

## A GREENER FUTURE FOR CARIBBEAN CONSTITUTIONS? THE BAHAMAS AS A CASE STUDY

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### I. INTRODUCTION

Many Commonwealth Caribbean countries have written constitutions, although very few of those constitutions contain substantive or procedural environmental rights. This is notable as many Caribbean countries are biologically diverse, heavily dependent on their natural resources for tourism, and ecologically vulnerable. Many constitutions in the region were inherited as part of the independence exercises of each country, and few Caribbean countries have since undergone systemic constitutional reform exercises. In addition, many Commonwealth Caribbean countries suffer from institutional fragmentation, and struggle to enforce their existing environmental laws, and therefore may be unwilling or unable to enforce a fundamental constitutional environmental right.

There are, however, an increasing number of regional examples of constitutions that include environmental rights. The Constitution of Guyana, under Articles 25 and 36, provides for the State to protect and make rational use of natural resources for present and future generations.<sup>1</sup> The 2011 Jamaican Charter of Fundamental Rights and Freedoms introduced a Bill of Rights containing a preambular reference to environmental protection,<sup>2</sup> and the draft Constitution of Grenada contains environmental provisions.<sup>3</sup> From August 2012 to July 2013, the Bahamas underwent a constitutional reform exercise. A number of submissions were made to include an environmental provision in the revised constitution, including a submission from the authors on behalf of the Small Island Sustainability Programme of The College of The Bahamas, and supported by a number of national environmental NGOs.<sup>4</sup> The Constitutional Commission of The Bahamas considered these submissions carefully, and concern was expressed as to whether the Government of The Bahamas could live up to a constitutional expectation of a healthy environment.<sup>5</sup>

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\* Michael Stevenson is a member of the Constitutional Commission of The Bahamas. This article does not necessarily reflect the views of the Commission.

<sup>1</sup> CONST. OF THE CO-OPERATIVE REPUBLIC OF GUY. ACT 1980, art. 25, 36.

<sup>2</sup> Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, Apr. 7, 2011 (Jam.).

<sup>3</sup> GREN. DRAFT CONST. pt. V, art. 28 (g), 29 (e), available at [http://www.gov.gd/egov/docs/legislations/constitution/grenada\\_constitution\\_draft.pdf](http://www.gov.gd/egov/docs/legislations/constitution/grenada_constitution_draft.pdf). See also CONST. OF HAITI, art. 52-1(h) (1987); CAYMAN ISLANDS CONST. ORDER (S.I. 1379), art. 18 (2009).

<sup>4</sup> CONSTITUTIONAL COMM'N, COMMONWEALTH OF THE BAHAMAS: REPORT OF THE CONSTITUTIONAL COMM'N INTO A REVIEW OF THE BAHAMAS CONSTITUTION 140 (2013).

<sup>5</sup> *Id.* at 142.

Ultimately, the recommendation was made by the Constitutional Commission to include an environmental provision in the revised Constitution, although it was unclear whether this was to be merely a preambular reference or a fundamental, justiciable environmental right.<sup>6</sup> We argue that this lack of clarity was purposeful, and in line with a conservative, common law approach to constitutional reform employed by the Commission. Using The Bahamas as a case study, we argue that while Caribbean countries should include substantial environmental provisions in their constitutions, this process has been largely unsuccessful. We argue that the Bahamian constitutional reform process in particular suffered from a type of ‘constitutional timidity,’ and this had a detrimental effect on the recommendation to include an environmental provision in the Bahamian constitution. This constitutional timidity is encapsulated in a conservative, pragmatic, and what we deem, common law approach, to constitutional reform in general, i.e., ‘if it ain’t broke, don’t fix it.’ This common law approach to constitutional reform was encapsulated under four main heads cited in the Commission’s Report. These were the preference for the use of ordinary legislation and judicial intervention, the preferential weighting of some issues over others, and a concern to achieve legitimacy through public acceptance of the recommendations.<sup>7</sup> We argue that this common law approach to constitutional reform ultimately led to a restrictive approach being adopted regarding the scope of an environmental constitutional provision.

## II. HISTORY OF COMMONWEALTH CARIBBEAN CONSTITUTIONS

By the 1960’s, the experiment of the West Indian Federation had failed, and the 1967 West Indies Act was created to establish ‘associated statehood’ for the tiny nations that made up the Commonwealth Caribbean.<sup>8</sup> During this time, there was a concern that in socioeconomic terms, these states were too small to survive as viable nations.<sup>9</sup> As part of the West Indies Act, the Queen could provide for new constitutions to govern newly independent Commonwealth Caribbean countries.<sup>10</sup> Jamaica was the first Commonwealth Caribbean country to obtain its independence in 1962, followed closely by Trinidad and Tobago, Guyana, and Barbados.<sup>11</sup> All of these countries adopted written constitutions as part of their independence exercises. Although at the time England did not have a written constitution, many of the constitutions,

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<sup>6</sup> CONSTITUTIONAL COMM’N, *supra* note 4, at 143.

<sup>7</sup> See generally CONSTITUTIONAL COMM’N, *supra* note 4.

<sup>8</sup> William C. Gilmore, *The Associated States of the Commonwealth Caribbean: The Constitutions and the Individual*, 11 LAW. AM. 1, 1- 2 (1979).

<sup>9</sup> Jenny Grote, *The Changing Tides of Small Island States Discourse – A Historical Overview of the Appearance of Small Island States in the International Arena*, 43 VERFASSUNG UND RECHT IN ÜBERSEE [VRÜ] 164, 172 (2011) (Ger.).

<sup>10</sup> Gilmore, *supra* note 8, at 3-4.

<sup>11</sup> Caribbean Community Secretariat, *A Brief History of the Caribbean Community (CARICOM)*, [http://www.caricom.org/jsp/community/caricom\\_history.jsp?menu=community](http://www.caricom.org/jsp/community/caricom_history.jsp?menu=community) (last updated 2011).

which would govern these small states, were written in Whitehall,<sup>12</sup> and therefore had a particularly colonial bent. They incorporated the characteristics of the separation of powers and parliamentary democracy of England, overlain with the supremacy of a written constitution. As a result, these constitutions were constitutive, establishing a system of government for these new states,<sup>13</sup> and also contained fundamental human rights provisions.

These written constitutions became both legally and symbolically important for Commonwealth Caribbean countries, representing “a true manifestation of the political will of the peoples of the region, and a symbolic break with colonialism and the former English colonial masters.”<sup>14</sup> Although each written constitution for each country is different, Robinson argues that they form a “familial relationship,”<sup>15</sup> developing almost a ‘Caribbean common law,’<sup>16</sup> which together with judicial decision-making, represents a symbol of legal and cultural ‘Caribbeaness.’ She argues that law has become an important cultural symbol of adaptation of an inherited legal system being appropriated by Caribbean people.<sup>17</sup> She notes, “They responded to colonial anxieties about whether black male elites had the gumption and competence to assume leadership of the emerging Caribbean nations in part through discourse of common law kinship, by showing that Caribbean men could stand shoulder to shoulder as lawyers, lawyers-cum-politicians, and judges with those in the metropole and other parts of the Commonwealth.”<sup>18</sup> As a result, the formation of Caribbean constitutions represented an important step in the independence process, and in the formation of these nation states and cultural identities in the region.<sup>19</sup>

### III. ENVIRONMENTAL CONSTITUTIONAL PROVISIONS AND CASELAW IN COMMONWEALTH CARIBBEAN COUNTRIES

Caribbean countries span from The Bahamas in the north to Suriname in

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<sup>12</sup> William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L & COMP. L.Q. 67, 67 (1993).

<sup>13</sup> Daniel Bodansky, *Is There an International Environmental Constitution?* 16 IND. J. GLOBAL LEGAL STUD. 565, 572 (2009).

<sup>14</sup> ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW & LEGAL SYSTEMS 97 (2d ed. 2008).

<sup>15</sup> Tracy Robinson, *A Caribbean Common Law*, RACE & CLASS, Oct. 2007, at 118, 122.

<sup>16</sup> *Id.* at 118.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 120.

<sup>19</sup> See ROSE-MARIE BELLE ANTOINE, *supra* note 14, at 1-33. The project of regionalization continues in the Caribbean. In 1972, Commonwealth Caribbean countries formed the Caribbean Community, or CARICOM, through the Treaty of Chaguaramus, signed in 1973. *Id.* at 214, 338-39. In 1989, the Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement was agreed which led to the Revised Treaty of Chaguaramus signed by most governments in the region (excluding The Bahamas) in 2001, which established the Caribbean Single Market and Economy (or CSME). *Id.* at 214.

the south.<sup>20</sup> Caribbean states are diverse in their governance systems, income, size, topography and political affiliations.<sup>21</sup> In 2006, the GDP per capita in the Caribbean averaged US\$10,194,<sup>22</sup> with high levels of debt to GDP.<sup>23</sup> Many of these countries have historically based their economy on agriculture, which is now a declining sector of GDP, with services based industries, particularly tourism, constituting a large part of their economies.<sup>24</sup> Levels of poverty in Caribbean countries have been measured at approximately 38% of the total population, with levels ranging from between, for example, 9% in The Bahamas to 75% in Haiti.<sup>25</sup>

Many Commonwealth Caribbean countries are also small island developing states (or SIDS), and share a number of commonalities, including both environmental and socio-economic vulnerabilities. These vulnerabilities include:

- low-lying areas vulnerable to sea level rise and storm surges;
- geographic positions strongly affected by tropical storms and cyclones;
- high temperatures;
- scarce land resources;
- considerable dependence on scarce or depleted fresh groundwater resources;
- small natural resource bases;
- concentrations of population and infrastructure along coastal areas;
- dependence on a narrow range of export products;
- heavy dependence on imports;
- susceptibility to international trade and commodity price fluctuations;
- small domestic markets and limited ability to develop economies of scale;
- limited opportunities for economic diversification;
- high transport and communication costs (particularly acute in archipelagic nations like The Bahamas);

<sup>20</sup> U.N. ENVTL. PROGRAMME, CLIMATE CHANGE IN THE CARIBBEAN & THE CHALLENGE OF ADAPTATION 6 (2008), available at [http://www.pnuma.org/deat1/pdf/Climate\\_Change\\_in\\_the\\_Caribbean\\_Final\\_LOW20oct.pdf](http://www.pnuma.org/deat1/pdf/Climate_Change_in_the_Caribbean_Final_LOW20oct.pdf).

<sup>21</sup> U.N. ENVTL. PROGRAMME, *supra* note 20, at 6.

<sup>22</sup> U.S. AGENCY FOR INT'L DEV., BUREAU FOR LATIN AM. & THE CARIBBEAN, PN-ADQ-200 LATIN AMERICA & CARIBBEAN: SELECTED ECONOMIC & SOCIAL DATA 6 (2009), available at [http://pdf.usaid.gov/pdf\\_docs/PNADQ200.pdf](http://pdf.usaid.gov/pdf_docs/PNADQ200.pdf).

<sup>23</sup> See SIOSIUA T. T. UTOIKAMANU, U.N. DEV. PROGRAMME, ACHIEVING DEBT SUSTAINABILITY AND THE MDGs IN SMALL ISLAND DEVELOPING STATES: THE CASE OF TONGA 5-9 (2010), available at <http://www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/achieving-debt-sustainability-and-the-mdgs-in-small-island-developing-states-the-case-of-tonga/UNDP%20Discussion%20Paper%20Tonga%20debt%20Dec%202010.pdf>.

<sup>24</sup> U.N. ENVTL. PROGRAMME, *supra* note 20, at 11.

<sup>25</sup> U.N. ECON. COMM'N FOR LATIN AMERICA AND THE CARIBBEAN, NUTRITION, GENDER AND POVERTY IN THE CARIBBEAN SUBREGION (U.N. DOC. LC/CAR/L.105) 4-5 (2006), available at <http://www.cepal.org/en/publications/27591-nutrition-gender-and-poverty-caribbean-subregion>.

- limited public budgets and dependence on foreign capital to finance development; and
- weak institutional structures and limited human capacity.<sup>26</sup>

Such constraints have negative consequences for sustainable socio-economic development. Additionally, unsustainable developmental practices within Commonwealth Caribbean states occurring over the past few decades have exacerbated these existing natural and socioeconomic constraints. The Caribbean maintains not only high levels of biological diversity and endemism, but also high extinction rates due to unsustainable natural resource exploitation, poorly managed tourism, pollution, habitat destruction, natural events, and the introduction of alien species.<sup>27</sup> Nutrient depletion, soil loss, deforestation and biodiversity loss is occurring in a number of states.<sup>28</sup> These states are highly vulnerable to the effects of climate change, such as sea level rise, ocean acidification, and increased tropical cyclone activity.<sup>29</sup> These states are highly dependent upon their natural resources for economic development, yet have a limited capacity to protect these natural resources.

Considering the region's high dependence on natural resources, it is curious that so few Commonwealth Caribbean constitutions contain substantive or procedural provisions aimed toward protecting the natural environment. Many Caribbean constitutions were written and adopted during the 1960's-1970's, before the international environmental movement had taken root. Since these original constitutions were adopted, only two countries have enacted entirely new constitutions under their own legislatures.<sup>30</sup> While many of these states have undergone constitutional reform exercises, very few recommendations emanating from these reviews have actually been enacted.<sup>31</sup> As a result, many Commonwealth Caribbean states operate under their original, non-autochthonal constitutions, which may explain the lack of environmental constitutional provisions. The Commonwealth Caribbean lags far behind its Latin and South American neighbors in this regard.<sup>32</sup>

Guyana is an exceptional Caribbean country in many ways. Located in South America, this member of CARICOM became a republic in 1970,<sup>33</sup>

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<sup>26</sup> U.N. ENVTL. PROGRAMME, *supra* note 20, at 9.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> Jon Barnett, *Titanic States? Impacts and Responses to Climate Change in the Pacific Islands*, 59 J. INT'L AFFAIRS 203, 207 (2005).

<sup>29</sup> See U.N. ENVTL. PROGRAMME, *supra* note 20, at 3; RAMON BUENO ET AL., THE CARIBBEAN AND CLIMATE CHANGE: THE COSTS OF INACTION 2 (2008), available at [http://seius.org/Publications\\_PDF/SEI-CIEL-Caribbean.pdf](http://seius.org/Publications_PDF/SEI-CIEL-Caribbean.pdf); Lisa Benjamin, *Climate Change and Caribbean Small Island States: The State of Play*, INT'L.J. BAHAMIAN STUD., 2010, at 78, 80.

<sup>30</sup> Derek O'Brien & Se-Shauna Wheatle, *Post-independence Constitutional Reform in the Commonwealth Caribbean and a New Charter of Fundamental Rights and Freedoms for Jamaica*, 4 PUB. L. 683, 683 (2012).

<sup>31</sup> *Id.* at 684.

<sup>32</sup> Christine Toppin-Allahar, *Environmental Rights*, Caribbean Association for Feminist Research & Action, Caribbean Human Rights Network, 2, 5 (1996).

<sup>33</sup> Trinidad and Tobago and Dominica are the only other republican states in the Commonwealth Caribbean. See Members of the Commonwealth Federation, <http://www.tntisland.com/countries.html> (last revised Apr. 13, 2015).

almost four years after its independence from England. The 1980 Constitution of the Cooperative Republic of Guyana contains two environmental provisions, and was one of the first in the Commonwealth Caribbean regions to include constitutional environmental provisions. Article 25 states, "Every citizen has a duty to participate in activities designed to improve the environment and protect the health of the nation."<sup>34</sup> Article 36 states, "In the interests of the present and future generations, the State will protect and make rational use of its land, mineral and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and improve the environment."<sup>35</sup> Although these provisions were unique among Commonwealth Caribbean constitutions at the time, Anderson has expressed doubts whether they actually confer enforceable rights to environmental quality to individual citizens.<sup>36</sup>

Despite the traditional lack of environmental constitutional provisions, there have been some important environmental cases in the region that have attempted to rely on constitutional provisions.<sup>37</sup> A number of these cases have attempted to rely on constitutional provisions that protect against appropriation of property without compensation.<sup>38</sup> A provision of this type was originally incorporated into the Jamaican constitution, which was modeled on the Nigerian constitution, and many regional constitutions followed the Jamaican model.<sup>39</sup> Although there was some debate as to whether this type of provision should be included, it was the Jamaican businesses, property owners, and foreign investor communities who argued, successfully, for its inclusion.<sup>40</sup> In addition to the private property bias in most Commonwealth Caribbean countries, regional jurisprudence also inherited the English laws of nuisance, which imposed no obligation to use environmentally friendly land practices.<sup>41</sup> As a result, the colonial common law heritage of the region could be said to actively allow environmentally destructive practices, as long as they do not cause negative impacts on neighbors, or contravene existing legislation. This

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<sup>34</sup> CONST. OF THE CO-OPERATIVE REPUBLIC OF GUY. ACT 1980, Feb. 20, 1980, art. 25, 36.

<sup>35</sup> *Id.* at art. 36.

<sup>36</sup> Winston Anderson, *Environmental Protection of Nariva Swamp and Guiana Island: The Need for the Greening of Caribbean Constitutions*, 10 CARIBBEAN L. REV. 225, 231 (2000).

<sup>37</sup> See e.g., *Jabar v. Rowley*, [1993] TT 1993 HC 1 (Trin. & Tobago); *Spencer v Att'y Gen. Ant. & Barb., Civ. App. No. 20A* (C.A. 1997); *Cal v. Att'y Gen.*, [2007] No. 171, 2 (Belize); *Maya Leaders Alliance v. Att'y Gen.*, [2010] No. 366, 11 (Belize).

<sup>38</sup> For example, see Article 27(1) of the Schedule to the Bahamas Independence Order, 1973, The Constitution of the Commonwealth of The Bahamas, which states, "[n]o property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied...." The Bahamas Independence Order 1973 [Constitution] July 10, 1973, art. 27 (Bah.). These conditions across the region usually include acquisition for a public purpose, with prompt and adequate compensation. See, e.g., *Jabar*, TT 1993 HC 1; *Cal*, No. 171 at 3; *Maya Leader Alliance*, No. 366 at 9, 11.

<sup>39</sup> *Gilmore*, *supra* note 8, at 28-29.

<sup>40</sup> *Id.*

<sup>41</sup> *Toppin-Allahar*, *supra* note 32, at 3. See *Ryan v. Fletcher*, [1868] UKHL 1, 3 (H.L.) 330 LR 3 HL 330.

situation is exacerbated by the institutional inadequacy of environmental agencies, and the general lack of enforcement of environmental laws in some Commonwealth Caribbean states.

As there are generally no environmental constitutional provisions to counter the fundamental right to the protection of property enshrined in a number of regional constitutions, this latter provision has been used both to justify environmentally unfriendly behavior, and to protect indigenous rights against State concessions to extract natural resources. While this article does not attempt to cover all regional jurisprudence on these constitutional provisions, a number of cases are noteworthy.

In the Trinidad and Tobago decision of *Jabar v. Rowley*,<sup>42</sup> Mr. Jabar argued that the government could not prevent his rice cultivation in the Nariva Swamp (the country's only freshwater wetland) because the Minister of Agriculture had encouraged this industrial exercise.<sup>43</sup> The government had declared part of the Nariva Swamp protected under the Forest Act, and one of the heads under which Mr. Jabar challenged this action was that it was a violation of his right to enjoyment of property, and the right not to be deprived of it under the constitution.<sup>44</sup> Lucky J in this case relied on the public nature of state lands to deny Mr. Jabar's arguments to a private interest over it.<sup>45</sup> He stated, "It is my view that State lands are the lands of all the people of Trinidad and Tobago, and any government has to be very wary in its dealing with such lands. The public interest is paramount in such circumstances, not the interests of the few."<sup>46</sup> His decision was aided by the finding that Mr. Jabar had illegally occupied Nariva Swamp for his rice cultivation.<sup>47</sup>

In the case of *Spencer v. Attorney-General of Antigua and Barbuda and Asian Village Antigua Ltd.*, the leader of the opposition party, Mr. Spencer, challenged the government's acquisition of Guiana Island, and other land on the Western coast of Antigua in part on the basis that the acquisition was unconstitutional, believing the development would wreak environmental damage. His arguments were rejected, and his challenge failed.<sup>48</sup> Ultimately this was because decisions to cede land were subject to the Land Acquisition Act, which allowed Cabinet to make these types of decisions. The Land Acquisition Act had been grandfathered into the Antigua and Barbuda Constitution through the savings law clause.<sup>49</sup>

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<sup>42</sup> *Jabar*, TT 1993 HC 1.

<sup>43</sup> *Id.* at 6, 16-17.

<sup>44</sup> *Id.* at 11, 15-16, 93.

<sup>45</sup> *Id.* at 107.

<sup>46</sup> *Id.* at 108.

<sup>47</sup> *Id.*

<sup>48</sup> *Spencer v. At'y Gen. Ant. & Barb.*, Civ. App. No. 20A, 3, 26 (C.A. 1997).

<sup>49</sup> In addition, the court relied on the Privy Council decision of *Williams v. Gov't of St. Lucia*, [1969] 16 (P.C.) (appeal taken from West Indies), which stated that a public purpose can include the acquisition of land for the development of a tourist resort.

Two important constitutional decisions from the Caribbean country of Belize<sup>50</sup> attempted to limit the government's rights to grant concessions for natural resource extraction in lands occupied by indigenous people. In *Cal and others v. AG of Belize*, the Supreme Court of Belize decided that the government had violated the constitutional rights to equality of treatment, life, liberty and security of person, and ordered the government to abstain from any acts that might affect the existence, value, or enjoyment by the Mayan people of their property.<sup>51</sup> The Mayan people claimed that the government had failed to respect the proprietary nature of their right to use and occupy their traditional lands due to issuance of logging leases, and concessions by the Ministry of Natural Resource.<sup>52</sup> Their request for a declaration to collective title in the land was successful, as they provided evidence of long standing use and occupancy of large areas of dry and wetlands for rice cultivation, hunting, and fishing.<sup>53</sup> However, although their claims of customary land tenure did amount to "property" under the Constitution, the Supreme Court held that the acts of the government in issuing leases for logging and oil exploration did not amount to arbitrary deprivation or compulsory acquisition of their land under section 17 of the Constitution. The granting of leases did, however, violate Articles 3 and 16; the right to equality of treatment, and non-discrimination, as the Mayan people had not been consulted or given a mechanism for redress.<sup>54</sup> The other case of *The Maya Leaders Alliance & others v. AG of Belize and The Minister of Natural Resources and Environment* was related to the 2007 case, but included more claimants under the Maya Leaders Alliance and the Toledo Alcades Association.<sup>55</sup> They claimed that since the 2007 case, the government had continued to ignore their customary rights in the land, and had allowed existing permits and concessions to resume, and threatened to issue more permits.<sup>56</sup> The Court ordered the government to adopt affirmative measures to identify and protect Mayan land rights in conformity with Articles 3 and 16 of the Constitution, and in consultation with the Maya people, to develop legislative and administrative measures to create a mechanism to protect their customary property rights.<sup>57</sup> In addition, the government was ordered to refrain from issuing further leases and/or concessions until this mechanism had been established.<sup>58</sup> Similar to the 2007 case, however, the government's actions did not constitute deprivation of property under Article 17 of the Constitution, and this was left to private law, and not the constitution, for redress.<sup>59</sup>

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<sup>50</sup> Belize is considered to be a Central American Caribbean country and is a member of CARICOM. See BELIZE CONSTITUTION (PUBLIC SERVICE) REGULATIONS, Oct. 11, 2014, Part I.

<sup>51</sup> *Cal v. Att'y Gen.*, [2007] No. 171, 66 (Belize).

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.* at 45, 68.

<sup>54</sup> *Id.* at 68.

<sup>55</sup> *Maya Leaders Alliance v. Att'y Gen.*, [2010] No. 366 of 2008 at 2 (Belize).

<sup>56</sup> *Id.* at 57.

<sup>57</sup> *Id.* at 58.

<sup>58</sup> *Id.* at 59.

<sup>59</sup> *Id.* at 60.

It is clear that there have been a number of cases that have attempted to use the constitution to prevent environmentally destructive activities.<sup>60</sup> While the right to property provisions have not been helpful to those attempting to develop, they have also not been helpful to those trying to stop environmentally destructive development, and a large measure of discretion has therefore been granted to governments to approve development projects. These cases speak to the urgent need for Caribbean countries to implement constitutional environmental provisions.<sup>61</sup> At the moment, environmental protection is left largely to the domain of domestic legislation and institutional agencies within these states. In The Bahamas, these mechanisms have proven largely inadequate to regulate and monitor the types of development projects undertaken in the country.

#### IV. ENVIRONMENTAL INSTITUTIONAL STRUCTURES AND LAWS IN THE BAHAMAS

The Bahamas comprises an archipelago of over 700 low-lying islands, and more than 200 cays, islets and rocks, covering approximately 100,000 mi<sup>2</sup> (260,000 km<sup>2</sup>).<sup>62</sup> This area includes the country's Exclusive Economic Zone (EEZ) in the Atlantic Ocean.<sup>63</sup> The total land area is approximately 5,380 mi<sup>2</sup> (13,934 km<sup>2</sup>). The islands extend 50 miles (km) east of Florida to 50 miles (km) northeast of Cuba.<sup>64</sup>

The main institution in the country with responsibility for the environment is the Ministry of Environment and Housing. Its areas of responsibilities include protection, conservation, and management of the environment.<sup>65</sup> This includes oversight of reefs and blue holes, forestry under the Forestry Act 2010, and oil and natural gas exploration.<sup>66</sup>

The agencies under the Ministry include the Bahamas Environment Science and Technology (or BEST) Commission, the Department of Environmental Health Services, Forestry Unit, and the Department of Housing.<sup>67</sup> There is no enabling legislation granting the Ministry or the BEST Commission statutory authority. This is particularly noteworthy as the BEST Commission reviews development proposals and EIAs, and provides recommendations to the

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<sup>60</sup> See, e.g., *Spencer v Att'y Gen. Ant. & Barb.*, Civ. App. No. 20A, 2 (C.A. 1997); *Cal v. Att'y Gen.*, [2007] A.D. 171, 6-7 (Belize); *Maya Leader Alliance*, No. 366 at 19.

<sup>61</sup> Anderson, *supra* note 36, at 225.

<sup>62</sup> SENES CONSULTANTS LTD., THE NATIONAL CAPACITY NEEDS SELF-ASSESSMENT (NCSA) REPORT 2-1 (2005), available at [http://www.best.bs/Documents/NCSA\\_Report.pdf](http://www.best.bs/Documents/NCSA_Report.pdf).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Environment and Housing, the Ministry of, THE GOVERNMENT OF THE BAHAMAS*, <https://www.bahamas.gov.bs/wps/portal/public/gov/government/contacts/agencies/government%20ministries/> (last accessed Jan. 22, 2015) (follow "Environmental and Housing, The Ministry of" hyperlink).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

government on the environmental aspects of the development.<sup>68</sup> There is no statutory obligation imposed on the government to publish or accept recommendations made by the BEST Commission. This situation is unusual in the Caribbean, as many Caribbean states have enabling legislation that establishes a central environmental agency with the power to monitor and fine developers.<sup>69</sup> The Bahamian environmental institutional structure is also fragmented, with a number of departments and agencies, including the Bahamas Investment Authority, Department of Housing, Department of Environmental Health Services, Department of Marine Resources, Department of Lands and Surveys and the Department of Physical Planning, responsible for issuing authorizations and permits for developments.<sup>70</sup>

In addition, as with many Commonwealth Caribbean countries, The Bahamas struggles to monitor or enforce its existing environmental laws and regulations. The 2005 National Capacity Needs Assessment Report undertook broad based public consultations in The Bahamas from January-March 2004.<sup>71</sup> Two key environmental concerns identified through over 64 meetings in this report are the need for the strengthening of monitoring and enforcement of existing environmental laws and regulations, and for greater clarity regarding the responsibility and accountability amongst government agencies for environmental management.<sup>72</sup> The recent 2013 Bahamas National Report – Diagnostic and Analytical Review of Environmental Governance Systems states as follows:

There is considerable fragmentation across trade and environment departments, and inadequate collaboration between agencies. Fragmentation is often due to the disparate nature of the regulatory legislation, and lack of an overarching environmental agency established by statute. Lack of collaboration is often due to under or inadequately staffed departments. This results in inefficiency, overlapping jurisdictions, operating within silos, and lack of monitoring and enforcement which hinders the effectiveness of environmental protection and is a major barrier to sustainable development.<sup>73</sup>

The report also sites lack of enforcement officers, understaffed agencies, and a

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<sup>68</sup> *Welcome*, THE BAHAMAS ENVIRONMENT, SCIENCE & TECHNOLOGY COMM'N, <http://www.best.bs> (last visited June 15, 2015).

<sup>69</sup> See Environmental Management Act of Trinidad and Tobago, c. 35:05 (2000) (establishing the Environmental Management Agency); Natural Resources Conservation Authority Act of Jamaica, § 3 1991 (establishing the Natural Resources Conservation Authority).

<sup>70</sup> *Government Departments*, THE GOVERNMENT OF THE BAHAMAS, <http://www.bahamas.gov.bs/wps/portal/public/gov/government/contracts/Agencies> (last visited Jan. 22, 2015).

<sup>71</sup> SENES CONSULTANTS LTD., *supra* note 62, at ES-2.

<sup>72</sup> *Id.* at ES-3.

<sup>73</sup> LISA BENJAMIN & STACEY MOULTRIE, BAHAMAS NATIONAL REPORT 2013 – DIAGNOSTIC AND ANALYTICAL REVIEW OF ENVIRONMENTAL GOVERNANCE SYSTEMS 75 (on file with authors). Copyright in this Report vests with the Caribbean Community (CARICOM) Secretariat. *Id.*

focus on short-term economic gain over long term sustainability, as reasons why non-compliance with environmental legislation is rife.<sup>74</sup>

The Bahamas is certainly not alone in the region, or amongst developing countries in this regard. Ramlogan and Persadie note that protection of the environment in most developing countries is not a priority due to a lack of financial, human, research, and mechanical resources.<sup>75</sup> They also note that in Trinidad and Tobago, lack of enforcement has been ascribed to lack of resources, multiplicity of enforcement agencies, corruption, lack of adequate punitive sanctions, lack of political will, limited public education initiatives, and delays in the justice system.<sup>76</sup>

#### V. REGIONAL CONSTITUTIONAL REFORM INITIATIVES AND BAHAMIAN CONSTITUTIONAL COMMISSION

It is noteworthy that many Caribbean countries have been through constitutional reform exercises, but very few of the recommendations emanating from those reviews have actually been incorporated into revised constitutions. Many of these constitutional reviews have three common themes among their recommendations: limiting the power of the Prime Minister; limiting or abolishing the role of the Senate; and reforming the electoral process to create a more mixed electoral system instead of the first-past-the-post system.<sup>77</sup> O'Brien and Wheatle note this "relative constitutional inertia"<sup>78</sup> may be due to the relative political stability in these countries, and the failure of many constitutional issues to grasp the attention of the populace, with perhaps the exceptions of the death penalty and homosexuality.<sup>79</sup>

In February 1994, the draft of a new Charter of Fundamental Rights and Freedoms was proposed in Jamaica. The Charter had a substantial number of new rights, including the right to a healthy and productive environment, and enhanced locus standi.<sup>80</sup> The draft Charter was reviewed after the general election in 1999, and the final Charter was approved by Parliament in March 2011.<sup>81</sup> Although many rights remained as positive rights, the final Charter had watered down a number of the substantive rights originally written into it, including only providing for a preambular reference to environmental protection, instead of a full-blown substantive right.

Constitutional reform exercises took place in Grenada in 1985 and from 2002-2006.<sup>82</sup> None of the recommendations from these exercises has been

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<sup>74</sup> BENJAMIN & MOULTRIE, *supra* note 73, at 75.

<sup>75</sup> RAJENDRA RAMLOGAN & NATALIE PERSADIE, DEVELOPING ENVIRONMENTAL LAW AND POLICY IN TRINIDAD AND TOBAGO 3 (2004).

<sup>76</sup> *Id.* at 28-32.

<sup>77</sup> O'Brien and Wheatle, *supra* note 30, at 685.

<sup>78</sup> *Id.* at 688.

<sup>79</sup> *Id.* at 688, 699-700.

<sup>80</sup> *Id.* at 692.

<sup>81</sup> *Id.* at 693.

<sup>82</sup> See Francis Alexis, GRENADA CONSTITUTION: ROAD TO REFORM (Feb. 14, 2014), [www.grenadaconstitutionreform.com](http://www.grenadaconstitutionreform.com).

adopted, although the draft Grenada Constitution contains two provisions regarding the environment in Article 28(g) and 29(e).<sup>83</sup> However, neither of these provisions fall under the fundamental rights and freedoms provisions (Part I), but instead are included under the General Welfare section (Part V) and the Fundamental Duties of Citizens section (Part VI). The introductory paragraph of Part V describes the rights referred to therein as integral, but not constitutionally protected.<sup>84</sup> Article 28 provides for a moral and political obligation of the government to pursue policies for the judicious management of resources to ensure these rights are provided.<sup>85</sup> Therefore, the justiciability of these environmental constitutional rights is unclear. There have been considerable delays in the exercise of constitutional reform in Grenada.<sup>86</sup> A Constitution Reform Advisory Committee was launched on January 16, 2014, and it is not clear if the draft constitution will be revisited.<sup>87</sup>

The first Constitutional Commission in The Bahamas was established in 2002.<sup>88</sup> The Commission was disbanded after the general election in 2007.<sup>89</sup> In August 2012, a Commission was reestablished to conduct a comprehensive review of the Constitution and to recommend changes.<sup>90</sup> The recommendations of the Commission were contained in a Report submitted on July 8, 2013, in time for the 40th anniversary of the independence of the country.<sup>91</sup> As part of the review, the Commission received submissions from the public and held public consultations.

On April 29, 2013, the authors, on behalf of the Small Island Sustainability Committee of The College of The Bahamas, submitted a request for the Commission to consider a substantive environmental provision as part of their recommendations.<sup>92</sup> The submission contained a detailed proposed clause (set out in Annex I) to be considered by the Commission. After holding an oral presentation of the submission, the authors submitted a follow up submission responding to several questions raised by the Commission in the oral presentation.

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<sup>83</sup> GREN. DRAFT CONST. pt. V, art. 28 (g), 29 (e), available at [http://www.gov.gd/egov/docs/legislations/constitution/grenada\\_constitution\\_draft.pdf](http://www.gov.gd/egov/docs/legislations/constitution/grenada_constitution_draft.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> ORGANIZATION OF AMERICAN STATES (OAS), MANAGEMENT BOARD OF THE INTER-AMERICAN AGENCY FOR COOPERATION AND DEVELOPMENT (IACD), CONSTITUTIONAL REFORM PROJECT: GRENADA - EXECUTIVE SUMMARY 2, available at <http://portal.oas.org/LinkClick.aspx?fileticket=GJwQ4TQG0l8%3D&tabid=1473>.

<sup>87</sup> Alexis, *supra* note 82.

<sup>88</sup> Ianthia Smith, *Commission Appointed To Review Constitution*, BAH. J. (Aug. 2, 2012), <http://jonesbahamas.com/commission-appointed-to-review-constitution/>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 5, 33-46.

<sup>92</sup> *Id.* at 140.

## VI. CONSIDERATION OF THE ENVIRONMENTAL CONSTITUTIONAL PROVISION BY THE BAHAMIAN CONSTITUTIONAL COMMISSION

As we attempt to explain the response of the Commission to the recommendation, the major claim we wish to examine in this part of the paper is that the Commission made a restrictive recommendation in relation to the proposed environmental constitution provision through the deployment of a discourse organized around what we call a common law approach to constitutional reform.

The section in the Commission's report concerning the issue of environmental protection using the Constitutional instrument is curiously ambiguous read on its own. The clear meaning of the section only becomes possible when it is considered alongside other sections of the Report. The main point of confusion in the section is whether the Commission intended the environmental provision, which it recommended to be included in the Constitution, to be justiciable.

In the report, the Commissioners recommended that a general principle should be included in the Constitution as a means of expressing "the importance of the environment for current and future generations and the duty of the state to protect it."<sup>93</sup> The Commissioners said that this principle could be stated as a separate article or placed within a section of the Constitution introducing second generation social and economic rights into the mix of recognized rights.<sup>94</sup> It could be assumed that the Commissioners intended to recommend the establishment of an enforceable environmental constitutional right. However, this assumption would be erroneous.

The first explanatory point to make, in this regard, is a technical point about the structure of Commonwealth Caribbean Constitutions and the language used by Constitutional lawyers to explain Commonwealth Caribbean rights provisions. With the exception of the Constitution of Trinidad and Tobago, rights within other Commonwealth Caribbean Constitutions are introduced by an *opening section*. Typically, an opening section begins with the word *whereas*, which is suggestive of a preamble, and sets out in general terms the rights that subsequently follow it in an enumerated form. In the Bahamas, for example, the opening section begins, "Whereas every person . . . is entitled to the fundamental rights and freedoms, . . . that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely— . . . life, liberty, security of the person."<sup>95</sup>

Most of the rights mentioned in the opening section are set out in greater detail in articles that follow (the detailed section), the right to which reference was made in the opening section inclusive of the limitations designed to demarcate the scope of such enumerated provisions. The question of the

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<sup>93</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 142.

<sup>94</sup> *Id.* at 143.

<sup>95</sup> BAH. CONST. ch. III, § 15.

justiciability of the opening question only arises due to the few instances in which the reference to the right in the opening section, which is supposed to stand as its enumerated formulation, is arguably broader in its initial scope than its putative corollary in the detailed section. Without going into the technical supporting arguments on both sides of the issue, which have developed in Commonwealth Caribbean case law concerning the enforceability of the opening section, suffice it to say that the Commissioners were of the view that the rights referred to in the opening section are not to be treated as justiciable, although thought to be of “inestimable historical and symbolic value.”<sup>96</sup>

While the Commissioners avoided directly recommending in the section of the report on environmental protections that a general principle of environmental protection should be placed in the non-justiciable opening section as part of the preamble to the Bill of Rights, it is clear that this is what the Commissioners were indirectly recommending. The first point to make in support of this argument involves drawing attention to the Commissions’ recommendation that the Constitutional recognition of an environmental provision should not appear in the “detailed provisions” of the Constitution, but rather as a general principle.<sup>97</sup> As the detailed provision was considered by the Commissioners to be the only justiciable part of the Bill of Rights, by implication the Commission was recommending that the general principle relating to environmental protection be placed in the unenforceable preamble. In support of this analysis, consideration should be given to the use of the illustration used by the Commission of the opening section of the Jamaican 2011 Charter of Fundamental Rights and Freedoms to show the “growing trend in the region towards recognition of [environmental] rights, if only as general principles of the Constitution.”<sup>98</sup> The specific, non-justiciable general environmental principle to which the Commission drew attention is found in the statement of the Jamaican opening section that refers to the “right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage.”<sup>99</sup> For the same illustrative purpose, the Commissioners also noted the non-justiciable obligation placed on the Belizean state vis-a-vis the environment found in the Preamble of the 1981 Constitution of Belize.<sup>100</sup> It would appear then that it was not of great concern to the Commission whether the general environmental principle was placed in the opening section of the Bill of Rights or in the Preamble of the Constitution. What mattered to the Commission was that, in either location, the general environmental principle would serve as a non-justiciable “directive principle[s] of state or a statement of fundamental duties of the citizen.”<sup>101</sup>

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<sup>96</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 33.

<sup>97</sup> *Id.* at 142-43.

<sup>98</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 141.

<sup>99</sup> JAM. CONST. ch. 3 § 13(3)(l).

<sup>100</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 142.

<sup>101</sup> *Id.* at 72.

As far as the recommended option of placing a general environmental principle in a new part of the Constitution concerned with social and economic rights was concerned, it is instructive to analyze the Commission's view of second-generation rights to determine what the Commission considered would be the effect of pursuing such an option. In the section on social and economic rights in the Commission's Report, the Commission states unequivocally its aversion to the notion of general welfare rights in the Constitution being in any way justiciable and enforceable.<sup>102</sup> The main argument put by the Commission, in this regard, points to the "problems associated with the implementation and enforcement of [economic and social] rights" that require, for their enforcement, judgments to be made to determine whether the state has capacity to realize such rights.<sup>103</sup> Underlying this argument are two theoretical positions taken by the Commission. First, a recognition of the capacity constraints suffered by SIDS as analyzed above, and these capacity constraints would limit the types of rights and freedoms afforded to citizens under the constitution. Second, that rights of the justiciable sort should be fixed; that their scope should not to be determined based on the resources and capacity of the state that may change over time.<sup>104</sup> Thus, the Commission was of the view that if statements concerning social and economic rights were to be placed in the Constitution, such statements would only serve as non-justiciable aspirational goals or principles.<sup>105</sup>

Alas, the Commission sets up a contradictory argument in support of their position regarding the unenforceable nature of social and economic rights by alluding to Article 2 of the International Covenant on Civil and Political Rights and Article 22 of the Universal Declaration of Human Rights.<sup>106</sup> While both articles call for rights to be advanced by a state in keeping with its capacity to put them into effect given its resources, the Commission refers to these provisions as a means of demonstrating why social and economic rights cannot be made justiciable because of their elastic scope, inherent instability and basis in contingency.<sup>107</sup>

Undoubtedly, the Commission was averse to the recommendation that the Constitution should contain a justiciable right capable of being deployed as a means of protecting natural resources and the environment. But what explains this aversion?

The answer to this question relates to the main thesis of this paper. Political considerations were able to shape the recommendations of the Commission via the adoption by the Commission of a mentality, or way of thinking, concerned with the implications of constitutional reform on the proper balance of judicial, executive, and legislative state power. As will be argued, this mentality is the spill over of a common-law constitutional

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<sup>102</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 23.

<sup>103</sup> *Id.* at 133.

<sup>104</sup> *Id.* at 133-34.

<sup>105</sup> *Id.* at 134.

<sup>106</sup> *Id.* at 133.

<sup>107</sup> *Id.* at 133-34.

perspective into the constitutional reform process. To be sure, what is being argued explains how discourse relating to constitutional reform and rooted in a common law tradition functioned to enable political objectives to determine the Commission's stance vis-à-vis the protection of the environment using provisions of the Constitution.

One of the principal indicators of this common law mentality in the sphere of constitutional reform is revealed in the Commission's view of the scope of their undertaking, which is revealed in the first few pages of their report in which the Commission indicates its comfort level with the anticipated disappointment of those who expected the Commission to radically rewrite the Constitution.<sup>108</sup> In this regard, what is most revealing are the four interrelated justifications given for taking a conservative approach to constitutional reform focused on fixing only those parts of the Constitution found to be "anachronistic or defective"—a focus, arguably, linked to the Commission's unwillingness to immediately address matters relating to improving good governance and the functioning of the political system using the reform process.<sup>109</sup> To be sure, the Commission was clear in the distinction it would draw between obvious Constitutional defects (which it would seek to cure) and matters relating to constitutional rewriting in the interest of good governance.<sup>110</sup> Despite this distinction, however, the Commission was at pains to point out that its recommendations went "beyond mere conservative tinkering";<sup>111</sup> that it had sought to "tread new ground in constitutional development."<sup>112</sup> Perhaps the tension between these two sets of self-assessments can be explained by noting that one of the basic methodological guidelines the Commission deployed to structure its recommendations required the Commission to distinguish the recommendations that demanded "immediate attention" from those that could be "afforded the luxury of further study or a more protracted timeline for implementation."<sup>113</sup> And from the most cursory examination of the Commission's report, it is clear that recommendations designed to fix the defects of the Constitution were given temporal priority over the recommendations relating to fundamental constitutional development issues.

The four implicit ancillary justifications given by the Commission for adopting its pragmatic, fix-the-defects-now approach can be explained under the four following heads: the (1) role of ordinary legislation; (2) judicial intervention; (3) weighting; and (4) legitimacy.

#### *A. Ordinary Legislation*

Throughout the report, the Commission adopted the position that

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<sup>108</sup> See CONSTITUTIONAL COMM'N, *supra* note 4, at 13-14.

<sup>109</sup> *Id.* at 13.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 14.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 15.

recommendations to change the Constitution were not needed as the matter being considered by the Commission could be dealt with through ordinary legislation. It may be surprising to point out that this position was taken in relation to not only matters involving constitutional defects, but also in relation to some of the matters involving the bigger issues relating to constitutional reform. Indeed, it is in the sphere of the Commission's consideration of the role of the Constitution in protecting the environment—clearly a matter of no small constitutional concern—that this position is so evidently illustrated. As already noted, the Commission recommended that the Constitution should be altered to include a non-justiciable general principle outlining the duty of the State to protect the environment.<sup>114</sup> What was not noted earlier, in this regard, was that the Commission defended this position by indicating that, instead of using the Constitution as the vehicle of environmental protection, a detailed enforceable environmental protective regime should be put into effect (“as a matter of high priority”) using ordinary legislation.<sup>115</sup> As we argue, this position regarding the function of ordinary legislation in constitutional affairs speaks to the operation of a common law mentality.

#### *B. Judicial Intervention*

The corollary of recommending, in the legislative sphere, that in many instances ordinary legislation could be used as means of responding to calls for constitutional change, was advanced, in relation to the judicial sphere, by the Commission seriously considering the argument that there were no “severe failings in the Bahamian Constitution that could not be remediated through judicial intervention, or proper operational of the constitutional conventions.”<sup>116</sup> While the Commission recognized that it could not rely totally on either the legislature and the judiciary to address many of the needed constitutional reforms, the Commission’s recognition of the role of ordinary legislation and judicial intervention must be certainly seen as part of the rationale upon which the Commission relied to justify the narrowness of the scope of the recommendations.

#### *C. Weighting*

The Report of the Commission was not, as the Commission admitted, “as wide-ranging in scope or presentation as the reports of some of the historic West Indian constitutional commissions.”<sup>117</sup> As a partial explanation for the deliberately restrained scope of the Commission’s work, the priority that the Commission attached to the obvious defects of the Constitution requiring urgent remediation over matters of possibly a more fundamental, meta-

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<sup>114</sup> CONSTITUTIONAL COMM’N, *supra* note 4, at 12.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 14.

<sup>117</sup> *Id.* at 12.

constitutional nature that could be put off for the future, needs to be considered. Alongside what the Commission understood to be the function of judicial intervention and ordinary legislation in possibly dealing with constitutional matters the Commission might wish to avoid, the division and weighting of issues by the Commission was an important device the Commission used to rationalize the allocation of its energies, and, to this end, the Commission deliberately pointed out that its “recommendations should [not] be accorded equal weight, or should be implemented contemporaneously.”<sup>118</sup>

#### *D. Legitimacy*

At every step in the Commission’s presentation of the justifications for the restrained scope of their recommended reforms—be it in terms of considerations given to weighting, ordinary legislation, or judicial intervention—the need for the recommendations to be rooted in the consent of the Bahamian populace, served as a foundational justification.<sup>119</sup> Moreover, the stated concern by the Commission with the democratic legitimacy of its work linked all of the rationales given by the Commission for the approach it adopted in conducting its review of the Constitution and ultimately the recommendations that were brought forward. Underlying, then, the justification given to what is being presented as the Commission’s common law approach to constitutional reform, was the Commission’s declared sensitivity to the public support the Commission’s recommendations would receive.<sup>120</sup> O’Brien and Wheatle also note the overwhelming support of the public in the region for Constitutional reform exercises.<sup>121</sup>

Faced with the choice of reform or radical departure, the Commission opted for the former, for the most part. The Commission was of the view that while the time may come for reforms that will include rewriting and reenacting the Constitution, that the country had not yet attained the level of public debate, constitutional study, nor public support that make such an effort worthwhile.<sup>122</sup>

As we discuss below, the Commission’s stated concern with the legitimacy of the reform exercise it undertook as an organizing principle that delineated the scope of the reform exercise, arguably, must be seen as an integral part of the common law approach it deployed.

### VII. A COMMON LAW APPROACH TO CONSTITUTIONAL REFORM

The common law method in judicial reasoning produces a slowly evolving system of rules responsive to a variety of inputs while being constrained by

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<sup>118</sup> CONSTITUTIONAL COMM’N, *supra* note 4, at 14.

<sup>119</sup> See *id.* at 12-13.

<sup>120</sup> CONSTITUTIONAL COMM’N, *supra* note 4, at 12-13.

<sup>121</sup> O’Brien and Wheatle, *supra* note 30, at 689.

<sup>122</sup> CONSTITUTIONAL COMM’N, *supra* note 4, at 14.

rules. With the use of the method, dramatic ruptures from the system of rules are avoided by the requirement that decisions have to be justified with reference to previous judicial decisions. In the sphere of judicial determinations about the meaning of the constitutional text, the method frees the text from the grip of a static meaning over-determined by the ideas of those who may have first authored the text. In Commonwealth Caribbean Constitutional case law, the adoption of the “living constitution” or common law approach to constitutional reasoning is settled throughout the Caribbean. While the debate in the U.S between originalist and constructivist may have influenced this outcome, the rejection of notions of original intent is more likely the product of the process by which the Westminster system of government was adopted as the basis of the independent West Indian Caribbean state—a process West Indian constitutional scholars have called non-autochthonous.

Still, in the Caribbean, the adoption of the living constitution has not become a recipe for the judiciary in the Caribbean to test the limits of its law making powers. On the contrary, the deeply engrained common law tradition in the Commonwealth Caribbean legal system means that constitutional case law has maintained a high degree of fidelity to the constitutional text and precedent. Indeed, the impetus behind this fidelity is the legitimacy that has been achieved as the constitutional common law method is deployed. Judges in the Commonwealth Caribbean are keenly aware that judicial fidelity to the text and precedent is an important basis of popular acceptance of constitutional case law and the judicial function in relation to the constitutional text. At the same time, the ability and the use of the common law method to channel judicial perceptions of public opinion and common understandings of justice into an evolving system of constitutional rules and decisions is an equally important basis of the constitutional courts legitimacy in the Commonwealth Caribbean. These two, seemingly opposed, sources of legitimacy—one rooted in the stability of the common law method; the other, in the inherent responsiveness of the method—reconcile in a third basis of legitimacy that draws upon both the stabilizing and responsiveness features of the common law method. This hybrid legitimization device is deeply conservative. As a device, it is operationalized through a judicial acceptance of the value placed by citizens on institutional practices that have stood the test of time and the channeling of this value into the judicial reasoning process. Here legitimacy is derived not from the objectivity claimed to be the effect of case-by-case, precedent-based reasoning, but the seemingly accepted view that cases and rules that have survived and support the constitutional structure must be presumably based on intelligent decision-making.

The scope of the Commission's work, its repeated claims of wanting the reform process to be a gradual one, which would allow the recommendations for reform to be seen as having democratic basis, is symptomatic of a common law mentality adopted by the Commission as an approach to constitutional reform. The concern for the legitimacy of the process inherent in the approach was allied to the view that was often expressed to the

Commission during the consultative process; that if the constitution is not broken then there is no need to fix it.

### VIII. CONCLUSION

The argument that still has to be made is how did the cluster of rationales, organized around the deployment of a discourse relating to ordinary legislation, judicial intervention, weighting, and legitimacy, operate together as an expression of a common law mentality as described? Underlying the common law discourse is a perspective concerning the distribution of power: fidelity to precedent as a discursive power is balanced against responsiveness in the interest of legitimacy, and both discursive forms of power emerge out of a broader discourse concerning law-making authority and the separation of powers. When the Commission deployed arguments suggesting the role of ordinary law and judicial intervention in the constitutional reform process, it was speaking about the use of responsive mechanisms clothed in legitimacy and arguably responding to the same legitimacy concerns that permeate common law-making. Its deployment of the weighting and legitimacy rationales (fix only what is broken now so that citizens can have the time to educate themselves about the bigger constitutional issues) corresponds to the common law mentality that places such value on the legitimacy function (objectivity) that is served through judicial decisions being tied to the text of previous cases.

The common law matrix underlying the Commission's recommendations was not coincidental. The common law mentality is the best-preserved feature of colonialism precisely because of the way it has become indigenized within the movement towards creating a more autochthonic Caribbean legal system since the adoption of written constitutions. And, in this regard, the fact that these written constitutions were modeled on a system of government, which itself was riddled through with a common law system, should not be overlooked for its power to explain the ease with which the Commission was able to deploy the discursive matrix in service of its political agenda.

The reform exercises in the region to include environmental provisions have, to a large extent, been unsuccessful. This is particularly true in the Bahamian context, where the Commission's common law approach to constitutional reform provided for a watered down recommendation for an environmental provision. While the Commission did recommend that framework environmental legislation be adopted,<sup>123</sup> the region's history of institutional fragmentation and lack of enforcement means this is only a second-best option for environmental protection. While some developing countries have adopted a State-based liability regime for environmental protection,<sup>124</sup> this has not occurred in the region. In fact, the Commission

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<sup>123</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 143.

<sup>124</sup> See Barbra Luppi et al., *The Rise And Fall Of The Polluter-Pays Principle In Developing Countries*, 32 INT'L REV. L. & ECON. 135, 137 (2012) (listing India, Malaysia, Taiwan, Ecuador, Chile and Costa Rica as adopting state-based liability regimes).

cites the concern regarding litigation as one reason why substantive environmental provisions have not been adopted regionally.<sup>125</sup> In the Bahamian context, a series of domestic cases for the judicial review of governmental decisions in the environmental sphere indicate the basis for the problematizing of environmental protection litigation.<sup>126</sup> Perhaps, however, what best explains the deployment of the common law discourse in service of the Commission's conservative approach to constitutional environmental protection and constitutional reform generally, is the political sensitivities and strategies that have developed in response to the inability of successive administrations to pass the most elementary of progressive anti-discrimination constitutional reforms because of petty political partisanship. Though the Commission was tasked with conducting a broad review of the Constitution, it realized that at the end of the day only a few, non-controversial, elementary reforms would be recommended by the government of the day to be put to Parliament and, via a referendum, to the general citizenry—the ones least capable of being turned into a political controversy, the ones successive governments had failed at introducing into the Constitution. Thus, the recommendations of the Commission were aligned with the government's conservative agenda using an internalized common law discourse as the means of rationalizing the ordering and division of the constitutional reform assessment between reforms most likely to attract a quick consensus and those that might simply serve as a distraction and cause citizens to reject all of the reforms put to them. No doubt the Government of The Bahamas' refusal to accept the results of an advisory referendum on gambling in 2013, which has created widespread cynicism in The Bahamas about referendum processes, may have provided the Commission with even more reason to play it safe.<sup>127</sup>

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<sup>125</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 141.

<sup>126</sup> See generally Queen v. Alfred 2013/PUB/jrv/00034 (Bah. 2014, unreported); Bimini Blue Coal. Ltd. v. Christie, [2014] (SCCivApp). The case of *Save Guana Cay Reef Assoc. Ltd. v. Queen* was appealed to the Privy Council. *Save Guana Cay Reef Assoc. Ltd. v. Queen*, [2006] 1 (Bah. Ct. App. 2006). Leave to appeal in the case of *Responsible Dev. For Abaco Ltd. v. Right Hon. Hubert A. Ingraham*, was recently refused by the Privy Council in 2013. Lisa Benjamin, *Country Report: The Bahamas*, 5 IUNC ACAD. OF ENVTL. L.J. 54, 54 (2014), available at <http://www.iucnacel.org/en/documents/1137-iucn-academy-of-environmental-law-ejournal-issue-5-2014/file>.

<sup>127</sup> CONSTITUTIONAL COMM'N, *supra* note 4, at 10.

**ANNEX I**

Proposed provision:

1. *All persons, including future generations of Bahamians, have a right to a healthy, biologically diverse, and ecologically balanced environment. The government shall not deny or abridge this right.*
2. *Recognizing the intrinsic value of nature, the government shall:*
  - (a) *provide for the conservation of biological diversity, natural resources and cultural heritage resources, and the sustainable use of their components, on the basis of the precautionary principle;*
  - (b) *provide for the protection of fauna and flora and natural resources in order to reduce risks to their ecological function, reduce the extinction of species, and reduce cruelty to animals, on the basis of the principle of sustainable development;*
  - (c) *promote the protection of ecosystems, natural habitats and natural and cultural resources, and the maintenance of viable populations of species and healthy natural resources in natural surroundings;*
  - (d) *provide sufficient, appropriate and timely information to the public regarding their environment and any substantial changes to it, and shall consult with the public and consider their views in relation to any decision which may have substantial effects on these resources; and*
  - (e) *promote sustainable development.<sup>128</sup>*

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<sup>128</sup>This proposed provision is based on, with some alterations, the proposal made by Joshua J. Bruckerhoff, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEXAS L. REV. 637 (2008).