CONSTITUTIONAL REFORM

A Contribution made at the Invitation of
The New Constitutional Commission
Friday, 8th February 2013
Freeport, Grand Bahama.

I am honoured by this invitation to participate in this Constitutional Commission's exercise assigned to it under the broad mandate of '*Constitutional reform*'.

This willing contribution comes from a member of the public keenly interested in *constitutional reform* as a topical and very relevant subject matter, generated by the Prime Minister's Communication to Parliament on 1st August 2012, announcing the appointment[1] of a new Constitutional Commission, which is tasked

> **"to conduct a comprehensive review of the Constitution of The Bahamas, and to recommend changes to the Constitution in advance of the 40th anniversary of Independence next year. These changes will require a national referendum to be held in due course so that the will of the people can be determined on the matter."**

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[1] In respect of which no formal instrument signifying it appears to have been officially gazetted.

A very likely starting point for any review of the Constitution is the preamble. There are two preambles which are important to the issues you have to discuss. There is the introductory preamble generally declaring *inter alia* the national commitment to the Rule of Law; and there is the preamble to Chapter III devoted to the Fundamental Rights and Freedoms of the Individual to which every person in The Bahamas it declares entitled "whatever his race, place of origin, political opinions, colour, creed or sex....".

Not to be confused with the law revision which is a function of Law Reform Commissioners authorised by Act of Parliament[2] to alter and amend statutory law, constitutional reform necessarily invokes procedures to effect amendment of the Constitution in manner and form that underscores its evolutionary character.[3] The amenability of Bahamian constitutional law to reform is enabled by the procedure the Constitution itself lays down[4] for its legitimate alteration and/or amendment.

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[2] *The Law Reform and Revision Act*, Chap. 3.

[3] Hinds v. The Queen [1977] A C 195, pp. **211-213** (*per* Lord Diplock).

[4] *Art. 54.*

One such procedure that is an absolutely essential step when the objective is to alter certain provisions of the Constitution that are entrenched, is a referendum. In that case the proposed enactment which is to effect the alteration must proceed through the Parliament in a certain form, in that it must state that it is an Act for that purpose.[5]

As some of you may have concluded at this point, The Bahamas is not alone in having challenges to basic institutions, including if necessary the document itself. Other developed countries in other times during their infancy were once also beset by such challenges, when they too had to consciously attend to them, often by having to devote their best resources in abating them.

In these or any other times it would be surprising - if not strange, if any man-made institution is able to escape the challenges that come with passage of time. Those challenges appear from different sources, and in varying intensities and forms; and, of course, they make different demands on the institution.

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[5] *Art. 54(5).*

There are changes whose fates are tied up with the institution's status and which needs reassuring of its capacity to sustain itself and the changes themselves. Such may be the urgency and intensity of the pressures that they invariably necessitate an accommodation or the creation of a new legal order or new legal realities.

Also, there are forces of attrition aimed at the institution's vital parts (that is, in mechanical terms, its moving parts) whose natural tendencies are to seek redundancy of everything man-made even as their aim is directed at a perceived but constantly moving state of equilibrium.

But no need for alarm: these are perfectly normal processes at work to which The Bahamas Constitution is no exception to their interplay. Between them they cause necessary, if not always healthy and comfortable tensions throughout the life of the institution.

Yes, The Bahamas Constitution - not unlike other written (and even unwritten) constitutions to which nations of people subject themselves from time to time, is the archetypal institution, unique in its organizing

provisions; yet not so as regard underlying principles that inform its purposes.[6] It is not all contained in a single document as the constitutional document of 1787 (and its amendments) of the United States of America.

Existing outside the Constitution yet not distinctly so as to deprive them of their status as part of the law of the constitution, are rules of the constitution called *conventions* that are not enforceable by the law courts.

Conventions nevertheless affect the working of the Constitution in that they have the effect of transferring legal powers from the legal holder to another official or institution. An example of this is the appointment power in virtue of *Art. 94(2)*, as relate to Justices of the Supreme Court (other than the Chief Justice) which is vested in the Governor-General acting on the advice of the Judicial and Legal Service Commission.

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[6] As enshrined in *The European Convention for the Protection of Human Rights and Freedoms* (1953) (Cmd. 8968); *The United Nations' Universal Declaration of Human Rights* of 1948; *The International Covenant on Civil and Political Rights* (adopted 16th December 1966, entered into force 23rd March 1976; signed by The Bahamas 4th December 2008 and ratified 7th May 2009); see, further, Privy Council decisions Minister of Home Affairs v. Fisher [1980] A C 319, pp. **328-329** (*per* Lord Wilberforce); Riley v. Att.-General of Jamaica [1983] 719, p. **728** (*per* Lords Scarman and Brightman); Forrester Bowe *et anor.* v. The Queen [2006] 1 W L R 1623, p. **1633** (*per* Lord Bingham).

I know of no convention involving Bar Council in a formal or informal role, part of a consultative process, in the selection of suitable candidates for appointment. The same is true of the appointment of a Chief Justice[7] and Justices of Appeal of the Court of Appeal[8] by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. This is a lacunae properly filled by constitutional convention rather than a legal rule.

Some conventions may seek to limit the operation of apparently broad legal power, or even prescribe that a legal power shall not be exercised at all.

Conventions include the rules governing activities of the Cabinet, the Prime Minister, and the Crown.

The truth is, that, at Independence (a legal reality evidenced by the Constitution's coming into existence) there already existed laws and conventions receivable as part of a changed constitutional regime by process of evolutionary and not revolutionary.

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[7] *Art. 94(1).*

[8] *Art. 99(1).*

However, the Prime Minister's statement referring to the Commission conducting "a comprehensive review of the Constitution" appears to be to the document itself.

An ever present feature of constitutional review is the Court's power to construe anew legal and technical expressions, and even descriptive words mentioned in the document's original text the effect upon which new technological developments and changes[9] brought by modern activities its Framers could not have foreseen. It means the Constitution is open to interpretation as "a living tree capable of growth and expansion within its natural limits"[10], and not as one which "still retains the watertight compartments which are an essential part of her original structure."[11]

It must be noted straight-away (and as their labels suggest) that *'constitutional reform'* is distinguishable from constitutional review. To the extent any reform if recommended and acted upon, will occur at some later

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[9] e.g., modes of receiving and effecting communication, and methods of transportation.

[10] Edwards v. Attorney-General of Canada [1930] A C 114, p. **136** (*per* Lord Sankey).

[11] Att.-Gen of Canada v. Att.- Gen of Ontario [1937] A C 326, at p. **354** (*per* Lord Atkin); or, as Lord Bingham of Cornhill in Reyes v. The Queen [2002] 2 A C 235, cautioned against judicial interpretation of its language, "**a will or deed or charterparty.**"

stage, then reform is potentially an outcome of review, as the Prime Minister's statement clearly anticipates.

And so, necessarily out of fairness to the members of the Commission, and having regard to the discussion topic, it would be presumptuous and indeed premature, to say what reforms will or should be made to the Constitution and governmental structure, or, for that matter, in the area of civil and political (human) rights.

Obviously, appointment of a new Commission does envisage a review of the governmental structure aimed directly at changes to the existing constitutional order; and it is to involve participation of the citizenry in the lawmaking process through a national referendum to determine the popular will.

As to the forces fueling a constitutional review by the new Commission with specific (although not fixed) terms of reference, albeit with its given broad mandate "to build upon the impressive work of what was done by the first Constitutional Commission", the announcement of the appointment of a thirteen-member Commission states that it is because,

> "this is an appropriate juncture for us, as a nation, to take stock of where we are today in light of the constitutional experience of the past four decades, and to collectively decide, both in the legislature and in a national referendum, what reforms and adjustments, if any, should be introduced in order to secure the continuing relevance, vitality and resilience of the supreme law of the land."

Although it is useful for purposes of illustration to refer to the Commission's terms of reference, I intend to limit my focus to some features of the Constitution that appear to be proper candidates for review within the scope of constitutional reform.

That noted and without belabouring the fact of the Constitution's distinction *vis-a-vis* Acts of Parliament, the question is whether some of the matters within the Commission's purview are (or legitimately ought to be) a focus of constitutional review seriously undertaken. The new Commission was assigned what is, admittedly, "a broad and diverse range of questions relating to our political system":

- Whether there ought to be constitutionally fixed dates for general elections;
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- Whether there ought to be fixed term limits for Prime Ministers and MPs?
- Whether the electorate should be vested with limited rights to recall their MPs?
- Whether the Senate, being an appointed body, should be constituted differently to encapsulate a broader cross-section of national interests?
- Whether eligibility for service in the Senate should be lowered from 30 to 21, the same age that applies to the House of Assembly?
- Whether the Senate should even be retained at all?
- Whether the unqualified right to free speech enjoyed by legislators needs to be modified so as to give the individual citizen either a limited right to reply to defamatory attacks made against him in Parliament, or a right to seek redress against the offending legislator in a court of law?
- Whether the constitutional power and authority over criminal prosecutions now vested in the Attorney General should be transferred instead to a constitutionally independent Director of Public Prosecutions with security of tenure?

Looking at the list, one might ask what urgency do these questions reveal to warrant any special concern? Assuming it is a necessity to have answers to questions that do not appear urgent on their face, is it not more apt to employ the legislative power after a full debate?

That said, it is not obvious from the announcement what the motive is for initiating a review at this time - what necessity fuels the call for constitutional review. Rather, it appears intended to be a stocktaking exercise aimed at identifying or addressing no national crisis.

In other words, constitutional review and ultimate constitutional reform require context. Insofar as this latest attempt at constitutional review is concerned the all important context is not identifiable. The fact that the new Commission has a 31st March 2013 deadline by which to report is not in itself an urgency explaining it. Nor does purity of motive suffice in this regard, and I suspect this is what explains the first Commission's fate, which was "effectively disbanded" after May 2007.

To speak of constitutional reform as a legitimate exercise of sovereignty and statehood that is permitted by the law of the Constitution, is but being descriptive without answering the question of what is involved in that exercise; or, why it is important (if not necessary) for the maintenance of the legal order, symbolized by a document called *the Constitution*. More fundamentally

it does not answer the questions: *what is a Constitution* and *how does it project itself in the life of the State*.

It must be asked, then: what is a Constitution and what are its functions and purpose that should require and admit of its reform at any point in time? As one might suspect, there are no definitive answers to these questions on which there is general consensus; in fact, depending on the issues to which they relate, any one of several emphasis may suffice.

In Prof. Basil Chubb's introduction to his book '*The Constitution and Constitutional Change in Ireland*' he adopts a description and gives an historical analysis of the Constitution of Ireland that are germane here:

> **"'Constitutions define and thereby limit public power....**
> **It is in fact a basic document of government, a point or source of reference, an instrument by which the government itself can be controlled. A constitution of this sort together with an independent judiciary endowed with the power to review and interpret** [the laws generally] **comprise an essential combination of institutions for the safety and well-being of a liberal democratic state."**

True, the topic invites an academic discussions if not confined to contexts reflecting organic distinction between Acts of Parliament concerned with specific subjects, and constitutional enactments. O'Connor J., a noted Australian jurist and an inaugural member of that nation's High Court, defined its constitution very early on in the union of sovereign States:[12]

> **"The Constitution, it must be remembered, is an instrument of government which from its nature must express its meaning in general terms. It is not only a law in itself, but an authority for making laws, and was intended by means of its broad general terms to adapt itself as far as possible to the changing conditions of trade and commerce, and to the new conceptions of legal rights and obligations which might in the ordinary course of things be expected to evolved in the development of Australia. On the other hand it must always be remembered, as this court has on several occasions pointed out, that the Constitution is something more than an instrument of government. It embodies the terms on which the people of the several States agreed for the sake of union to surrender their autonomy in certain respects. Keeping both these aspects of the Constitution in view, the true rule of interpretation would appear to be that**

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[12] Attorney-General of New South Wales v. Brewery Employe's Union of New South Wales [1908] 6 C L R 469, p. 533.

> **there should be given to all legal and technical expressions the widest meaning that is consistent with the terms of the contract of union."**

And recently Lords Scarman and Brightman said[13] of Jamaica's Constitution[14] as to the interpretation of its fundamental rights provisions, that it is

> **".. to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all the presumptions that are relevant to legislation of private law."[15]**

In essence, then, a Constitution is the embodiment of the popular will and commitment of those for whose purpose it exists, to control arbitrary governmental powers and individual caprice by subjecting them to an institutionally established Rule of Law. And one way to ensure against arbitrariness and lawful tyranny is to constitute the people themselves as the source of political authority, with their welfare its supreme goal.

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[13] Riley v. Attorney-General of Jamaica [1983] A C 719, at pp. **728-729**.

[14] Expressing "**no doubt that the proper approach to the interpretation of such constitutions is as described by Lord Wilberforce.. in *Minister of Home Affairs v. Fisher* [1980] A C 319**".

[15] Minister of Home Affairs v. Fisher [1980] A C 319, p. **329**.

As a safeguard against arbitrary exercise of power, the Constitution ordains a separation of governmental power and authority. Under its scheme the Legislature frames and passes laws; the Courts interpret and declare on the validity of such laws; and the Executive administers them. This is the classical constitutional arrangement commonly referred to as the separation of powers (functions).

The role of the Courts in our constitutional scheme is very illustrative; and because of the Prime Minister's seeming unconsciousness of judicial interpretation as a legitimate and all pervasive lawmaking component of that scheme, I make several essential points about it.

First, the Constitution from its inception contained various transitional provisions affecting its operation, and enabling the legislative and executive branches to institute changes affecting this nation's governance. Principal among these provisions are those concerned with establishment of the various Courts that should comprise its Higher Judiciary, but which have not been engaged in the Thirty-nine years since Independence.

Second: even as the Constitution by *Arts. 93* and *98* established a Supreme Court and a Court of Appeal for The Bahamas from 10th July 1973 onward, transitional provisions, namely *sects. 1(2)*, *9*, and *10* of *The Bahamas Independence Order 1973* ("the 1973 Order") were needed to legitimize the judicial acts of those who immediately prior to 10th July 1973 were appointed Judges of then existing Courts "as if they had been appointed under the provisions of Chapter VII of the Constitution"; and given the constitutional imperative in *Arts. 98* and *103* that a Judge subscribe the Oath of Allegiance before entering upon the duties of his office.

However, the Framers had to take into account and make provision for another reality being instituted by the Constitution and which directly affected the status of Judges of the Court who were historically citizens of other countries where many of them continue to reside.

The new reality was the creation of a citizenship of The Bahamas that was to be conferred on persons born in the Bahama Islands and alive on 10th July 1973, as distinct from that of the United Kingdom and Colonies

(being the right of persons resident within the Colony but whose birthplace was elsewhere). Nevertheless they were persons whose lawful exercise of the judicial power was not subject to constitutional challenge.

The Constitution addressed this evidently pressing necessity of the chronic unavailability of resident local judicial manpower by transitional provisions[16] enabling The Bahamas Government to enter into arrangements

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[16] The Court of Appeal established by *Art. 98* of the Constitution is distinct from a shared court of appeal provided for by *Art. 100(1)* when exercising jurisdiction in respect of The Bahamas:

> **"100.-(1) Notwithstanding anything contained in this Part of this Chapter, Parliament may make provision -**
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> **(a) for implementing arrangements made between the Government of The Bahamas and the Government or Governments of any other part or parts of the Commonwealth relating to the establishment of a court of appeal to be shared by The Bahamas with that part or those parts of the Commonwealth, and for the hearing and determination by such a court of appeal of appeals from decisions of any court in The Bahamas; or**
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> **(b) for the hearing and determination of appeals from decisions of any court in The Bahamas by a court established for any other part of the Commonwealth.**
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> **(2) A law enacted in pursuance of paragraph (1) of this Article may provide that the jurisdiction conferred on any such court as is referred to in that paragraph shall be to the exclusion, in whole or in part, of the jurisdiction of the Court of Appeal established by this Part of this Chapter; and during any period when jurisdiction is so conferred to the exclusion of the whole jurisdiction of the said Court of Appeal, Parliament may suspend the provisions of this Part establishing that Court.**
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> **(3) In paragraph (1) of this Article the expression "any court in The Bahamas" includes the Court of Appeal established by this Part of this Chapter."**

with Governments of other Commonwealth countries for sharing their Courts in place of the Court of Appeal established by *Art. 98.* As for substituting a final Court in place of the Judicial Committee of the Privy Council, the Constitution also provides for this in *Art. 105(1).*[17]

The first point of note regarding *sect. 9* of the 1973 Order is that it constitutionalised the Supreme Court and Court of Appeal as distinct institutions that were being continued under those designations as organs of government of the Colony of the Bahama Islands then in existence immediately before 10th July 1973, "for the purposes of the Constitution"; and it constitutionalised by continuing the then Justices holding offices in the Colony's Superior Courts "as if they had been appointed under the provisions of Chapter VII of the Constitution."

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17 "105.-(1) Parliament may provide for an appeal to lie from decisions of the Court of Appeal established by Part II of this Chapter to the Judicial Committee of Her Majesty's Privy Council or to such other court as may be prescribed by Parliament under this Article, either as of right or with leave of the said Court of Appeal, in such cases other than those referred to in Article 104(2) of this Constitution as may be prescribed by Parliament.

(2) Nothing in this Constitution shall affect any right of Her Majesty to grant special leave to appeal from decisions such as are referred to in paragraph (1) of this Article.

(3) Parliament may by law provide for the functions required in this Chapter to be exercised by the Judicial Committee of Her Majesty's Privy Council to be exercised by any other court established for the purpose in substitution for the Judicial Committee."

Another point of note is that Supreme Court and Court of Appeal Justices as of 10th July 1973 were meant to be appointed under the Constitution and not in exercise of any prerogative authority, akin to which is what has become a long-standing role of the Cabinet selecting Judges to appoint to the Supreme Court and Court of Appeal, to the exclusion from which exercise is formal participation by patently interested parties.

The argument that *Art. 99(2)(i)* of the Constitution requiring appointees to the Office of Justice of Appeal be a person who "holds or has held high judicial office", is a legal block to potential appointments to that Court of suitable qualified practitioners at The Bahamas Bar, inasmuch as they might not have already been a judge of the Supreme Court or of a superior Court of another designated Commonwealth country, is misplaced based as it is on a misinterpretation and/or misapplication of the said provision in the overall constitutional scheme. Properly construed *Art. 99(2)(i)* assumes that Justices of Appeal will be appointed from among Justices of the Supreme Court who meet and satisfy its requirement;

so that one solution might be to increase the number of Supreme Court Judges from which to select appointees.

The purpose of the transitional provisions was not to continue in existence thereafter a previous colonial order or status of colonial Courts and Judges appointed and holding offices in virtue of the colonial order, but rather under the Constitution of The Bahamas as an independent and democratic sovereign state.

That the Constitution would contain transitional provisions to ensure functioning of the Supreme Court established by *Arts. 93* and Court of Appeal established by *Art. 98*, leads inexorably to the conclusion that the status of things immediately prior to its declaration of The Bahamas as a democratic sovereign nation was not intended to continue Forty years post Independence.

I observe the new Commission is not asked to look at the status of the Judiciary that the provisions of *sect. 9* of the 1973 Order operated to defer but not avert, under a moratorium imposed ever since 10th July 1973 by *Arts. 100* and *105(1)* of the Constitution, although it is speculated they will likely have to consider as well,

> "whether and, if so, to what extent, the Caribbean Court of Justice - or perhaps even a final court of our own - should replace the Judicial Committee of the Privy Council as the final court of appeal under our constitution."

The Constitution contains no emphatic adjuration as to how it is to be interpreted. It means, therefore, any theory of constitutional interpretation must in the end be a matter of conviction within the individual judge's breasts, based on some theory external to the constitutional instrument itself. In the normal course of events this could prove a burden of immense moral and political force upon those tasked with interpreting the laws, namely, the judges of the various courts.

For example, one finds the celebrated Australian writer and authority on its constitutional development *Garran*, in a 1897 article, '*The Coming Commonwealth*', agreeable to a Constitution being construed as a living force where concern is responsible government, which "as we know it, is a new thing and a changing thing."

Likewise, O'Connor J. observed in Jumbunna Coal Mine NL v. Victoria Coal Miners' Association[18] **that**

> **"it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve."**

And Dixon J., who would later become Chief Justice of Australia's High Court and one of the great jurist that or any commonwealth country has since produced, said in Australian National Airways Pty Ltd. v. The Commonwealth[19]**:**

> **"it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."**

Yet inexplicably - some might say irresponsibly, in The Bahamas for all of the post-independence period, the critical task of constitutional interpretation has been left to foreign nationals whose nativity and sworn allegiance are to peoples and flags of other countries, and about whom the most can be said at any point in time, is that they are works in progress.

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[18] (1908) 6 C L R 309, at p. **367-368**

[19] (1945) 71 C L R 29, at p. **81.**

The view that the democratic ideal, inherent in the Constitution's design and purposes, is best advanced by governmental institutions like the judicial branch which at the apex ought to symbolically reflect the nativity of the people for whom they exist, is not novel. Indeed, it was important enough to draw a comment from Lord Steyn, a retired Law Lord once a member of Her Majesty's Judicial Committee of the Privy Council.

Lord Steyn was on that occasion anticipating the day (that eventually came) when the United Kingdom constitutionally would adopt a new legal order within which an English Supreme Court sits at the apex of the judiciary's hierarchy institutionally insulated from the presence of the legislative and executive branches of government by strict separation of powers, as was not the case then constitutionally; where, in more than a symbolic way, the Lord Chancellor was an integral and primary functionary within all three branches. In the changed state being anticipated, he frankly conceded (no doubt referring to himself and another South African-born Law Lord, Lord Hoffmann).[20]

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[20] "It would be impudent to suggest that in a Supreme Court there would be a place for

The reason for this is embarrassingly obvious and requires no apology. Because, integral to his (or her) responsibility for the development of the law and its institutions (one not to be lightly assumed or irresponsibly assigned), a Judge might be required by circumstances to be patriotic and to reflect a certain amount of national pride (but not ever to abandon principle), even to the point of being protective of established traditions and marks of cultural identity, rooted in intimate firsthand knowledge of the context in which a matter arisen for judicial consideration.[21] Indeed, as Lord Taylor of Gosforth CJ also observed,[22] it is inevitably a consequence of the process of rights adjudication that a Judge's value system, informed as it might be as much by experience as by cultural and historical influences, is called into duty.

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emigré South African lawyers. But, given the massive contribution of past and present Scots Law Lords, it would be essential in any new constitutional arrangement to retain the presence of Scots lawyers."

[21] E. g., Wellcome Foundation Ltd. v. Commissioner of Patents [1983] NZLR 385, at pp. **386-7** (*per* Cooke J., as he then was); New Guinea (Export) Co. Pty Ltd. v. Basis Vedbaek [1980-84] L R C (Comm.) 115, at pp. **123-4** (*per* Bredmeyer, A. J.); Maeaniani v. Saemela [1980-84] LRC 339, at p. **343** (*per* Daly, C. J.).

[22] A lecture entitled *'Human Rights: The Legacy of Mrs. Roosevelt'* delivered to The Holdsworth Club, 30 November 2001.

The criticism, that it is to a pool of foreign Judges by and large whose task it has been to interpret the law of the Constitution and to influence the direction of our political development, is to be neither provocative nor controversial, nor mischievous. It is rather to contrast the Courts' historic lawmaking function, of which the Prime Minister appears disassociative in alluding to a "collective experience of the past four decades."

Yet, the post-independence history of The Bahamas as concerns the contribution of The Bahamian Courts to government chronicles almost from the beginning the nation's constitutional development coming under effective arrest both from an intellectual perspective and in the all important area of institutional symbols. Therewith, all efforts to establish a judicial portrait of ourselves as well as a national political pedigree were subordinated to the politically expedient at the expense of discernible social order and political development.

In this regard the criticism which cannot seriously be challenged is that in the post-independence period the superior court are not institutionally accountable,

in the sense of reflecting institutional identity equating with what I have on another occasion described as a "judicial self-portrait... commensurate with the courts' conception of their role in the political life of the state."

The exclusive power of superior Courts of record (which the Supreme Court and the Court of Appeal are) to be final interpreter of the law is an inherent power of judicial review. It is essentially a lawmaking power invariably engaged in constitutional interpretation and is distinct from Parliament's authority under *Art. 52* "to make laws for the peace order and good government of The Bahamas."

I should also like to say something about one of the more significant aspects of the Commission's mandates (if not a primary one) under the terms of reference: it is

> **"that the new Commission will pay particular attention to the need to strengthen the fundamental rights and freedoms of the individual, including the need to end gender-based discrimination against women consistent with United Nations Conventions and more enlightened views that have developed globally since the attainment of our Independence. The Commission's inquiry into this particular matter will**

> **necessarily entail close examination not only of the anti-discrimination and fundamental rights provisions but the citizenship provisions of the Constitution as well. Indeed there are other difficult Citizenship-related questions that will no doubt exercise the Constitutional Commission as well."**

It is submitted, to the extent this mandate implies (as some now maintain in debate) that the need to end gender-based discrimination against women is a direct result of a lacuna or an anomaly of the Constitution, requiring its amendment to be repaired, it is not at all evident from its provisions why this should be so.

Indeed it is a contradiction in terms, if not a patent absurdity, to say that the Constitution which declares[23] its status as the supreme law, and which also declares the individual's right to protection of the law against discriminatory laws and practices "whatever his race, place of origin, political opinions, colour, creed, or sex", itself nonetheless operates discriminatorily as regards citizenship rights as between genders or otherwise.

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[23] *Art. 2.*

Parliament's authority, subject to the provisions of the Constitution, to make laws for the peace, order and good government of The Bahamas is absolute. The fact that the Constitution provides in what circumstances persons meeting particular description are entitled to Bahamian citizenship, in some but not all instances, is not a prohibition against Parliament providing for the acquisition of citizenship of The Bahamas "by persons who do not become citizens of The Bahamas by virtue of the provisions of [Chapter II of the Constitution]."[24]

Finally with regard to the new Commission's terms of reference, which is rather ambitious in terms of the sheer number of matters put to it for consideration and report within the time stipulated. In the absence of an evident necessity for a resolution of these issues owing to a galvanized national interest in such matters that is increasingly polarizing, it is possible the Commission will take up this constitutional review as a more or less academic exercise.

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[24] *Art. 13*, paragraph (a).

And to proceed indiscriminately to put some of the issues to the people in a referendum might reveal what I suspect is a lack of popular enthusiasm over them.

Maurice O. Glinton
4th November 2012