Jackson, and embracing a realistic interpretation that reflects the evolving socio-economic realities of the day.

The amendment to recognize the indigenous people by the Belizean Legislature²⁹ and the ready application of it by the judiciary is illustrative of the dynamic complementarity of these two institutions in creating a “constitutional space” for indigenous people in Belize. The legislature and the judiciary were discharging their implied role of ensuring that the constitution fulfills the aspirations of citizens of the state as reflected in the preamble. Included in the constitutional reforms to the preamble of 2001 were also references to “ethnicity”, “gender equality” and persons with disability. These, however, have not yet attracted litigation.

²⁷ *Chinese Association of South Africa and Others v Minister of Labour and Others*, High Court of South Africa (Transvaal Provincial Division) Case No. 59251/2007.

²⁸ 1980 AC 319.

²⁹ This amendment was requested by representatives of the indigenous people who were at the time engaged in negotiations with the Government of Belize over their rights to a homeland. The writer was intimately involved in the negotiations.

The Maya also argued that their human security was being threatened. They hunted, fished, farmed and gathered communally for their physical survival. This, they said, was being threatened by the government's refusal to respect their right to communal lands. Other than section 3 of the Belize Constitution which recognized "security of the person" as one of the fundamental rights and freedoms to which each individual is entitled, the Belize Constitution contained no separate, detailed or enumerated right to "security of the person". In other Caribbean constitutions,³⁰ the equivalent to Belize's section 3 is non-justiciable and considered by the Caribbean Court of Justice in *Attorney-General v Joseph* to be "in the nature of a preamble".³¹ This is because in those constitutions that opening section of their bill of rights is specifically excluded in the section that lists the rights that are enforceable. In Belize, the framers were wise to make that opening section specifically enforceable. The Chief Justice was therefore not detained by doubts as to the justiciability of section 3. He found that:

...the land they traditionally use and occupy plays a central role in their physical, cultural and spiritual existence and vitality ... without the legal protection of their rights to and interests in their customary land, the enjoyment of their right to life and their very lifestyle and well-being would be seriously compromised and be in jeopardy. This, I find, will not be in conformity with the Constitution's guarantees.

The failure of the rest of the Caribbean³² to make the opening section of their bill of rights enforceable has unnecessarily hindered the development of human rights in the region. It has resulted in a thirty-year evolutionary creep by Caribbean judiciaries towards finding a meaningful role for that opening section. Tracy Robinson, for example, makes an argument for the opening section of Caribbean bill of rights to assume "greater weight in constitutional interpretation as a normative guide..."³³ It is entirely open to Caribbean Legislatures through constitutional reform to amend their constitutions to give enforceability to it in the manner of Belize, Bermuda and Antigua and Barbuda.

Is the right to work enforceable?

Another noteworthy difference between Belize's bill of rights and that of its Caribbean counterparts is the provision of the right to work as a substantive and enforceable right under the

³⁰ Except for Bermuda and Antigua and Barbuda.

³¹ (2006) 69 WIR 104.

³² With the exception of Bermuda and Antigua and Barbuda.

³³ T Robinson, 'Inherent Constitutional Rights: recalibrating the common law constitution', (unpublished) 2007.

section 15 of the Belize Constitution. Section 15 provides that no person “shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise.” McIntosh argued that “the problem with the constitutionalization of ...the right to work means that the State ...would be in violation of the citizens’ fundamental right whenever its economic policies fail to ...provide work for anyone willing and able to work.”³⁴ He argues that its dependency on social and economic contingencies makes it meaningless as a constitutional right. In *Belize Petroleum Haulers Association v Habet and Others*,³⁵ the Belize Court of Appeal found that the requirement in the Belize Petroleum Haulers Association Act that before the Department of Transportation could grant a license to haul petrol to an applicant it had to have regard to whether the applicant was a member of the association and was prohibited from issuing a hauler’s license to anyone unless recommended by the association, was a breach of the right to work. Carey J.A., dismissed the association’s argument that the right to work was not enforceable but more in the nature of a constitutional privilege and liberty, as “semantic Terpsichore”.³⁶ In *Brown Sugar Marketplace & Others v AG and Others*,³⁷ the right to work again arose. The allegation was that a wall erected by the cruise ship docking facility which prevented its competitors from having direct access to cruise ship tourists on a boardwalk abutting all their properties was in breach of the competitors’ right to work. The case attracted immense media publicity. The Chief Justice found that the maintenance of the walls infringed the claimants’ right to work. The view of the Court of Appeal³⁸ was that since the cruise tourists could exit the docking facility and access the facilities of the claimants, albeit in a roundabout manner, their opportunity to earn a livelihood was not infringed. The approach of the Belizean courts in interpreting the right to work seems to be that what is guaranteed is the opportunity to pursue a trade or profession without unlawful hindrance by legislation or administrative action.

The remainder of Belize’s bill of rights approximates to those of its counterparts in the Caribbean and the judiciary has been fairly robust in enforcing fundamental rights and freedoms. *Belize Broadcasting Authority v Courtenay*,³⁹ for example, enforced the protection from discrimination

³⁴ McIntosh, supra note 14 at 245.

³⁵ Civil Appeal 20 of 1994, Belize Court of Appeal, (unreported), at www.belize-law.org.

³⁶ Ibid, p. 9.

³⁷ Supreme Court of Belize, Claim No 28 & 29 of 2007, 11 March 1998 (unreported), at www.belize-law.org.

³⁸ The Court of Appeal set aside the judgment of the Chief Justice with reasons to be delivered in October 2008.

³⁹ (1986) 38 WIR 79; 3 BzLR 403.

and freedom of expression. In *Wade v Roches*,⁴⁰ the Court of Appeal upheld the decision of the Chief Justice that Wade, the General Manager of Roman Catholic Schools, had discriminated against Roches in terminating her employment as a teacher after she became pregnant. Earlier, *Alonzo v DFC*⁴¹ had firmly established that redress for breach of constitutional rights could not lie against a body that was not a public body endowed by law with coercive power. *Wade v Roches* was distinguishable since the management authority of the schools had been clothed by legislation with powers that gave it a public character.

Saving law clauses: Belizean style

The clearest illustration that the framers of the Belize Constitution, in drafting the Belize Constitution, were alert to some of the challenges that had emerged from the region's experience with constitutional interpretation was their approach to savings law clause in the Belize Constitution. As recently as 2007, it was observed that:

The general and special saving law clauses are probably the most contradictory feature of Caribbean constitutions. Courts now adopt a restrictive reading of them because they are so devastating to the protection of fundamental rights and freedoms. But even the most restrictive reading faces limits; and the Privy Council in *Mathew and Boyce*, ruled that it was not possible to significantly read down the general saving law clause without doing violence to the supremacy of the provisions of the constitution.⁴²

The savings clause in the Belize Constitution appears in the chapter of the bill of rights at section 21:

Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this part.

In examining section 21, Lord Bingham in *Patrick Reyes v R*⁴³ observed that "... unusually if not uniquely, the continuing savings clauses found in many other if not all Caribbean constitutions, whether in the wider form found in some constitutions or the narrower form found in others, have no close counterpart in the constitution of Belize." Henry P in *San Jose Farmers' Cooperative Ltd. v Attorney General*,⁴⁴ gave a fuller explanation for the singularity of section 21 when he observed that:

⁴⁰ BZ 2005 CA 6; (Civil Appeal No. 5 of 2004), at www.belize-law.org.

⁴¹ 1 BzLR 82; BZ 1984 CA 20.

⁴² T Robinson, 'Inherent constitutional rights: recalibrating the common law constitution', (unpublished) 2007.

⁴³ [2002] UKPC11; (2002) 60 WIR 42, PC, Bze.

⁴⁴ (1991) 43 WIR 63

In certain territories where the “Westminster model” Constitution had been adopted, provision had been made for the continuing validity of existing laws, notwithstanding their inconsistency with fundamental rights and freedoms provisions of the constitution of the territory. In others, such existing laws become instantly unconstitutional when the Constitution of the territory came into force because they were afforded no such protection. Both provisions created problems and section 21 of the Belize Constitution was designed to overcome both problems by providing a breathing space during which the Governor-General and Parliament could effect the necessary legislative changes.⁴⁵

A majority of the Court of Appeal consisting of Henry P and Liverpool JA, having found certain sections of the Land Acquisition (Public Purposes) Act to be inconsistent with the Constitution, went on to effect minor textual amendments to the sections to bring them into conformity with the Belize Constitution. The dissent by Smith JA that this amounted to the creation of new law and could not be done by the court was met by the mild rebuke of Liverpool JA that in fact this was a task entrusted to the court which it was obliged to undertake “with an approach akin to that which Lord Atkin in *Liversidge v Anderson* [1942] AC 206 would have required of his “bold spirits””. The Legislature shortly after that judgment effected the amendments to the legislation pointed out in the judgment to bring the Act into conformity with the Constitution.

In contrast, in *Melendez v R*,⁴⁶ the Court Appeal was astute to the implied constraints on the power to modify and adapt unconstitutional laws to bring them into conformity with the Belize Constitution. The appellant, a minor at the time of his commission of murder, was, in accordance with the Indictable Procedure Code, sentenced to be detained at Her Majesty’s pleasure. The court found that this was a provision that obliged the court to delegate to the executive the power to determine the length of detention of a convicted person and was “a patent infringement” of the principle of separation of powers. The court was invited to utilize section 134 of the Belize Constitution to modify that provision of the Code to bring it into conformity with the Constitution. Telford Georges, President of the Court of Appeal, declined the invitation. He was very much alive to the fact that the circumstances here were different from the *San Jose Farmers* case. Even though the insertion by the court of simple wording could have effected conformity, Georges P observed that the “area of punishment is quite different. There is no clear principle of the common law or constitutional criterion to chart the path for one seeking to amend with modifications. It remains very much a matter of social policy.” He made a clear distinction between the prescription of a fixed

⁴⁵ Ibid, 70.

⁴⁶ 3 BzLR 289; BZ 1995 CA 4.

penalty which was a matter for the Legislature and the selection of a penalty for a particular case, the latter being a matter for the courts. The court found an escape route from its constitutional quandary in the Criminal Code which had recently been amended to empower a court to impose life imprisonment in special and extenuating circumstances where a murder of the type in issue in that case had been committed.⁴⁷

A liberal legislature

Compared to many Commonwealth legislatures that display a reflexive reluctance to expand citizens' right to access the courts to test their constitutional rights, the Belizean legislature may be regarded as having adopted a liberal approach. Included in the Belize Constitution (Third Amendment) Act of 2001 was an amendment to Chapter Two containing the bill of rights. Section 20 which provided the right of access to the courts for redress contained a proviso that if the Supreme Court dismissed an application on the grounds that it was "frivolous and vexatious", no appeal would lie. The amendment deleted that proviso. Such a proviso had been unique to Belize and no counterpart could be found, for example, in the constitutions of Jamaica, Barbados or Trinidad and Tobago. No doubt the framers of the Belize Constitution at that time were influenced by considerations of efficient use of precious court time. The proviso lay dormant until the advent of the phenomenon of constitutional challenges to the death penalty. A couple illustrations will contextualize the rationale for the amendment.

In *Lauriano v Attorney General*⁴⁸ the appellant, a death row inmate who had exhausted all appeals, brought a constitutional motion challenging the constitutionality of his death sentence. The Supreme Court, pointing out that the appellant had had the opportunity to canvas the issues before the courts, dismissed the motion as frivolous and vexatious. Before the Court of Appeal, the state made a preliminary objection that the Court of Appeal had no jurisdiction in light of the proviso. Georges P rejected the submission that, despite the proviso, the court could examine whether the basis on which the Chief Justice had arrived at his conclusion that the grounds were frivolous and vexatious was sound. He concluded that to do that "would be to allow an appeal against the determination itself." A few other cases followed this emerging pattern.

⁴⁷ Compare *DPP v Mollison* (2003) 64 WIR 140 where a similar law was modified to read 'at the pleasure of the court' rather than at the pleasure of the executive.

⁴⁸ (1995) 47 WIR 74; 3 BZLR 77.

Finally, in *Mejia, Bull and Guevara v Attorney General*,⁴⁹ the Court of Appeal revisited its position. Georges P said that a “literal interpretation of the proviso ...makes serious inroads in the scheme for the enforcement of the protective provisions of the Constitution.” Because the proviso was unique to Belize, no cases could be cited indicating the relevant matters to be considered in exercising the power to dismiss an application as frivolous and vexatious in the area of fundamental rights and freedoms of a constitution. The court reasoned that, in exercising the jurisdiction to dismiss a constitutional application on the ground that it was frivolous and vexatious, a judge should act judicially. Finding that there was no basis for dismissing the application as frivolous and vexatious, the court allowed the appeal.

Through judicial activism, the court introduced a qualification to the apparent absoluteness of the proviso. But the Legislature was not content with this judicial amelioration of the severity of the proviso. It deleted it from the Constitution along with another proviso commonly found in Caribbean constitutions. That other proviso was to the effect that the Supreme Court could decline to exercise its jurisdiction where it is satisfied that adequate means of redress for constitutional contravention are available under another law. Together, these amendments conferred upon the citizenry unhindered access to the courts where they alleged breach of their fundamental rights and freedoms.

A constitutional convention & the making of a crisis

The Belize Constitution (Fourth Amendment) Act 2001 introduced a curious amendment into the Belize Constitution. The amendment provided that the Governor General could not exercise his constitutional powers to make appointments to offices established by the Constitution or a public office after the National Assembly has been dissolved. The seeds of this amendment were sown in February of 1999 when Belize came close to a constitutional crisis. The government of the day made a number of appointments to the judiciary, including the appointment of a Chief Justice, one day before the general elections scheduled for 27 August 1998. The Secretary to the Cabinet had written to the Leader of the Opposition on 19 August 1998 inviting his comments on the proposed Chief Justice. The Opposition Leader replied that he stood ready to meet to present his views. On 24 August the Governor-General signed and sealed the instrument appointing the

⁴⁹ 3 BZLR 248.

Chief Justice. That same day, the Secretary to the Cabinet invited the Leader of the Opposition to a meeting with the Prime Minister in the capital on 25 August. The Leader of the Opposition replied suggesting that the meeting take place in Belize City on the 26 August 1998. On 25 August 1998 the Prime Minister replied, regretting that he was unable to accede to the request for a change in the appointment for a meeting. On 26 August 1998 the Chief Justice was sworn into office. The general elections were held. The government of the day lost the elections and the Leader of the Opposition became the Prime Minister of Belize.

Nearly six months after the appointment of the Chief Justice and the holding of the general elections, a Belizean citizen in *James Jan Mohammed v Attorney General*⁵⁰ challenged the constitutional validity of the appointment of the Chief Justice and sought prohibition, restraining the Chief Justice from continuing to act as Chief Justice.⁵¹ The relevant section of the Belize Constitution governing the appointment of a Chief Justice was section 97(1) which set out the procedure as follows:

The Chief Justice shall be appointed by the Governor-General acting in accordance with the advice of the Prime Minister given after consultation with the Leader of the Opposition.

But the Belize Constitution also contained a provision not to be found in any other constitution in the Caribbean. This provision set out the effect of consultation and the requirements of consultation. It stated that:

Where any person or authority is directed by this Constitution to exercise any function after consultation with any other person or authority, that person or authority shall not be obliged to exercise that function in accordance with the advice of that person or authority.

Where any person or authority is directed by this Constitution or any other law to consult any other person or authority before taking any decision or action, that other person or authority must be given a genuine opportunity to present his or its view before the decision or action, as the case may be, is taken.

Section 34 (4) of the Belize Constitution also contained a clause ousting enquiry by the courts of those functions of the Governor-General requiring him to act in accordance with the advice of, or after consultation with any person or authority. There is force in the judge's conclusion that the ouster clause could only protect from review the question of whether the Governor-General himself had actually acted in accordance with advice or after consultation. That was not what was being questioned. What was being challenged was the failure by the prime minister to comply with the constitutional requirement to consult prior to advising the Governor-General to appoint the Chief

⁵⁰ Supreme Court of Belize, action 73 of 1999 (unreported).

⁵¹ The Chief Justice was not a party to the case and had no knowledge that it was before the courts.

Justice. The judge found that when the prime minister wrote to the leader of the opposition inviting him to a meeting on Tuesday, 25 August 1998 to consult on the matter of the judicial appointments, the Governor-General had already signed and sealed the instrument appointing the chief justice on that same day. The judge said:

This is the most telling piece of evidence and shows that the proposed meeting scheduled for Tuesday, 25th August, 1998, was a mere sham ...the appointment had been perfected by the Governor-General even before the scheduled meeting which had been specifically arranged to hear the views of the then Leader of the Opposition on the proposed appointment, had taken place.

The judge added *obiter*:

I also take judicial notice of the fact that general elections of members of the House of Representatives was due to be held on the 27th day of August 1998 and the proposed appointment of Mr. Sosa as Chief Justice became effective a day before the election, i.e., 26th August 1998. Such a course of action is unheard of in a parliamentary democracy based on the Westminster model where the government of the day after the issue of the Writ of Election acts merely in a caretaker capacity and refrains from taking any major decisions. To my mind, to appoint a Chief Justice substantively just a day before the general elections makes a mockery of parliamentary democracy.

The two ends of the rule of law were tied in a Gordian knot. The case did not go before the Court of Appeal so whether that court would have unpicked the knot, or like Alexander the Great, sliced it, must remain a matter of speculation. On the one hand, the Belize Constitution, like other Caribbean constitutions, provided that a judge could be removed from office *only* for inability to discharge the functions of his office or for misbehavior. On the other hand, the Constitution had provided a defined procedure for the appointment of a judge and had gone further than its Caribbean counterparts in explaining what consultation was to involve. The clear intention was that the procedure be respected. The Wooding Commission, set up in the early 1970s to review Trinidad and Tobago's Constitution, had cautioned about the dangers of transplanting the Westminster model into "societies without political cultures which support its operative conventions". The Belize framers had the foresight to avoid *legis non scripta* and reduce the convention of consultation into constitutional text. In the end, the deposed Chief Justice and the government reached an out-of-court settlement and the legislature two years later removed the possibility of a re-occurrence of this kind of matter in a constitutional amendment.

Judicial accountability and independence

What differentiates *Meerabux v AG*⁵² from other cases around the Commonwealth involving the removal of a high court judge is that it was not politically motivated. Complaints against the judge⁵³ were initiated by the Bar Association of Belize and by a practising senior counsel. They invoked the constitutional procedures for removal on the ground of misbehaviour in office. The Constitution empowered the Governor-General to remove a justice of the Supreme Court on the advice of the Belize Advisory Council, sitting as a tribunal, after it had inquired into a referred complaint. The judge alleged bias because the Chairman of the Belize Advisory Council, who was an attorney-at-law (and was required by the Belize Constitution to be an attorney-at-law), was a member of the Bar Association of Belize, the body that complained to the Belize Advisory Council. The Privy Council accepted that the answer could be found in the doctrine of necessity. They were of the view that

it must be taken to have been within the contemplation of the framers of the Constitution that the Chairman who was directed by the first proviso to section 54(11) to preside over an inquiry into the question whether a judge of the Supreme Court should be removed for inability or misbehaviour would be a member of the Bar Association...it must also have been appreciated that complaints alleging inability or misbehaviour on the part of a justice of the Supreme Court would be a matter of concern to the Bar Association, and that it would be likely to be involved in the presentation of such complaints to any tribunal that was convened to inquire into the matter under section 98(5)(b)...in this context mere membership of the Association is not to be taken, in itself, as a ground of disqualification in the case of the Chairman.

The appellant also alleged that his section 6(8) constitutional right, which required that all proceedings of every court or other authority shall be held in public, was infringed. The Belize Advisory Council had held its inquiry in camera. The Privy Council found that section 6(8) is designed to reinforce the fundamental guarantee in section 6(1) that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. But, they held, it must be assumed:

that the framers of the Constitution had that fundamental guarantee in mind when they were addressing themselves to the composition and powers of the BAC and the functions that it was to perform. It must also be assumed that they had it in mind when they were devising the procedure that should be followed for the removal from office of a justice of the Supreme Court. They had the opportunity, if they were so minded, to make it clear that the guarantee in section 6(8) applied to these proceedings. The provisions which deal with these matters in sections 54 and 98 of the Constitution contain no hint that they must be read subject to the provisions of section 6(8)...it is

⁵² [2005] UKPC 12; (2005) 66 WIR 113, PC, Bze

⁵³ This was the same judge who presided over the deposing of the Chief Justice.

not engaged upon the determination of the existence or extent of any civil right or obligation within the meaning of section 6(8).

The judges of the Supreme Court, the Court of Appeal and the Privy Council all reached the same conclusion in the *Meerabux* case. At no stage was any serious issue taken with the operation of the removal procedures. Yet, on such a momentous matter as the removal of a judge, the legislature felt that the procedure ought to be tightened up. The existing procedure was that complaints for the removal of a judge were made directly to the Governor-General who would consider whether the question of the judge's removal ought to be referred to the Belize Advisory Council. The Belize Constitution (Fourth Amendment) Act now requires complaints to be made to the Judicial and Legal Services Commission which then considers whether the question of a judge's removal ought to be referred to the Belize Advisory Council. This removes from the Governor-General the onus of deciding whether there is enough in a complaint that merits referral to the Belize Advisory Council and places the onus on the Judicial and Legal Services Commission, a four-person panel comprised of the Chairman of the Public Services Commission, the Chief Justice, the Solicitor-General and the President of the Bar Association. It also removes the Head of State, as it were, from the political fray that sometimes accompanies something as weighty as the removal of a judge.

In 2005, the Legislature, in its fifth constitutional amendment, introduced two other amendments intended to further strengthen the independence of the judiciary. The first recognized the Magistracy as an integral part of the judiciary and provided security of tenure for qualified magistrates in the same manner as that provided for justices of the Supreme Court. Of the people who come before the courts, the great majority do so at the Magistrates Court. Public perception of justice, to a large extent, is therefore fashioned there. It would therefore seem appropriate that the magistrates also be given security of tenure. The benefit of this is however yet to take effect. Of the sixteen magistrates in Belize, only five are qualified as attorneys. There is currently no plan in place for the systematic training of magistrates which would professionalize the magistracy within a specified time period.

The second amendment introduced is somewhat opaque; it provides that "the budgets presented by the offices of the Auditor-General ... the Supreme Court and the Court of Appeal shall be given first priority calls on the Consolidated Revenue Fund." No doubt this was intended to prevent the more indirect methods of judicial interference such as budget attenuation or the

diminution of judicial salaries or pensions by allowing the judiciary to design its own budget and present it which, along with other listed constitutional offices, would take a first bite out of the budget regardless of the other demands on the budget. In practice this has not worked out as the budget for the judiciary is routinely whittled down by the Ministry of Finance and consistently represents less than 1% of the national budget.⁵⁴

Unprecedented reforms

Another instance of the Belize Legislature being sensitive to deficiencies in the Belize Constitution concerned the issue of floor-crossing. Floor-crossing is also a topic of constitutional reform discourse that has been debated for a long time across the Commonwealth. *Rowland v Musa and Hernandez* and *Rowland v Courtenay, Smiling and Swan*⁵⁵ involved the alleged attempt by two former Attorneys General to bribe two sitting members of the House of Representatives of the governing party to “cross the floor”. If the two sitting representatives had indeed crossed the floor, it would have resulted in a change of government. The bribery charges eventually collapsed. The legislature however amended the Constitution in 2001 to provide that if a member of the House of Representatives crosses the floor his seat shall be declared vacant resulting in a by-election to fill the vacant seat.

More controversial is the provision in the Belize Constitution (Sixth Amendment) Act of August 2008 that allows for the recall of elected representatives before the expiry of their normal term of office the mechanics of which are fleshed out in an accompanying Recall of Representatives Act.⁵⁶

The question of the role and relevance of the Senate has been a live issue in Commonwealth Caribbean constitutional discourse since the 1970s. The Wooding Commission of Trinidad and Tobago had recommended its abolition. Constitutional amendments introduced in 2001 restructured the Belize Senate, giving it new powers unprecedented in the Caribbean. The senate was originally

⁵⁴ For an interesting survey of this question of administrative independence of the judiciary, see Chief Justice David Simmons’ “Judicial Independence and Judicial Accountability –Some Contemporary Issues” an unpublished address to the Judiciary, Magistracy and Legal Profession of Guyana.

⁵⁵ Supreme Court actions No 59 and 60 of 1994 (unreported).

⁵⁶ In an online column the writer criticizes recall as debasing rather than deepening democracy, see www.flashpointbelize.com.

comprised of eight members, five appointed on the advice of the prime minister, two on the advice of the opposition leader and one on the advice of the Belize Advisory Council. This was expanded to twelve, six on the advice of the prime minister, three on the advice of the opposition leader and one each by the council of churches, the chamber of commerce and trade union congress along with the civil society steering committee. The senate's powers and functions were expanded to include approving any bill to alter the Bill of Rights, authorizing the ratification of any treaty by the Government of Belize, approving the establishment in Belize of any new, foreign military bases and approving the appointment of ambassadors, judges, the Director of Public Prosecutions, the Contractor-General and the Ombudsman. Since the restructuring of the senate, it is the opinion of this writer⁵⁷ that the value of the senate as a revising chamber has improved. The number of instances in which bills sent by the House of Representatives have been improved upon in substance and in drafting has dramatically increased. It has also been observed that the scrutiny of and proposed amendments to the draft bills come from the independent senators representing the churches, the business community, the trade unions and civil society.

Emboldened by its new powers, the senate sought to extend the ambit of its oversight to an extent unprecedented in the Caribbean. Following a huge public controversy over the alleged mismanagement of Belize Social Security Board (BSSB) funds in high risk, failed investments, the senate passed a resolution appointing a special select committee of the senate to inquire into the management and operation of the social security board. Almost two years later it concluded its report which was debated by the senate and accepted. One of the recommendations was that the CEO of the BSSB should be terminated. Following her termination, the CEO challenged, *inter alia*, the jurisdiction of the senate to embark on the inquiry.⁵⁸ The Supreme Court decided that under the National Assembly (Powers and Privileges) Ordinance which was still in force in Belize, the senate could have embarked on such an inquiry. While the Belize Constitution did not confer any specific power to embark upon such an inquiry, neither did it prohibit it. The Constitution, the judge found was “*merely silent about those matters.*” Since there was no conflict between the National Assembly

⁵⁷ The writer was a parliamentarian from 1999-2008.

⁵⁸ *Garcia v Hulse and Others*, Supreme Court of Belize, Action No. 496 of 2006 (unreported) available at www.belizeclaw.org.

(Powers and Privileges) Ordinance and the Belize Constitution, the court was happy to conclude that the enquiry had not been unlawful.⁵⁹

The Belize Constitution (Sixth Amendment) Act of 2008 has further reformed the Senate ensuring that the senators nominated by the Opposition and the non-government organizations together constitute the majority. It expands the senate's powers to initiate and conduct public inquiries into mismanagement or corruption by persons in central government or statutory bodies, removing the basis for the challenge of the senate's jurisdiction that was relied upon in the *Garcia* case.⁶⁰

The most far-reaching reform as it relates to the Executive has been the three-term limit for holders of the office of prime minister that was introduced in the sixth constitutional amendments.

Separation of Powers: Judiciary v Legislature

With both the legislature and the judiciary vigorously embracing their respective roles in developing the Belize Constitution, it was perhaps only a matter of time before they differed about *how* the Constitution should be developed to best reflect the aspirations of the people. Differ they did, and sharply, in *Vellos and Others v Prime Minister of Belize and the Attorney General*.⁶¹ Two of the biggest issues of the day, crime and oil,⁶² provided the basis for the disagreement. In response to spiraling crime The Belize Constitution (Sixth Amendment) Bill proposed to derogate from the guaranteed right of liberty of the person by detaining persons for up to seven days where such persons are suspected of committing or likely to commit defined serious crimes. It also proposed to derogate from the right not to be deprived of property as it related to mineral rights. Could a parliament which had the requisite majority amend the Constitution to derogate from already existing rights? This was the high seas of constitutional interpretation. The waters, though not unchartered in the Commonwealth, were very unfamiliar. The Supreme Court of India had declared that the Parliament's power to amend the Constitution by a special majority does not include the power to amend its basic structure or basic features.⁶³

⁵⁹ There was no appeal from the decision of the Supreme Court to the Court of Appeal.

⁶⁰ *Supra*, note 58.

⁶¹ Supreme court of Belize, Claim 305 of 2008 (unreported) available at www.belize-law.org.

⁶² Oil was discovered in commercial quantities in Belize in 2005.

⁶³ *Kesavananda v Bharati* 1973 (4) SCC 225.

The Belize Supreme Court did not go that far. But the amendments faced an obstacle. The Referendum Act provided that a referendum shall be held on “any amendment to Chapter II of the Constitution which derogates from the fundamental rights and freedoms guaranteed therein.” To circumvent this, an amendment to the Referendum Act repealing that clause was tabled at the same time as the sixth amendment bill. The thinking no doubt was that the Referendum bill would be enacted well before the constitutional amendment which required a 90 day delay before the second reading. Before the Referendum amendment bill could be enacted, a group of registered voters sought mandamus against the prime minister to compel him to initiate a referendum on the amendment to the bill of rights. The Chief Justice granted an interim injunction prohibiting the presentation of the bill for the signature of the Governor-General pending the trial. At the stage of final judgment, the Chief Justice found that the constitutional amendment bill if enacted, would derogate from the rights to protection of personal liberty and from deprivation of property and that clause 2 (2) of the Referendum Act “was intended to protect against the amending powers by a cyclical majority” and without it “no fundamental right or freedom...would be immune from alteration or derogation.” He concluded that:

...in introducing the two bills on the same day, there was a clear attempt to remove from consideration or to deny an opportunity the electorate of Belize to have a say on the proposed changes to ...the Belize Constitution...it does not make one whit of a difference that the statutory requirement of a referendum on such a proposed constitutional change may be repealed or abolished.

He lifted the injunction, declined to order mandamus against the prime minister, but declared that a referendum should be held on the relevant clauses of the constitutional amendment bill. The decision to injunct the amendment to the Referendum Act, an ordinary piece of legislation which was not itself unconstitutional appears untenable. But for the interim injunction, the amendment to the Referendum Act would have gone ahead, removing the basis for the judicial review action. The decision is on appeal and will more than likely be overturned.

What next in reform?

The story of constitutionalism in Belize has been one in which both the judiciary and the legislature have tried to ensure that the Belize Constitution does not remain inflexible, like the hieroglyphs on a Mayan stela, but that it “evolves organically over time to reflect the developing

needs of society.”⁶⁴ If one accepts the view that the constitution should be the institutionalization of the people’s will, then undoubtedly the dénouement of the story is that much of the constitutional reforms had the benefit of the active participation of the people.⁶⁵

Should it matter that an educated analysis of a particular piece of reform demanded by the people, such as the right of recall, shows that it will debase rather than enhance democracy? Belize has been inconsistent in its approach to this question. In the February 2008 general elections the people voted, by separate ballot, for an elected senate. Recall of representatives was instituted by the legislature but an elected senate was rejected.

Perhaps what is more important is that Belize has not been coy in testing reforms to its Westminster bequeathed constitution to find a form that fits well with the thinking of a restive citizenry as to how best it should be governed. The reforms have not been regressive but reflect a genuine attempt at improving the constitution. Belizean legislators cannot be described, to borrow from Blackstone, as rash and inexperienced workmen nailing on ad hoc changes to the great cathedral of the constitution without regard for the integrity of the underlying structure.

Yet the process of constitutional development has not been without blights caused by the failure to establish the CCJ in its appellate jurisdiction, the appalling delay in delivering judgments that undermines the rule of law, the failure to develop ADR mechanisms to ease the cost and time of court processes and the anomaly of retaining a British head of state. It is hoped that these matters will be tackled in the next round of reforms.

Horace Walpole observed of the centuries-old British constitution that “It is Time that composes a good constitution...” In a fast-paced world in which the changing demands of the people consistently outstrip the state’s ability to respond, might we not be forgiven for using the innovative tool of constitutional reform to shortcut the time-intensive process of constitutional adjudication?

⁶⁴ DPP v Mollison, *supra*, note 47.

⁶⁵ As expressed in political reform consultations, on talk-shows, in civil society consultations and in party political consultations.