A Recipe for Change: Constitutional Reform in Saint Lucia

Amit Chhabra, St. George's University
Damian Greaves, St. George's University

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Amit K. Chhabra* and Damian E. Greaves**

“Le mieux est l'ennemi du bien.”
(The perfect is the enemy of the good.)
- Voltaire, *La Bévuele*

I. Introduction

In spite of relative peace over the years in the English-speaking Caribbean, recent debate has centered on whether certain constitutional charters should be amended or replaced in their entirety. This movement presents the first major opportunity for these British Commonwealth nations to re-examine their governments’ parliamentary underpinnings so as to account for adequate protections of civil liberties and inter-branch checks; moreover, it is an opportunity to disallow “the law to become the hostage of history.”¹ Too often, “constitutional reform” is cited as an essential course of action, whereas an expansion of the body of law and improvements in enforcement of the rule of law and existing guarantees would suffice.² Though the success of the

* Visiting Professor of Law, St. George’s University. J.D., Notre Dame Law School; A.B., Cornell University. I would like to thank my wife Sonali Chhabra and my family for their unbounded love and devotion.

** Assistant Professor of Humanities and Social Sciences, St. George’s University. Damian has served as Minister of Government in the Cabinet of Saint Lucia, a Member of Saint Lucia’s House of Representatives, the Senate of Saint Lucia, and a Member of the Saint Lucia Labour Party.


² Although there have been consistent demands for Caribbean constitutional reform over the years since the islands gradually obtained independence throughout the 1970s, we recognize that particularly strident public calls arose in the aftermath of the unpopular *Pratt and Morgan, infra*, decision by the Privy Council wherein a sentence of corporal punishment was commuted to life imprisonment. However, the renewed
United States Constitution is often touted as a shining example, the United States has not adopted a parliamentary system and thus comparisons can be imprecise; moreover, we note that the existing U.S. Constitution incorporates numerous amendments that have allowed it to evolve.

The purpose of this article is to assess the adequacy of the approach taken by the existing Saint Lucia charter by comparing it with the paragon of the United States Constitution and its amendments. Firstly, do all citizens have equal rights and liberties under the law? Second, is each branch of government truly independent? For example, we look to whether there are institutional safeguards that prevent each branch of government from overstepping its prescribed role. Third, can the existing concerns be addressed through constitutional amendments or through enhanced enforcement, or must the entire existing charter be replaced? The paper concludes by prescribing amendments to establish a truly independent executive, legislature and judiciary, and by setting forth principles in favor of anti-majoritarian, nonoriginalist judicial review. These criteria are essential for an evolving way forward.

A. Regional Context

In the English-speaking Caribbean, we boast of a democracy that has proven to be more resilient than that of any other sub-region of the developing world. As an example of this trend, then-Secretary-General of the Organization of American States (OAS) César Gaviria Trujillo remarked that "Barbados has enjoyed three centuries of interest in a Caribbean Supreme Court followed the 1992 Report on the West Indian Commission, one year before the Pratt and Morgan decision. Still twenty years earlier, the Representative Committee of the Organization for Commonwealth Caribbean Bar Association (OCCBA) was established to study the replacement of the Privy Council by a Caribbean Court of Appeal. See http://www.caribbeancourtofjustice.org/about3.htm.
parliamentary rule an experience unparalleled in the world.” He went on to comment that the region is known for its democratic institutions and appreciation of democratic values and practices. Nonetheless, over the past two decades the region has seen a flurry of rhetoric and constitutional reform efforts across its member states, while the fundamental institutional structures have remained unchanged. Issues of participation, legitimacy, accountability, local governance and the people’s constituent power are at the heart of this discussion as are separation of powers, the fusion of executive and legislative branches, limited parliamentary oversight of the government in small legislatures where Cabinet members are also Members of Parliament (MPs), and the disproportionality of electoral results under the first past the post (simple majority) system.

Moreover, a number of recent general events and trends in the Eastern Caribbean as well as conditions peculiar to Saint Lucia have provided the impetus for an unprecedented quest for the deepening of the so-called spirit of democracy and calling for constitutional reform. By comparison, Grenada has made progress in this regard and already has a new draft constitution. In all of this, there are many who have touted the virtues of globalization in terms of its myriad opportunities and this has

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4 Id.

5 Justin Blount, Zachary Elkins and Tom Ginsburg, Constitutional Reform in the English Speaking Caribbean: Challenges and Prospects, 15 (2011). These issues have largely been addressed in other Caribbean constitutional reform efforts, namely in the Bahamas, St. Vincent & The Grenadines, Barbados, Guyana, and Trinidad & Tobago.

6 There have been calls for reformed charters in Grenada, St. Vincent & The Grenadines, Bahamas, Barbados, Guyana, and Trinidad & Tobago.

7 For example, Trinidad and Jamaica are widely seen as more industrialized and thus attract more Caribbean residents due to perceived economic opportunities. In fact, the 1958 West Indies Federation is believed to have collapsed, in part, due to the fear of Trinidad and Jamaica that there would be mass migration to their islands by residents of other Caribbean provinces. Another main
been accompanied by questions of the role of our imported and imposed independence constitutions in this new globalized dispensation. The analyses below thus encompass the issues of participation, legitimacy, accountability, transparency and fairness.

B. Saint Lucia’s Political Background

In Saint Lucia, there has been an ongoing conversation on constitutional reform initiated by the Saint Lucia Labour Party (the “Labour Party”) during its 1997-2006 term in office. The Labour Party recently regained power after the November 28, 2011 General Election. The party initiated official dialogue via the appointment of a Constitutional Reform Commission, headed by legal luminary and distinguished Justice Suzie d'Auvergne. It placed the matter of constitutional reform firmly on the nation's agenda for the near future and we saw a commitment to continue this process by the United Worker's Party (UWP) administration. The aim is to re-define the very core of society: the nation's value system, socio-political conditions and how citizens seek to define themselves - their identity - in a rapidly changing world. A golden opportunity now avails itself with the ostensible political will that obtains on all sides of the political divide.8

Saint Lucia’s society and state are legacies of its colonial past, though the 1978 governing charter has not changed over time; there have been no amendments. The defining features of this colonial inheritance include: a separation between the state and society that has resulted in a lack of assimilation between the two, and ultimately

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reason is that the overwhelming majority of the financial contributions came from Trinidad and Jamaica, and the other provinces continued to demand that they contribute even more. See http://en.wikipedia.org/wiki/West_Indies_Federation.

the deficiency of its nationhood; a highly stratified society which has been inimical to
the much-desired enterprise of national integration; a highly authoritarian and
centralized government which has frowned upon the democratic ideal of the
facilitation of citizen empowerment; embellished expectations that have arisen out of
the self-government experiment and an independence constitution that was at best
negotiated and at worst imposed, as opposed to a transparent expression of the
national will. Indeed, the existing charter was never ratified by popular referendum,
and thus cannot be said to be the “authoritative expression of our collective will.”9
Simeon McIntosh aptly summarizes this political and constitutional legacy in positing
the view that political decolonization involves three stages: "[t]he progressive
devolution of qualified home rule, then self-government, and finally, independence."10
In the absence of major amendments and concerted adaptation, the governing
document might not be as responsive to Saint Lucian society at the end of this
process as it was at the outset.

II. What is a Constitution?

A constitution is purely a charter for the rules that govern the way we live in a society.
Inclusive of the ordering of this life is the enunciation of what is collectively perceived
as the good life, a certain conception of justice and an explanation of those
institutions by which this good life is supposedly to be attained. It also prescribes the
range of activities that will be influenced by these institutions. Thus a constitution is
fundamental to the giving of form to collective life and therefore has to be considered
the most significant of human endeavors as it aims to shape the lives of citizens in
society. To be sure, the constitution addresses a fundamental and universal challenge -
the question of how humans are to live with one another in society and how they are

9 Simeon C. R. McIntosh, Caribbean Constitutional Reform: Re-thinking the West Indian Polity, 264 (2002).
to relate to each other and to their state. In this way, it can be argued that a constitution defines both our moral and political community as it can simultaneously be an instrument of political order and an expression of people’s moral aspirations for political life. Ideally therefore, a constitution is a collective and public expression of the essential political commitments of a people - the kind of people they are and aspire to be.

In purely political terms and from the point of view of a democratic society, the constitution sets down the most basic arrangements of political power in the society and establishes the parameters for its legitimate exercise by a few over the majority. This obviously does not foreclose the possibility of anti-majoritarian, unpopular laws; indeed, the United States’ example shows us that these are often necessary to protect the people from themselves.¹¹ Ultimately, a constitution must protect the citizen from the abuse of political power and tyrannical rule. It must protect the liberty of the citizen by the prudent control of political power and, by extension, protection of equal basic political rights and liberties, freedom of association and freedom of speech. Rights and liberties guaranteeing the security and independence of citizens, such as freedom of movement and the protection of the rule of law, cannot be overlooked.

III. What is the Rationale for Constitutional Reform?

Constitutional reform can be defined as an attempt to modify the rules that govern a country. It is commonly accepted that constitutions are time-bound and that, eventually, they can suffer temporal dysfunction. The Saint Lucian experience is one where there is some concern over the need for change of the constitution. Not unlike

¹¹ For example, the electoral college was instituted in the United States to provide that state electors, not the voting public, would pick the President. This was seen as a necessary check on the passions of the masses, which could be swayed to vote in passion without due consideration of all relevant factors.
other countries in the region, there is growing concern over the fact that aspects of
the constitution, as currently configured are unsuitable and need to be geared more
towards today's developmental and contextual realities. There has been a consistent
call for increased dialogue and political party reform, particularly relating to general
funding and campaign financing. In addition, the ever-present phenomenon of
excessive partisanship, questions of an ineffective separation of powers, the efficacy
of the no-confidence mechanism, the independence of the judiciary and the
appropriate size of legislatures, have not escaped the scrutiny of sections of the Saint
Lucian citizenry. This can be explained by the reality of a society seeking to
continuously reassess and reshape itself in light of the massive social, economic and
cultural changes with which it must come to grips.

It must be acknowledged that Saint Lucia, like its sister territories of the
Commonwealth Caribbean, received its political identity and derived its current
charter from Great Britain. Its political institutions thus reflect the fundamental
design of the constitutional monarchy of Britain, it continues to recognize the Queen
as head of state, and its citizens pledge continuing allegiance to her. And thus, as
Colin Hughes points out, constitutional reform here has tended to be based on the
British idea that “the only form of self-government worthy of the name is
government through ministers responsible to an elected legislature.”

However, we have a great opportunity to question the Westminster system itself.
Does this model inherited from Great Britain guarantee good governance today,
despite and in light of the popular view that the system has served the people of the
region well and is a source of strong parliamentary democracy? Saint Lucians have
lived through an almost schizophrenic experience battling their French and English

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checkered past, perfectly embodied in their dual language, rival La Rose and La Marguerite flower festival legacy, and hybrid legal culture intermixing traditional French civil law and Quebec codes with an English common law legal system and training. Moreover, they have also had to contend with a very significant African heritage. Thus, constitutional reform must be a quest for identity and an attempt to get to the root of existence in a very active and affirmative way. We must not be afraid to take the opportunity to effect deep political and philosophical transformation. We must effectuate a complete re-fashioning of our institutions of governance and democracy.

This process must detect our place in the West Indies regional integration process and the impact of any adjustment of our constitutional arrangements in view of the regional integration imperative. One should not negatively impact the other. Instead, there should be an encouragement of the perception of the two as twin pursuits geared towards the enhancement of the region and its constituent parts. As per Simeon McIntosh, "Constitutional reform must be a collective re-thinking of the West Indian Polity." McIntosh's passion is that constitutional reform, even as an individual enterprise at the level of a country or society, must take into account not only a re-definition of Saint Lucia's national identity but must be a conscious and deliberate engagement of its Caribbean temperament; the two are not mutually

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14 Id. at 63-64.

15 CARICOM – the Caribbean Community – is an organization of fifteen Caribbean nations that have come together under the Treaty of Chaguaramas to work towards their mutual economic betterment, a Caribbean Single Market and Economy, and a Caribbean Court of Justice. See generally, http://en.wikipedia.org/wiki/Caribbean_Community.

16 Simeon C. R. McIntosh, *Caribbean Constitutional Reform: Re-thinking the West Indian Polity*, x (2002).
exclusive. In other words, it must assist in the broader mission of an "authentic postcolonial Commonwealth Caribbean identity."\(^{17}\)

1. Options for Saint Lucia

In terms of governance, there are alternative ways of structuring the constitutional arrangements along the continuum of the two concepts of 'Parliamentary' or 'monarchial' and 'Presidential' systems, best illustrated by the United Kingdom and United States, respectively. The related literature on constitutional reform in the region\(^ {18}\) suggests that there is no one universally best solution to this challenge.

However, Dr. Ernest Hilaire\(^ {19}\) - a young, much respected Saint Lucian intellectual - in his submission to the Constitutional Reform Commission, suggested that constitutional reform in Saint Lucia ought to take into account the change in the perception of human rights since 1945, with the new idea in vogue regarding freedom to and freedom from. This of course has implications for our social and cultural milieu and the civic arrangements that portend. While it is true that constitutions across the region generally vary, it has to be acknowledged that one of the most common elements is a set of rights, and Saint Lucia's constitution is no exception. It includes the basic core and political rights such as freedom of expression, religion, assembly and association, providing for approximately twenty-two such rights. Yet, while property rights have featured prominently in political discussions across the

\(^{17}\) Id.


\(^{19}\) Damian Greaves, Address On “Constitutional Reform – the Saint Lucia Experience” to the Biennial Convention of the Saint Lucia Overseas Associations, January 20, 2002, Bridgetown, Barbados.
developing world, the need to maintain flexibility to reallocate assets continues to be complicated by entrenched property rights. There is also the rise of civil society and the new social movements that have emerged out of which has emanated the demands for new social and economic rights. This development has exposed the insufficiency of social and economic rights in Saint Lucia and by extension the region, indicating that for the most part the rights included in the Saint Lucian constitution are largely limited to civil and political rights. Issues such as the right to health and the right to shelter have not been highlighted. It is therefore timely that any meaningful and serious reform effort ought to take into consideration the social and economic rights of the citizenry.

Hilaire further contends that a Saint Lucian constitutional reform thrust could not proceed without due consideration of the ascendancy of neo-liberal economic thinking as the current dominant economic model. This all-encompassing intellectual and political economic thrust has implications both in terms of the development and the role of the state. Thus, constitutional reform in this period of rapid social and economic transformation ought to take into account not only the emergence of a new understanding of human rights since 1945, but substantial changes in the way the society is governed. In this new neo-liberal environment, Hillaire recommends that the nature of the state, its powers, functions and responsibilities require review. This extends to whether there is need for a career public service, or for guarantees against abuse and mechanisms to address abuses against the state. In addition, it is expedient at this time to deliberate on the place of more centralized power and to consider whether the power of the state should be dismantled in favor of more personal or community choices. This will also have to take into account the provision of social

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services by the state as has come to be expected by the citizenry. Additionally, the issue of the separation of church and state should be considered.

The question to be posed is whether Saint Lucia’s society can comfortably survive the onslaught of these substantive changes, particularly taking into consideration the way it is currently governed. In recommending changes, we need to consider whether the current constitutional arrangements are actually inimical to the survival of the nation or merely vestigial of colonial times.

IV. The Saint Lucia Constitution Order 1978 (the “Order”)

A. Civil Rights and Civil Liberties Protections

On paper, the Order captures many of the basic liberties that we would expect to see in a democracy, including those contained in the U.S. Bill of Rights. The Preamble acknowledges that “the enjoyment of rights depends upon certain fundamental freedoms namely: freedom of the person, of thought, of expression, of communication, of conscience and of association....these freedoms can only be safeguarded by the rule of law.”21 Moreover, there is a recognition of the State’s welfare role in guaranteeing its citizens an adequate standard of economic and social well-being.22 Social welfare language also appears, in the principle that material resources should be directed “to subserve the common good” and that labor should not be exploited or inhumane conditions imposed;23 however, there is little evidence that these provisions have been interpreted to provide any particular social or health

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21 The Saint Lucia Constitution Order 1978, Preamble (c) & (d).

22 Id. Preamble (e).

23 Id. Preamble (f).
care rights.\textsuperscript{24} A “commitment to democracy” and universal adult suffrage indicates an absence on paper of vestiges of inequality in voting rights.\textsuperscript{25} We also see respect for human rights, an aim toward friendly foreign relations, and the stated model of an engaged citizenry that “has duties towards every other and to the community.”

The fundamental rights and freedoms safeguarded appear to use language from, or similar to, that found in the United States Constitution and its Bill of Rights. As the British drafters of the Saint Lucia Constitution had the benefit of 200 years of American constitutional precedent and jurisprudence, this might not be coincidental. Rights are granted “whatever his race, place of origin, political opinions, color (sic.), creed or sex” to “life, liberty, security” as well as equality and equal protection.\textsuperscript{26} Freedom of conscience, expression, assembly, association, privacy, and no deprivation of property without just compensation recall the First and Fifth Amendments of the Bill of Rights.\textsuperscript{27}

Law enforcement standards are established. Section 2 states that persons shall not be deprived of their lives, and defines criminal law standards in which the State may justifiably use or allow the use of deadly force to avoid a greater harm to society. Similarly, Chapter 1(3) sets forth circumstances under which the State can deprive a person of his liberty, similar to that which we see in ordinary law enforcement. Recalling the American standard for a \textit{Terry} stop,\textsuperscript{28} the Order allows a person to be

\textsuperscript{24} Similarly, in the United States there is no implied right to basic health care. If there is to be substantial constitutional reform, some argue, then there should be universal health care as in Europe and Canada.

\textsuperscript{25} Id. Preamble (g).

\textsuperscript{26} Id. § 1(a). Equal Protection appears in the Fourteenth Amendment to the United States Constitution. \textit{See U.S. CONST. amend. XIV.}

\textsuperscript{27} Id. § 1(b) & (c).

\textsuperscript{28} \textit{Terry v. Ohio}, 392 U.S. 1 (1968).
deprived of his personal liberty “upon a reasonable suspicion of his having committed, or being about to commit, a criminal offense (sic.) under any law.”

There is no express definition of a crime; American jurisprudence ordinarily requires some overt act that evinces an unlawful mental state before a lawful conviction can be made. Other differences from American criminal law include the absence of a *Miranda* right to remain silent and to competent counsel that are mandated by the Fifth and Sixth Amendments, and made applicable to the states via the Fourteenth Amendment. However, a person who is charged of a crime is presumed innocent and may seek the advice of counsel; there is simply no court-appointed counsel and no mandatory recitation of a right to have such counsel. *Ex post facto* laws and double jeopardy are outlawed, and the right to a fair hearing is granted. Further, Section 7 provides for protections against arbitrary searches or entry upon private property similar to the Fourth Amendment’s proscription of unlawful searches and seizures.

Slavery, forced labor, torture, and inhuman treatment are outlawed. Freedom of conscience, thought, religion and propagation of religion, expression, assembly and

29 The Saint Lucia Constitution Order 1978, § 3(1)(e).


31 U.S. CONST. amend. V, VI, and XIV.

32 The Saint Lucia Constitution Order 1978, Section 8(1).

33 Id., Sections 8(4), (8)(5) & (8)(8).

34 See generally Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment to the states through the Fourteenth Amendment’s Due Process Clause); *Katz v. United States*, 389 U.S. 347 (1967) (defining the scope of the Fourth Amendment to anywhere a defendant had a “reasonable expectation of privacy”); and *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing a stop-and-frisk under reasonable suspicion that criminal activity is afoot, that the suspect has a weapon, and that the suspect is imminently dangerous to the police officer).

35 Id., §§ 4 & 5.
association\textsuperscript{38}, and movement\textsuperscript{39} are also granted. Discriminatory laws on their face and in their effect, on the basis of race, gender, national origin, political opinions, or other bases, are forbidden;\textsuperscript{40} similarly, the Thirteenth, Fourteenth and Fifteenth Amendment attempted to outlaw slavery and other forms of discrimination in the United States.\textsuperscript{41} The equal protection and substantive due process cases gave life to these provisions as applied in various scenarios.\textsuperscript{42}

B. Judicial Review: Potential to Develop the Body of Law

Other than establishing a High Court\textsuperscript{43} and providing it with original jurisdiction over constitutional matters,\textsuperscript{44} the Order does not stipulate or even hint that the judiciary is co-equal with other branches of government, that judicial review\textsuperscript{45} shall be given due deference, or that \textit{stare decisis} shall control.

\begin{itemize}
\item \textsuperscript{36} Id., § 9.
\item \textsuperscript{37} Id., § 10.
\item \textsuperscript{38} Id., § 11.
\item \textsuperscript{39} Id., § 12.
\item \textsuperscript{40} Id., § 13.
\item \textsuperscript{41} U.S. CONST. amend. XIII, XIV, and XV.
\item \textsuperscript{42} See infra pp. 17-18.
\item \textsuperscript{43} The Saint Lucia Constitution Order 1978, §105(1).
\item \textsuperscript{44} Id. §106(1).
\item \textsuperscript{45} This is the principle of \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803), the seminal American case establishing that U.S. federal courts have the implicit authority to interpret and invalidate acts of the other co-equal branches of government, so as to ensure that they act within the limits of the Constitution.
\end{itemize}
Using United States jurisprudence as an example, Saint Lucia has the potential to build upon its existing charter if amendments can be enacted, and the courts are empowered and inclined to build upon the existing body of law under a system of co-equal government.

Thus, a powerful but co-equal executive is needed to bring about conditions that would enable the courts to adequately perform their interpretive role. This is possible under the current paradigm as the Order entrusts substantial power to the executive and legislative branches. Parliament “may make laws for the peace, order and good government of Saint Lucia” and executive authority is vested in the Queen, on whose behalf the Governor-General may act; in turn, the Governor-General can vest authority in the Prime Minister, and appoint a Leader of the House, other Ministers, and a Leader of the Opposition. Of course, as discussed infra, there is no present-day need for the Queen to be in the picture at all; the description of executive power must be amended to bring it in line with popular sentiment.

Moreover, the absence of regional judicial review prevents a proper development of constitutional jurisprudence. By way of example, McIntosh opines that Jaundoo v. A.G. likely would have been decided otherwise if the ultimate arbiter, the Privy

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46 The Saint Lucia Constitution Order 1978, §40.
47 Id. § 59(1) and (2).
48 Id. § 60(2).
49 Id. § 60(3).
50 Id. § 67(1).
51 Jaundoo v. A.G. (Guyana) [1971] A.C. 972. The case involved a challenge to a taking of land without just compensation. The Court determined that it could not decide against the Crown as the purpose of its own existence is to serve the Crown.
Council, did not serve merely at the behest of the Crown; for this reason, the court could not conclude that the Crown had inadequately compensated the complainant. Additionally, the Privy Council’s decision in *Pratt and Morgan* that a span of five years between condemnation and hanging was “inhuman and degrading punishment and other treatment” has been seen as absurd in light of the fact that hangings themselves are authorized under the Jamaican Constitution.

In response, efforts have continued in the direction of a Caribbean regional appellate court. These have taken the form of the Eastern Caribbean Supreme Court (ECSC) and the Caribbean Court of Justice (CCJ). The ECSC is a creature of the Organization of Eastern Caribbean States (OECS), which includes Saint Lucia, but is a superior court rather than a court of last resort. On the other hand, the Caribbean Community (CARICOM) nations established the CCJ expressly to abolish the practice of sending appeals to the Privy Council. However, individual nations need to abolish this practice, i.e., by amending their constitutions or issuing other enabling legislation. Saint Lucia has not yet done so, thus it has been unable to send cases to

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52 Simeon C. R. McIntosh, *Caribbean Constitutional Reform: Re-thinking the West Indian Polity*, 303-5.


54 Simeon C. R. McIntosh, *Caribbean Constitutional Reform: Re-thinking the West Indian Polity*, 341.

55 Established by the West Indies Associated States Supreme Court Order No. 223 of 1967.

56 Established on February 14, 2001 by the Agreement Establishing the Caribbean Court of Justice by members of the Caribbean Community (CARICOM), of which Saint Lucia is a member.

57 ECSC states joined with the United Kingdom to enter into a “status of association” pursuant to the West Indies Act of 1967, which further provided that the Queen would enact the West Indies Associated States Supreme Court Order (“Order”) to establish common courts for the ECSC states. All ECSC states, including Saint Lucia, have enacted the order. The main effect of the Order was to fuse the High Court and the Court of Appeal into the ECSC. See [http://www.eccourts.org/about.html](http://www.eccourts.org/about.html).
the CCJ as a court of last resort. Thus, Saint Lucia needs to amend its charter to remove the Privy Council as its court of last resort and replace it with the CCJ.

Of course, pure judicial independence would mandate that a regional court is not as reliable as a Saint Lucian court. Due to the current paucity of talent to determine weighty constitutional issues in each jurisdiction, the current approach of relying on the CCJ is a good interim measure and might be the only feasible solution for Saint Lucia. Moreover, there remains concern that CCJ jurisprudence would be of the same quality as that of the Privy Council; specifically, some are concerned that it will be less vigilant about human rights.

1. Substantive Due Process and Equal Protection

For an example of the law that we can expect to develop, we look to the United States, where the doctrines of equal protection and due process as embodied in the Bill of Rights have been thoroughly developed primarily through judge-made case law. Substantive due process consists of that body of case law developed by interpreting the Fifth and Fourteenth Amendments. The Government must provide due process where there is a deprivation of life, liberty or property.

Which liberties are protected? If we rely on a purely textual reading, we would believe this to be the right to be free of shackles and arbitrary detention. However, the Supreme Court in Roth v. Board of Regents indicated that more is intended: “the term denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful

58 Honourable Mr. Justice Saunders, JCCJ, The fear of cutting the umbilical cord ... the relevance of the Privy Council in Post Independent West Indian Nation States, 2nd Annual Eugene Dupuch Law School Lecture, Nassau, Bahamas (2010); see http://www.caribbeancourtofjustice.org/papers_addresses.html.
60 Roth v. Board of Regents, 408 U.S. 564 (1972).
knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.”

This interpretation struck down as unconstitutional a Virginia miscegenation statute as violative of the right to marry. Additionally, in discussing the fundamental right to custody of one’s children the Court indicated that Due Process would be violated in breaking up a natural family solely to protect the perceived best interests of the child; thus, the State would need to prove its case by clear and convincing evidence. Additionally, although the Supreme Court in earlier cases did not recognize the right to procreate in a challenge to forced government sterilization of the mentally retarded, it soon reversed itself.

Case law has also been instrumental in initially affirming the constitutionality of “separate but equal” as consistent with the Equal Protection mandate of the Fourteenth Amendment, as well as in later characterizing this doctrine as “inherently

61 Id., 572.
62 Wikipedia defines this as “the mixing of different racial groups through marriage, cohabitation, sexual relations, and procreation.” The Virginia statute in question criminalized a white person for marrying a person outside the Caucasian race.
66 Skinner v. Oklahoma, 316 U.S. 535 (1942). The Supreme Court disallowed the Oklahoma Habitual Criminal Sterilization Act, which allowed courts to order the sterilization of convicts in crimes involving “moral turpitude.”
67 Plessy v. Ferguson, 163 U.S. 537 (1897).
unequal” in the landmark case of Brown v. Board of Education\textsuperscript{68} that triggered the move to end state-complicit segregation in the United States. This doctrine also extended to other areas of public facilities.

The lesson in all this is that an active judiciary that is not limited to its precedent is essential if Saint Lucia’s laws can be expected to evolve. Apart from constitutional amendments, or even an entire new constitution, judicial review must be authorized in Saint Lucia’s charter and backed up by a powerful executive tasked with the responsibility of effectuating the judiciary’s interpretation.

C. Local Government

The Order does not explicitly provide for local government. One of the ways in which increased representation can be achieved, thus furthering the democratic ideal in Saint Lucia, is by re-instituting local government. As Neville Duncan advises, “Local government is a critical dimension of a reformed system of governance and hence its development is urgent.”\textsuperscript{69} There is a school of thought which suggests that nonpartisan local government should be the order of the day today in order to avoid the fomenting of polarization and gridlock, should local government and Parliament be controlled by different political forces. In fact, Prime Minister Ralph Gonsalves of Saint Vincent and the Grenadines proposed a combination of ruling and opposition party nominations and civil society representatives, to "capture a satisfactory element of representative democracy without deepening partisan party divisiveness."\textsuperscript{70}

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\textsuperscript{69} Neville C. Duncan, Accountability, Responsibility and Participation: Creating Mechanisms for People’s Participation, 6.

\textsuperscript{70} Local Governance in Small States: Issues - Experiences – Options: Final Report of the OAS/UNDP Conference
This proposal can be described as noble, but in the main, pitifully naïve when examined in the context of Saint Lucia. Allowing the participation of parties at the local government level can serve to strengthen parties and provide an outlet for otherwise marginalized political interests. On the other hand, prohibiting their participation might perpetuate polarization due to the lack of an alternative channel for political expression. In addition, local elections with the participation of parties can serve to strengthen the link between them and the citizens of the country. Indeed, parties in Saint Lucia tend to have greater access to top political leaders on the local level and in turn, these leaders will be more familiar with the needs of the community. This seemingly symbiotic relationship has the potential to translate into more responsive leadership of political parties on the national level, providing citizens a voice in their parties and establishing a continuously replenished pool of new leaders from which to choose.

D. Separation of Powers and Checks and Balances

1. Independent Judiciary

Whereas Section 8 of the Order provides that the High Court has original jurisdiction to hear claims, and that decisions of the High Court can be appealed to a Court of Appeals, the final appellate arbiter appears to be Her Majesty in Council. However, this contravenes commonsense in that it essentially refers controversies to a foreign power, albeit one with historical ties to Saint Lucia. “The domiciling of ultimate judicial power over our constitutions in London, it is reasoned, leaves our political

independence incomplete." The requirement for a competent, independent judiciary is thereby sacrificed and the law interpreter becomes the true law-giver.

In interpretation one acquires power not only over the present and future in the rendering of judgments or the design and workings of bureaucratic institutions, but over those and the past in the determination of meaning. In extending the meaning of nationality those who interpret alter the significance of the past: what it was, what was done, what came of it. They become authors, of themselves, their past and their posterity.

Moreover, as mentioned above, there is no language indicating that the judiciary has powers co-equal to the executive and legislative branches, or that a judicial determination shall be given due respect by the other branches of government. Although this might be true in practice, the reality of a true separation of powers, and of the judiciary’s ability to command respect in decisions concerning other branches is not clear. The only convincing evidence is that the High Court is the arbiter of constitutional cases. In practice, the Prime Minister merely appoints the judiciary.

Legitimacy concerns mandate that the judiciary’s co-equal role as independent guardian of the Constitution be codified and implemented by an active executive, and that due respect must be afforded to its determinations,

2. Powerful Executive

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72 Simeon C. R. McIntosh, Caribbean Constitutional Reform: Re-thinking the West Indian Polity, 265 (2002).


74 The Saint Lucia Constitution Order 1978, § 106(1).

Similarly, whereas the Governor-General is the official executive authority and delegates his power to the Prime Minister and other Ministers, this vestige of colonialism is contradictory to the need for a powerful executive that derives its independent powers from only the Saint Lucia charter.

Generally, constitutions of the Commonwealth Caribbean do not vest executives with as much power as in other Commonwealth states. Specifically, they lack in four key areas: executive decree, executive veto, executive initiation of legislation, and constitutional amendment proposal.\textsuperscript{76}

a. Emergency Powers

Chapter 1(14) of the Order provides for emergency powers for the Governor-General, though such powers may not contravene those of Parliament. Similarly, the United States Constitution provides that habeus corpus may not be suspended except in times of rebellion or invasion where the public safety requires it;\textsuperscript{77} however, the President may not contravene Congress.\textsuperscript{78} Under the Order, the resultant scenario could allow the Governor-General to severely limit the Prime Minister’s discretion and ability to act; in effect, the executive power of the Prime Minister is a revocable license existing at the whim of the Governor-General. Again, this vestige of colonialism needs to be updated to reflect the new reality.


\textsuperscript{77} U.S. CONST. art. I, § 9.

\textsuperscript{78} \textit{Youngstown Sheet \& Tube Co. v. Sawyer} (Steel Seizure Case), 343 U.S. 579 (1952). President Truman attempted to proclaim a state of national emergency during the Korean War, but the Supreme Court held that he could not act contrary to acts of Congress. At issue was Executive Order 10340, which President Truman issued hours before Union Steelworkers Union’s announced strike went into effect, directing the Secretary of Commerce to seize the mills and keep them milling, so as to not disrupt the Korean war effort; the justification was to avoid endangering the national defense.
Additionally, though the Governor-General can only declare a state of emergency in limited scenarios, there exists a potential for abuse. Among other reasons, a state of emergency can exist “as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence or of infectious disease, or other calamity whether similar to the foregoing or not.”\textsuperscript{79} This language is broad and poses the potential for abuse. Whether such abuse might actually occur is not the point; in fact, given the historical absence of evidence of such abuse, this objection might be dismissed.\textsuperscript{80} Nonetheless, the reliance on a grant of power from the Governor-General is a relic of colonialism that is a constant reminder to Saint Lucians that their government does not function independently, but rather at the whim of the Queen and her representative-in-residence. Ultimately, even the Governor-General holds office only “during Her Majesty’s pleasure.”\textsuperscript{81}

b. Term Limits for Prime Ministers

Some contend that with the attainment of constitutional independence, an oppressive state system had been left in place. In fact, the argument has been further extended to suggest that it has been buttressed by constitutions that generally gave enormous powers to the leaders. In the Saint Lucian experience, not unlike elsewhere in the Caribbean, the Prime Minister and his Cabinet have the power to do many things. It would appear that there is no separation of powers of the so-called three branches of government. It is the Prime Minister who appoints the judicial branch and there is no

\textsuperscript{79} The Saint Lucia Constitution Order 1978, § 17(2)(b). Emphasis added.

\textsuperscript{80} Note that to date there has been no historical evidence of abuse.

\textsuperscript{81} The Saint Lucia Constitution Order 1978, § 19.
confirmation of the legislative branch. In fact, what obtains is that the latter functions as a rubber stamp of the executive branch, which is where, in actuality, the power lies. Moreover, experience has taught that in deciding who runs the constituency, the leader has the biggest say. At present, the system has no checks or balances, so there is no actual oversight of the executive branch; and the opposition, which is supposed to be the watchdog, is rendered virtually incapacitated within the current constitutional framework.

In these circumstances where the apparent culture is one in which the party in power is dominant and controls the government, there is perfect justification for constitutional reform aimed at putting in place the framework for a democratic culture. One is aware, however, that one cannot legislate a democratic culture; instead one needs to have laws that facilitate its flowering.

Indeed, some have called for reduction in the power of Prime Ministers who are deemed to hold absolute power and who upon assumption of office begin to demonstrate authoritarian tendencies. The call now is for term limits for Prime Ministers in order to avert the possibility of abuse of office and the dictatorial tendencies that can emanate. By comparison, in the United States Franklin Delano Roosevelt was elected to four terms as President; however, this was considered excessive and triggered a two-term limit. Indeed, his break with a two-term tradition was supported as necessary at the time only due to the war effort in the 1940s.

On the other hand, while fairness in term limits for Prime Ministers may be highly desired at this juncture, one laments the dearth of credible and qualified leadership

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83 U.S. CONST. amend. XXII.
talent. Consequently, there is a fear that a search for qualified leaders to assume the highest office in our country every decade could amount to a rather challenging experience not only in the case of Saint Lucia, but the entire region. Be that as it might, the time has come for a more serious approach to the nurturing of leadership talent both by political parties and the community at large. Such an important task cannot continue to be left to fate and the force of circumstances.

3. Independent Legislature

Parliament consists of Her Majesty, a Senate and a House of Assembly. Again, what is the need to include Her Majesty, and by extension the Governor-General? Rather than serving to provide a strong executive, the appointment of senators by the Governor-General divides the government: out of a total eleven senators, six are appointed by the Governor-General acting in accordance with the Prime Minister’s advice; three are appointed by the Governor-General acting in accordance with the Leader of the Opposition’s advice; and two are appointed by the Governor-General acting in his or her own, unfettered discretion. Unlike in the case of executive and judiciary power, where the Governor-General and the Queen arguably play less of a role, in the case of the legislature, they are very actively appointing senators and perpetuating a divided government. Is it not possible that Saint Lucians want only one party to govern the Senate, or want both parties to govern but in proportions other than those prescribed?


86 Id. § 24(2).
But even the parliamentary system of appointment of ministers is antithetical to a truly independent legislature. Rather, the legislature should be responsive only to the people. A constitutional amendment should rectify this.

IV. Other Criticisms

1. Political Reform

Constitutional reform will necessarily affect the way that political parties compete for power, the dynamics of the game, as well as how parties organize themselves and finance themselves internally. This process of constitutional reform cannot take place in a vacuum. It also requires a change in how we run our politics in our political parties. We all know that politics in a democratic society cannot take place without parties. Political parties and other civic organizations are institutions that ought to serve as vehicles of democracy. The question one needs to ask is whether our constitution ought not to recognize political parties and other civic organizations, even to the point of outlining their roles in the promotion of democracy. Another pertinent question that warrants investigation is whether our reformed constitution ought not to consider provisions that guide elections in relation to the dating of these elections, term limits, campaign financing and other such pertinent matters. The overarching concern is whether this would ultimately redound to the desired benefit of deepening and broadening the democracy of Saint Lucia. It means therefore that an inescapable part of the constitutional reform process is that our politics must be modernized and its essential terms codified.

2. Campaign Finance

Still related to the role and participation of political parties is the very sensitive question of campaign financing. In recent times, this phenomenon has become a widely debated issue and it has reared its head in recent presidential elections in the
United States. In our Saint Lucian context, both parties are reputed to have spent large sums of money in the recently concluded campaigns of 2006 and 2011. The concern was further exacerbated when there were allegations that diplomatic ties were broken with the Republic of China in 2006, in preference to the Republic of China (or Taiwan) by the United Workers Party (UWP) which is now in opposition. Allegations have been circulating regarding the suspicion of a Taiwanese-sponsored UWP election campaign. This has led commentators and concerned citizens on both sides of the political divide to echo some disquiet regarding the foreign policy of sovereign states being influenced by campaign funds, rather than what is best for a country's development.

It is therefore important that any consideration of constitutional reform in our context should follow the United States’ example of including campaign financing legislation that regulates how funds are raised, requires disclosure of the source of funds and limits the amount spent at election time. In addition, the following questions can be raised: Firstly, should the state contribute to campaign financing? Secondly, should there be limits of contributions from any one individual, corporation or country? Of course it has to be borne in mind that campaign finance legislation would entail a cost to the country regarding its administration, regulation and enforcement. In the case of the United States, the body charged with this responsibility is the Federal Election Commission which has the exclusive authority to: issue advice and write regulations interpreting and enforcing campaign finance laws, disclosing to the public all reports filed by Political Action Committees and administering the presidential public funding system. Indeed, as part of the efforts to

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88 FEC.gov.
improve disclosure and the efficacy of the law, the Commission also engages in substantial educational outreach intended to promote greater voluntary compliance with federal campaign finance law.

3. Accountability in Government

The phenomenon of accountability and transparency in government is another niggling issue that has come under scrutiny by the citizenry. A constitution must play the role of holding the various organs of government accountable, via the legislature and the judiciary. This is what we mean by checks and balances. A reformed constitution must improve the provision for independent assessment and evaluation of the performance of the office of the Director of Audit and other very important positions within the governmental system. For certain, an effective Government Audit Office and independent, non-partisan and professional Director of Audit are critical to the accountability process in government.89 Without the requisite report of the Director of Audit and the House of Assembly, the opposition is devoid of any mechanism to assess how the arm of Government and the Public Service function; and hence the requisite informed questions cannot be posed to the Government on its stewardship. This stifles the opposition’s effective participation. The activation of an effective Public Accounts Committee (PAC) would be an effective deterrent to inefficiencies and maladministration.

Unfortunately, in Saint Lucia both the Public Accounts Committee and the Audit Office need rejuvenation. The current head of the Audit Office has been acting in the position for quite some time. In reality, one can interpret this as a mechanism used by

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the government to muzzle this office, de-motivate the staff and hence be an impediment for reports tabled to the House of Assembly. In the case of the Public Accounts Committee, this entity does not meet on a regular basis. Consequently, the checks and balances embedded in our constitution for holding government accountable have become dysfunctional and silent. A reformed constitution must ensure the restitution and revitalization of these checks and balances.

Accordingly, there are several changes that are needed to improve accountability and transparency in Government. Best practice dictates that Parliament focus on performance measurement in government. A serious focus on outcomes and outputs instead of inputs is needed. In consequence, as part of its focus of attention every year, the budget debate should begin to analyze how the previous year's funds were spent and the outcomes of the various projects implemented.

V. CONCLUSION

A prominent talk show host in Saint Lucia once commented, "We ought not to be spectators, regarding the constitution."90 This is a truism. There are those who argue that despite our parliamentary system, and free and fair elections, the post-colonial Caribbean political system is in essence undemocratic. Yet there are others who argue that our democracy is intact. Blount affirms that the constitutionalism of the English-speaking Caribbean is one of stability,91 which could well be an indication of institutional success hitherto. This stability stands in sharp contrast to "the churn and burn of constitutions in the Americas, where constitutions exhibit exceedingly low life

90 Russel Lake Show - Radio 100, Helen Fm (no details), 2009.

It would appear that such constitutional stability has gone hand in hand with democratic stability. Yet, one senses that there is always room for improvement as a balance ought to be struck between stability and flexibility.

It can be contended that there is consensus regarding the reality that constitutional reform would in essence "further begin an unfinished nationalist project of constructing an authentic post-colonial Saint Lucian identity and end the constitutional absurdities." These new "architectural stylings" should ostensibly be able to guarantee further social and economic rights in the form of social welfare; clearly provide and enforce the fact that the judiciary, executive and legislative branches are co-equals; introduce term limits; and give due deference to interpretations made by the judiciary, even when they do not reflect popular will. The end product should demonstrate the differences between the constitution as currently configured and that of a new generation. One must hasten to caution that at the end of it all, public consultations or a final commission report should not be seen as ends in themselves, but rather as important interim milestones to flesh out and achieve a more efficient, responsive and honest government. Above all, it must define what the general good demands in order to strengthen the values to which Saint Lucia’s society has committed itself.

92 Id.
93 Simeon C. R. McIntosh, Caribbean Constitutional Reform: Re-thinking the West Indian Polity (2002),