



The Bermuda Constitution 1968: Reflections on its Past and Future

Our aim in producing this pamphlet is to raise public awareness of the Constitution and engage the people of Bermuda in necessary discussions so that they can determine whether and what constitutional changes are needed.

It is Centre for Justice's view that reform is needed to address significant gaps in the fundamental rights chapter, which will be outlined below. This is the case regardless of whether Bermuda intends to move towards independence in the near future. It is usual practice for a pre-independence constitution to be created in the lead up to independence in order to ensure a smooth transition. Bermuda's 'pre-independence' constitution is now 50 years old and, in our view, requires updating whether or not this is as part of our preparations for independence.

Beyond the issues of fundamental rights we take no view on what specific reforms, if any, should be made, including the question of independence, nor do we advocate for any particular constitutional model: these are issues to be determined by the people of Bermuda. Our role is strictly one of education and consultation rather than advocacy.

What is a Constitution?

Constitutions are vitally important to both individuals and public life: from protecting core democratic values, such as an individual's freedom of speech and freedom of conscience, to setting limitations on the power of the legislative, executive and judicial branches through a system of checks and balances. At the conference, Dr Caroline Morris told us that a constitution not only sets out the rules for how state power is distributed and controlled, but it should also embody something of the people who give those rules meaning: something of who they are, and who they aim to be. A constitution created offshore, she noted, and then transplanted to take effect in another territory might be something quite different from one grown from home soil. Is it time, then, as Professor Nicola Barker argued at the conference, to 'Bermudianize' the Constitution? In other words, is it time to create a new *Bermudian* Constitution: one that reflects the values and aspirations of the people of Bermuda, and one that has been created following extensive public consultation?

History of the Constitution

In her paper, Professor Barker outlined the historical context of the constitution. In a process that was typical of its time, the Bermuda Constitution Order 1968 was enacted following a constitutional conference in London in 1966. In attendance at that conference with the Secretary of State for the Colonies and Bermuda's Governor, were 15 Bermudian politicians and their legal advisers (8 UBP and 3 PLP members of the House of Assembly and 4 independents). Not only did this delegation of the political elite mean that ordinary people had little direct influence on the provisions of the constitution but also, as the PLP representatives argued at the time, this delegation was not a democratic representation of Bermuda. These politicians had been elected

under a system where the electoral districts were unequal and property owners had an additional vote.

The PLP representatives had argued consistently throughout the constitutional reform process that electoral reform must precede constitutional reform so that the latter would have a truly representative and democratic foundation but they were in the minority. Similarly, the Bermuda Industrial Union had produced a thoughtful, yet largely ignored, report outlining their views on what the new constitution should contain. This included what would have been ground-breaking provisions for the protection of the family, including special assistance for motherhood and childhood, the right to social security, and access to healthcare. They said: “Every citizen has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. In 1994, South Africa enacted similar provisions in its post-apartheid constitution, recognising that, as Dr Beth Goldblatt outlined in her paper, the apartheid era’s legacy of poverty, inequality and disadvantage based on skin colour and class is harmful for society in many ways – politically, economically and socially. Active measures would need to be taken to overcome this legacy. This was not recognised in Bermuda’s 1968 Constitution, which has no provisions directed towards addressing *structural* racial inequalities, although it did seek to prevent future instances of discrimination on the basis of race in the fundamental rights chapter.

The Provisions of the Current Constitution

The first chapter of the Constitution outlines fundamental rights. It contains many of the same rights found in the European Convention on Human Rights, which was extended to Bermuda in 1953, but not all of them. Notably, as Mr Peter Sanderson outlined at the conference, the right to private and family life, and the prohibition of discrimination on the basis of sex, amongst others, are absent from the Constitution. The Bermuda judiciary have been able to ‘read in’ to the Constitution some of these missing rights on the basis of an assumption that Parliament would not wish to legislate contrary to Her Majesty’s international obligations. However, this assumption can only operate when the legislation is ambiguous in some way. While the Human Rights Act 1981 fills some of the gaps in relation to anti-discrimination provisions, this is only ordinary legislation and can be repealed relatively easily if Parliament so wishes. As such, it offers limited protections compared to a constitution. Also absent from the Bermuda Constitution are rights contained in the International Covenant on Social, Economic and Cultural Rights, which came into force in 1976, and those in the Convention on the Rights of the Child, which came into force in 1990. Notably, other Territories, including the Cayman Islands, the British Virgin Islands, and the Turks and Caicos Islands, have now also added environmental rights to their recently updated constitutions.

The second chapter describes the powers of the Governor. As the Queen’s representative, the Governor is officially the Head of Government but his day-to-day powers are limited by the Constitution. He must generally ‘obtain and act in accordance with the advice of the Cabinet’ with some exceptions, including the Governor’s special responsibilities for: external affairs; defence; internal security; and

the police. However, even in these respects the Governor is advised by the Governor's Council, which includes the Premier and 2-3 other Ministers, though the Governor is not required to act according to their advice on these particular matters. He may also, at his discretion and with approval of the Secretary of State, delegate responsibility for any of these reserved matters to the Premier or another Minister. The Governor's other powers include the discretion to grant pardons on behalf of Her Majesty, and to make appointments to certain public offices including the Public Services Commission, the Attorney-General, the Commissioner and Deputy Commissioner of Police, the Auditor General and the Chief Justice. The Governor also exercises some powers in relation to legislation, under chapter 3 of the Constitution. These are mostly formal and mirror the powers of the Queen in relation to the UK Parliament. For example, acting on the advice of the Premier, he may prorogue or dissolve the legislature.

It is important to note that, as is the norm in jurisdictions with a written Constitution, the Bermuda legislature is not a sovereign one. It is given powers *subject to the provisions of the Constitution* to make laws for the peace, order and good government of Bermuda. If a law is found to contravene the Constitution, the Bermuda courts have the power to strike it down. Laws are made through bills passed by both Houses and assented to by the Governor on behalf of Her Majesty. The Governor may assent, withhold assent, or reserve the bill for the signification of Her Majesty's pleasure. The latter is required in limited circumstances, such as where a bill appears to him to be inconsistent with Her Majesty's international obligations, or inconsistent with the provisions of the Constitution, for example. The Bermuda Parliament is also technically subordinate to the UK Parliament, though the UK has not directly legislated for Bermuda without its consent since 1968, and had not done so for a considerable time before then, so it is questionable whether it remains able to do so.

Chapter 4 provides that the Governor also formally exercises executive authority that is vested in Her Majesty, such as appointing the Premier and Cabinet, as well as the Opposition Leader. He does not have a free choice, however. The Constitution requires that he must appoint as Premier the member of the House of Assembly who commands the confidence of a majority of the members of that House. This mirrors the UK's constitutional convention that the Queen will appoint as Prime Minister the person who commands the confidence of a majority of members of the House of Commons.

Chapter 5 of the Constitution outlines the role and appointment of the judiciary and courts. At the conference, Chief Justice Kawaley highlighted the importance of judicial independence. He described how the 1968 Constitution introduced security of tenure for judges of the Supreme Court and Court of Appeal, and guaranteed the right to a fair hearing before an independent and impartial court. Prior to 1968, he explained, the lines between the legislature, executive and judiciary had been very blurred, with the Chief Justice serving as President of the Legislative Council, for example. As detailed below, the Chief Justice's argument at the conference was that judicial independence ought to be further protected in a new constitution.

In 2001, the Constitution was amended to create the role of the Ombudsman. At the conference, the current Ombudsman, Ms Victoria Pearman, explained her functions and jurisdiction: her office provides a free service to the public in order to assist them

in seeking redress for maladministration. This is a point of last resort, once all other avenues of complaint have been exhausted. Ms Pearman also highlighted the importance of the independence of this role, with the Constitution providing that in the exercise of her functions, the Ombudsman shall not be subject to the direction or control of any other person or authority.

Why Reform?

Bermuda's Constitution is the oldest of all the British Overseas Territories and arguably out of date with respect to fundamental rights and judicial independence. Furthermore, as Dr Morris noted in her paper, the Constitution conferred on Bermuda by Westminster was not one peculiar to Bermuda, its needs, its history, its culture and its people. It is largely a copy of the Constitution conferred on the Bahamas in 1963, one of a suite of Colonial Office constitutional templates that were in use during the decolonisation and independence era of the 1960s. As such, the system of government that it creates was based on the Westminster system and not designed with Bermuda's size, political culture, and historical context in mind. A number of possibilities for constitutional reform were highlighted at the conference:

Fundamental Rights

Both Professor Barker and Mr Sanderson argued that Bermuda's fundamental rights chapter is lacking in comparison to the international human rights that Bermuda residents theoretically have access to via the UK. However, there is no particular reason why reform ought to be limited to providing the missing rights from the European Convention on Human Rights. Ms Martha Dismont from the Family Centre spoke movingly of the difficulties faced by Bermuda residents living in poverty, who have difficulty accessing basic needs such as food, housing, and transportation to work. At the moment, Bermuda's fundamental rights chapter is limited to civil and political rights, but in the last fifty years since this was written, there has been increasing recognition that people struggle to exercise these rights if they lack access to basic needs such as adequate food and housing. As such, Dr Goldblatt notes that more than 90% of countries have incorporated at least one social and economic right into their Constitution, and that such rights have existed in some countries such as Mexico since 1917 and Ireland since 1937, so they are by no means new rights. Dr Goldblatt outlined the social and economic rights available under the South African Constitution, including rights to housing, healthcare, food, water, social security, and education, as well as certain social and economic rights specifically for children, and economic rights for workers. She also noted the importance of a strong right to equality, due to the connection between poverty and inequality. These rights may provide a useful example for Bermuda in considering reform.

Judicial Independence

Chief Justice Kawaley explained at the conference the importance of judicial independence for Bermuda's economy: Bermuda, he said, is regarded as a safe place to invest because of the rule of law and its trustworthy legal system. He highlighted some ways in which judicial independence could, and should, be improved in a new constitution. First, all judicial officers should have security of tenure. Second, there should be a constitutional Judicial and Legal Services Commission. Third, there

should be a constitutional requirement for the Government to financially support judicial administration. Fourth, there should be constitutional provision for a Minister of Government charged with upholding the rule of law and judicial independence.

System of Government and Elections

Ms Susie Alegre and Dr Morris outlined alternatives to the Westminster system of Parliament and the ‘winner takes all’ First-Past-the-Post voting system that might be of interest in considering reform of the Bermuda Constitution. Ms Alegre described the system in the Isle of Man, a Crown Dependency with a population of around 90,000 people. The Isle of Man legislature, the Tynwald, primarily consists of independent representatives rather than political parties. This means that voters are not able to vote for a clear governmental agenda as the identity of the individual representatives who will eventually become Ministers will not be known until after the election, when they are selected from amongst Members of the Tynwald. However, the absence of political parties allows for a greater emphasis on consensus building rather than on political point scoring.

Dr Morris highlighted the way in which First-Past-the-Post has a well-known tendency to deliver two-party legislatures. This feature encourages adversarial politics, which can be damaging in a small territory where direct confrontation and outright disagreement are antithetical to the way of life. She noted that diversity of political party representation is not a common feature under First-Past-the-Post and this tends to be exacerbated in smaller jurisdictions. First-Past-the-Post can also create disproportionate majorities for the ‘winning’ party where a party can form the government without winning the popular vote. This situation, she suggests, may suit the political parties involved, who know that they will each have their turn to dominate the legislature but because a large number of votes are essentially wasted under this system, it can lead to feelings of political alienation and disenfranchisement amongst the people. Complacency on the part of parties who know they have certain electorates won before the polling station opens can leave voters in those constituencies neglected and unheard by their representatives.

Dr Morris noted that proportional representation is used in around 65% of national legislatures as an alternative to First-Past-the-Post. Proportional representation, she explained, is popular because every vote counts and voters are more likely to vote when they know their vote will not be wasted or ignored. There is greater parliamentary power over the executive, as diversity of parties increases and executive dominance lessens. They also tend to improve the diversity of representatives in the legislature, particularly women. For these reasons, Bermudians may wish to consider whether this system is more suitable than First-Past-the-Post.

The Role of the Senate

Dr Morris also noted that it is unusual for small states to have a second chamber in their legislature: out of 79 states with a second chamber, only four are in countries with a population of less than 2 million. Some larger states, including Denmark, Sweden and New Zealand have also abolished their second chamber. As such, she suggested that if Bermuda wishes to retain its second chamber, it might be worthwhile giving some thought to the role that it plays: what are or should be its powers and

relationship with the lower house? How should it be composed? How long should members serve for? Should there be an age limit? Should the upper house have a special role in protecting the constitution?

Preamble

The current constitution has no preamble. Dr Morris noted that even though they have no legal effect, preambles play a very important part in the constitution. They set the tone for what follows, introduce the values and aspirations of the people, and explain how power is to be divided between the institutions of state and the people. For example, Dr Goldblatt outlined part of South Africa's preamble, which recognises that the role of the Constitution is to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person;
and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

A preamble to a new Bermuda Constitution could be an important statement of Bermudian national identity and values.

The Process of Reform

At the conference, Dr Morris noted that constitutional reform can be an exciting moment in a people's history: it provides an opportunity to think about how power should be allocated and controlled, decide what their important values and goals are, and a chance to reimagine their constitutional, political and cultural identity. She emphasised that care needs to be taken that this process is not undertaken in an exclusionary way – public participation and endorsement is the key to legitimising the constitution and engendering loyalty and respect for both its formal rules and its spirit. Centre for Justice endorses this view and would advocate for the maximum possible public participation in any process of constitutional reform. As such, we will be undertaking a preliminary public consultation later this year to ascertain the views of the public. This will necessarily be limited due to our resources but we note with interest Dr Morris' advice that the Citizen's Assembly has become an increasingly popular method of constitutional reform in recent decades, particularly in North and South America, although she said that the Marshall Islands in the Pacific also provided an early example of this process in 1979.

Dr Morris explained that under this model, a group of citizens is selected at random (rather like jury service) and given the task of learning about, debating and proposing new constitutional arrangements. This process typically takes several months and involves sustained engagement with the public through public meetings and consultations, receiving and hearing public submissions, online forums and discussion papers. Some members of the Citizens Assembly may take responsibility for particular areas of interest. She emphasised that experts are on hand to advise, but they are not leading the process. At the end of the process, the recommendations of

the Citizens' Assembly are put to the public in a referendum. Dr Morris does not suggest this type of process is perfect, but argued that it does have much to recommend it from the perspectives of legitimising the process and the result, and potentially stemming the trend of a lack of faith or alienation from political processes that is often a block to engaging the public in constitutional reform.

Will the UK Agree to Reform?

In her paper, Professor Barker noted that despite a popular perception in Bermuda that the UK would not agree to constitutional reform short of independence, this is not current FCO policy. In a 2012 White Paper, the FCO claimed that it was equipping each Territory with a modern constitution and that they expect these constitutions to continue to evolve and to require adjustment in the light of circumstances. While there has been significant recent constitutional reform in most other British Overseas Territories, this has not been the case in Bermuda. In response to a question from Professor Barker, the FCO confirmed to her that: 'Suggestions from any Overseas Territory governments, including Bermuda, for specific proposals for constitutional change will be considered carefully.' The UK does not, apparently, intend to lead a process of constitutional reform for Bermuda, but this is entirely appropriate. Constitutional reform should come from within Bermuda, not from the UK. The 50th anniversary is a good opportunity for new conversations about Bermuda's constitutional future to begin and the UK is, rightly, not standing in the way of that.*

*This pamphlet was compiled on behalf of the Centre for Justice Constitutional Reform Sub-Committee by Professor Nicola Barker (University of Liverpool). It contains extracts from and summaries of the papers given at the Centre for Justice's conference: *The Fiftieth Anniversary of the Bermuda Constitution: Reflections on its Past and Future*, held at the Bermuda Underwater Exploration Institute, on 8 June 2018.