I shall explore the conjecture that our Independence constitutions are not our own. 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.

Whose Constitution?
Law, Justice and History in the Caribbean

Sixth Distinguished Jurist Lecture 2016
by Professor Richard Drayton PhD FRHistS
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Judicial Education Institute of Trinidad and Tobago
Sixth Distinguished Jurist Lecture 2016
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Sixth Distinguished Jurist Lecture

“WHOSE CONSTITUTION? LAW, JUSTICE AND HISTORY IN THE CARIBBEAN”

Professor Richard Drayton PhD FRHistS

March 2nd, 2016
As the audience streamed into the Convocation Hall of the Hall of Justice on the evening of 2nd March, 2016, for the Sixth Distinguished Jurist Lecture, the 1930s recording by Attila the Hun and the Mighty Terror of the early 19th century kalinda, “Prisonieres levez” could be heard. This, along with other calypsos from the 30s and 40s, set the stage for Professor Richard Drayton’s address, “Whose Constitution? Law, Justice and History in the Caribbean” in which he articulately outlined (complete with on-pitch renditions of calypso) the “profound and unacknowledged constitutional crisis” in which the contemporary Caribbean has found itself.

Just as the calypso’s melody reached through the mists of time to the days of slavery in Trinidad and beyond, across the Middle Passage to the Akan funeral rituals from which it originated, so too the lecture by the Guyana-born and Barbados-raised Rhodes Professor of Imperial History at King’s College London sought to explicate the way that the Caribbean historical experience, out of which have sprung our constitutions, laws and governing principles, is rooted in violence, corruption and a careless and irresponsible attitude towards our relations with each other and with our natural environment. Professor Drayton made clear that this dysfunctional relationship between the population and the law originated in the system of colonialism in which “between the absolute power of the planter, and the absolute power of the Crown, fear and compliance existed, but never free consent.”

Professor Drayton went on to outline that, although there was considerable interest in, and agitation for, changes in our constitutional arrangements, “this brief efflorescence of popular will” did not result in constitutional guarantees of the protection of the rights of Caribbean people. Rather, a network of ‘ouster’ and ‘savings’ clauses perpetuated colonial systems of inequality and subordination even when, as in the case in Trinidad and Guyana, these constitutions were republican in nature. A
significant element within this perpetuation of colonial norms was the retention of the Judicial Committee of the House of Lords acting as the final court of appeal, a development which Professor Drayton identifies as “an impediment... to the emergence of a Caribbean jurisprudence.”

Instead, the need to move beyond “a more psychological bondage” has become imperative. For Professor Drayton, this requires “an exorcism of this ghost of despotism past” and the final section of his lecture discussed how this “rooting the law in the spirit of our people” might happen. With regard to the judiciary, Professor Drayton posed a series of challenges, including:

“... 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 can we preserve the authority of the law while turning consent into the centre of our jurisprudence?”

In previous years, the second part of the programme, the panel discussion, would have been held on the subsequent day. It was decided this year to hold both lecture and discussion on the same day and to invite a larger cross-section of the national community. Most significantly, the format of the panel discussion was changed to one which was more conversational. Moderated by The Honourable Mr. Justice Malcolm Holdip and the Honourable Madam Justice Margaret Mohammed, the panel (The Honourable The Chief Justice Mr. Justice Ivor Archie O.R.T.T., Professor Bridget Brereton, Dr. Rita Pemberton, Mr. Reginald Armour SC, Father Martin Sirju and Ms. Attillah Springer) remained seated in the audience and contributed to the discussion when called upon. This format proved effective in producing a stimulating and wide-ranging discussion with persons from all walks of life participating, many expanding and interrogating points raised by Professor Drayton. The issues mentioned included the environment, Tobago self-determination, the Caribbean Court of Justice, the education system and the need for meaningful participation by the wider population in legal and constitutional matters.
Of particular interest to the Judicial Education Institute was the call by a number of speakers for the Institute to play a larger role in bringing constitutional, judicial and legal matters to the wider population in order to meet the need for ‘consent’ by the population in the creation of a constitution. While the structure and format of the day’s proceedings allowed for more voices to be heard on the questions under discussion, and while the Institute arranged for live streaming of the event over the Internet and has made the Distinguished Jurist Publications available online, this challenge of reaching out even further is at the present time actively engaging the Board and Staff of the Institute.

The final section of this publication contains the transcript of an interview on morning television with Professor Drayton and the Chairman of the Institute, The Honourable Mr. Justice Peter Jamadar JA, as well as copies of articles written by columnists Dr. Raymond Ramcharitar and Dr. Hamid Ghany on questions raised by Professor Drayton. The Judicial Education Institute is pleased that the 2016 Distinguished Jurist Lecture has proved to be one of the most engaging and topical in the series and we are satisfied that this publication will serve to further the vision of the Institute, promoting “Transformation through Education.”

Mr. Kent Jardine
Judicial Educator, JEITT
Welcome and Introduction

On behalf of The Honourable The Chief Justice Mr. Justice Ivor Archie O.R.T.T., President of the Board of the Judicial Education Institute of Trinidad and Tobago, and on behalf of the entire Board of the JEITT, welcome.

Welcome to the 2016 edition of the Judicial Education Institute of Trinidad and Tobago’s Distinguished Jurist Lecture Series.

My name is Avason Quinlan. I am a Magistrate, as well as a Board Member of the JEITT. For this evening’s 6th Distinguished Jurist Lecture, I am honoured to be your Master of Ceremonies.
Your Excellencies: The Acting President of the Republic of Trinidad and Tobago, Her Excellency Christine Kangaloo, and her husband, His Excellency Kerwin Garcia;

The Honourable The Chief Justice of Trinidad and Tobago, Mr. Justice Ivor Archie and his wife Mrs. Denise Rodriguez-Archie;

Speaker of the House of Representatives, The Honourable Bridgid Annisette-George;

Distinguished members of the Diplomatic Corps;

Chairman of the Judicial Education Institute, The Honourable Mr. Justice Peter Jamadar, Justice of Appeal;

Other Honourable Justices of Appeal, Justices and Masters of the Supreme Court of Trinidad and Tobago;

Honourable Justices and Members of Superior Courts of Record here in Trinidad and Tobago;

His Worship Keron Valentine, Mayor of Port-of-Spain;

Magistrates, Registrars and Members of the Court Administrative Unit;

Members of the legal fraternity and civil societies;

Our very distinguished speaker and special guest, Professor Richard Drayton PhD FRHistS;

Members of the media.

Welcome to the 6th Distinguished Jurist Lecture.

This series of lectures is presented in furtherance of the JEITT’s mission to promote excellence in the administration of justice in the Republic of Trinidad and Tobago. To achieve this, the JEITT holds as its vision, “Transformation through Education.” I invite you, at your own leisure, to visit the JEITT’s website at www.ttlawcourts.org/aboutjeitt for a more comprehensive look into its history and its work since inception in 2003.

For this, the second consecutive year, our Distinguished Jurist Lecture is being streamed live to over ten countries. Our streaming audience includes Professor Cheryl Thomas from University College London,
Justice Sandra Oxner of the Commonwealth Judicial Education Institute, Dame Linda Dobbs D.B.E., our Distinguished Jurist of 2015, Sir Marston Gibson, Chief Justice of Barbados and our Distinguished Jurist of 2013, Sir Shridath Ramphal, our Distinguished Jurist of 2011, and many more!

At this time, it gives me great pleasure to introduce our Distinguished Jurist of 2016, Professor Richard Drayton PhD, FRHistS.

I was privileged to be in the audience at the Caribbean Association of Judicial Officers’ 4th Biennial Conference September 2015 in Montego Bay, Jamaica where I first encountered Professor Drayton, who delivered the Keynote Address titled: “Longer than rope? Time, History, and the Law in the Caribbean.” Also present in the audience was our Chief Justice, Mr. Justice Ivor Archie. The value and relevance of that address to us, individually, organisationally and as a society, is why Professor Drayton is our Distinguished Lecturer today; you are in for intellectual stimulation.

Richard Drayton was born in Guyana and grew up in Barbados where he attended Harrison College. In 1982, he won a Barbados Scholarship which took him to Harvard University. At Harvard, he studied History and the History of Science. He went on to do his graduate studies at Yale, and then went to Oxford as the Commonwealth Caribbean Rhodes Scholar. Following Oxford, he was awarded a Research Fellowship at the University of Cambridge. He moved back to Oxford in 1994 as Darby Fellow and Tutor in Modern History at Lincoln College. In 1998, he became Associate Professor of British History at the University of Virginia. In 2001, he returned to Cambridge as University Lecturer in Imperial and extra-European History since 1500, and also as Fellow and Director of Studies in History at Corpus Christi College.

In 2002 he was awarded the Philip Leverhulme Prize for History. In the Spring of 2009, he was Visiting Professor of History at Harvard University. Since 2009, he has been Rhodes Professor of Imperial History, King’s College London.

Professor Drayton is a Senior Research Associate of the Centre for World Environmental History of the University of Sussex. He was a member of the Academic Advisory Committee on the Bicentenary of the Abolition of the Slave Trade of the British Empire and Commonwealth
Museum. He is also a Fellow of the Royal Historical Society, a member of the American Historical Association and the Association of Caribbean Historians. He is a co-convenor of the Imperial and World History seminar at the Institute of Historical Research.

Professor Drayton believes that it is important for historians to communicate with the wider public, and in particular to speak up where their work on the past has relevance to the present. In that regard, he has appeared on BBC radio, in public debates on Britain’s imperial past and present, and has published op/ed pieces in the Guardian. He has been invited to give many distinguished lectures and has lectured on many topics, including

“Hybrid time: The Incomplete Victories of the Present Over the Past”, Throckmorton Lecture at Lewis and Clark College (2007);

“The Problem of the Hero in Caribbean History”, 21st Elsa Goveia Lecture, University of the West Indies (2004); and

“What happens when two ways of knowing meet?”, the Elizabeth T. Kennan Lecture at Mount Holyoke College (2003).

Professor Drayton’s research interests include the History of the Caribbean, in particular its intellectual life, both elite and ‘from below’, since 1800, in which he is well-published. He has both written in and contributed to many publications, including articles in peer-reviewed journals. In fact, his book, entitled “Nature’s Government: Science, Imperial Britain and the ‘Improvement’ of the World” (2000, 2005), won the Forkosch Prize of the American Historical Association in 2001.

It is no wonder, from this much summarised biographical data, that Professor Drayton was identified as the perfect Distinguished Lecturer to deliver for us today’s lecture, “Whose Constitution? Law, Justice and History in the Caribbean.”

Please join me in welcoming to the podium, CARICOM Citizen, Professor Richard Drayton PhD, FRHistS.
Whose Constitution?
Law, Justice and History in the Caribbean

Professor Richard Drayton PhD FRHistS
Distinguished Jurist Lecture 2016
I.

Your Excellencies, the Acting President of Trinidad and Tobago, Mrs. Christine Kangaloo and Mr. Kerwyn Garcia;

The Honourable the Chief Justice of Trinidad and Tobago, Mr. Ivor Archie and Mrs. Denise Rodriguez-Archie;

The Speaker of the House of Representatives, The Honourable Ms. Bridgid Annisette-George;

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.¹

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.² 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

¹ Lassalle vs. Attorney-General (1971) 18 W.I.R. 379 (CA TT) and Lassalle, Shah and Others v AG (1972) 20 W.I.R. 361 (CA TT) remain perhaps the most important Caribbean appellate judgements for the immediate post-independence period, as much for their expansive view of the potential of the judiciary to give new life to the common law as for their defense of due process against the pressure of the Executive.

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 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. 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 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. 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

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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.

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’. 5 ‘The sovereign’, Schmidt tells us in the Political Theology, ‘stands outside the juridical order and, nevertheless belongs to it …’. 6 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’. 7 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 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.

5 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.

6 Carl Schmitt, Political Theology, Four Chapters on the Concept of Sovereignty, George Schwab (trans.), (Chicago, 2005), pp. 4-7.

7 TNA: CO 295/552, f. 229, Byatt to L S Amery, 29 December 1924.
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.

As Diana Paton has put it, ‘the dominant experience of legalities from the slaves’ point of view was of terror and violence.’ 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 organised and which survived the changing of laws.

8 Robinson, Bulkan 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’ T racy Robinson, Arif Bulkan, Adrian Saunders, Fundamentals of Caribbean Constitutional Law (London, 2015), p. 46.
Sir Henry Maine, in a formula reprise 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.¹³ 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 where, after the end of slavery, indentured contracts were tacitly associated with ideas of the racial difference of the Indian or Chinese coolie.¹⁴ 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”.¹⁵ 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 esclavs 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

¹³ S. Ramphal, Creating a Regional Jurisprudence (Port of Spain, 2012), p. 41.
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’.

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”.¹⁶ 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 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.\textsuperscript{17}

Consent became even less important after 1800. The nineteenth century saw the dramatic extension of the franchise in Britain, while the ‘white dominions’ of Canada and Australia acquired internal self-government. But wherever under the British Crown whites, or more specifically those of British-stock, would be in the political minority, the powers of legislatures were weakened, and the Crown’s prerogatives extended. 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.\textsuperscript{18} In such colonies, in a model which spread outwards from the West Indies, Governors could initiate legislation, with Orders in Council emanating from London or Government House.\textsuperscript{19} 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{20} As late as 1928, British Guiana lost its representative constitution and became a Crown


\textsuperscript{18} See Hobart to Governor of Trinidad, 2 December 1804 and James Stephens to Addington quoted in Archibald Gloster, Attorney-General of Trinidad to Governor Hislop 4 July 1804 TNA: CO 101/84, f 272. Hobart urged that the form of government devised for Quebec—Governor and Council without an assembly, be applied to Trinidad, with Stephens urging that “in the forming of a constitution for this new Colony, to avoid the fatal error of giving it in its infancy a legislative assembly at least until its population and wealth become such as to promise a respectable representation”


\textsuperscript{20} 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 R. W. Kostel, A Jurisprudence of Power: Victorian Empire and the Rule of Law (Oxford, 2005).
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’.21

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. 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 mad if the Gazette announced an Order in Council not authorised by statute creating a new Court of Appeal’.22 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 November 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 to make ordinary laws.23 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

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23 TNA: LO 2/875 Law Officer’s Department, ‘Opinion on the Constitution of Trinidad and Tobago’ (1959).
Act 1966 c. 37, passed by the House of Commons on November 17, 1966, which in theory the British parliament could repeal tomorrow.\(^24\)

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.

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.\(^25\) 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.26

From Cipriani to Butler to Marryshaw in Grenada and 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.27

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 within the sphere of British dominance. Alexander Bustamante in his speech in Montego Bay in 1947 had been quite candid about this: ‘I want to become Governor

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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, recognised 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 decolonise 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 decolonisation 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.

28 Proceedings of the Closer Union (British West Indies) Conference, p. 18.


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 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

32 See TNA: CO 1031, 3229-3239, see especially 3231 and 2 for popular submissions.
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 constrained space of sovereignty which was then called Dominion Status. But the archives also reveal how firmly the British pressed towards particular goals and were keenly concerned to ensure that constitutional instruments secured a post-colonial future compatible with British interests. Animating this is a palpable anxiety that others of different races and cultural origins might choose to make different futures. 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.’

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.

That the independent West Indies would be a space of constitutional monarchies which looked towards Westminster for its institutional norms was a paramount concern. Duncan Sandys, the Secretary of State for the Colonies, told Clark on 29 May 1962 ‘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’.

Sandys followed this up a week later on 5 June 1962 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.” Ellis Clarke, the Constitutional Adviser to the Trinidad Government was keen to show his loyalty, agreeing that the monarchy would be entrenched, and that ‘he thought it would be acceptable to the general feeling in Trinidad if it were entrenched more strongly still’.35 Eric Williams, when pressed by Sandy, was more circumspect, replying, ‘one could not say in an emerging state what parties might be formed with what policies’.36 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.37 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 constitutions 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

35 Ibid.
37 See the discussion in Robinson, Balkan, Saunders, Fundamentals of Caribbean Constitution Law, pp. 59-63 which guided my reading on the wider Caribbean pattern of Constitution making.
individuals. But these are 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.38

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 an 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.

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,

38 Robinson, Bulkan, Saunders, Fundamentals of Caribbean Constitution Law, pp. 237-8; McIntosh, Caribbean Constitutional Reform, passim.
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.’ 39 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.40

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 their improvement...’ This violent paternalism remains a central principle of our post-colonial state. It may be time for an exorcism of this ghost of despotism past.

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 provides 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.41 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.42 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 recognised in English common law.43 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

43 Robinson, Bulkan, Saunders, Fundamentals of Caribbean Constitution Law, pp.141-2)
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 in 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 common law solution, but it operated with an implicit insensitivity to local culture and needs, and to non-British ideas of justice. Indeed, human rights doctrine, particularly in their expansive post-1968 sense, must always take second place for the Privy Council to judicial coherence with common law precedent. 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. Indeed, as is apparent in TCL vs. Guyana [2009] and Myrie v. Barbados [2009], the Court has played a critical role in giving meaning to the Caribbean Community’s attempts to negotiate a common framework of rights through the Chaguaramas process. In both cases, moreover, individual rights have been secured against arbitrary state action. The Court has a central role to play in giving meaning to the constitutional independence of the Caribbean in the Twenty-First century, and the adhesion of Jamaica and Trinidad can only now be a matter of time.

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.\textsuperscript{48}

During India’s 1970s ‘emergency’, Indira 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”.\textsuperscript{49}

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 recognise that parliamentary sovereignty as won in 1962 was only the prelude to a much harder and slower work of economic, cultural and spiritual decolonisation, what in another context I have called ‘secondary decolonisation’.\textsuperscript{50} 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.

\textsuperscript{48} On the concept of ‘Constitutional Identity’ see Gary J. Jacobsohn, Constitutional Identity (Cambridge, MA, 2010).

\textsuperscript{49} Minerva Mills, AIR SC 1789 (1980), para 1798. Minerva Mills has already been productively appealed to by Chief Justice Conteh in Belize in Bowen vs. Attorney-General BZ 2009 SC2.

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.51

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 Clarke, 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 decolonisation’ might involve returning to the interrogation of the incomplete nature of our decolonisation begun 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 Martí 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, recognised, 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.²² The securing of social and economic rights, side by side with political liberties, remains one of the fundamental challenges for all democracies, here and elsewhere.²³

The duty of the judge is to 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?²⁴ 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 decolonisation and depatriarchalisation 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, or fails to protect citizens against state violence? How can we preserve the authority of the law, while turning consent into the centre of our jurisprudence?

JUDICIAL EDUCATION INSTITUTE OF TRINIDAD AND TOBAGO
Conversations

Moderators:
The Honourable Mr. Justice Malcolm Holdip
The Honourable Madam Justice Margaret Mohammed

Panel:
The Honourable The Chief Justice Mr. Justice Ivor Archie O.R.T.T.
Mr. Reginald Armour SC
Professor Bridget Brereton
Dr. Rita Pemberton
Father Martin Sirju
Ms. Attilah Springer
Magistrate Quinlan: Now, to take us through the Conversations on the topic, I welcome Justice Malcolm Holdip and Justice Margaret Mohammed, both judges of the Supreme Court of Trinidad and Tobago.

Justice Holdip: Good evening, ladies and gentlemen. It is indeed a pleasure to have you all here.

Justice Mohammed: The facilitators for tonight are The Honourable The Chief Justice Mr. Justice Ivor Archie, Professor Bridget Brereton, Dr. Rita Pemberton, Mr. Reginald Armour SC, Father Martin Sirju and Ms. Attillah Springer.

To start off the proceedings, I will first ask the Honourable Chief Justice to give his comments.

Chief Justice Archie: Thank you very much, Margaret. I do not know quite how one begins a discourse after such a tour de force, but I suppose protocol requires that I be given the rather daunting task.

First of all, let me congratulate Professor Drayton on a most insightful and incisive commentary on our predicament. At the core of his thesis is the proposition that legitimacy of government is grounded on the consent of the governed; so that before our societies can give that consent, we should have some degree of consensus about the type of society that we want to construct, and how we want to live with and relate to each other. And that is what constitutional reform ought to be about. We need to decide what a constitution is for; because, as long as we continue to perceive constitutions primarily as instruments for the separation or distribution of power—which, as he has pointed out, tend to serve the interests of the entrenched power elites and, in the context of our electoral construct, alternating competing tribes—then we will continue to do violence to each other. And the lofty aims in the preamble to our constitution, which are often ignored, will remain just fluff.

May I take the opportunity to remind us of our preamble where we affirm, “Respect for the principles of social justice”. We therefore believe
that the operation of the economic system should result in the material resources of the community being so distributed as to subserve the common good, that there should be adequate means of livelihood for all, and that labour should not be exploited or forced by economic necessity to operate in inhumane conditions, but that there should be opportunity for advancement on the basis of recognition of merit, ability and integrity.

We go on to assert our belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of national life and thus develop and maintain due respect for lawfully constituted authority.

From my point of view, voting once every five years does not constitute meaningful participation in national institutions. We search, in vain so far, to see social and economic rights entrenched as fundamental rights, as indeed we see in some constitutions such as South Africa, where the history has been very different and there has been a real liberation struggle. How then are we to maintain respect for lawfully constituted authority in the absence of that participation?

I perceive part of what Professor Drayton is saying to be a challenge to the Judiciary in the absence thus far of a constitution that is truly a platform for the social and economic development of our people, that we should use those lofty words as an interpretative lens in our deliberations and decisions. It is a huge challenge that requires creativity and boldness from the Bench and the Bar. But I do not think it is a job for the lawyers alone. The whole of civil society has to confront this dilemma and participate. We cannot speak of sovereignty until we repatriate our jurisprudence. And it is here that Professor Drayton, I think, rightfully trains his guns on the savings clauses.

As the child of a mother who was one of the first to teach West Indian History for O’Levels, and as a UWI graduate of the 1970’s post Black Power era, I remain astounded at the fact that fourteen years after independence, we could reintroduce savings clauses into our 1976 constitution and that thirty years on, we are still debating whether to adopt the CCJ as our final appellate court. Professor Drayton is a product of the Caribbean. With those kinds of minds, how can we really doubt that we need to have our own jurists deciding our own cases, in our own context and understanding of our history?
Is it that we are so massively lacking in self-confidence? If there is no other agenda, then what is it that we are afraid of? To quote Bob Marley, “Emancipate yourself from mental slavery, none but ourselves can free our minds.” That is my mantra. That is the work that we have cut out for us. That is why we started this lecture series. I look forward to a rich debate tonight and to a continuing conversation in the months and years to come. Thank you very much.

Justice Holdip: Thank you very much, Chief Justice. Professor, do you wish to have any commentary, short as it may be, on what the Chief Justice has said? And then I would invite members of the audience who wish to participate.

Professor Drayton: I merely would like to congratulate Trinidad for having such an excellent Chief Justice, who is providing such leadership, not just to the Judiciary but indeed is serving as a citizen in a very significant way.

Justice Holdip: Thank you. Having put things into an historical context, I would endeavour to ask Professor Brereton if she might, in fact, be able to make some measure of contribution to the proceedings as of now.

Professor Brereton: Thank you, moderators. In Professor Drayton’s brilliant lecture, he made the point extremely clearly that during the colonial era, and even after Emancipation, for the population at large in the British Caribbean, the law, the courts and the agents of the law, were seen primarily as forces of violence and injustice. In other words, there was nothing remotely like—there was nothing resembling—“consent”, to use Professor Drayton’s word, at that period in the Caribbean.

I have researched the biography of a British Colonial Chief Justice of Trinidad and Tobago. His name was John Gorrie and he was considered mad; he was certainly a maverick. He was a maverick Scot with strongly left-wing views and a commitment to justice for all. Now, he fully
understood the response of the ordinary people in the Caribbean to the courts and the law, because twenty years before he came to Trinidad, he had been involved in the investigations into the Morant Bay rebellion, and that rebellion was caused, at least in part, by the deep popular mistrust and resentment of magistrates in Jamaica.

When he came to Trinidad, he became Chief Justice of Trinidad and Tobago because he happened to be CJ of Trinidad when the unification took place. Both in Trinidad and Tobago, he tried to make the courts more accessible to everybody and he tried in his rulings and his procedures to dispense, as he saw it, substantive justice. Now, needless to say, he was comprehensively defeated and got rid of by a coalition of the local propertied elites and the British officials in London and in Trinidad.

The British Empire may have abolished slavery and then, by 1920, abolished indenture, but it continued to be run in the interest of propertied and business people, both in Britain and in the colonies. And the Judiciary was part of that even though there were, I am sure, many upright and well-intentioned colonial judges, both British and Caribbean—though I don’t think there was anyone quite like my man, Sir John Gorrie.

My question is, in fact, a question that Professor Drayton posed and the Honourable Chief Justice posed. In the fifty-five years since independence, and with a judiciary which is now and since independence has been almost entirely comprised of sons and daughters of the soil, how have our judges tried to use the courts and their rulings to make this “consent” of the governed more of a reality? As Gorrie, the colonial British judge tried and failed in the late 19th century, how have our independence judges tried to use their power on the Bench, to use the courts in order to make this business of “consent” more of a reality --I assume they have tried -- and with what success? Thank you.

Justice Holdip: Thank you very much. Those stimulating remarks certainly would endeavour some sort of participation from our members of our audience here. I see so many legal luminaries and I would hope and wish that at least a few of them would come forward, especially on the point made by Professor Brereton on the role that judges have
perceived with regards to their activism and seeking to change our societal modes. Come forward. I would ask you simply to identify yourself as you make your presentation.

Dr. Kirk Meighoo: I am Dr. Kirk Meighoo. That was an excellent presentation. I am so pleasantly surprised. You have laid it out so well, the issues, and made it live. I wanted to raise some points about our own tradition. There is a lot I have to say so I will try to make it concise.

Our own tradition here is probably not as liberal or as fully liberal and fully enlightened. And the colonial tradition is not as fully evil as it may sometimes be in nationalist historiographies. In our stories, we tell of our colonial struggle. I want to give an illustration of the 19th century. This is done from research that Lloyd Best and I had done in researching our 400-year constitutional history in the Caribbean.

The Crown Colony system has been seen as a system in which the British tried to deprive us of our democratic rights, and that has been the dominant interpretation of it. What we have seen from looking at the actual debates and what was going on at the time, is that it is a little bit different. And I think it has some relevance for today.

In 1792, the British Parliament passed a resolution, committing itself to the gradual abolition of slavery. Five years later, Trinidad and Tobago was captured and there was a huge debate as to whether the democracy that existed in the other Caribbean islands, Barbados, Jamaica, Antigua, et cetera, should be instituted here as well. Now, the abolitionists knew that planter democracy, the old representative system, was not going to bring about the gradual abolition of slavery. Instead, Trinidad, the Crown Colony model, was developed after a very long period of debate, to have local participation but not let the planters control things. And Trinidad became a model colony where all sorts of slave amelioration legislation was passed and hopefully the other islands would have adopted it and so forth.
And what had happened was, the crown colony tradition spread, very often because of things like the Morant Bay rebellion in Jamaica and the Belmanna Riots in Tobago; almost every time it was because of a huge riot of the newly-emancipated persons who were oppressed by the local democracy. So there was a sort of liberal authoritarianism imposed by Britain to protect the local populations from the local West Indian rulers. There is a huge lesson for today as well.

Our “elite”; in Trinidad and Tobago, for example, if I am not mistaken— we have historians here that can correct me—most slave owners were not white in the early 19th century. We had free coloureds who were slave owners here. So the racial colonial picture is very, very much mixed and indigenising things does not necessarily mean making things more enlightened or liberal. I think this is why local populations still look to protection from abroad, because we know of the realities of local power structures. Thank you.

Mr. Israel Khan, SC: Israel Khan, attorney-at-law, practising in Trinidad and Tobago. I am wondering if you are aware that there are over five hundred pending indictments for murder in Trinidad and Tobago and the timespan to get a trial in our courts is about ten years. And we really believe in the presumption of innocence. It takes ten years for an accused person in Trinidad and Tobago, on an offence which is not bail-able, and usually, they come from the dispossessed section of the society; the poor people. Where is the justice in Trinidad and Tobago and how can we do something about it? I am happy there are politicians here because we say from time immemorial, in which the Chief Justice—our present Chief Justice supports, that murders must be categorised into first, second and third degree, and second and third must be made bail-able and we should implement plea bargaining.

I believe that the politicians are not interested in what is happening in our prisons because there are no votes there. They are not interested. Governments will go, governments will come and now we have about five
hundred pending indictments for murder, and the accused person cannot get a trial. So if you could assist us as to how we go about eradicating this injustice. How do we do it?

Professor Drayton: The problems with the system of remand in Trinidad and Tobago are quite clear and I think this is something which, I would like to think, is already receiving attention from judicial authorities. And I have eavesdropped on conversations which suggest that there is some hope of change to some of the criminal procedures, in order to facilitate a more speedy passage of indictments through the court.

Mrs. Hazel Thompson-Ahye: Good evening. I am Hazel Thompson-Ahye and I am a child rights advocate, among other things. Professor, I did my homework on you and I am not at all disappointed, except you mentioned laws for a number of disadvantaged groups. You did not mention my constituency, so I rise in defence of them. You say that the law should be rooted in the spirit of a people. Have you been reading the newspaper? We have some evil spirits here. I have some reservations, therefore, about that. I think the law with respect to children should be rooted in international standards and norms, whether it be Juvenile Justice, the Convention on the Rights of the Child, the Beijing Rules, the Riyadh Guidelines, or the Havana Rules. That is not happening.

I am sure you are familiar with Professor John Eekelaar from Oxford University. I wrote him my version of a Dear John letter and brought him to the Caribbean some years ago. And one of the things he wrote is the importance of thinking that children have rights. He said that it would be a mistake to think that the convention is for children. It is for adults; it is for all time. Children do not remain children. In fact, when we give children their rights, he said, we are laying the foundations for a better world.

You started off talking about violence. Children are not born violent, sir, we have created them and I am not talking about parents, I am talking about the society. We report to the Convention on the Rights of
the Child and we have recommendations which we do not follow. One of the recommendations for Trinidad is that we should have a child ombudsman. The children ombudsman of Ireland -- again, I had the pleasure of meeting her, Emily Logan–is saying that in part, we should root our laws. We should have the Convention in the Constitution.

You spoke about the constitution. What is your view? Because there are some people who have the view that many countries in Europe, they have the constitutional provision entrenched here. Should we, in fact, not have child rights fully protected by putting it in our constitution and not rooted in the spirit of these people who, in this Lenten season, need plenty prayers, sir?

Professor Drayton: Thank you very much for your intervention. I would have thought that the rights of children would be one of the things to be considered in any national conversation about a constitution. But to return a little bit to my theme, in a way, what we are confronting here is one more bit of the legacies of having a social and legal system in which the power of the paterfamilias, a power in which the paterfamilias presided not just over the slave, but also the animals and children and women. And that essentially there is a linkage between these modes of domination. It may well be that we have turned to the issue of the rights of the child last, when perhaps we should have turned to it much earlier on.

Mme. Justice Mohammed: I want to call on Father Sirju, since we just spoke about spirits and evil and prayers.

Father Martin Sirju: I have to join others in thanking Professor Drayton for his distinguished lecture and for raising pertinent issues in the history of our political development. Two points came up of concern to me and one is the business of consent, and the second of violence. Prof Drayton raised the issue of consent and violence showing that the two aspects are not mutually exclusive: violence went hand in hand with a lack of consent. My input in this discourse is a comment rather than a question.
The paper in your presentation, Professor, reminded me of the history of the Catholic Church. In the history of the Roman Catholic Church prior to 1962 there prevailed in the Church from the 16th century onward a reactionary atmosphere consequent to the Reformation. The decades before the Second Vatican Council (1962-65) (for short Vatican II) was one of recrimination, suspicion, autocracy and fear of the other, whether the other was non-Catholic or non-Christian. This in itself was a form of violence, subtle but real.

Vatican II changed all that. It introduced in the culture of the Church what was forgotten for centuries: dialogue, co-operation, openness, religious freedom, humble listening and interfaith dialogue. Instead of a passive laity who had to “pay, pray and obey”, they had a voice in the Church once again. The Church was now described as “the People of God.” Input and consent were restored, albeit not totally.

Part of that spirit of dialogue emerged in Caribbean theological discourse in the 1970s, spurred on by the Black Power Uprising of 1970. One of the leading church thinkers here was Dr Idris Hamid, a Presbyterian minister who edited a collection of papers entitled “Troubling the Waters”. The collection implied one of the functions of the churches is to “trouble the waters”.

At a recent consultation on education held some weeks ago it was emphasised by several secondary school educators that boys learn differently from girls, which is common knowledge today. What was more surprising was a pervasive call for more technical-vocation (‘tech-voc’ for short) education for boys since boys are more “hands-on”. It was noticeable that this clarion call for tech-voc education was essentially for boys at government secondary schools but not for boys at prestige denominational schools.

The implication was that some boys can handle “grammar school” type education but others cannot. It was basically a statement about class. Boys from the lower class ought to be shunted into tech-voc education but boys from the upper class deserve something “higher”. This approach stifles consent, is a form of discrimination; and leads to violence, which we are seeing in our society today.
Professor Drayton’s lecture invites us to reflect on education policy as a whole to see whose aptitude is being stifled; whose consent is not being given in his/her educational development; and to make bolder strides in the direction of educational equity.

**Justice Holdip:** Thank you very much Father Sirju.

**Mr. Daniel Khan:** Good evening. Daniel Khan; I have practiced for ten years. I am also the son of the previous contributor. Professor Drayton, your theme coming down to the end was consent, those who are asked to consent to the laws. Professor Brereton spoke about what had the judges done to encourage consent, if I phrase it like that. Mr. Khan Senior spoke about the failings of the criminal justice system. Contextually, I believe what he was saying is the criminal justice system ought to encourage us to consent, if I phrase it like that. What we have is circular, that we are asked to follow laws and we did not consent to the making of the laws, and then when we infringe the laws, the judges are asking us somehow, by enforcing the laws, for us to consent.

It was a question I think my constitutional teacher posed—where does the constitution get its power from? I think historically he was showing how the constitution developed. Certainly, we wanted a utopian society. But I think that is really where we are, or what the discussion is. Should we follow the laws that are there for our benefit? When we punish, does it encourage us to consent to the authority, which we did not consent to in the first place. Thank you.

**Mr. Cathal Healy-Singh:** Good night. Very well done, Professor Richard Drayton. My name is Cathal Healy-Singh and I am an Environmental Engineer. I came across the legal process—the Judiciary, the law courts—and
found it to be very un-consenting in the challenge of decisions being made by statutory bodies and Government entities which appear to be violating the public interest in the area of protecting the environment and the natural resources on which we depend.

What was interesting about your conversation was that what seems to be most precious to a State is its Constitution. In our case, it does not make any specific references to valuing those resources. What are protected very much so are the rights of commerce, of economic interests, of capturing public goods and assets and deriving social benefits because somebody derives a job as a result of this capture. Nowhere in the equation or at the decision-making table or in the legislation that we have in hand, including our Environmental Act, actually gives us the instruments and equips us with the ability to sustain ourselves. This course of sustainability, we have come to understand, requires values of economic interest and social interest and indeed environmental interest to sit together at that table to best use them, or most wisely sustain them.

The judicial review instrument was the one that we have pursued a good handful of times, to right decisions that are being made by the State that have violated public interest and public goods and et cetera and et cetera. What I found most difficult about it, and perhaps you might comment, is that the law itself that seeks to protect these resources, were all derived from sort of international banks, World Bank, IMF, et cetera. What they have handed us are very weak instruments that seem to protect the interests of polluters. The very economic interests that sit in the driver’s seat also seem to drive the politics of the country. The institution responsible for protecting environmental resources and interests is very much a rubber stamp and I think this is indisputable in Trinidad and Tobago.

What is very difficult is the judicial review. Even for public interest cases, many lawyers will not act, depending on the political climate. They will only act if the politics are wrong for them and unfortunately, cases take longer than the terms of government. So what you have are lawyers that once willing, become reluctant. The public interest when it comes to these things is in grave danger at the moment. As an environmental engineer who has been involved in this particular sphere, things look quite grim. I don’t know if you could comment on that. Thank you.
**Professor Drayton:** Well, thank you very much for that comment. To begin with, positive law is a lot stronger in protecting the rights of property than in protecting common rights. Indeed, the great dynamic for the growth of law has often been, in fact, the creation of forms of personal rights and personal protections. And indeed, in fact, it may well be that the most successful legal strategies will have to do with beginning with the right to property, but assert finding ways to locate these public goods in the language of private property.

You are absolutely right that the legal and institutional instruments, which protect things like the environment and things which are of common interest are weak in most jurisdictions and particularly weak in the Caribbean. I have to say too that the nature of some of the treaty making which has gone on since the 1990's in the age of the World Trade Organisation (WTO), has sought, in fact, to weaken such legislation even more. One of the implications, for example, of the Trans-Atlantic economic treaty, which has been negotiated, the Transatlantic Trade and Investment Partnership (TTIP), behind the backs of the citizens of most of the democracies of the Atlantic, is in fact that it would not then become a kind of Dutch auction of social and environmental protections; where it would now become a torsionary action by a State to impose restrictions on the environmental practices of a company, which are stronger than those in another jurisdiction which is linked by this treaty.

So it means that supposing the Trinidad government wanted to pass a law creating various sanctions for the leakage of oil from pipelines into agricultural lands -- something which, of course, happens from time to time -- which were stronger than those that existed in Canada and the United States, then British Petroleum (BP) could sue Trinidad saying, 'You are imposing on us a business cost, which is...' So what we are seeing, in fact, in some of these agreements, is the making of international agreements which weaken the capacity of sovereign governments to act to protect their environments. But I mostly thank you for your comment.

**Chief Justice Archie:** A brief interjection here. I am so grateful for that contribution because it is for that reason precisely that I referred to the preamble, because we have to begin, in the context of constitutional reform, to interrogate words or expressions like, “the material resources of the community,” because that is what is going to lead us to define
fundamental rights more broadly as, for example, rights to clean water, rights to unpolluted air. Trinidad and Tobago, I believe, has the second highest per capita carbon footprint in the world and we are not doing anything about that. And until we have a constitutional and a legislative framework that empowers us, then it is very difficult for judiciaries on their own to shoulder that burden of transformation.

**Justice Holdip:** Thank you very much, Chief Justice. I would like to recognise Mr. Abdullah.

**Mr. David Abdullah:** Thank you very much moderators. Good evening. I am David Abdullah. Professor Drayton, excellent lecture.

I wanted to link what the Chief Justice said a moment ago, together with what Professor Brereton said and the point you are making, as to whether or not we do not have to take a very radical approach to constitutional reform. Some of us are now advocating that what we need in Trinidad and Tobago is the second republic, because the republican constitution of 1976, in terms of the institutional framework, cannot and has not delivered upon the objectives which have been so well defined in the preamble, which The Honourable Chief Justice referred us to. So the preamble sets out the objectives if you wish, but the institutions and the instruments to deliver those objectives for the society have failed because of the very construct of those institutions, which institutions emerged essentially out of the historical process which you described. Therefore, we need to make a fundamental break and transform those institutions so that they can deliver upon the objectives.

We cannot rely upon having a good Chief Justice point to Professor Brereton. We cannot rely on a good Chief Justice, or a good Prime Minister, or a good President, or a good head of the Integrity Commission to deliver institutionally what the institutions really, themselves cannot do. I wish you to comment on that.
Justice Holdip: Thank you very much, sir. The goodly gentleman to my left, please, sir.

Mr. Mervyn Extavour: Thank you very much. I am Mervyn Extavour from the Accreditation Council of Trinidad and Tobago. I am so pleased that the discussion is taking place against the background of a Judicial Education Institute, which should be prescribed to treat with some of the problems—because all our issues and challenges must be part of the education process, which can prepare and train our people.

I had this question even before I heard your presentation, Professor Drayton. I must say, extremely excellent. But my initial question, even before the discussion was, do you think that the Judicial Education Institute can play a role in providing support to the judicial community, in dealing with the question of the ills like overcrowding of prisons and the continuum of the inefficiency of the justice system that the people claim that exists? I had another question which dealt with history. Have we sufficiently dealt with history or infused it into our education system, to inform and prepare our people to take their places in society and deal with all of the things that you have been talking about? Thank you.

Professor Drayton: Thank you very much. The Judicial Education Institute has two mandates. One of its mandates is to provide a space in which magistrates and judges continually refresh their training and think more deeply about the nature of their work. It has a second function, which I think it is attempting to perform tonight, in terms of opening up a national conversation about the rule of law, whereby judges serve as citizens to include the wider public in thinking about the nature of the constitution and the system of justice. I am quite confident from my conversations with several members of the JEI that the issues which you raise about the criminal justice system are issues which exercise them as profoundly as they exercise you.
The problem for judges is that judges have a particular task to perform, which is to serve the law in the context of the courts. They have a second life, of course, as citizens but their capacity to lead as citizens, also depends on other citizens, people like you, engaging them and taking the kinds of conversations they have helped to bring into the public sphere into domains which they themselves cannot reach. The nature of the calling of the judge is that the judge has to stand back from political life. That is not to say that judges, as citizens, cannot address political questions. But the kinds of conversations they open up need to be carried forward by the wider public.

**Mme. Justice Mohammed:** I would like to call on another facilitator, Ms. Attillah Springer.

**Ms. Attillah Springer:** Good evening, everyone. First of all, my sincere thanks to the organisers of this forum for inviting me to be one of the facilitators of tonight’s conversation. Indeed, when I saw the list of names I had a new appreciation for the phrase, “Cockroach in fowl party,” but who should these conversations be for, if not the cockroaches; those who feel that the law is not for them, far less the Constitution? As Professor Drayton says, law in the Caribbean has been about subordination and domination. And from his closing questions, I feel like we are still a long way off from changing the language that will transform our Constitution to one that can defend the rights of the people, the land, the sacrifice of our parents. And when I say parents, I am speaking specifically about my father who was one of those who spent nine months charged with sedition on Nelson Island in 1970. A language that can heal the accumulated traumas and help us unpack the verbal, physical and institutional violence that erodes us daily.

The language of the lecture is what stood out for me. Professor Drayton has presented himself as a good storyteller, a calypsonian in that sense, taking apart the story and framing it in a way that makes sense to even
the cockroach in the fowl party. There is no real impetus for us as citizens to understand our rights or what laws protect us. My own interest in the Constitution came when I was organising a protest and we needed to find out what we had to shout at the police officers, who would invariably be sent to intimidate us. I have found in 15-plus years as a professional protestors that reading the Constitution offers me no sense of security. I have found that I know the law better than the police who are sent to strong-arm me. I have found that in the face of guns, even a basic understanding of the law has no real value. So it is the language that Professor Drayton uses that emboldens me to challenge the Judicial Education Institute to a more public engagement with judicial and constitutional literacy. How can we be critical of a document we have little or no awareness of?

The worm in the mango is part of the gathering here in these hallowed halls, even as Woodford Square stands empty and silent, when it is now, more than ever, that we need to be talking, sharing ideas, proffering solutions. As a mango lover, I am terrified by this worm that we keep ingesting. I want to suggest we need more public engagements with constitutional literacy, we need a new language of engagement because we are in such a crisis, because we are crushed every day under the weight of a language that does not and cannot speak to us. The language of domination and subordination needs to be challenged and ultimately dismantled if we are ever to move forward.

Professor Drayton: “It, it, it, it is not; It, it, it, it is not; it is not, it is not, it is not enough; it is not enough to be free, of the red, white and blue; of the drag, of the dragon...” (“Negus” by Kamau Brathwaite).

Ms. Netty-Ann Gordon: Good evening. I am Netty-Ann Gordon. Professor Drayton, Trinidad and Tobago is a sovereign nation. We have one country and two islands. My question for you the, the panel, or our distinguished guests is how can we refocus our attention on constitutional reform to have a constitution that is more representative; to have a constitution where there is consent, at a time when one half of our twin island state has on its
agenda a quest for self-government? How can we reconcile our focus at this present time? Thank you.

Professor Drayton: Well, the Honourable Chief Justice, as a Tobagonian, may wish to respond to this directly, but I would like to learn more about this, yes.

Justice Holdip: May I ask Tobagonian Rita Pemberton to speak?

Dr. Rita Pemberton: With respect to the issue of whether we could pursue any matters as a nation, when Tobago is seeking self-government, I do not see a contradiction. The people of Tobago want to be empowered to make decisions about their destiny. They have been deprived of that over the long history from the era when various European powers scrabbled over who should own, right down to the present day. And I think it is part of their right, under any kind of constitution, to be able to do this.

Justice Holdip: Spoken as a true Tobagonian.

Dr. Rita Pemberton: That I am. Professor Drayton explains present day violence as the expressions of people who, as a result of their historical experience, have no claims of ownership and duty of care towards society and law. The legal system supported violence-based labour systems against which people reacted. As a consequence, he asserts that the constitutions that have been forged are deficient of consent, the third element of the rule of law and results in the lawlessness that currently prevails in our societies. The challenge for us is to find a mechanism to attain the consent factor in our constitution.

There are several features of the operations of the legal system which developed from our present constitution that are cause for concern. These must be addressed if a constitution with popular consent is to be achieved. I wish to bring four of these to your attention.

Across history, people did not understand the law. It entrenched privilege, discriminated against people by race, class and colour and did
not serve their interests. To them, the law was an obstacle in their fight to survive and progress. Today the law remains a foreign country. No facility exists to explain the law and its operations to everyday folk in Trinidad and Tobago. Information regarding the simple matter of the court dress code is provided to many by the court security officer who denies them entry when they have a court matter, because of improper dress. Some court decisions do not make sense to ordinary folk, whose attitude is well summed up in the 1979 calypso by Shortpants “The Law is an Ass.”

Popular perception is that the privilege-based legal system of yesteryear remains entrenched today. It is manifested in the long delays for justice. Some people wait years to get a high court hearing, more years to get a court decision (6 years in one instance) and even more years to get a date for an Appeal hearing. Then there is the frustrating and costly practice of frequent adjournment caused by no shows of lawyers and police officers, missing documents etc. As Kizzy sang in her calypso, it is also reflected in the language used to describe the same infractions committed by different classes of people so that, according to the label used, one group is more criminalised than the other.

Many are unable to access justice within the system. The denial of justice is evident in the large number of unsolved cases. Remember Akiel Chambers (1998)? Linnis Benn White and son (2012)? These and other similar cases have become frozen into oblivion and no one has been held accountable. It is also evident in the cost of justice. Lawyers are expensive and beyond the financial reach of many. What is the precise role of a lawyer in the justice system? Can justice be obtained without the services of a lawyer? How can the public get access to information to help them make informed decisions when choosing a lawyer? These are questions people ponder on when their friends or families have matters before the courts but there are no Help desks to provide guidance on these matters.

There is a feeling that the legal system in Trinidad and Tobago promotes injustice. It does not ensure compliance with the law, so the courts pronounce and people do what they will. Court decisions are often not terminal in civil cases. Some people get killed by the defendants in their matters after receiving favourable judgements. Is there any provision for supervising the implementation of judgements in civil matters? If so, with which arm of the law does this responsibility lie?
Present day responses to law and justice reflect parallels to those of the past and are hinged on the perception that the legal system continues to favour the interests of a privileged group. Unfavourable historical circumstances produced an underclass of deprived people who developed a culture of resistance which continues to the present day. The annals of the history of Trinidad and Tobago are littered with instances of defiance of laws and practices which were considered unjust and unacceptable. In its deficiencies, the legal system remains firmly anchored in the past and if the people are to sanction a constitution, they must be assured that the legal system it generates will be shorn of these deficiencies.

My question then, is similar to Attillah’s. How can we meet the league of people outside of the court? In the court, they can be intimidating and “they not mih friend.” If we can meet them outside the court, we might be able to write a Dear John letter, but I think the consent issue could be handled if you could meet them as people, as citizens, outside of their legal practices. Thank you.

Ms. Natasha Baker: Good evening, everyone. My name is Natasha Baker. I am a transitional student at Hugh Wooding Law School. I am originally from the U.S. Virgin Islands, and I have only lived in Trinidad for about six months. To give some background, I am new to the Trinidad culture. I have not extensively been a part of these conversations; however, I have heard of them through courses and some of these lectures.

As a visitor here, my rhetorical question on this issue has been, if indeed there is a great desire in Trinidad and Tobago for constitutional reform, why does it seem to me, as a visitor who has only been here for about six months, that the populace outside of these conversations and discussions do not have a drive to enact such a reform? Where are the protests; the letters; the activism towards true constitutional reform? And without that, it begs another question. Isn’t it possible that where Trinidad and
Tobago is right now, with the independence and the Constitution, that it truly does reflect, perhaps, what the ideals of the society are?

Out of the lecture that we just had, we know that the constitution is derived from a common view of the values of a people. If you look to how America, for example, was originated, it came from people who moved from England, with one common sense of freedom of religion and freedom in other distinct areas. And they came together as a small body, formed a constitution that eventually made up the American society. Subsequent to that, various minority groups would have rallied to have changes and amendments to that constitution. That did not undermine the value of the constitution but then reflected what the greater society wanted.

In this context, Trinidad and Tobago has become an independent nation from a colonial rule. So with regard to the common cores and values, is it truly present where you can say that you can have one constitutional identity? And if that is the case, then why can’t members be more active in reaching that identity? And if that cannot happen, perhaps it is that where you are now represents your true identity. For example, the savings law clauses that were spoken about, if this is something that does not represent what Trinidad wants, why hasn’t it been removed or amended?

As for other clauses of the Constitution that were mentioned in the lecture which do not represent the Trinidadian ideals—why haven’t they been removed? Perhaps it is just a matter of time—waiting for the populace to understand what the true identity is—to really move towards constitutional reform. Perhaps the current constitution represents the identity of the people at this present time.

**Professor Drayton:** Well, a couple of quick responses to this. One is that the reason why there is not a broader public debate about the Constitution is because people who are on the underside of these social relations simply have no view that it is possible to change anything systemically. It is the characteristic of those minorities who are privileged within the system, people like those who are in this room, who in fact have the capacity to even conceive this is imaginable. So I think that the point is really that in every situation of this kind, it is usually, in fact, small minorities of people who essentially bring these issues to the public and
create a reason for other people to start petitioning and writing letters. I think that you should not expect there already to be a mass demand for change on any social question. It will always begin with small minorities of activists who seek to raise the conscience of their fellow citizens towards these public ends. That is quite normal.

I suggest you have a look at Voltaire’s book called Candide; a novel in which he addresses the point of view that, perhaps, we live in the best of all possible worlds. He makes us think a little bit harder about the kind of philosophical and psychological complacency that is involved in that. Thank you.

**Justice Holdip:** Chief, I will allow you to make a response and then I will hear from the President of the Law Association.

**Chief Justice Archie:** If I understood Ms. Springer correctly, that is the problem which we face, in that we don’t have a language; we don’t have a vocabulary with which to conduct this necessary conversation. Constitutional reform doesn’t begin with a draft of a constitution. It has to begin with a deeper discussion about history, about culture, about corruption. For example, what do we perceive to be corruption? For young people, the first thing you do when encountering access to public goods—getting a driver’s licence—is probably one of the most corrupt processes in Trinidad and Tobago. I suppose we want to access something to which we are entitled, but because we have not had a discussion about process, then we engage our personal networks and all of those sorts of things to get what we want.

For a large percentage of persons, access to substantive justice becomes an issue. The incentive to change, when power changes hands, dies because you then become plugged in—the very people who have been agitating for change become plugged into the network. You can access power and therefore, there is no longer a need. So where does the discourse begin? We have a start tonight. We are being challenged to find a way, to find a mechanism to take that discussion to the wider population. But I stress this is not just the job of the Judiciary. This is not just the job of the Judicial Education Institute. This is the job of the academics; this is the job of the activists; this is the job of the politician; this is the job of the church; this is the job of every one of us in the society.
Justice Holdip: Thank you very much, Sir. Reginald Armour, Senior Counsel, please.

Mr. Reginald Armour, SC: Thank you very much, moderators. It is difficult to choose the few things that I would like to say because the conversation has been so enriching. I am going to try to be as brief as possible.

Let me say first of all, speaking on behalf of the Law Association: I would like to commend Professor Drayton for a truly enthralling and enriching contribution; we are truly all grateful to him. As President of the Law Association of Trinidad and Tobago, I congratulate the Chairman of the Judicial Education Institute and the Chief Justice. This engagement with each other that we have been about over the last couple of hours is salutary in a number of respects, but particularly for the quality of conversations that, as a people, we need to continue to have in this space and in larger spaces. Thank you to the Judicial Education Institute.

I speak now in my personal capacity. I would love for the rest of the membership of the Law Association of Trinidad and Tobago to follow my lead on this but, I do not now pretend to speak on their behalf.

There are two things that struck me in what Professor Drayton said this evening, and both are so relevant to everything that has been said here this evening by the audience.

One was, “Across the region, many of our citizens, despite having the right to vote and sit in parliament, do not have a sense of ownership of and a duty of care towards the State, the society and the law. This is a problem of our constitution.” If we reflect on that statement, this is what this entire conversation has been about. That sense of ownership that we, historically, have lacked; that sense of being outside our ownership of Being, which today we continue to be impelled to challenge, recognising that we still lack ownership, that as a people we remain outside. It is a very powerful point.
The second thing that Professor Drayton said takes me to another subject on which I want to comment, briefly, this evening. In speaking of the straitjacket in which we have found ourselves, historically—in moving from his mention of the Committee of Trade for Plantations (the telling origin of the Judicial Committee of the Privy Council)—he said this: “Any evolution towards a constitution suited, in Montesquieu’s 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.” This makes the point that everybody has been making here tonight. We have to take ownership of our process; that ownership and process is going to involve not just historians, not just lawyers, but as the Chief Justice has pointed out, our churches, civic society and more than ever, our peoples. Least of all should it be the exclusive domain of politicians who all want to be governors in their little dominions.

How does that translate into what I want to talk about in terms of the Caribbean Court of Justice? The reality is that we cannot—if we want to take ownership of our destiny—continue to exist at the periphery of someone else’s society. So our quest for ownership involves making hard choices, the difficult choices—no one is suggesting a panacea. Those of us who have children can reflect on the parallel. There comes that point in our lives when our young children will step out on their own. Tremulous though we are, as parents, in our fears that they will stumble and fall, we do not serve them well in their charting their own destiny to keep them in their bedrooms, wrapped in the cotton wool of our insecurity. We have to take responsibility for our future. If we are going to chart our own course, one of the legitimate paths to that course is to embrace the Caribbean Court of Justice as part of our natural evolution, imperative and inevitable in our historical journey.

In this very Hall, in 2012, in one of these Jurist Lectures, that is what one of our judges told us—relevant then, now and for the future—in speaking of the role of a Judge. That judge was Justice Adrian Saunders, a Judge of the Caribbean Court of Justice, a former Chief Justice of the Eastern Caribbean. He says that in the construct of the limitations that judges have
to function within “The common law provides us with a legal heritage that is hailed throughout the world, but the law is a living instrument. In the building of a just and independent society, our judges have an obligation to interrogate the common law, to discover those features of it that had been constructed for a different time and a different society. Courts should subject the common law to a rigorous analysis to ensure that in being faithful to precedent, we are not inadvertently retarding the progress of our own societies.”

That is the kind of challenge that judges have, yet they survive, they function, evolve and grow. Their duty is to respect the law; they cannot themselves be supreme revolutionaries in hastening the change and the ownership that we want to claim. So they must rely on us, the citizenry, the publics, to claim our space if we are going to make progress. And that is why I think the Judicial Education Institute has to be commended in the second component element that Professor Drayton reminds us of; this the function of that Institute, in a sense stepping outside of the normal hallowed tradition of the Judiciary, to engage us, the public, in a conversation that is about our transformation.

What can we learn from the ten year history of the Caribbean Court of Justice, if it is to tell us that that is the way to go in claiming our center and no longer existing on the periphery? There are a couple of significant judicial decisions that have been made by that Court, in its recent history. There is the case of Myrie out of Barbados. How many of us know of that case, all through the Caribbean, from Kingston in the north to Belmopan in Belize? The publics of the Caribbean are speaking about the case. A young woman from Jamaica who went into Barbados and was strip searched by the Immigration and Customs officials. She brought her claim before the Caribbean Court of Justice in vindication of something that all of us as Caribbean people take for granted and treasure. Freedom of movement through the Caribbean, to play cricket, to marry, to love, to party, to work, to live, to Be a Caribbean people.

In arriving at this decision, the Caribbean Court of Justice went outside of the domestic law of Barbados, which had not incorporated the Treaty arrangements. The Court grounded its decision with reference to statements which had been made at the Ministerial level, by different governments over a period of time. Those statements had created for Ms.
Myrie, a Caribbean Citizen, a Legitimate Expectation that she would not be subjected to the injustice that she experienced in Barbados, in simply trying to move freely from Jamaica to Barbados to work. She was awarded damages and compensation. That is an example of how a Caribbean Court of Justice can work for us.

What is another example? Marin, out of Belize. Professor Drayton reminds us, in the very language of his opening remarks. He reminds us. At best we have careless attitudes to work and to the care of nature and our buildings; at worst, of our predatory relationship to the State apparatus, where individuals and companies seek to strip private wealth out of public assets. What was Marin about? Marin is the first case in the Commonwealth Common Law, in which a court has given the right to a former Member of Cabinet, to bring a motion for misfeasance in public office against a former member of government, who had sought to strip private wealth out of public assets. Who will guard the Guards? That too, is the Caribbean Court of Justice.

Another example is the Maya Alliance out of Belize, which has given legitimate recognition to rights of the indigenous people of Belize; a judicial decision that has transcended anything that any previous international tribunal has done for indigenous people.

This then is the nascent Caribbean Court of Justice; a court that is recognising its origins, this history of the people that it serves and is genuinely looking to develop a society that is just. A court which, in its very creation, has stepped beyond the protection of vested plantation class interests and is borne of a Caribbean people striving for the centre of their legitimacy, of their constitution. Small “c”.

As a lawyer, I accept all of the criticisms, including the criticisms of my colleague this evening, for whom I have the greatest respect, Israel Khan SC. I accept all of the criticism of the fact that our system is imperfect. But our system can only be as perfect as we will make it. It will never be nearly as perfect as we would like it to be, if we leave the responsibility for the development of our justice in the hands of people who are not of us.

Thank you very much, Professor Drayton, for this invigorating treatise. Thank you to the Judicial Education Institute of the Republic of Trinidad and Tobago.
Justice Holdip: Thank you very much. And with that, Ladies and Gentlemen, I see the Master of Ceremonies is approaching the podium and I thank you all very much for the contributions that you have made, but time waits on no man.

Magistrate Quinlan: Thank you very much. I knew immediately, having listened to Professor Drayton, that as Master of Ceremonies I would have been challenged with time. Thanks to the audience for such a lively conversation. I am confident that the JEI has achieved its objective of transformation through education. The transformation and the education are not only internally driven, but external to the Judiciary.
Good evening, distinguished Ladies and Gentlemen.

Firstly, we thank Their Excellencies Christine Kangaloo and Kerwin Garcia for taking the time out of their busy schedules to share this evening with us. Her Excellency is, of course, no stranger to this Hall of Justice, having worked and practised within these walls. It is a source of much pride to us all to be able to welcome her back as the Acting President of the Republic of Trinidad and Tobago. We thank them both.

As we began, so must we end. The Guyana Journal once wrote of the goodly Professor Richard Drayton as follows:

“Drayton believes that it is important for historians to communicate with the wider public, and in particular to speak up where their work on the past has relevance to the present.”
This statement, of course, encapsulates the erudite exploration of the relation between present societal circumstances and the several constitutions of the Region, inherited from or thrust upon us by the Sovereign (depending on one’s point of view), ably delivered this evening by our eminent and distinguished jurist Professor Drayton. Professor, for this we are collectively grateful. You have reminded us in no uncertain terms of the historical constitutional context in which our legal systems have grown, of our struggle for independence—the word “struggle” of course being used with a measure of caution—and, in a very forthright manner, you have brought home to all of our guests this evening the need for the region to revisit our constitutions with a view to making the changes that will augur well for West Indian Society.

Rest assured that we shall as a profession, a judiciary, and a society give due consideration and weight to your well thought-out and expressed suggestions for change in the region.

On behalf of the Judicial Education Institute of Trinidad and Tobago and the Judiciary, we thank you.

We also thank our facilitators, The Honourable The Chief Justice Mr. Justice Ivor Archie O.R.T.T., Professor Bridget Brereton, Ms. Attillah Springer, Dr. Rita Pemberton, Father Martin Sirju and the President of the Law Association of Trinidad and Tobago, Senior Counsel Reginald Armour, for their engaging, insightful, and invigorating comments and discussion. You have contributed in no small measure to this evening’s proceedings bringing to bear the views and opinions of large sections of a diverse society longing for meaningful change. You have stimulated the conversation and it is in everyone’s interest that the conversation begun today continues.

We thank Mr. Justice Malcom Holdip and Madam Justice Margaret Mohammed, our Moderators, for providing yeomen service in steering the ship of discourse over sometimes volatile waters but keeping it afloat at all times. Well done, good and faithful colleagues.
We thank our esteemed Master of Ceremonies, Her Worship Avason Quinlan, for sterling delivery and exceptional poise in the performance of her duties. The proficiency with which Her Worship has performed her task is a testament to her steadfast judicial character to which we have all become accustomed.

We thank our Pannist, Mr. Daryl Reid, for the excellent rendition. It is always a heartening experience to hear the sound of the steel pan wafting through the Hall of Justice. We thank you for a riveting performance.

We must also thank those who make the magic happen. Without them, we would be unable to bring that which we have learnt today to the people of this nation and to our West Indian brothers and sisters. We therefore thank Enhanced Media Systems Ltd. and Pierre’s Photography for its presence and invaluable assistance at this annual event once more. For the beautiful décor, we thank Frances Pollonais-La Foucade. To Horsham Print Services for our beautiful invitations, to the several media houses covering this evening’s event, to the publisher of our Distinguished Jurist Lecture publications, Paria Publishing Co. Ltd, and to Avatar Ambulance Services, we offer our appreciation and gratitude.

We thank The Grape Vine Ltd for catering the reception soon to follow.

And, of course, none of this would have been possible without the dedicated and efficient team of the JEITT led by their team leaders, our Honourable Chief Justice Ivor Archie and Justice of Appeal Peter Jamadar.

Finally, we thank you our guests for your presence and participation.
Continuing the Conversations:  
The Morning Brew

On the morning of March 3rd, 2016, CNC3 television network invited Professor Richard Drayton (RD) and Justice of Appeal Peter Jamadar (PJ) to appear on the ‘Morning Brew’ hosted by Hema Ramkissoon (HR). The following, published with CNC3’s permission, is a transcript of the Morning Brew discussion.

**HR:** Welcome back, Trinidad and Tobago. I’m Hema Ramkissoon. This morning we’re having a discussion—and I really would like you all to pay attention—because it’s about you, and me. It’s really about the ways that we enjoy every single day of life; how we enjoy the privileges of life. We are looking at the fact that the Constitution has basically been defined as a set of rules which denote the significant institutions of the State, their compositions, and regulate the relationship between and among them. We’re talking about the Executive, the Judiciary, the Legislature, and the relationships between them and the Citizens—the most important part.
The Judicial Education Institute of Trinidad and Tobago has decided that we need to have a detailed discussion about the Constitution: How we are going to ensure that citizens understand what their fundamental rights are. How do we change the Constitution? Because Constitutional reform has been on the front burner for quite a while now. Should we change it? And how do you ensure that the changes reflect the changing needs of our society?

Joining us on set this morning are Professor Richard Drayton PhD FRHistS and Justice of Appeal Peter Jamadar, attached to the Judiciary, but today he is here in his capacity as Chairman of the Judicial Education Institute of Trinidad and Tobago.

Good morning. Thank you for joining us.

**RD & PJ:** Good morning. Thank you.

**HR:** Let us consider the initial definition of the Constitution. We can start with you, Justice Jamadar. When citizens of our country understand the concept of a Constitution, what exactly is it?

**PJ:** What it is and what it is supposed to be was actually the subject of our lecture last night. What Professor Drayton brought to light was this idea that a Constitution ideally ought to be a set of principles, of values, that become reduced into rules—we call them laws, as a Supreme Law—that is intended to govern a people. However, at the heart of a legitimate Constitution there ought to be consent; the consent of the citizens. It is the agreement of the people to be governed by a set of values and principles. Therefore, in our lecture last night, Professor Drayton addressed what he considers—and I agree with him—to be a lack of underpinning consent for our Constitution, which therefore questions the legitimacy of our Constitution.

In your preface to this conversation, you asked why is it, with all this discussion around Constitutional reform, that we still experience ourselves as stuck?

You asked this because this conversation about Constitutional reform in Trinidad and Tobago is not new.

**HR:** No, it’s been around for quite a while.
PJ: Correct. And we’ve had all kinds of versions. Yet, still, the population’s experience is as if this is going nowhere. Against that backdrop, our contribution to that longer conversation is premised on this: Without a historical understanding of why we have what we have now, there can be no awareness about why we are where we are now, including why we seem to be stuck. And without awareness, you can’t make informed choices. Our initiative is therefore as much about diagnosis as it is about empowerment.

From the Judicial Education Institute’s point of view, and from the Judiciary’s point of view, our contribution to the society on this conversation of Constitutional reform, was to bring Professor Drayton, who we consider to be a most eminent scholar and historian, to help us in Trinidad and Tobago understand from a historical perspective, why we appear to be, and are experiencing ourselves as being, in this gridlock on the question of constitutional reform.

HR: Professor, why are we in a gridlock?

RD: When you say to the average citizen the words “Constitution” or “Government” or “Law” they think of something which is outside of themselves. They think about something which either they have to live in fear of, or possibly even something which they have to extort advantages from—‘the Government did this,’ ‘the Government did that’—and there’s an important transition which all of our societies have to achieve over the next 50 years, which is towards citizens thinking of the Government as themselves; thinking of the Law as themselves. And how exactly do we get towards that?

The first stage is to understand why we are, where we are. Why is it that citizens, in fact, even when they are, in many cases, sitting in Parliament, have a sense of the State as something which doesn’t belong to them? The environment is something which they can seek to acquire wealth from, but not something which they need to take care of and to treat as their own. What I was trying to do in the lecture last night was to think a little bit about where these attitudes come from. And, in fact, to address the fact that it may have been half a century since the Union Jack came down in Trinidad and Tobago, but we are five centuries into a much longer experience of being, essentially, a society which understood itself not
from its inner values, but from values and perspectives imported from the outside.

How do we turn ourselves from being the satellites of external systems of value into being the center of our own moral universes?

**HR:** Now, in your lecture yesterday, “Whose Constitution? Law, Justice and History in the Caribbean,” you talk about our colonial past. And there is the belief that much of our Constitution simply resembles or was adopted from our colonial masters and it’s not really relevant to our local modern-day society.

The Constitution has been described as a living and breathing document and should adapt to our societal changes and the needs of our citizens. Do you consider that our judges, by their interpretations of the Constitution, that they have been able to do that?

**RD:** I think the first point to make is that the moment at which Trinidad and Tobago and other societies in the Caribbean became independent in the 1960s, the decision was taken by the Caribbean politicians who were negotiating the transition to independence, to attempt to create Constitutions which preserved the legal and judicial constitutional order which preceded it.

You can understand this decision having been taken in the anxiety of what exactly the new states would be like. So, for example, from the perspective of Trinidad and Tobago, there were great concerns from what were the Opposition forces, which represented minority groups, that the new independent Government of Trinidad might operate in ways which were abusive to the human rights of minorities in Trinidad.

So there were considerable pressures for the creation of structures which would guard those rights through systems of checks and balances. One can understand in the immediate aftermath of independence why there was some impetus behind the preservation, via things called General Savings Clauses, of the forms of law which pre-existed.

But 10 years, 20 years, 50 years after Independence, we need to now begin to allow our Constitutions to operate as living documents; that is to say, to have the very powerful and clear statements of constitutional principle, which are in the preambles to our Constitution manifesting.
And indeed, the Trinidad and Tobago Constitution of 1976 is a formidable document in terms of its initial sections containing both the kinds of statements of negative liberties, which were imported into the Independence Constitution of 1962 from the Canadian Bill of Rights, but also containing the beginnings of a number of declarations about positive liberties, about the rights of Trinidadians, to have and enjoy the material, economic and social conditions which would allow them to enjoy their civil liberties.

But the tragedy is that by the very nature of our laws, these very muscular rights preambles are neutered by the Savings Clauses.

**HR:** Exactly. How do you then manoeuver that system if you want to move forward? These are archaic clauses that exist that anchor you down.

**PJ:** Hema, I think that part of what we need to, for the public’s understanding, introduce into this part of the conversation is a legal doctrine called stare decisis, which is that lower courts are bound by the decisions of higher courts. In the Caribbean, there’s a very important recent decision on the Savings Clause, which is the Queen v Boyce, which is a death penalty case. It resolved at the level of the highest court that binds us in Trinidad—the Privy Council—that a pre-Independence or pre-Republican law, pre-1976 or 1962 Constitutional law, is saved irrespective of whether or not it infringes the rights that we have enshrined. So, local courts are bound by this principle of stare decisis; they are straitjacketed, they are imprisoned by it, they are bound to follow it.

That’s part of the predicament.

**RD:** Yes, I think that it may well be time for the attempt to put together some kind of constitutional convention, which might in fact think about creating the foundation, as was discussed last night in our Conversations—the possibility of the foundation of a Second Republic—which would have very different kinds of principles and approaches. I think this could be done over the course of the next few years. These are the kinds of conversations which the citizens of Trinidad have to have. It involved asking the question, what sort of society do they want to live in?

**HR:** Looking at the society we want to live in, our Constitution enshrines fundamental principles that our societies are built upon, and looking at the fact that we continue to move forward with this, the rule of
law and the separation of powers as well as the protection of fundamental rights—it has been described as evolutionary, unlike other jurisdictions which have been revolutionary. Do you think as a people we take for granted the fundamental principles, or do we even understand what our fundamental principles are?

**RD:** My sense is that most citizens have a very weak understanding of the nature of their Constitution. I think it may well be the case that many lawyers, in fact, themselves are well aware of the instrumental parts of the law with which they have to do business, but probably have not thought about the Constitution as a document as a whole.

**PJ:** I also think that part of the problem is that the language that we use when we talk about legal doctrine and principles alienates people. Our Constitution should incorporate values. If we were to use the language of values, an underpinning question would be, what are the societal values that we treasure; that we consider important?

Another part of the problem is that the Constitution is actually contradictory and self-undermining by reason of the Savings Clause. So, in fact, there’s another section that people are not even fully aware of. In Section 14 of the Constitution, it says that in a Human Rights case, the Court has the power to do just about anything to remedy it (Section 14 (2)). And then there’s Section 14 (3); a one-liner that says, the State Liability and Protection Act is part of Section 14. And do you know what the State Liability and Protection Act says? In Section 22, it says, in effect, that you cannot grant an injunction against the State.

So here you have one section of the Constitution saying that where there is an infringement of a fundamental right, the Court has this broad power to do anything to remedy it. On the other hand, in the very Constitution, it is saying—and interestingly, this was not in the 1962 Constitution, but it was imported into the Republican 1976 Constitution—that injunctions cannot be ordered to prevent infringements of Human Rights.

This is an argument that comes up in Court. Technically, if a person is sentenced to death and they’re going to execute him or her, you cannot grant an injunction saying he/she shall not be executed, because Section 22 of the State Liability Act says you can’t grant it. Yet, Section 14 (2) of the Constitution says you can do whatever you need to do to vindicate the fundamental rights.
So the citizenry are legitimately confused, I think. Because they hear that they have all of these fundamental rights, and then they come to Court and these Judges are saying, 'oh, there's something called a Savings Clause and therefore we can't grant relief' or 'there is something called the State Liability and Protection Act, so we can't grant you an injunction'. Understandably, they are confused, they lose confidence in the process, and therefore they become disenfranchised and disengaged from the constitutional debate. I think that's a problem. It is a big problem, because ultimately it undermines public trust and confidence in the administration of justice, and therefore erodes the democratic underpinnings of the society.

**HR:** Now, looking at the fact that many have called for constitutional reform, hinting that our Republican Constitution has outlived our society’s needs, do you share the view that Judges should be more progressive in interpreting the Constitution?

**PJ:** Because of the doctrine of stare decisis, being bound by the decisions of higher courts, there are permissible limits within which judicial activism can reach therefore also overreach. I think the issue is more fundamental, and I’ll ask Professor Drayton to speak to it. Until we have a constitutional document that the population at large, and that means all segments of the population, agree on and agree to—unless there is real consent—then the document is not owned; it is not our document. I think that’s the fundamental point.

As Professor Drayton said last night, our Independence Constitution was actually introduced by Royal Fiat. It was an Order in Council. That is to say, we did not even pass it. Is that right?

**RD:** Yes. At least Trinidad went forward in 1976 to entrench its own sovereignty. In the case of a place like Barbados, Barbados is only independent by grace of a vote by the Parliament in Westminster; and if the House of Commons was to turn around tomorrow and decide that Barbados was no longer independent, there is no legal foundation outside of that Act.

That’s an extreme case, but the survival of the Judicial Committee at the Privy Council as the highest Court of Appeal for Trinidad and Tobago means that, in a sense, whatever happens in Trinidad and Tobago in terms
of the evolution of political or legal or judicial norms, is always going to be secondary to evolutions in the United Kingdom’s legal and judicial norms. Thus the legitimacy of what is indigenous is constantly undermined.

**HR:** So you’re an advocate for removing the Privy Council?

**RD:** I think that it’s absolutely clear that we cannot move towards a system of justice which is owned by Caribbean people without, in fact, repatriating the sovereignty of our highest Court.

**PJ:** And, provided there is broad and deep public consent to trust, as well as confidence and confidence in our own administration of justice.

**HR:** How do we come to a point where the people believe this Constitution is about them; that this is a reflection of consensus? How do you bridge that and how do we begin that process?

**RD:** What’s interesting in that in the year of Independence, in 1962, there was a very brief window in which the Government opened the discussion to what would be the new Constitution to the citizens of Trinidad and there was the most extraordinary public response. There were over 130 submissions made by individuals and various groups. I think that was an index, in fact, of how seriously at that time citizens took the question of becoming a new nation.

As it happened, the final document paid little attention to most of those submissions.

**HR:** That’s typical of the Caribbean and how we consult.

**PJ:** And I think in a way, that helps answer the question—how do we own it? If the population gets excited, gets involved, and they make a lot of contributions and their experience of the process is what they say is ignored and something new or different is imposed, then it remains the colonial model of an external imposition. How do you own something if your contribution is actually rejected or not considered of value, and not incorporated?

**HR:** How do we begin this process? When do we begin this process? How do we start it?

**RD:** We start it right now, in the conversations we are having, until enough citizens take this up. This is not a matter which the Judiciary
can lead on. The Judiciary, by nature, as a constitutional institution, can discuss issues of constitutional principles and public law with other citizens. But ultimately this is a matter which has to be led by people who are outside of the Judiciary.

**HR:** Though we have a written Constitution, many of our citizens are ignorant of the rights that are guaranteed to them. Do you think the Judiciary has done enough to educate persons on the rights guaranteed to them? Is that the responsibility of the Judiciary, or is that the responsibility of the citizenry or the Government?

**PJ:** I think the Judiciary shares responsibility with the wider society including the State apparatus, to educate the population about the Constitution. To that extent, the Judiciary through the Judicial Education Institute is trying to do exactly that, for example with the lecture we had last night. What the population may not appreciate is that this lecture will be broadcast on 3 Sundays, that the lecture will be published in the media for everyone to read, and that last night we streamed it on the world wide web to over 10 countries live, in an effort to educate and to inform the widest cross-section of persons. But more can be done and, certainly, more needs to be done. But it’s not only the responsibility of the Judiciary. Others must join in this endeavour.

**HR:** Professor Drayton, looking at our Constitution, what is the greatest gap that exists now?

**RD:** I think the contradiction between the Rights Clauses and the Savings Clauses and the Ouster Clauses. The Ouster Clauses are the ones which say you cannot provide judicial redress for breaches in the laws, because they’re protected by this or that—that you can’t prosecute the State, essentially, for human rights abuses. To streamline the Constitution and to allow the Constitution to work as a document as a whole, for the benefit of the people, this would be where I would begin.

**HR:** Justice Jamadar, your judgments in interpreting the Constitutions have been regarded by many as illuminating. One thinks about the Trinity Cross case in your judgment in which you extended the breadth of the Anti-discrimination Clause in the Constitution. What do you consider the most important elements of constitutional adjudication?
**PJ:** One important element is grounding interpretation and application in, among other things, a historical understanding and analysis. In the Trinity Cross case, or in the Israel Khan decision which you may recall—Mr. Khan SC went into the Magistrates Court wearing a nehru suit and the Magistrate said that he had no right of audience. At first instance, the position was agreed. In the Court of Appeal, we overturned that position. We looked at the historical antecedents and discovered that simply importing European or English norms would not be respectful of a T&T citizen’s rights, because there are different cultures that have come here and they have notions of dignity in dress, in behaviour, in decorum, that are absolutely appropriate for the court. So, in short, because of that historical analysis and understanding, we were able to say that a nehru suit that was dignified enough was proper attire for the Court, and you didn’t have to wear—as the Magistrate had held—a jacket and a tie; as if a jacket and a tie is somehow normative and definitive of dignified wear, in the context of the cultural milieu of the people in Trinidad and Tobago, which clearly it cannot be.

**HR:** Professor Drayton, I’m putting you a bit into the politics of the land and I’m sure you’ve looked at the papers over the past couple of days. Many have complained about the delays in the justice system and our Constitution does not guarantee the right to a speedy trial. How much of a difference do you think would be made if that right were guaranteed? Because if people think of the justice system, that is the one thing they think about; that is the one thing that affects them most: ‘I am taking so long to get my right to be heard.’

**RD:** My conversations with the Judiciary indicate that they also are very exercised about the problems of delays in the judicial system. I think that it is an accepted serious problem that we have people on remand, for a variety of offenses but particularly for serious offenses, in many cases awaiting trial for 5 years and more.

**HR:** 10 years.

**RD:** 10 years at worst. I think that one of the initiatives which is underway is a reform of Criminal Procedure in order to create mechanisms through which more matters could be dealt with outside of the court
system, and more matters could be dealt with in ways which people could actually be processed through the system, if they were not in fact being indicted for very serious offenses, which might allow more of them to be remanded on bail instead of in custody.

It is worth bearing in mind that Trinidad and Tobago has made enormous advances in terms of the speed of its civil courts and its civil processes. If you compare the speed of judgments being delivered by the Trinidad and Tobago bench to those being delivered in Barbados or the Eastern Caribbean States, Trinidad and Tobago has made huge advances in terms of the efficiency of its delivery of civil justice. If, in fact, these reforms as they have been discussed are implemented, I am hopeful that in 5 years’ time, we would not have these kinds of abusive delays in the delivery of criminal justice.

**HR:** How much do you think these delays have actually undermined our fundamental rights guaranteed in the Constitution?

**RD:** I think they’ve undermined our fundamental rights first in the case of these citizens who have been held on remand for quite excessive periods of time, but they’ve also undermined the rights of those who have not been held in remand, because in a way what it does is it creates a context in which the criminal justice system becomes something which people find ways around. I can well imagine that there are a number of prosecutions which do not happen, for one reason or another, simply because people wish to keep other people out of this remand system. So I think in a way, justice delayed is justice denied, not just for those who are in front of the courts, but indeed for society as a whole.

**HR:** Justice Jamadar, what do you tell the citizenry when they look at the Constitution? You talk about the protection of fundamental human rights and then they tell you, ‘well, justice delayed is justice denied and this right is not guaranteed to me.’ They want this right to be guaranteed to them, one, and to what extent do you think it has undermined our fundamental rights protected by the Constitution?

**PJ:** First of all, I don’t think you need to have that right enshrined in the Constitution. The right to a fair trial is, by implication, not a right to a ‘speedy’ but to a timely trial. Fairness means that you must have
your matter determined within a reasonable time, which is a sufficient constitutional standard; and no one can excuse the delays in our system. And I’m not going to try to do that. I’m not going to try to give explanations as to why that is so except to say we all have to join in the task of addressing this issue, especially in the criminal justice system. What I can say, however, is that conceptually, it is virtually impossible to have an effective and efficient judicial system if every single matter has to go to final determination. What that means is you ought not to have more than 10% of matters going to trial. The implications are that there have to be built-in mechanisms to resolve 90% of your matters in other ways.

Some very good news is this. We have started, at least in the High Court, introducing the idea of a Maximum Sentencing Indicator Hearing, which basically says to an accused person and the prosecutor that if this matter were to come up, it is likely that this is the sentence you can get, and if you choose to plead guilty now, given all of the competing factors, we can offer you a reduced sentence. It’s not arbitrary; it’s within fixed parameters. It has to be worked out. It is encouraging, in the sense that these matters are now being resolved justly. You are not getting off for nothing, but you are getting off with a fair sentence for an early plea, and that is helping. So this is an actual innovative intervention in the criminal justice system that is happening right now.

There is also the larger project of reform of the Criminal Procedure Rules. I am on the Rules Committee, and that is very far advanced—I will not say more than that. These new criminal procedure rules can potentially revolutionise the way the criminal justice system is run, as we did with the CPR, the Civil Proceeding Rules. The CPR is not perfect, but it has improved things significantly. We expect similar results, over time, in the Criminal justice system, once these new procedural rules are introduced.

So, I will say to the citizenry that the system is not functioning as it ought to. There is, in fact, injustice being caused by delay. We can make no excuses about that. But we are earnestly trying to fix it and there are concrete interventions in the pipeline that will address, positively, delay in the criminal justice system.
**HR:** Professor Drayton, you have the final word this morning as we wrap “Whose Constitution? Law, Justice and History”. Whose Constitution, who’s benefiting, and how do we start the change?

**RD:** By beginning with recognising that the Constitution belongs to the citizens, and that means that citizens have to educate themselves about what their rights are and to become engaged in demanding the fulfilment of these rights from their politicians. You cannot expect politicians to lead. Politicians need to be led by the citizens. Politicians will respond to citizens when citizens, in fact, move very clearly in directions which they consider to be compatible with the future interest of the nation. The time to begin is now.

**HR:** Remember, the politicians must be led by the citizens and not the other way around. Thank you all for participating in this enlightening interview.
Whose Constitution?

By Dr. Hamid Ghany

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Last Wednesday, the Judicial Education Institute held its sixth annual Distinguished Lecture which was delivered by Prof Richard Drayton, Rhodes Professor of Imperial History at King’s College, London.

Lecturing on the topic “Whose Constitution? Law, Justice and History in the Caribbean”, Prof Drayton took the audience through a maze of historical data that confirmed for his audience the very British foundations of our constitutional structures.

I was pleased that he cited a quote from Eric Williams from July 19, 1955, that I have used very often in my own writings, in which Williams said:

“Ladies and gentlemen, I suggest to you that the time has come when the British Constitution, suitably modified, can be applied to Trinidad and Tobago. After all, if the British Constitution is good enough for Great Britain, it should be good enough for Trinidad and Tobago.”

That statement was made by Williams in Woodford Square in a lecture delivered under the auspices of the Teacher’s Educational and Cultural Association, and Drayton delivered his point effectively by saying that Williams had delivered it “just across the road” using his finger to point the way from his perch on the podium in the Hall of Justice.
If there was one statement that highlighted the context of the entire constitutional process for T&T, it was that one. Many people who stepped forward to ask questions or make brief statements before asking a question touched on many aspects that lie at the core of the functioning of the judicial process or impinge on the functioning of the judicial process.

There was an impassioned plea from the president of the Law Association, Reginald Armour, SC, for T&T to accede to the appellate jurisdiction of the CCJ. Armour went on to regale the audience with the virtues of the CCJ.

The occasion was a good one that allowed for a reasonably dispassionate approach to discussion on matters that would otherwise be regarded as contentious. The Chief Justice, Ivor Archie, sought to broaden the responsibility for discussion on constitutional reform by suggesting that it was a responsibility in which many other sectors in society besides the legal profession ought to be involved.

A young student from the US Virgin Islands, who had only been in the country for about six months, made what was one of the more perceptive statements of the evening when she raised the issue of identity in relation to reform and posited that if the Constitution was out of line with our identity then there would be a clear movement to reform it.

That statement tied directly into the Williams narrative of 61 years ago about T&T having “the British Constitution, suitably modified…”

In my own work, I have contrasted Williams’ statement with one made by Norman Manley in the Jamaican House of Representatives on January 24, 1962, in which he said:

“Let us not make the mistake of describing as colonial, institutions which are part and parcel of the heritage of this country. If we have any confidence in our own individuality and our own personality we would absorb these things and incorporate them into our being and turn them to our own use as part of the heritage we are not ashamed of.”

Manley did not accept the Williams narrative that our institutions should be imported, but rather argued that they were indigenous by evolution and should be embraced as ours.
While his comments were made in relation to Jamaica, they have currency throughout the entire Commonwealth Caribbean insofar as they establish that our institutions are indigenous by virtue of colonial evolution and continuance.

This has obviously been lost on the proponents of the CCJ to replace the Privy Council. For many people, the Privy Council is not alien to their societies and so the argument about “completing the cycle of independence” is intellectually deficient because of the organic links between our constitutional history and our institutional bases.

The knighthood and membership of Her Majesty’s Privy Council are deeply cherished and desired gold standards of Commonwealth Caribbean public and judicial service recognition. There is a natural organic link between our CCJ and the Privy Council insofar as knighthoods and membership of Her Majesty’s Privy Council are concerned.

Antigua and Barbuda, Barbados and St Lucia have instituted their own national awards which now have locally-created knighthoods as their highest awards. The conferment of the titles of “Sir” and “Dame” have continued along the path outlined by Norman Manley some 54 years ago in Jamaica, to the extent that the evolutionary process has now made knighthoods part of the local recognition for national awards.

The oath of office for a Privy Councillor is indeed very burdensome on the individual to protect the person of Her Majesty Queen Elizabeth II, her heirs, and her successors.

We argue about this matter without recognising the natural organic connection between the two. We live in a region whose identity is defined by its connection to the British honours system, whether you take the Williams narrative of 1955 or the Manley corollary of 1962.
A propos of the discussion of the previous few weeks, of how and why people behave the way they do in a/our social system, Prof Richard Drayton’s distinguished lecture, “Whose constitution? Law justice and history in the Caribbean,” delivered for the Judicial Education Institute on March 2, provides a fascinating piece of the puzzle. (It’s available at www.ttlawcourts.org)

Prof Drayton, a historian, was born in Guyana, grew up in Barbados, and was educated at Harvard, Yale, Oxford and Cambridge. His lecture began with the premise of a regional “profound and unacknowledged constitutional crisis.” More specifically, “many of our citizens, despite giving the right to vote, do not have a sense of ownership of, and a duty of care toward the state, society and the law.”

This is almost Naipaulian in its upending of notions of a “Caribbean” culture or civilisation. Nonetheless, the lecture is an argument for the entrenchment of the CCJ, as opposed to the Privy Council as the region’s final court of appeal. I disagree with the conclusion but the historical insight is bracing and timely.

One just needs to look around regional prison and justice systems to see how alienated people are from the institutions of the societies to which they supposedly belong. If one case is emblematic of this it’s the
recent conviction of Michaeline Wall, a woman born with a congenital medical condition, who was charged with possession of marijuana and faced either a 12-month sentence or a $2,500 fine.

Ms Wall’s statement that marijuana relieved her constant pain, despite its legitimate medical use in the US, UK and elsewhere, backed by copious research, was ignored. It’s illegal here. And the jails are packed with young (mainly black) men who have had their lives ruined for possession of small amounts of marijuana (while murderers, child molesters and corrupt politicians roam free).

The problem began, says Drayton, with the punitive posture of the law to Caribbean subjects, rather than a civil, consensual relation—“Our societies were forged less from the love of liberty than by generations of violence sanctioned by statute and common law.” The key issue is that “very few subjects of the English Crown in the tropics were legal persons… from the seventeenth century to about 1830, only white propertied men who were communicant Anglicans were fully included as rights bearers.”

The primary power relation (he continues) was manifest as an absolute control over the slave, and later indentured worker, by the owner/employer. The tradition continued after emancipation in Crown Colony Government, which applied those principles to the whole society. And this presumption and practice of absolute power over the bodies of subalterns (“sub-persons”) imbued the newly forming mechanisms of authority (police, law, overseer, health, education).

Regional independence constitutions, instead of addressing this perversion in law, retained it through “ouster” and “savings” clauses. These transferred rights of the sovereigns to governments, and protected archaic and brutal pre-existent legislation from review.

The mentality which brought this about was a legacy of Crown Colony government which infected the men (mainly) who wrote the Independence constitutions. Rather than delivering their nations from colonial injustice, as Drayton puts it, “almost every colonial premier and postcolonial Prime Minister wanted exactly such absolute power.”

All this is used as thrust for Drayton’s conclusion which is the necessity of a CCJ to develop a more indigenous tradition of jurisprudence, since the Privy Council adjudicates with reference to
the evolving law of its precincts—the UK. This is where I part ways with the professor.

He correctly identifies the pathological trait of the independence politicians, and their successors—they, in effect, wanted to be the oppressor, not to end oppression. But he recommends as a cure for this syndrome the complete severing of ties with the UK/metropole, rather than the desire (expressed by Albert Gomes et al) to be a self-ruling full partner in the Empire/Commonwealth rather than a satellite entity. (Which position is the correct one seems to be evident given the last 50 years of independence and emigration statistics.)

Drayton evades this conclusion by not taking his observations to their logical terminus: the new ruling classes were indoctrinated by the same regimes of thought as the independence leaders. The desire for control over the subaltern, to relive the humiliations of colonialism, but as the brute rather than the brutalised, pervaded and pervades, the very atmosphere of authority in these islands. From policemen, store clerks and civil servants, to Cabinet ministers, men of commerce, and professionals (doctors, lawyers, accountants)—the desire and practice of brutality remain.

It is from this human resource pool that would come the men (mainly) who would be charged with the development of the Caribbean jurisprudence. It’s understandable why Prof Drayton does not come to this conclusion—he is speaking to contemporary legal and political establishments which believe themselves to be more enlightened than their predecessors. However, as the state of the nation, and the region, show, it ain’t so, Joe.

The main issue facing the societies riddled with crime, dysfunctional schools, abuse, violence, and institutionalised ignorance can’t be solved by falling back on indigenous resources, which Drayton calls “secondary decolonisation.” Quite the opposite: why develop theories when workable ones already exist? Cars from Japan run on Caribbean roads. Metropolitan medicines cure local diseases. American computers transmit Trini information.
This isn’t to say there should be no local adaptation or innovation, but severing ties with the past, and the present of the coloniser/metropole, has proven to be disastrous here and elsewhere. Ironically, the issue is emblematised in Professor Drayton: the brightest and best leave, and often adopt a patronising metropolitan liberal attitude to local issues. Here, the very people who kept the savings and ouster clauses are reborn every generation to guide societies to fear intellect and innovation, and chase them away or strangle them.
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Whose Constitution? Law, Justice and History in the Caribbean

Sixth Distinguished Jurist Lecture 2016

by Professor Richard Drayton PhD FRHistS

The sixth edition of the Judicial Education Institute of Trinidad and Tobago’s Distinguished Jurist Lecture Series was delivered by Professor Richard Drayton PhD FRHistS on Wednesday 2nd March 2016 at the Convocation Hall, Hall of Justice, Port-of-Spain, Trinidad and Tobago.

Professor Drayton’s topic, “Whose Constitution? Law, Justice and History in the Caribbean” explores the historical relationship between the Trinidadian citizens and the Independence Constitutions, and further, examines the prevalent lack of possession surrounding these Constitutions.

In doing so, he encourages his audience to observe the connections, and interdependency, of past and present, to analyse the structures of government, and to observe the Constitution as political order.

The widespread interest with which Professor Drayton’s lecture was received from various sectors of society can be witnessed both by the CNC3 Morning Brew television interview and the Trinidad Guardian newspaper articles published within.