“Whose Constitution? Law, Justice and History in the Caribbean”

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Your Excellencies the Acting President of Trinidad and Tobago Christine Kangaloo and Kerwyn Garcia; The Honourable the Chief Justice of Trinidad and Tobago, Mr Justice Ivor Archie and Mrs Denise Rodriguez-Archie; The Speaker of the House of Representatives, The Honorable Bridgette Annisette-George; The Attorney-General of Trinidad and Tobago the Honorable Faris Al Rawi and other Honourable Ministers of Government; Distinguished Guests, Ladies and Gentlemen:

It is a great privilege to stand together with the Judiciary of Trinidad and Tobago. I think at this time of two of your predecessors Telford Georges and Aubrey Fraser, whom I knew as a child, and whose defense of civil liberties and due process after the 1970 crisis remains one of the proudest moments in the history of the Caribbean judiciary.

The rule of law emerges at the tension between three elements across the past and present of a society. Legislation is the language, fixed through writing on stone or parchment, through which the past sends forward principles and processes for collective life. Judicial review, second, is the process through which privileged men (and recently women) are empowered to give meaning to those rules in the present. And, third, often forgotten, consent, through which
men and women choose to live within those rules, even to embody them, so that the law describes not external compulsion but the way a community freely lives.\textsuperscript{1} We have in our Caribbean an abundance, even perhaps an excess of legislation; we are fortunate in a judiciary which is able, independent and honest, but we are less lucky in our history and experience of consent.

It is a great honour and pleasure to speak to you today. But my subject is the constitution, and I do not bring you comfort. We are across the Caribbean in the grip of a profound and unacknowledged constitutional crisis. This is not a crisis of an armed gang kidnapping the legislature, or seeking by force of arms to command the executive, nor is it a crisis of the executive seeking to act outside of the law, or to control the judiciary. It is a crisis of both governors and governed, and of their relationship to the \textit{res publica}, to the commonwealth and the collective good.

The most extreme manifestations of this crisis are the extraordinary levels of violence in our societies, manifest most tragically in our murder rates. Eight of the 20 nation states with the highest homicide rates in the world are English-speaking Caribbean societies.\textsuperscript{2} In Japan the murder rate is 0.3 per 100,000 inhabitants, in Trinidad and Tobago it approaches 30, and in Jamaica 40. To be clear, you are one hundred times more likely to die a violent death in Trinidad than in Japan. Less immediately shocking, but over time far more destructive, are at

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best careless attitudes to work, and to the care of nature and our buildings, and at worst a predatory relationship to the state apparatus and the environment, where individuals and companies seek to strip private wealth out of public assets, of which the petty bohbohl of the functionary and the Panama or Swiss bank account of the politician are only symptoms. Across the region, many of our citizens, despite having the right to vote and even to sit in parliament, do not have a sense of ownership of, and a duty of care towards the state, society and the law. This is a problem of our constitution.

By ‘constitution’ I am speaking to three interpenetrating orders of experience. At one level I shall address the origins and consequences of the Jamaica and Trinidad constitutions of 1962, the Guyana and Barbados constitutions of 1966, and those that followed. As the title of this lecture promises, I shall explore the conjecture of the late Professor Simeon McIntosh-- whose company I was fortunate to keep on Sundays at George Lamming’s lunch table at the Atlantis Hotel in Barbados over a decade ago – that our Independence constitutions are not our own.\(^3\)

But I shall go beyond the question of those bodies of basic law to consider the larger question of the structures of government, the constitution as political order. And beyond that, by ‘constitution’, I reach also to what underpins law and politics: how we live together, and how we imagine ourselves living together, here, on these rocks, in this sea. In understanding how we were constituted, how we are made, we can confront how the past keeps a grip on the present, subverting the best intentions of statesmen or jurists.

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My subject is the history which inhabits the black ink of our laws and how we live in, through, and against them. It is a Caribbean story, but it is not without relevance to the larger global history of law, and even the theory of jurisprudence. For the analysis of law in society is indeed nothing less than, in Tamanaha’s phrase, ‘The Third pillar of Jurisprudence’.4 ‘The sovereign’, Schmidt tells us in the Political Theology, ‘stands outside the juridical order and, nevertheless belongs to it...’. The significance of the Caribbean for the wider philosophy and history of law may lie in the way in which it provides an extreme case in which, even after the end of formal colonial rule, even in the midst of republics, sovereignty, by the silken knots of our constitutions, is held perpetually outside of itself.

II.

As a way in, I offer a small parable in the form of some family history. My engagement with Trinidad and Tobago is a personal one, as my mother was Trinidadian. My mother's father was a McCracken. His brother Albert in 1924 was your predecessor on the bench, appointed Registrar and Marshal of Trinidad, rising to become a senior judge, even though his Colonial Office file noted with concern that he was ‘not of pure European descent’.5 Their father was a conveyancing solicitor. A grandfather a generation earlier was an officer at the Chaguanas prison, but most respectable, a pillar of the Royal Philanthropic Lodge and the Anglican Church. However just a few decades earlier, the neck of their great-great-great uncle had been

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4 This essay is a deliberate extension of that line of socio-legal analysis which Tamanaha has recently described as an alternative to both Natural Law and Legal Positivism, see Brian Z. Tamanaha, ‘The Third Pillar of Jurisprudence: Socio-Legal Theory, William and Mary Law Review, 2015, 56(6), pp. 2236-2277.

5 TNA: CO 295/552, f. 229, Byatt to L S Amery, 29 December 1924.
broken by a British hangman for his role in the 1798 revolution in Ireland. In the space of one hundred years or so, the outlaw had become the jailor, the solicitor, and then the magistrate. This story, in its shape, is your story. I doubt there are many members of the Caribbean judiciary today whose ancestors were not similarly on the hard side of the law, as slaves, or indentured labourers.

Our societies were forged less from the love of liberty than by generations of violence sanctioned by statute and common law. Very few of the subjects of the English Crown in these tropics were legal persons. From the seventeenth century to c. 1830, only white propertied men who were communicant Anglicans were fully included as rights bearers. The rights of this minority were directly proportional to the subjection of the majority. The Commissioners to enquire into the Laws of the West Indies noted in 1827 that:

The general principles of colonial law were. . . deduced from the Roman not the Gothic code. . . The Roman master, if a pater familias, was invested with the authority of the civil magistrate. He had power over his slave beyond imprisoning, chaining, or scourging him, extending even to life. By the fundamental principles of colonial law . . . the power of the master over the slave was considered absolute.

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6 Robinson, Bulk and Saunders, are quite right in their recent masterwork on the constitutional history of the Caribbean to underline ‘the foundational place of violence and racial difference in Caribbean history and governance’ Tracy Robinson, Arif Bulk, Adrian Saunders, Fundamentals of Caribbean Constitutional Law (London, 2015), p. 46.


In the shadow of the law, before and even after Emancipation, the overseer, the policeman and gaoler were free to beat submission into the bodies of poor. Women, children, people of African, Indian or Chinese origin, those without property, even those who were white but not protestant or of British stock, were to a greater or lesser extent 'subpersons', in the term of the Jamaican philosopher Charles Mills, at the origins of our legal order, and in the social world which it organized and which survived the changing of laws.\textsuperscript{9} It is striking to find in a 1962 file marked 'Secret' from the Commonwealth Relations Office that a British functionary expressed concern about the powers which would be vested in the Governor-General of independent Trinidad and Tobago in the following language: 'It seems to me to be relevant in this connection that the first Governor-General is likely to be Sir Solomon Hochoy who is a Trinidadian of Chinese extraction, and not someone from this country'.\textsuperscript{10} Even Sir Solomon, knight of the realm, as solid a bourgeois figure as one could imagine in his colonial society, was not entirely to be trusted.

Sir Henry Maine, in a formula reprised by Sir Shridath Ramphal in the first lecture of this series in 2011, famously described the modern history of law as a transition from status to contract. This tidy liberal teleology does not work in the history of the Caribbean, where despotic forms of contract shaped and overlapped with enduring regimes of status discrimination. This was true at the origins of the Sugar Revolution in seventeenth-century Barbados, where Simon Newman suggests punitive forms of white indentured labour gave African slavery its shape, and in nineteenth and twentieth-century Trinidad and British Guiana


\textsuperscript{10} Minute of AW Snelling 30 May 1962, TNA: DO 200/6.
where, after the end of slavery, indentured contracts were tacitly associated with ideas of the racial difference of the Indian or Chinese coolie. The end of slavery, also, did not liberate the African to become a free contractor to either labour or the social compact. The franchise was protected from these newly-created legal persons by high property and income franchises, poll taxes, and literacy tests. At the same time, a raft of new legislation – such as vagrancy laws and master and servant regulations – drove labour towards the employer and gave him the whip hand. The paradox of emancipation was, as Saidiya Hartman put it for Louisiana, “the liberty of contract merely acted as the vehicle of involuntary servitude”.  

The judiciary, all appointed by the colonial government, were usually guardians of this social order.

Race and class and gender intersected, as they had before 1838, to order a schedule of status in which embodied difference intersected with the private violence of the home and work place, and the public violence of the state. In ‘Prisonieres levez’, perhaps the oldest Kalinda, we have oral testimony of this social order of law as violence. This song from the era of slavery passed across the decades and finally recorded the 1930s by Atilla and Terror is an Akan funeral dirge which survived the Middle Passage, but the lyrics in kreyol describe a landscape of New World terror: “Deux esclav es courri sorti Tunapun'/ Congo bayo bwa fait yo devire” [Two slaves tried to run away from Tunapuna./ Congo hit them with a stick and made them run back] with the only English words, the language of law and punishment ‘Judge and Jury gun’ try me for murder’. A hundred years later, Tiger lamented that if a man has money today, he could ‘commit murder and get off free/ [and] live in the Governor’s company’.

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Laws had prevented slaves from drumming and restricted the right to gather, and after slavery other laws similarly sought to control the celebration of carnival or religious ritual, with law and police terror restraining the worship of Kali, Hussein, and Shango. As late as 1917 in Trinidad, the legislature passed the Shouter Prohibition Ordinance, followed by Grenada in 1927 with the ‘Public Meetings (Shakerism) Prohibitions Ordinance’. As Earl Lovelace reminded us in one of his greatest novels, *The Wine of Astonishment* (1986), for many to honour their conscience and spirit required them breaking the law. The banned calypso ‘Sedition Law’, complained, “They want to license we mouth they don’t want we talk/ they mean to license we foot they don want we walk”. The flipside to living in fear of police and the gaol was even some celebration of violent resistance of the law, with in 1938 a calypso celebrating the murder of a policeman: “everybody’s rejoicing, how they burned Charlie King, everybody was glad, nobody was sad, when they beat him and they burned him in Fyzabad”.12 We lived an ocean away from the liberal romance of the foundation of society and law lying in contract and sympathy.

Not only was despotism our lived law, fundamental law came from outside. In the older West Indian colonies – Barbados, Jamaica and Antigua – property-owning white men enjoyed legislatures which exercised, in the language of Roman law, a local *dominium* vs. the Crown’s *imperium*. But laws made by these legislatures were secondary to English law. Following from the precedent of Poyning’s Law of 1494 which made the laws made in Ireland subordinate to Westminster, the laws of West Indian legislatures were subject, first to the scrutiny of the Privy

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Council, whose primacy in our legal life begins in the seventeenth century, when its Committee of Trade presided over these extensions of Crown sovereignty, and then of the Colonial Office. The Declaratory Act of 1766, Lord Mansfield’s judgement in Campbell vs. Hall (1774) and The Colonial Laws Validity Act of 1865 together defined a limited space of local legislative sovereignty, while underlining the legal supremacy of Westminster, depriving colonial legislatures of the right to make any statute 'repugnant' to English law.  

Consent became even less important after 1800. In a century in which democracy expanded its reign in Britain, and in which the white dominions Canada and Australia acquired internal self-government, but enlightened despotism was what was imposed wherever whites, or more specifically those of British-stock, would not be in the political majority. In colonies taken from other European powers, the legal and juridical order of the first colonisers was allowed to persist, Roman-Dutch law in the Guianas, French civil law in St Lucia, and for a while Spanish precedents in Trinidad. But the corollary of this was that the British decided they could govern either without or with weak legislatures. In Trinidad, for example, the paradigm of this experiment, the British, not wanting to give the vote to either the many propertied free coloured who had emerged under the French Code Noir, and not wanting to be outvoted by whites who were Catholics, imposed 'Crown Colony government', in which the Governor, in the name of the Crown, had absolute power.  

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14 See Hobart to Governor of Trinidad, 2 December 1804 and James Stephens to Addington quoted in Archibald
Orders in Council emanating from London or Government House. It was an attractive option for Governors. After the Morant Bay Rebellion in Jamaica in 1865, for example, Governor Eyre begged the Colonial Office to impose the Governor and Council Constitution of Trinidad in order to keep people like Bogle or Gordon out of the legislature.\textsuperscript{15} As late as 1928, British Guiana lost its representative constitution and became a Crown Colony, when the British feared too many of the wrong people had been winning the right to vote. The Wilson-Snell Commission was candid about the racism underlying this retrograde constitution, arguing that without such a change the colony would see ‘the loss to public life . . . of the small but important European class which still controls the principal agricultural and commercial activities in this colony’.

Westminster undemocracy was the experience of the Caribbean until the eve of independence. Only Barbados, the Bahamas and Bermuda had an elected House of Assembly, although of course, the property qualification for the franchise meant a small and privileged electorate. Elsewhere the Crown had full power to legislate by Order in Council, guided by a partially elected Legislative Council in British Guiana, Jamaica, and the Leewards, while in St Vincent, St Lucia and Grenada the governor got to pick who made laws. The Order in Council, Letters Patent, Royal Instructions, laws passed in Westminster: these autocratic instruments of law were the legal foundations for colonial constitutions, and indeed for political independence. A.

\textsuperscript{15} TNA: CO 137/393/5 Eyre to Secretary of State, October 1865. On the the Morant Bay Rebellion as a problem in English legal history see Kostel, \textit{A Jurisprudence of Power}. 
V. Dicey, in his classic *Introduction to the Study of the Law of the Constitution* (1897) wrote that 'we would think the Cabinet had gone made if the Gazette announced an Order in Council not authorized by statute creating a new Court of Appeal'. But this is exactly how things were done in the colonies. Indeed the independence constitution of Trinidad and Tobago, which created the legal basis of the Court of Appeal in this nation, was itself an Order in Council, an act of royal fiat, which appealed not to the liberties or the will of the people of these islands, but instead to the chain of Crown-initiated constitutional acts which ran from The Trinidad and Tobago Act, 1887 (50 & 51 Vict c.44); the Order in Council of 17 Nov 1888 which “reserved power to Her Majesty to make from time to time with the advice of the Privy Council all such laws as appeared to her necessary for the peace, order and good government of the colony”; the Letters Patent of 6 June 1924 and 5th May 1941; and the Letters Patent of 16 March 1950 which finally sharply limited the Crown’s power make ordinary laws. In Barbados, where the step to a republic has not yet been taken, in strict constitutional terms political independence is premised on the Barbados Independence Act 1966 c. 37, passed by the House of Commons on November 17, 1966, which in theory the British parliament could repeal tomorrow.

Between the absolute power of the planter, and the absolute power of the Crown, fear and compliance existed, but never free consent. The legacies of this history are tangled around the constitutions of the Caribbean.

III.

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17 TNA: LO 2/875 Law Officer's Department, 'Opinion on the Constitution of Trinidad and Tobago' (1959).
Rights are sometimes conceded from above. Or they can be taken from below. In the first wave of decolonisations – the United States (1783), Haiti (1804), and Spanish America – the end of European domination came through the military victory of creole rebels. Their political elites wrote new constitutions in which they sought to express the will of new nations. They were animated by the view of Montesquieu in *L’Esprit des Lois* that each community deserved laws which were in tune with their climate, environment, and culture. The Irish Constitution of 1937 and the Indian Constitution of 1950 similarly came in the tail of long and forceful struggles for national liberation, and expressed the will to make laws in the image of a sovereign people. In all these cases, elaborate processes of consultation and assembly, over months and years, sought to engage the popular will in these new documents.

None of the constitutions of the English-speaking Caribbean can be compared to this, and this has to do with the context through which we acquired legislative sovereignty. The unflattering truth is that we did not have an independence struggle to compare with those of India or Kenya or Ghana, and that when after 1945, and in particular in the 1950s into the 1960s, the British conceded first universal suffrage, and then forms of responsible government and then constitutional independence, they did so on their own terms. It is true that the Garveyite and trade union awakenings of the 1920s and 30s which converged in the riots of the 1930s created a political current across the ‘repeating islands’ of the Antilles which fought elections and sought greater autonomy from Britain. But only in British Guiana, where, for example, Rory Westmass, who died last month, and the national poet Martin Carter dynamited the statue of Queen Victoria outside the Law Courts in 1954, do we have the kind of uncompromising anti-
colonial militancy of Ireland or India. Elsewhere, most nationalism in the British West Indies was made up of working-class demands for better wages and working conditions, for a government which served them, and middle-class demands for a fair share of the posts in the colonial administration of their own territories, including forms of home rule within the British Empire.

From Cipriani to Butler to Marryshaw in Grenada, Rawle in Dominica, these were the parameters of struggle, for which colonial constitutional order was an axiom. Albert Gomes, speaking on behalf of Trinidad at the Standing Closer Conference in Montego Bay in 1947 declared:

What we desire... is a self-governing dominion... We in the West Indies want to graduate to self-government in the same way as Canada and Australia and all the others have graduated. We want to do it as part of the British Empire, sharing with you the traditions and qualities which have made her the greatest power in the earth and the most civilised nation in the whole universe.

One cannot imagine a Nehru or a de Valera or an Nkrumah speaking in such terms. Few were those like Richard Hart in Jamaica, or C.L.R. James and John La Rose here, or Eusi Kwayana in Guyana, who dreamed of a socialist republicanism which would break once and for all the ties to Britain. And figures like those were systematically pushed to the margins by men like Norman Manley, Grantley Adams and Eric Williams, who simply wanted command of their own state apparatus. Alexander Bustamante in his speech in Montego Bay in 1947 had been quite candid about this: 'I want to become Governor of my colony!'. It might be said that
almost every colonial Premier and post-colonial West Indian Prime Minister wanted exactly such absolute power.

Britain famously has no written constitution. And the canniest of the nationalist leaders, Eric Williams recognized that the Colonial Office palaver about the need for constitutions before independence was a trap both for the road to independence and in its aftermath. In a speech from the podium at Woodford Square in 1955, he dryly quipped, 'If the British Constitution is good enough for Great Britain, it should be good enough for Trinidad and Tobago', by which he meant, that to decolonize all Britain had to do was to concede full sovereignty to the parliament of Trinidad, no written document was needed.  

But the Colonial Office was already committed to a different strategy, which, as with the independence constitutions of Ghana and Malaya in 1957, Nigeria of 1960 and Sierra Leone of 1961, sought to create strong constitutional frames through which would preserve the structures and balance of interests of colonial societies after the Union Jack came down. Critically, the acceleration of the timetables for decolonization in the 1950s was, as Robinson and Louis tell us, part of Cold War strategies which aimed to keep post-colonies as the partners of the West by means of ceding powers to cooperative nationalists. The Colonial Office, and its successor the Commonwealth Relations Office imposed themselves over the process of constitution making, presenting itself as honest broker between the governing and opposition parties in each colony.

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18 Eric Williams, ‘Constitutional Reform in Trinidad and Tobago’, TECA (Port of Spain, 1955), p. 30.  
The British did not, in a simple sense, impose the independence constitutions on the Caribbean. The ruling party in each colony had a key role, the main opposition had a voice, local lawyers, such as Ellis Clarke in the case of Trinidad, had roles as draughtsmen, and there was public consultation, even if only for brief periods. In the case of Trinidad and Tobago there was in fact quite extraordinary public ferment around the question of the independence constitution. The Colonial Office files collecting and discussing the drafts, the constitutional interventions of parties and citizens, and the discussion of the draft texts in the House of Assembly, run to many volumes. I am not aware of any historian who has yet treated comprehensively this brief efflorescence of popular will. But over a hundred memoranda were submitted by individuals, groups, institutions, trade unions, religious bodies, business and professional associations, ranging from the Chamber of Commerce, Trinidad Incorporated Law Society, Holy Ghost Order, the Alumni of St Mary's, the Tackveeyatul Islamic Association, to many now obscure individuals. Many of these converged on similar demands, for example, Electricity Supply Staff Union, Association of Professional Engineers, and the Friendly Society Movement of Trinidad and Tobago sought that the Fundamental Human Rights in the Universal Declaration of Human Rights should be more fully entrenched in the Constitution. There was also considerable lobbying on behalf of “the rights of the family” from The Archbishop of Port of Spain and other religious groups.

Particularly keen were the concerns expressed by the East Indian minority of Trinidad, that they would be discriminated against in the independent polity. These ran from the Islamic association’s request that the right of appeal to the Privy Council should be available without

21 See TNA: CO 1031, 3229-3239, see especially 3231and 2 for popular submissions.
sanction of parliament for at least ten years, to broader demands that from the Maha Sabha for elections by proportional representation and for clauses to protect minority rights equivalent to those in the constitutions of Cyprus, Kenya and British Guiana. There was also a small, now quite surprising, campaign by the Trinidad and Tobago Partition League for the division of Trinidad into separate Indian and Afro-Trinidadian sovereign polities. But what is clear is that neither Ellis Clarke, nor the Colonial Office paid much attention to these demands, except perhaps in the importation of a Bill of Rights from Canada’s 1960 constitution under the encouragement of Hugh Wooding’s memorandum on behalf of the Bar Association. The final constitution owed far more to the independence constitution of Sierra Leone than it did to the multiple interventions of Trinidadians.

No British actor formally compelled Ellis Clarke, the Constitutional Advisor to the Trinidad government, to write the document he did. But he was a colonial product and his aim, like Gomes a generation before, was for Trinidad to share in that that constrained space of sovereignty which was then called Dominion Status. But the archives also reveal how firmly the British pressed towards particular goals. The Secretary of State for the Colonies on the 29 May 1962 told Clark firmly, ‘that it would be desirable to be quite clear and firm about the form of government and avoid the risk of an early change to a republic’, following this up a week later on 5 June 1962 Sandys by advising the Independence Conference: “I think it very important that the constitution should not be capable of easy amendment...... The other point which I think useful is provision for appeal to the Privy Council.... I should like to propose that this provision should be specially entrenched in the constitution”. The CRO official Snelling in a minute of 30 May 1962 complained that the draft constitution “entrenches a lot of
provisions including a declaration of human rights and fundamental freedoms. Perhaps the position of the Queen would be entrenched.” It is, in retrospect, astonishing that these British officials were given any standing in the making of the legal and political order of the independent Caribbean.

The process which yielded Trinidad’s Independence constitution should be seen, too, as the most inclusive and democratic in the West Indies. In Jamaica the public had only 30 days to respond to a constitution draft which was made, and then revised, far from the gaze of future citizens. By the 1970s, when the rest of the British West Indies acquired parliamentary sovereignty, the form of an independence constitution was already a given, so constraining in Antigua or Grenada any space for reflection and negotiation.

IV.

Via entrenchment, which created high bars to constitutional change, and a web of provisions which limited judicial review, the Independence constitutions restrained the legal evolution of the Caribbean. The founding documents of Jamaica and Trinidad of 1962, and of Barbados and Guyana of 1966 are schizophrenic documents. On the one hand, touched by the post-1945 emergence of human rights doctrine, the Universal Declaration of Human Rights of 1948 and the European Convention of Human Rights of 1953, they contain bills of rights and a variety of provisions which in theory protect the liberties and dignity of individuals. But these are

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weakened, if not eviscerated, by being twined together with clauses which limit the space open to judicial review in two ways. First 'Ouster clauses' protect decisions or actions taken by the head of state or his or her delegates, or advisory bodies such as service commissions, from the scrutiny of the courts. Essentially, what was the royal prerogative is now entrenched, in this way, in our public life. Perhaps even more noxious, however, and here is where the schizophrenia comes in, the 'savings clauses' declare that no regulation or aspect of justice and punishment which was considered lawful in the period before independence shall be judged now to be unlawful relative to any other part of the constitution. As Robinson, Bulkan and Saunders aptly put it, expanding McIntosh’s position:

With these savings law clauses colonial laws and punishments are caught in a time warp, continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. These clauses . . . operate in constant tension with the bill of rights and frustrate the aims and purpose of the constitutional guarantees . . . [They put] colonial punishments beyond challenge on the ground they are inhuman or degrading.²³

It was true that the parliaments of the Caribbean were always able to repeal old laws or introduce new ones, but the savings clauses wrapped a externally-imposed legal order formed by centuries of despotism and structural inequality in a knot which naturally became encrusted with political and public inertia until it became our own. Like victims of a long period of confinement, we thus carry the manners of the prison even after our liberation.

²³ Robinson, Bulkan, Saunders, Fundamentals of Caribbean Constitution Law, pp. 237-8; McIntosh, Caribbean Constitutional Reform, passim.
The worm in the mango of our constitution is an idea of law as domination and subordination. For this the powers of the Crown vested in the government of the day remain the anchor. These royal powers are translated into our republics, indeed extended, in the case of Guyana. That British constitutional tradition to which we remain a satellite has at its centre a theory of the law as a system of irresistible sovereignty, for which the rights of subjects and citizens were secondary. Blackstone in the *Commentaries*, in the critical book on the Rights of Persons, emphatically founds government and law in royal power: 'The King of England is, therefore, the sole, and not only the chief magistrate of the nation, all other acting by commission from, and in due subordination to him... The King is considered, in domestic affairs ... as the fountain of justice.' John Austin (1790-1859), the former soldier turned jurist, the pioneer of the alternative positive law tradition, was even more clear about the origins of law in an imperial will. At the centre of his idea of the Law is that law is the command of the uncommanded commander who has the power to compel others:

The term superiority signifies might: the power of afflicting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes. ... In short, whoever can oblige another to comply with his wishes is the superior of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the inferior.\(^{24}\)

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\(^{24}\) *The Province of Jurisprudence Determined*, lecture VI.
For Austin, it was from the superior to the inferior to the law emanates, law was implicitly a power relation around which social order was based. This autocratic principle is the feudal ghost in the British constitution, and in our own. Its Utilitarian legacies include the idea of justice as centred on punishment, and a toleration for inequalities of rights premised on ideas of reason and civilisational progress. John Stuart Mill, Austin’s disciple, in On Liberty (1869) thus created his famous escape clause for colonial tyranny: ‘Despotism is a legitimate mode of government for Barbarians if the end be there improvement...’. It may be time for an exorcism of this ghost of despotism past.

For those in the Caribbean who became the governors of their own colonies in the 1960s and 70s proved quite willing to avail themselves of the authoritarian aspects of the Westminster tradition. Barbados’s 1974 constitution made no amendment to the savings and ouster clauses, but instead added to the powers of the Prime Minister, who already nominated the majority of members to the Senate, the right to nominate the judiciary. What is extraordinary is that in the republican constitutions of Trinidad of 1976 and Guyana of 1980, the power of ouster and savings clauses not only persisted but were strengthened. Section 6 (1 and 2) of Trinidad’s constitution provide an enhanced regime of protection of earlier definitions of law and rights, while in Guyana, the new constitution, uniting the head of state and the executive in the presidency, vested a host of other quasi-regal powers to be held beyond the scrutiny of the courts.25 When in 2011 Jamaica changed its constitution, the general savings law clause was repealed, but preserved special savings protection for all legislation relating to sexual offences, pornography, and abortion, while adding ouster clauses protecting punishment from scrutiny.

Most extraordinarily, for a soi-disant 'Charter of Fundamental Rights and Freedoms', it entrenched in the constitution a definition of marriage as a contract between a man and a woman so that parliament in the future would not have the power to amend its statute, but would have to revise the constitution in order to allow sexual minorities to share in the right to marriage. This is a purely Jamaican charter, and yet it carries in itself that mechanism for putting the past's dead hand on the future common to all the independence constitutions.

The savings clauses' effect is in a toxic combination with the consequences of the Judicial Committee of the House of Lords acting as the final court of appeal. In Lord Devlin’s notorious ruling in DPP vs. Nasralla (1967), for example, characteristic of the early post-colonial period, the Council rigorously protected colonial-era legislation and social norms from examination on human rights grounds. Devlin interpreted the existence of the constitutional bill of rights of Jamaica in 1962 was merely an endorsement of a colonial judicial order in which 'the fundamental rights . . . were already secured to the people of Jamaica by existing law”. In Collymore vs. AG (1967), the Privy Council similarly declared that in Trinidad there was no right to strike because such a right had never been recognized in English common law. In 1971, rulings in D’Aguiar vs. Cox and Jaundoo vs. AG, similarly appealed to the savings clauses of the Guyana independence constitution. Boodram v Baptiste (1999) similarly saved hanging as a mode of capital punishment from any human rights scrutiny. It is true that Hoffman in Pratt (1994) cutlassed a route through the common law to the commutation of sentences of capital punishment which had not been executed in reasonable time. But on Boyce vs. Regina (2004), on the other hand, Hoffman was emphatic in his defending the general savings law

clauses as impassable barriers to the judicial review of capital punishment on human rights grounds.

The impediment which the Privy Council poses to the emergence of a Caribbean jurisprudence is that, quite naturally, it seeks consistency with UK judicial and governance norms. Diplock's approach in Hinds vs. R (1975) was to reach for British and colonial precedents and norms when in doubt. This might be a sound a common law solution, but it operated with an implicit insensitivity to local culture and needs, and to non-British ideas of justice. Any evolution towards a constitution suited, in Montesquieu or Bolivar's sense, to our climate and manners, is thus permanently postponed. The importance of the Caribbean Court of Justice lies not merely in the better, cheaper, and quicker justice it might provide us, but in the opportunity it gives us to become the centre of our own legal order, instead of being permanently at the periphery of another.

In rebalancing our jurisprudential identity we become more attentive to ourselves and to the advantages of other judicial traditions, not just the United States and the Code Napoleon jurisdictions, but also India. The Indian judiciary's courage in 1970s during Indira Gandhi's 'emergency' should, for example, be better known. Gandhi, with her crushing parliamentary majority, kept passing constitutional amendments which introduced new 'ouster' clauses, protecting even the conduct of elections from judicial review. Again and again, the judges intervened to knock her back and to limit the state of exception. Finally Amendment 42 declared: "No amendment... shall be called into question by any court on any ground". The judges kept pad and bat together and knocked that away too. Here is Justice Chandrachud in
Minerva Mills (1980) : “Amend as you may the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore you cannot destroy its identity”.  

V.

It may be in the Caribbean, 50 years after independence, that we must become our own founding fathers and mothers. Our task, one in which legislators, judges and citizens must share, is to create a constitutional identity which we can claim as our own ‘precious heritage’. The first step towards this is to recognize that parliamentary sovereignty as won in 1962 was only the prelude to a much harder and slower work of economic, cultural and spiritual decolonization, what in another context I have called ‘secondary decolonization’. This deserves your attention as judges and as citizens because no incarceration, flogging or hanging can do the work of rooting the law in the spirit of our people. That was tried before, during centuries of tyranny. Laws can only move from external constraint to inner inspiration, if they are grounded in justice and embody the personality of all citizens.

At the heart of the colonial experience was an alienation from ourselves and our own landscape, with our economies, our ideas of order, beauty, determined by registers of meaning and value and justice anchored in foreign soils. The change of flags at midnight had no power to change these deep structural forms of dependence. This was what Mahatma Gandhi had prophesied in

Hind Swaraj (1908) in which he posed the following dialogue between a 'Reader' who angrily claimed “we shall then hoist our own flag. As is Japan, so must India be. We must own our navy, our army, and we must have our own splendour, and then will India's voice ring through the world”, to which Gandhi replied:

You have drawn the picture well. In effect it means this: that we want English rule without the Englishman. You want the tiger's nature, but not the tiger; that is to say, you would make India English. And when it becomes English, it will be called not Hindustan but Englistan. This is not the Swaraj that I want.  

A similar complaint about the incompleteness of our Swaraj in the Caribbean, the gap between its outer form and its inner life was made by the Black Power generation of 1970, on the one hand, and the rastafarian movement which arose in the wake of their defeat, on the other. Those who managed the society, men like Williams and Wooding and Clark, no less moved by patriotism, sought to meet halfway, but the institutions and modes of mind and governance in which they were embedded limited their degrees of freedom. The straitjackets of our constitutions were only the partners of a more profound psychological bondage.

That 'secondary decolonization' might involve returning to the interrogation of the incomplete nature of our decolonization began by the troublemakers of the 1970s. It would involve too the search within all our ancestral traditions-- Amerindian, African, Hispanic, French, East Indian and Chinese for resources of values to bring to the ordering of our world. We might turn to India for inspiration where, as the late Sir Christopher Bayly showed, Ayurdevic ideas about the

physical constitution of the human body had an important impact on Indian political ideas, the body physical in its place and climate as the basis for the body politic. From our neighbours, and in particular from Simon Bolivar of Venezuela and Jose Marti of Cuba, we can find guidance. There are broad horizons of Constitutional possibility, beyond the kinds of negative liberty which define that British tradition from which our constitutions derive, which await our attention. The makers of Cuba’s Constitution of 1940, for example, recognized, on the best liberal grounds, that political rights and civil liberties would only mean anything if economic and social rights to minimum wages, public education and health, and equality of pay for women, were also guaranteed.

The duty of the judge is be the witness of the present in the work of giving laws their meaning. To return to the questions I posed in Jamaica last September: how should the Caribbean judge confront the problem of law and justice in societies which were wholly constituted in a 'state of exception', where law was not endogenous, or convergent with an experience of universal citizenship? If law might be seen as an instrument through which the past seeks to exert a despotism over the future, to what extent should Caribbean judges guide the interpretation of statutes towards the needs of present and future justice? How far, more generally, should the judge view her or himself as a maker of history? How should judges exercise their hermeneutic power over the life of the law as agents of the decolonization and depatriarchalization of our societies? What role, in particular, should judges play in urging the society to interrogate the weight of colonial legislation which remains in force: vagrancy laws, statutes which leave extraordinary regal power in the hands of the political executive, legislation which discriminates
against women or the poor, or criminalises sexual minorities? How can we preserve the authority of the law while making consent into the centre of our jurisprudence?

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