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Indigenous constitutionalism and the death penalty: The case of the Commonwealth Caribbean

Margaret A. Burnham*

The Commonwealth Caribbean remains an obstinate holdout against the international trend limiting use of the death penalty. The death row population in the region per capita is about four times that of the United States. Widely debated in legal circles for a decade, capital punishment jurisprudence will be affected by the creation of the regional appellate court that was launched in April 2005. Modeled after the European Court of Justice, the Caribbean Court of Justice (CCJ) will assume the constitutional jurisdiction currently exercised by the Judicial Committee of the London-based Privy Council. Critics claim the CCJ was created to undo the constraints on the death penalty decreed by the Privy Council and international human rights tribunals, while proponents maintain that the new court completes the region's assumption of sovereignty. This article situates the debate in the constitutional history of the independence era, the current regionalization movement, and the interplay between international norms and domestic fundamental rights.

1. Introduction

Important holdouts, most notably the United States, China, and Japan, resist the steady march toward a customary international human rights norm rejecting capital punishment. Claiming that a sentence of death does no violence to human rights principles, these nations assert a sovereign right to include the sanction in the range of penalties available to the state. The English-speaking states of the eastern Caribbean region, adding their voices to the shrinking chorus of retentionists, have found support for their position in their independence-era constitutions. In what follows, I explore the founding principles that constrain the reach of fundamental rights in these countries, and I suggest that the compromises of the founding moment, which simultaneously brought these states into the community of nations and shackled them to their colonial past, help to explain the constitutional dilemma preventing them from embracing wholeheartedly the emerging international jurisprudence condemning the death penalty.

* Associate professor, Northeastern University School of Law. For their valuable research assistance, I thank Kelly J. McAnnany, Sarah E. London, and Sonya Sultan-Khan. Email: m.burnham@neu.edu

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As the pages of this journal attest, constitutionalism has become a critically important measure of a state's democratic and moral standing in the modern world. Cross-state constitutional conversations are reshaping municipal norms and doctrine; supranational tribunals are adapting and influencing state constitutional practice; and the academic subdiscipline of comparative constitutional law is generating useful schemata within which to organize these developments. However, little attention has been given to the imprint of the colonial experience on postcolonial constitutionalism. With the disruption of empire in the post–World War II era, scores of new states were created, and most of them adopted constitutions promising representative government and democratic rights. These charters were neither original nor indigenous. Rather, like independence itself, they were not only bestowed on the new state by the colonial power but were superimposed on existing legal structures, themselves transplanted to serve colonial interests. Current challenges in human rights enforcement in postcolonial states are marked by both the original methods of constitutional formation and the motives of the framers, local and foreign. But we have yet to explore fully the nature of these influences—a task I will venture upon here in the context of the issues posed by capital punishment.

The states of the English-speaking Caribbean (hereafter ESC)[1] present an intriguing laboratory in which to explore both the science of modern constitutionalism and its response to the urgent challenge the death penalty represents to human rights and to the rule of law in the region. The small ESC states inherited their basic constitutional structures about forty years ago at the time of their independence from the United Kingdom. However, the most significant judicial voice in Caribbean constitutionalism, the Privy Council, remains in London. Currently on the table is a plan to render fully indigenous the constitutions of these small states by replacing the Privy Council with the Caribbean Court of Justice (CCJ), the regional constitutional court launched in April 2005 that will handle both international trade and municipal law. The Privy Council has sought to bring the constitutional practice of the Commonwealth Caribbean in line with international human rights norms, and some observers in the region are concerned about whether the new court will follow the same path, with the same vigor, that the Law Lords have demarcated.

Capital punishment remains the most pressing human rights issue in the Commonwealth Caribbean, creating a turbulent undercurrent in the debate over what form of constitutional adjudication best suits these states. The death row population has climbed dramatically as violence generates

[1] This article uses the terms "Commonwealth Caribbean" and "English-speaking Caribbean" to refer to those states and entities that were once, or remain, under British rule, i.e., Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.

strong, popular support for repressive measures. Both the penal law of capital punishment and the methods for imposing it reflect archaic, preindependence English practice. Commencing in 1993, the Privy Council sought to impose some constitutional order over the administration of the death penalty, first by setting a time limit on death row imprisonment, and then by striking down the mandatory death sentence in certain circumstances. International tribunals also played an important role in prescribing limits on the use of the death penalty in the region. In construing the independence constitutions, the CCJ will need to reconcile emerging global human rights standards, domestic values, and the jurisprudence of the Privy Council.

This article explores developments in Commonwealth Caribbean constitutionalism in relationship to the death penalty. Section 2 has a broad sweep, situating the controversy over the Caribbean Court of Justice within two other debates. One debate concerns the colonial influence on constitutional traditions; the other concerns the constitutional legitimacy of capital punishment. In this section the critique is both historically descriptive and normative. I suggest that the constitutional challenges about to confront the Caribbean Court of Justice have their origins in the founding events and the conservative bias of the framers, who, for political reasons, were intent on preserving much of the colonial legal system. Although the charters they produced include generous individual rights provisions, these constitutions are, by virtue of what are called "savings clauses," both brittle and static, and they have thus far proved largely inadequate in protecting fundamental rights.

Section 3 considers the role played by the Privy Council and international human rights tribunals in the death penalty debate. Here I address the central doctrinal question that the CCJ will have to resolve in constitutional matters, including the death penalty, namely, the regressive impact of the savings clause, which essentially grandfathers preindependence penalties and colonial laws into the postindependence constitutions.

In conclusion, the article suggests that if the new court is to develop an effective constitutional corpus, the CCJ will need to establish its place firmly within the emerging global consensus that deems certain aspects of capital punishment, such as the mandatory sentence, incompatible with enlightened constitutionalism.

2. From the Privy Council to the Caribbean Court of Justice

2.1. Establishing the Caribbean Court of Justice

Launched in April 2005, the Caribbean Court of Justice has original jurisdiction over trade matters and final appellate jurisdiction over constitutional cases. It is the creature of an agreement that entered into force in 2002 and

now has been signed by thirteen states in the region.[2] All but one of the thirteen states share a British colonial history,[3] one aspect of which is the superintendence of the Judicial Committee of the Privy Council, a tribunal that had, from the early nineteenth and into the twentieth century, ultimate appellate authority over the courts of the United Kingdom's colonial possessions.[4] When the twelve Commonwealth Caribbean states became independent in the early 1960s, all but one[5] continued to utilize the Privy Council as its court of last resort,[6] constitutionalizing the right of individuals and other legal entities to review by that court.[7] After independence, a central function of the Privy Council was the review of constitutional rulings of the Caribbean courts.[8] For those states that subscribe to it the Caribbean Court of Justice assumes the appellate role formerly carried out by the Privy Council.

Significant controversy surrounded the establishment of the CCJ.[9] The court brings to fruition a long-standing campaign for an independent

[2] The Agreement Establishing the Caribbean Court of Justice, signed February 14, 2001, entered into force on July 23, 2002, when Guyana deposited its instrument of ratification, joining St. Lucia and Barbados. The states that signed the Agreement are Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrrat, St. Christopher (also known as St. Kitts) and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. THE CARICOM SYSTEM: BASIC INSTRUMENTS 441–458 (Duke Pollard ed., Caribbean Law Publishing Co. 2003); Agreement also *available at* http://www. caricom.org [hereinafter POLLARD, THE CARICOM SYSTEM]. Although the CCJ has commenced operations, as of this writing its appellate jurisdiction extends only to Barbados and Guyana. *See* http://www.caribbeancourtofjustice.org. Laws passed by the Jamaican legislature to amend the constitution to replace the Privy Council with the CCJ were declared void by the Privy Council. Independent Jamaica Council for Human Rights v. Marshalll-Burnett, [2005] U.K.P.C. 3.

[3] Suriname is a former colony of the Netherlands. The remaining twelve parties are all present members of the British Commonwealth.

[4] For the role of the Judicial Committee of the Privy Council, see Hugh A. Rawlins, *The Privy Council or a Caribbean Final Court of Appeal?,* 6 CARIB. L. REV. 235, 237 (1996).

[5] Guyana severed ties with the Privy Council in 1970.

[6] These newly independent states continued to base their legal systems on the common law and to employ Westminster-style parliamentary governance. They also adopted similar constitutions that entrenched fundamental rights and judicial review.

[7] The constitutions that grant to individuals a right of review by the Privy Council are ANT. & BARB. CONST. § 122; BAH. CONST. arts. 104–106; BELIZE CONST. § 104; DOMINICA CONST. § 106; GREN. CONST. § 104; ST. KITTS & NEVIS CONST. § 99; ST. LUCIA CONST. § 108; ST. VINCENT CONST. § 99; and TRIN. & TOBAGO CONST. § 109. Barbados severed its ties to the Privy Council in April 2005.

[8] Appeals to the Privy Council may be as of right, with leave of the state Court of Appeal, or with special leave of the Privy Council. ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 230–231 (Cavendish Publishing Ltd. 1999).

[9] The arguments for and against the CCJ are usefully surveyed in David Simmons, *The Caribbean Court of Justice: An Historic Necessity* (Thirteenth Commonwealth Law Conference, Melbourne, Australia 2003).

regional tribunal. Even during the colonial era, there were calls for such a court, and they grew more pressing with the onset of independence, since, in that period, a regional court was seen as a central organ of a united West Indies.[10] However, until recently, almost all of Britain's former Caribbean colonies retained their ties with the Privy Council because they found that court to be an effective and inexpensive resource. The region's legal elites appreciated the proficiency and efficiency of the Privy Council judges, as well as the impartiality that distance seemed to foster, all critical judicial attributes that are hard to realize in these small, closely-knit island nations.[11] In 1989, at a meeting of heads of government of the Caribbean Community and Common Market (CARICOM),[12] a new call was issued for a regional court that could assume the appellate function of the Privy Council. In a 1992 report, the West Indian Commission spelled out a full argument for the new court.[13]

In 1993, the momentum for a regional court was accelerated by a controversial decision of the Privy Council on the death penalty in Jamaica.[14] The case, *Pratt and Morgan v. Attorney General for Jamaica*,[15] raised the question whether long-term detention on death row, triggering the "death row phenomenon," violated the guarantees provided by state constitutions and international human rights treaties. When the Privy Council issued its opinion in 1993, the defendants had been incarcerated under sentence of death by hanging since 1979. They appealed those sentences to the Court of Appeal of Jamaica and, thereafter, to the UN Human Rights Committee, the Inter-American Commission on Human Rights, and to the Privy Council. The Privy Council determined that the prolonged delay violated both the

[10] An earlier incarnation of CARICOM (Heads of Government of the Caribbean Community and Common Market) was the British West Indies Federation, a federal government, including a federal supreme court, serving ten member islands, which came into being in 1958. When Jamaica and Trinidad and Tobago gained independence in 1962 the federation, and with it the court, was dissolved. For an analysis of the federation experiment, see ELISABETH WALLACE, THE BRITISH CARIBBEAN: FROM THE DECLINE OF COLONIALISM TO THE END OF FEDERATION (Univ. of Toronto Press 1977).

[11] *See* The Trinidad and Tobago Wooding Constitutional Commission Report (1974), ¶¶ 345–346.

[12] CARICOM is the instrument of regional governance and common market established by treaty in 1973. The treaty was revised in 1992.

[13] The effort to establish a regional court is described in Hugh A. Rawlins, in *The Caribbean Court of Justice: The History and Analysis of the Debate,* 14–15 (CARICOM Secretariat 2002), *available at* http://www.caricom.org [hereinafter Rawlins, *The CCJ*].

[14] As Duke Pollard has put it, the *Pratt* case was "a wake-up call for the jurists of the Caribbean Community to address the philosophical, ethical and doctrinal foundations of an emerging humanitarian municipal jurisprudence." DUKE POLLARD, THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE 49 (Caribbean Law Publishing Co. 2004) [hereinafter POLLARD, THE CCJ].

[15] [1994] 2 A. C. 1 (P.C. 1993) (appeal from Jamaica).

constitution's prohibition against inhuman or degrading treatment and international human rights norms. It ordered the defendants' death sentences remitted to life and it set a limit of five years on all appellate processes in capital cases.

Pratt was followed by several other Privy Council decisions that were critical of the law and practice regarding capital punishment in the Commonwealth Caribbean. These decisions provoked a strong negative reaction in the region, where the public was deeply concerned with escalating crime rates[16] and overwhelmingly in favor of the death penalty. Opposition to the Privy Council mounted in the wake of *Pratt,* and resentment generated by that and other cases energized the claim that the Privy Council was a colonial relic imposing alien values upon,[17] and degrading the sovereignty of, the states over which it had judicial superintendence.

Additional arguments against the Privy Council targeted the expense and inconvenience of appellate review in London, as well as the unfamiliarity of the court with local circumstances, especially the runaway crime problem.[18] Moreover, many other Commonwealth colonies had severed ties with the Privy Council in the 1980s and early 1990s.[19] Together, these developments

[16] In addition to reactivating the death penalty, some ESC states adopted other harsh measures to fight the crime wave. For example, in the Bahamas, flogging, which was abolished in 1984, was reintroduced in 1991, at which time the legislature also substantially increased the penalties for serious crime. Prince Pinder v. The Queen, [2003] 1 A.C. 620 (P.C. 2002) (appeal from the Bahamas).

[17] As the death penalty was abolished in the U.K., *The Murder (Abolition of Death Penalty) Act,*1965, some argued that the Privy Council was seeking, indirectly, to bring about the same result in its former colonies. *See, e.g.,* Alan S. Reid & Nick Ryder, *Death of the Privy Council: Exaggeration or Stated Fact?*, 14 COMMONWEALTH JUD. J. 32.

[18] Members of the Privy Council themselves have long recognized the difficulty of administering justice to the far-flung populations of the colonies. In 1828, Lord Brougham said, "It is obvious that, from the mere distance of those colonies and the immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge, any judicial tribunal in this country must of necessity be an extremely inadequate court of review." *Quoted in* M. SHAHABUDDEEN, THE LEGAL SYSTEM OF GUYANA 171 (Georgetown, Guyana 1973).

[19] In addition to the Commonwealth Caribbean countries, as of 2003 the Privy Council also hears appeals from Akrotiri and Dhekelia (in Cyprus), the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, St. Helena and dependencies, Turks and Caicos Islands, Brunei, Kiribati, Mauritius, and Tuvalu; *see* http://www.privy-council.org.uk/output/Page32.asp. One commentator has observed that the growth of a common international law has contributed to reduced reliance on the Privy Council. K. J. Keith, *The Unity of the Common Law and the Ending of Appeals to the Privy Council,* ICLQ 54.1 (197)(2005). The shift from the Privy Council to domestic supreme courts or regional appellate courts was accelerated when, in 2003, the U.K. prime minister proposed replacing the Law Lords with a U.S.-style supreme court. *See Report of the Commonwealth Meeting of the Expert Group to Examine the Removal of Appellate Jurisdiction from the Judicial Committee of the Privy Council by Member Countries* (London June 2003).

gave force to the movement to break with the Privy Council and to replace it with a regional court that would be more readily accessible to litigants.[20]

At the same time, regional economic integration was gaining momentum around the world,[21] and new legal structures were emerging to interpret integration treaties and to resolve disputes among participating states and other actors.[22] While the 1973 Treaty of Chagaraumas did not include an effective dispute resolution apparatus,[23] the 1992 Revised Treaty created a more complex set of rights and obligations, which, in turn, necessitated an adequate enforcement vehicle to give them binding effect. The European Court of Justice served as a model for the Caribbean, as well as other integration movements, and the new court will adjudicate trade matters arising under the CARICOM agreements.

It was against this backdrop, in 1998, that the ESC states signed the agreement to create the CCJ.[24] As a constitutional court, the CCJ has the difficult

[20] The CCJ is an itinerant court headquartered in Trinidad and Tobago. The thirteen countries subject to its original jurisdiction are Antigua-Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent, Surinam, and Trinidad and Tobago.

[21] The Caribbean integration project was accelerated by the emergence of NAFTA in 1994 and the formation of the Single European Market in 1992. *See generally,* JAMAICA AFTER NAFTA: TRADE OPTIONS AND SECTORAL STRATEGIES (Ann Weston & Usha Viswanathan eds., Ian Randle Publishers 1998); Jason R. Wolff, *Putting the Cart Before the Horse: Assessing Opportunities for Regional Integration in Latin America and the Caribbean* 20 SPG FLETCHER F. WORLD AFF. 103 (1996).

[22] Similar tribunals that are at various stages of organization include the Court of Justice of the Andean Community, the Central American Court of Justice, the Court of Justice of the Common Market for Eastern and Southern Africa, and the Judicial Tribunal of the Economic Community of West African States.

[23] For a discussion of the strengths and weaknesses of the existing CARICOM dispute resolution system, see Victor Jordan, *The Caribbean Court of Justice as Part of a Wider Integration Movement* 11 (Fourth Annual SALISES Conference, Barbados 2003), and David Berry, *The New Caribbean Community: An Introduction to the Institutional Changes in the Revised Treaty of Chagaraumas,* 7 CARIB. L. B. l (2002).

[24] The Bahamas, one of the more developed economies in the region, has hesitated fully to endorse CARICOM and declined to sign the CCJ agreement. The state is a member of the CARICOM community but not of the single market and economy. It has not broken its ties with the Privy Council. As a former attorney general, Tennyson Wells, explained, the Bahamas, whose relatively advanced economy is based on international banking and financial services, arguably would lose in an economic partnership with weaker Caribbean states. It would also lose if it acceded to the jurisdiction of the CCJ, because, he argued, its ties to the Privy Council provided reassurance to investors:

> We have an international economy here. We are perhaps the most cosmopolitan country in the region. We have a tremendous investment in the financial services sector and the tourism sector. People who come to the Bahamas hear that they have the right of appeal not only in the local system, but that they can appeal any decision they do not like to the Privy Council. That gives them a sense of confidence.

See also Leonard Birdsong, *Is There A Rush to the Death Penalty in the Caribbean: The Bahamas Says No,* 13 TEMP. INT'L & COMP. L. J. 285, 307 (1999) [hereinafter Birdsong, *Is There A Rush*].

task of harmonizing the constitutional law of the member states and of determining how it will treat the precedents established by the Privy Council under which these states, up to now, have been living.

2.2. The independence constitutions

2.2.1. The shift from the colonial legal systems to independence

The newly independent ESC states inherited legal systems that were amalgams of British law and acts promulgated by the colonial legislatures. These legislatures governed the colonies under the Crown Colony system that defined political relations with the sovereign from 1878 onward.[25] Initially entirely under British rule, the territories were increasingly self-governing in the aftermath of the First World War. The Colonial Laws Validity Act of 1865 established the relationship between British law and colonial law, and the extent to which lawmakers in the territories could regulate their own affairs. The act subordinated these devolved powers to the ultimate sovereignty of the Westminster Parliament.[26]

Although England professed to have schooled its colonial subjects in the virtues of representative government, until World War II it restricted suffrage in the West Indies to a miniscule portion of the population.[27] When the Colonial Laws Validity Act was adopted in 1865, England could have expanded suffrage to include the masses and opened up the political structures, then in use by the planter class, to govern the islands. It chose instead to constrict existing political rights and to bring the administration of the territories back to England. This suited the planter and elite classes as well as the colonial state. They all feared black rule and sought at all costs to avoid another Haiti.[28] The failure to enfranchise the black majority gave rise to nationalist movements in the islands that were agitating for political participation and, ultimately, for independence. In the 1930s, Jamaica,

[25] Under the Crown Colony system, the Crown retained ultimate legislative power, usually exercised through the Order in Council. The governor, the Crown's representative, could refuse his assent to, or reserve a bill passed by, the colonial legislature. Technically, neither Barbados nor the Bahamas were Crown Colonies because the Crown did not hold legislative power in those territories. For a description of the differing forms of Crown Colony arrangements, see generally A. W. Brian Simpson, Human Rights and The End of Empire: Britain and the Genesis of the European Convention 278 (Oxford Univ. Press 2001).

[26] Ann Spackman, Constitutional Development of the West Indies 63 (Caribbean Universities Press 1975).

[27] The vote was based on property, income, and literacy qualifications. In 1939, only 3.4 percent of Barbadians, 5.5 percent of Jamaicans, and 6.5 percent of Trinidadians were entitled to vote. Wallace, *supra* note 10, at 56.

[28] Gordon Lewis argues that race hierarchy and fear of black rule "lay at the heart of British policy." Gordon K. Lewis, The Growth of the Modern West Indies 107 (Monthly Review Press 1968).

British Guiana, Barbados, and Trinidad and Tobago erupted as radical workers' movements began to make claims for economic justice and for access to the polity. These movements, signaling the maturing political consciousness of the West Indian, were the genesis of the political parties that would eventually come to shepherd the independence process.

In its ill-fated first incarnation, West Indian independence was tied to the birth of a single new nation, the Federation of the West Indies, extant from 1958 to 1961. At least a decade in the planning, the federation finally collapsed in the wake of a bitter constitutional convention in London in 1961, where it became apparent that the larger states, particularly Jamaica, were not convinced of the benefits to them of federation. After the failure of the federation experiment, Jamaica and Trinidad and Tobago quickly drafted independence constitutions, which were adopted in 1962.[29]

The process England followed in granting full sovereignty to its Caribbean territories was protracted and, in the end, almost anticlimactic. It was not lost on Caribbean nationalists that their independence journey, from Crown Colony status to full independence, was far different from the course England followed for the territories that were dominated by whites, namely, Canada, New Zealand, Australia, and South Africa, all of which were granted dominion status before the Second World War.[30] "Self-governance" was the elusive goal before the imperial tether to the islands could be severed, and the British held a low opinion of the ability of black West Indians to conform to the conventions of western governance.[31] Hence, each grant of power—from full adult suffrage, to the ministerial system, to cabinet governance—was bestowed cautiously by England, as if it were a gift to a child coming of age. In 1942 the Colonial Secretary, Lord Cranborne, declared "[w]e are pledged to guide Colonial people along the road to self-government within the framework of the British Empire."[32]

There were, however, no criteria by which to judge the islands' fitness for self-rule. The Colonial Office in London decided, without rhyme or reason, when the islands were ready for the vote, or to control their police forces, or to select their jurists. Tightly controlled by Great Britain were the pace and

[29] The history of the federation experiment is chronicled in WALLACE, *supra* note 10.

[30] The dominions were self-governing while the Crown colonies were not. *See, e.g.,* SPACKMAN, *supra* note 26 at 2–3.

[31] A Colonial Office guidebook for its staff instructed them as follows:

> They have to bring all the resources of Western civilization to bear in overcoming the natural handicaps which are the lot of so many millions in the tropics; and, as the natural handicaps are overcome, and a secure economy established, they have to guide the people to social betterment and political maturity.

COLONIAL OFFICE HANDBOOK 1948 (London 1948), *quoted in* SIMPSON, *supra* note 25, at 293.

[32] *Quoted in* SIMPSON, *supra* note 25, at 291.

nature of decolonization,[33] particularly in the quiescent islands where, unlike India, the local demands seemed neither especially belligerent nor urgent. Jamaica did not enjoy universal suffrage until 1944,[34] and it was not until 1959 that it could claim full governance of its affairs.[35] The historian Gordon Lewis described the process as a "tutelary democracy" with the culminating event—the adoption of the Constitution—Jamaica's "graduation ceremony . . . marking her final success in the British honours school."[36] Independence was to be the final chapter in the long saga of the white man's burden, ever the moral sanctuary for colonialism.

2.2.2. Cold War politics and independence

However reluctant England was to relinquish control, the dynamic trajectory of the decolonization movement elsewhere in the world inevitably pulled the West Indies into the process. Although geographically isolated and economically dependent on the old imperial relationship, even before independence in the 1960s these states were affected by the seismic shifts in post–World War politics, characterized by the emergence of Third World nationalism and *négritude*, the call for self-determination, the rapid disintegration of empire, and the spread of socialist ideas to the Americas.

Under the leadership of Cheddi Jagan and his People's Progressive Party (PPP), which in 1953 won by a landslide in the country's first universal adult election under a new constitution, British Guiana (later to become, after independence, Guyana) had declared itself open to socialism, engendering enormous anxiety and hostility in Washington and London. In October 1953, Britain, acting with U.S. support if not assistance, suspended the new Constitution of British Guiana and sent troops to the territory to roust Jagan's People's Progressive Party. Among the reasons Britain gave for suspending the Constitution were that the PPP had removed the ban on the entry of West Indian communists into the colony, and that government ministers had allowed "communist literature" to "pour into the country."[37] Endorsing the U.K.'s aggression in British Guiana, Secretary of State John Foster Dulles telegrammed American envoys in the Caribbean to advise them that

[33] Where, as in the case of British Guiana in 1953, the independence movement could not be controlled, Great Britain acted quickly to halt what it regarded as premature decolonization. *See infra* at note 38.

[34] The Constitution of 1944 established universal adult suffrage and an elected executive council. JAM. CONST. (Order in Council, 1944) S.I. 1944, no. 1215.

[35] The 1959 Constitution established a cabinet as "the principal instrument of policy" for the island. JAM. CONST. (Order in Council, 1959) S.I. 1959, no. 862.

[36] LEWIS, *supra* note 28, at 186.

[37] *Report on the Suspension of the Constitution Order on 8th October 1953*, ¶ 8 *in* SPACKMAN, *supra* note 26, at 493.

"[o]ur view is that establishment Commie bridgehead there would be matter deep concern all republics hemisphere which value their sovereign independence . . ."[38]

Meanwhile, in Jamaica the People's National Party, led by Norman Manley, also espoused socialist goals and advocated state ownership of certain central economic sectors, while the opposition Democratic Labor Party of Sir Alexander Bustamante urged a larger peasant participation in the polity. In his early political life, even Barbados's Grantley Adams supported socialist ideas. When his party met in 1946 the Red Flag was hung and the hammer and sickle displayed, and at a meeting in 1945 Adams argued for new texts for students of the West Indian University "written from a Socialist viewpoint."[39]

Cuba brought all of these developments to a head, dramatically altering the geopolitical dynamic worldwide, presenting a bold challenge to American hegemony in its sphere of influence and providing a beachhead for Soviet socialism in the American hemisphere. The zeal and rapidity with which the Cuban revolution took hold, shaking off a century of subordination and radically reorienting the country's governance, alliances, and markets in the face of perilous hostility, astonished the entire world, not least Washington. If Cuba could switch gears so quickly, then so too could other Third World nations.

After the Cuban revolution in 1959 and the British intervention in British Guiana in 1953, the United States and the European colonial powers were determined to contain, if not disrupt, Soviet influence in the Americas. They balanced two competing agendas—trying to retard the pace of decolonization while, at the same time, holding out the western democratic model as preferable to socialism. The colonial powers worried that if they granted independence too quickly the new states would fall prey to the communist movement. This intense power struggle between the West and the socialist world forced third world nationalist leaders—as it did civil rights activists in the U.S.—to survive an ideological litmus test; they had to demonstrate uncompromising adherence to the West and to capitalism to garner support for independence from the United States and the European imperial powers.

It was in this complex political climate, highly polarized and intolerant of political diversity or experimentation, that the West Indian leaders came to the table to negotiate their independence constitutions. In these political

[38] *Quoted in* Cary Fraser, Ambivalent Anti-Colonialism: The United States and the Genesis of West Indian Independence, 1940–1964, 129 (Greenwood Press 1994). In the event, the Caribbean leaders were quick to condemn Guyana's PPP. Barbados's Adams remark was typical: "However much we must regret suspension of any constitution, we should deplore far more the continuance of a Government that put Communist ideology before the good of the people." *Quoted in* Spackman, *supra* note 26, at 495.

[39] *Quoted in* Spackman, *supra* note 26, at 30–31.

conditions, unsurprisingly, the charters, which were largely adopted in the 1960s,[40] mirrored the Westminster model of parliamentary governance.[41] Neither the authorship of the documents, nor the ideas they embodied, were in any meaningful sense genuinely indigenous. Unlike the American or, more recently, the South African constitutions, they were not the product of sustained political discourse. Rather, they were drawn up relatively quickly by the political elites of the colonies and endorsed by politicians and lawyers in London. The Westminster model was presumed to represent the epitome of democratic governance. Little if any consideration was given to alternative constitutional models, or to the advantages and limitations of the Westminster constitution for the Caribbean environment.[42]

The larger and more powerful territories—Jamaica, Trinidad and Tobago, Guyana, and Barbados—led the way to independence. Jamaica first introduced its constitution shortly after the demise of federation, and adopted it in 1962. A draft developed after legislative deliberation in Kingston was then reviewed and endorsed in England. Premier Norman Manley, who led the delegation to London, made clear this was not an effort to reinvent the wheel. He observed:

> I make no apology for the fact that we did not attempt to embark upon any original or novel exercise for constitution-building. We had a system which we understand; we had been operating it for many years with sense. It is a system which has endured in other countries for generations successfully. It is a system which is consistent with the sort of ideals we have in this country, and it was not difficult to decide that we would follow that familiar system with those modifications which we thought the circumstances of Independence deserved.[43]

In Trinidad and Tobago a draft constitution was published in February 1962, with written comments solicited from the public within forty days. Even in this short period, there were over 160 submissions, many of which criticized as inadequate the civil liberties guarantees. The Civil Service Association objected that the savings and clawback clauses in the constitution eviscerated the protected rights. After a public meeting attended by two hundred people, a draft was approved in Trinidad and, thereafter, like the Jamaican

[40] Jamaica and Trinidad and Tobago were the first states to adopt independence constitutions in 1962, and St. Christopher and Nevis the most recent, in 1983.

[41] *But see, e.g.*, Independent Jamaica Council for Human Rights v. Marshall-Burnett and Or., [2005] U.K.P.C. 3 (appeal from Jamaica), ¶ 9, observing that while the Jamaican Constitution of 1962 was drafted on the Westminster model, it also departed in establishing the supremacy of "the Constitution and not, as in the United Kingdom, Parliament."

[42] *See* Keith Patchett, *The Legal Inheritance of the Smaller Commonwealth States*, 8 COMMONWEALTH JUD. J. 16, 17 (1989).

[43] *Quoted in* LLOYD BARNETT, THE CONSTITUTIONAL LAW OF JAMAICA 25 (Oxford Univ. Press 1977).

document, was reviewed and endorsed in London and adopted in August 1962.[44] Guyana and Barbados followed in 1966, Grenada in 1973, and the six other islands thereafter.[45]

2.2.3. The autochthony debate

Circumstances of origin cast a long shadow over the life of a constitutional project, and it is this ineluctable truth that has led some Caribbean commentators to question the authenticity of their constitutions. The debate over constitutional nativity is really an inquiry into the contemporary relevance of the charter.[46] Is the new state wearing a constitutional hand-me-down ill-suited to its needs, or has it reinvented the bequeathed charter and thereby made it its own?[47] Is the charter a living organism that creates new space for democracy or a calcified monument to the founding choices and compromises?[48]

Some scholars maintain that the West Indian constitutions are not autochthonous because of their umbilical link to the acts of Parliament that spawned them.[49] The concern over autochthony was introduced by Kenneth C. Wheare, who wrote that Caribbean citizens want to be able to say "that their constitution has the force of law and, if necessary, of supreme law within

[44] Wallace, *supra* note 10, at 212–213. For an account of constitutional formation in Trinidad and Tobago by a drafter, see George Collymore, In the Fires of Hope: A Biography of Statesman Ellis Clarke 50–52 (Adworks 2000).

[45] St. Lucia adopted its constitution in 1978, Antigua in 1981, the Bahamas in 1973, Belize in 1981, Dominica in 1981, St. Vincent in 1979, and St. Kitts and Nevis in 1983.

[46] As Margaret DeMerieux has written, the debate over authenticity is not just theoretical. She suggests there are three useful questions implicit in the authenticity debate. First, does the constitution meet the needs of the society? Second, is the constitution a product of local, democratic process—is it "of the people, by the people, and for the people"? And third, does the constitution provide maximal opportunities for popular participation in governance? Margaret DeMerieux, Fundamental Rights in Commonwealth Caribbean Constitutions 15 (Univ. of the West Indies 1992).

[47] A Barbadian governor-general, Sir Hugh Springer, famously remarked that "[o]ur Constitution came from Britain but a dozen generations of Barbadians have made it their own." *Quoted in* Simeon C. R. McIntosh, Caribbean Constitutional Reform: Rethinking the West Indian Polity 1 (Caribbean Law Pub. Co. 2002).

[48] On the relationship between the deliberative process of the founding and the endurance of democratic constitutionalism, see, generally, Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge Univ. Press 2003); Cass r. sunstein, Designing Democracy: What Constitutions Do (Oxford Univ. Press 2001).

[49] The question of constitutional authenticity has been explored also in the African context. *See, e.g.,* Carla M. Zoethout & Piet J. Boon, *Defining Constitutionalism and Democracy: An Introduction,* in Constitutionalism in Africa: A Quest for Autochthonous principles (Carla M. Zoethout et al. eds., 1996). J. Oloka-Onyango, *Constitutionalism in Africa: Yesterday, Today and Tomorrow*, in Constitutionalism in Africa: Creating Opportunities, Facing Challenges 4 (J. Oloka-Onyango ed., Fountain Press 2001).

their territory through its own native authority and not because it was enacted or authorized by the parliament of the United Kingdom; that it is . . . 'home grown,' sprung from their own soil, and not imported from the United Kingdom."[50] Simeon McIntosh has written that "[t]he Constitution was not the creation of the sovereign will of the people; . . . they were not *le pouvoir constituent* . . .[t]he Constitution's status as supreme law was not established by an autochthonous legal process, one that rested on West Indian will alone."[51] The independence constitutions themselves contained remnants of their colonial origins. Except in Guyana the monarchic form survived. The legislatures included a nominated element, which had been a central and much criticized feature of the colonial legislatures. And the Privy Council remained as the dispositive judicial voice.[52] But Lloyd Barnett has argued that, ultimately, the important question is one of political and not legal autonomy, and that the "thirst for autochthony . . . may be appeased not only by a revolutionary or ostensible break in legal continuity but by various less legalistic manifestations of nationhood."[53] In part in an effort to escape the autochthony dilemma, Trinidad and Guyana adopted new charters to displace the independence constitutions. Trinidad and Tobago adopted a new Constitution in 1976,[54] and Guyana did so in 1980.[55]

Grenada presents an interesting case in the autochthony debate, because although it experienced the sharpest rupture from the past, its current legal system is a pragmatic mix of old and new laws. The 1979 revolution broke with the postcolonial legal regime, introduced locally derived political structures and an independent court system, and abolished appeals to the Privy Council and the jurisdiction of the regional Eastern Caribbean Supreme Court (ECSC). However, the People's Revolutionary Government (PRG) reauthorized much of existing law, including constitutional law. When the PRG was

[50] K. C. Wheare, The Constitutional Structure of the Commonwealth 89 (Greenwood Press 1982).

[51] McIntosh, *supra* note 47, at 89.

[52] Spackman, *supra* note 26, at xxxxii.

[53] Barnett, *supra* note 43, at 30.

[54] The 1976 Constitution created a republic and otherwise changed very little of the independence constitution.

[55] The Guyana Constitution of 1980 established a "socialist-cooperative" government. It includes a chapter on directive principles that is unique in the Commonwealth Caribbean charters. The directive principles introduce socialist economic reform and impose affirmative duties on the state to facilitate the transformation to socialism. For example, art. 18 provides that "land is for social use and must go to the tiller." Article 14 guarantees to every citizen the "right to free medical attention." Article 16 guarantees the right to "proper housing," art. 27 grants the "right to free education from nursery to university," and art. 29 guarantees the right of women to equality. The Constitution was amended to make clear these rights are nonjusticiable. Guy. Const. (1980).

overthrown in 1983, the 1973 Constitution was reinstated, but many of the laws passed by the PRG remained valid. Grenada returned to the Privy Council and to the ECSC in 1991.

Indisputably, constitutional origins, like flags and anthems, are important emblems of independence and statehood. A point of departure and of return, they ground and launch the new entity and situate it in global legal and political systems. Ultimately, however, as Barnett and DeMerieux have argued, origins matter for functional and not existential reasons. In this regard, the Caribbean constitutions labor under an inherent conservatism that is, I suggest, traceable to the imperatives of the independence period, including the pressures of the Cold War, London's preference for mimicry, and the failure of imagination on the part of the Caribbean framers. These factors yielded flawed bills of rights that have hampered efforts to enforce fully individual rights up to today.

2.2.4. The bills of rights

Significantly, the independence constitutions departed from the Westminster model in their inclusion of written bills of rights, marking the transition from reliance on common law to protect individual rights to the explicit grant of judicially enforceable rights. All of the constitutions confer upon the courts the power of judicial review and establish constitutional supremacy. The bills of rights protect the right to life[56] and to be free from "inhuman and degrading"[57] or "cruel and unusual"[58] punishment. Except for the Belize constitution, they also contain savings clauses that insulate from constitutional review punishments that were lawful in the preindependence period. Because these savings clauses have been held to preclude outright abolition, constitutional attacks on capital punishment have focused exclusively on the adequacy of procedural protections.

Theoretically, prior to adoption of the bill of rights, the common law protected the citizen's liberties against excessive state action.[59] In fact, however, there was no significant history of judicial redress for government intrusions on civil liberties before adoption of the various bills of rights.[60] Early

[56] For example, the Trinidad and Tobago Constitution protects the "right of the individual to life, liberty, security of the person, the enjoyment of property, and the right not to be deprived thereof except by due process of law." TRIN. & TOBAGO CONST. pt. I, 4(a).

[57] The Trinidad and Tobago Constitution provides that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment." TRIN. & TOBAGO CONST. pt. I, 17(1).

[58] The Jamaican Constitution provides that Parliament may not "impose or authorize the imposition of cruel and unusual treatment or punishment." JAM. CONST. pt. I, 2(b). Similar provisions are contained in the constitutions of Barbados and the Bahamas.

[59] *See, e.g.,* dicta of Lord Hailsham in Maharaj v. Att'y Gen. of Trinidad & Tobago (No.2), [1979] A. C. 385 (P.C.) (appeal from Trinidad & Tobago).

[60] DEMERIEUX, *supra* note 46, at 22.

interpretations of these schedules of rights restricted their scope to the common law practice. For example, in *Collymore v. AG*,[61] Chief Justice Wooding of the Court of Appeal of Trinidad and Tobago ruled that the newly constitutionalized right of association did not protect the right to strike because English common law did not recognize any such right. Such a constricted reading of individual constitutional rights in a system of parliamentary sovereignty, termed the "frozen concepts theory" by one commentator discussing the 1960 Canadian Bill of Rights,[62] effectively reduced the new bills of rights from higher to ordinary law, subject only to parliamentary enlargement to meet the shifting needs of a modern and newly independent people.[63]

There are several reasons for the inclusion of the bills of rights in the Caribbean constitutions. Virtually all constitutions adopted after the United Nations Declaration for Human Rights followed that model for the protection of fundamental rights. In addition, the United Kingdom and its colonies were party to the European Convention on Human Rights,[64] which became the source of much of the text in the Caribbean constitutions.[65] When Trinidad and Tobago and Jamaica adopted their constitutions in 1962, the merits of the rights bills were debated, but thereafter they were automatically included in all their essentials in the later constitutions. In the deliberations

[61] Collymore v. Att'y Gen. of Trinidad & Tobago, [1967] 12 W.I.R. 5 (C.A.) [1970] A.C. 538. Justice Fraser of the Court of Appeal wrote "[t]here is no common law right to strike and it must therefore follow that the so-called right to take part in a strike is not included in the freedom of association protected by . . . the Constitution." *Id.* at 48.

[62] Walter S. Tarnopolsy, *The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms,* 44 LAW AND CONTEMP. PROBLEMS 169 (1981). The Canadian Supreme Court has addressed the "frozen concepts" theory in a recent application of the 1982 Charter of Rights and Freedoms to the same-sex marriage issue. In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, C.S-26 [2004] SCC 79 ¶ 22.

[63] For a discussion of the reconciliation of parliamentary sovereignty with meaningful judicial review in the Commonwealth constitutions of the 1960s, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism,* 49 AM. J. COMP. L. 707 (2001).

[64] In 1953 the European Convention, signed by Great Britain in 1950, was extended to the West Indies. *See* SIMPSON, *supra* note 25, at 6. Although the newly independent states adopted bills of rights derived from the European Convention, their constitutions made no reference to the convention, and thus the human rights law developed by the European Court of Human Rights is in no sense binding on these former territories. This may not have been the result intended by the framers. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties,* 36 COLUM. J. TRANSNAT'L L. 211, 220 (1997).

[65] The Jamaica Bill of Rights was derived from the Nigerian Constitution, which in turn was adapted from the European Convention on Human Rights. R. v. Martin, Hinds & Ors., [1974] 22 W.I.R. 368, 389 (C.A.). For an account of the inclusion of a bill of rights in the Nigerian Constitution, see Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?,* 24 MICH. J. INT'L L. 103, 116 (2002).

surrounding the two earliest constitutions, it appeared the bills of rights were thought to add little to the panoply of individual rights protected by the common law. They were meant to preserve the status quo rather than to confer expanded rights against the state.[66]

At the same time, because London was determined to deliver intact to the newly independent states what it considered to be a venerated tradition of liberal democracy, the rights bills were meant to anchor this legacy of representative governance and individual rights. Designed as a bulwark against totalitarianism, the bills of rights evinced Britain's missionary drive to export its highly vaunted political freedoms to the colonies. The British Overseas Information Services declared in a 1946 document that:

> Britain is free. One of her main contributions to civilization has been its emphasis on personal freedom, and we have succeeded . . . in reconciling liberty and order. Freedom in Britain means . . . freedom of thought, expression or opinion, religious belief, freedom to organize political parties, trade unions etc. and perhaps above all, freedom to criticize authority. We wish to see this concept of individual liberty adopted throughout the world.[67]

In adopting bills of rights, Jamaica and Trinidad and Tobago were implicitly rejecting two very different political models. To the south were the unstable regimes of Central and South America, and to the west was communist Cuba. April 1961 brought the Bay of Pigs invasion, and in that same year Fidel Castro declared Cuba a socialist country. Trinidad and Tobago and Jamaica were seeking investment and trade with Canada and the United States, and they wanted at all costs to reassure these potential economic partners of their political trustworthiness. On his country's accession to independence in 1962, Jamaica's first prime minister, Sir Alexander Bustamante, declared that the United States was the only country in the world that he liked, and he offered his newly independent country as a base to replace Guantánamo.[68] Hence, for instrumental reasons the bills of rights of the new states were modeled after those of their large neighbors to the north.[69]

Inevitably, these circumstances would inform the early readings of the independence constitutions, and, like a genetic code, influence both interpretive practices of the courts and the scope and breadth of the individual

[66] *See* DeMerieux, *supra* note 46, at 37–38.

[67] *Quoted in* Simpson, *supra* note 25, at 292.

[68] Lewis, *supra* note 28, at 414.

[69] *See* Barnett, *supra* note 43, at 377.

rights protections. As the death penalty jurisprudence makes clear, these constitutions proved inadequate to the task of incorporating evolving international norms into the domestic constitutional regime. I turn now to the death penalty cases.

3. Retention of the death penalty and Caribbean constitutional jurisprudence

All of the Commonwealth Caribbean states retain the death penalty,[70] although only Trinidad and Tobago, Saint Kitts and Nevis, and the Bahamas have actually hanged prisoners within the last ten years.[71] These territories belong to a shrinking minority of retentionist nations.[72] Along with Guatemala, Cuba, and the United States, the Commonwealth Caribbean states are the only ones in the Americas still wedded to the sanction.[73] Even as the world is converging toward agreement on abolition, political leaders in the Caribbean stubbornly refuse to acknowledge that the death penalty violates human rights. At a 1999 meeting of the Permanent Council of the OAS, Trinidad and Tobago's prime minister, Basdeo Panday, adamantly insisted that despite its use of the death penalty, his country was in compliance with international human rights standards. The death penalty, he stated, is outside the strictures of the human rights regime because "[i]nternational law allows it and it is a matter that falls squarely within the domestic jurisdiction of sovereign states."[74]

[70] Grenada retains the penalty but is considered by Amnesty International to be an abolitionist state under the ten-year criterion. *See* http://www.amnesty.org/deathpenalty-countries-eng (June 9, 2004). Grenada executed five men in 1977 and 1978 after a lapse of fifteen years; there have been no executions since. Barbados, Belize, Jamaica, and Dominica have not had an execution in ten years, but they do not have an established practice of not carrying out executions and, therefore, are not considered abolitionist states by Amnesty International. The last execution was in 1984 for Barbados, 1986 for Belize, 1986 for Dominica, and 1988 for Jamaica. Roger Hood, The Death Penalty: A Worldwide Perspective 59, 248 (Oxford Univ. Press 2002).

[71] The Bahamas executed two men in 1998 and one man in 2000. St. Christopher and Nevis executed one man in 1998, the first execution there in thirteen years. Trinidad and Tobago executed one man in 1994 and ten men in 1999. *See* www.reprieve.org.uk/cj.shtml.

[72] As of 2004, there were 117 abolitionist countries (including states that are de facto and states that are de jure abolitionist) and 78 retentionist countries. *See The Death Penalty: An International Perspective, Death Penalty Information Center, at* http://www.deathpenaltyinfo.org/article.php?did=127&scid+30#ar (last visited Jan. 24, 2005).

[73] *See Amnesty Report: Abolitionist and Retentionist Countries, at* http://www.amnesty.org/pages/deathpenalty-countries.

[74] *See* http://www.oas.org/OASpage/press2002/en/Press99/092399.htm.

In this parochialism Panday and other similarly minded Caribbean leaders[75] are in accord with the position of the United States.[76] The United States contends that by limiting it to the most serious crimes and imposing rigorous procedural safeguards, the capital sanction can be made to operate in a fair and humane manner.[77] In the view of the U.S. State Department, the relevant cleavage is not between abolitionist and retentionist states, but between those with, and those without, the juridical apparatus to render safe their capital punishment systems. The criminal justice systems of the Commonwealth Caribbean lack such safeguards, and hence even if it could be reasonably debated that it is not inconsistent with the right not to be subjected to inhumane treatment, the death penalty raises fundamental fairness issues in systems with insufficient resources.

Although its key features have been widely condemned as contrary to international norms, the colonial death penalty system remains largely in place in the Caribbean. First, hanging, the sole method of execution, is protected from challenge by the savings clause, although it is increasingly regarded as unnecessarily painful.[78] Second, the mandatory penalty for all murder still prevails in some jurisdictions. The mandatory penalty includes crimes committed without intent to kill, and joint-enterprise crimes, and bars mitigating defenses such as duress and drunkenness. Third, a distinctive feature of

[75] Not all Caribbean leaders are of the same view. In 2000, Attorney General Godfrey Smith of Belize stated, "I would not wish to see the Caribbean expend its greatest energies on human rights aspects of the death penalty . . . I would much rather that we . . . concede the ineluctability of . . . abolition . . . and then embark . . . to manipulate the very same international human rights movement for the recognition of the right to development for people in developing countries. . . ." *Quoted in* Julian Knowles, *Capital punishment in the Commonwealth Caribbean: colonial inheritance, colonial remedy?* in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 308 (Peter Hodgkinson & William A. Schabas eds., Cambridge Univ. Press 2004).

[76] A number of commentators have explored the debate over whether the death penalty contravenes human rights. *See, e.g.*, Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse,* 19 BROOK. J. INT'L L. 273 (1993); James Wyman, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543 (1997); Paolo Carozza, "*My Friend is a Stranger": The Death Penalty and the Global Jus Commune of Human Rights*, 80 TEX. L. REV. 1031 (2003).

[77] The United States delegate to the OAS opposed adoption of an Optional Protocol to the Death Penalty in the American Convention on Human Rights, stating: "In our view, imposition of the death penalty for very serious crimes after a fair trial with the full protections of due process, offered by an effective judiciary, is not a violation of fundamental human rights or of international law." Assemblea General, Actas y Documentos, volumen II, primera parte, O.A.S. Doc. OEA/Ser.P/XX.o.2, at 250–251 (1991).

[78] The Privy Council declared death by hanging constitutional in Boodram & Ors. v. Baptiste [1999] 1 W.L.R. 1709. Current international standards require the least inhumane and degrading method of execution, and that the prisoner should not be made to suffer unnecessarily beyond that required to bring about death. Ng v. Canada, unreported, UN Doc. CCPR/C/49/D/469/199 (UNHRC) (November 5, 1993).

the penalty is the extensive use of executive sentencing in the form of the mercy review. A means of ameliorating the hardship and rigidity of the automatic penalty, the mercy system has deep roots in English practice.[79] However, nonjudicial decisions on mercy are largely uncontrolled by due process safeguards and, therefore, contravene international norms.[80]

Until the 1980s, when a dramatic increase in homicide in the region led to its revived popularity with the electorate, the death penalty was used so infrequently as to amount to a virtual moratorium. But violent crime skyrocketed beginning in the 1980s,[81] and so, too, did the number of death sentences and executions.[82] The death row population per capita in the ESC is about four times that of the United States.[83] As of 2003, approximately 250 men and women were on death row in the ESC.[84]

The increased use of the penalty in the 1980s induced a criminal justice crisis, for these jurisdictions did not have an adequate legal infrastructure to administer properly the increasing number of capital cases.[85] Prison conditions were harsh and not suited to long-term death row

[79] Robert Weisberg has written that "[t]he British legal landscape of the [eighteenth century] . . . included horrifyingly draconian criminal laws that often imposed the death penalty as punishment for property crimes, confounded by a complex and mysterious system whereby judges of various levels could issue pardons, and whereby perhaps half of all death sentences were revoked by some discretionary decree." Robert Weisberg, *A Colloquium on the Jurisprudence of Mercy: Capital Punishment and Clemency: Apology, Legislation, and Mercy*, 82 N.C. L. Rev. 1415 (2004).

[80] The Privy Council placed some limits on executive sentencing in capital cases in Lewis v. Att'y Gen. of Jamaica, [2001] 2 A.C. 50 (P.C. 2000) (appeal from Jamaica), [2000] 2 W.L.R. 1785.

[81] The murder rate doubled in Jamaica in the six years from 1991 to 1997. There were 561 reported murders in 1991 and 1,038 reported murders in 1997. Planning Institute of Jamaica, *Economic & Social Survey* (1991–1999).

[82] In Jamaica there was a four-year moratorium between 1976 and 1980. Between 1980 and 1988, Jamaica hanged fifty-nine prisoners. In 1988, with 191 prisoners on death row it had one of the highest per capita death rows in the world. Amnesty International USA, When the State Kills. . .The Death Penalty: A Human Rights Issue 155 (Amnesty International 1989). For an account of the resumed use of the penalty in the Caribbean after de facto moratoria, see Hood, *supra* note 70, at 59–60.

[83] *See* Amnesty International, *Facts and Figures on the Death Penalty*, AI Index: ACT 50/005/2003, Apr. 11, 2003.

[84] Accurate figures on the death row populations are hard to obtain. According to one rights organization, as of 2003 the death row population was as follows: Bahamas, 31; Barbados, 17; Belize, 6; Jamaica, 50; Trinidad and Tobago, 87. *Caribbean Justice Bulletin*, March 2003 Newsletter *at* http://www.reprieve.org.uk/cj/mar03.htm. *See also* Joanna Harrington, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, 98 Am. J. Int'l L. 126, n. 9 (2004).

[85] The problems include inordinate delays in trial proceedings, poor representation, and major deficiencies in the codification of substantive and procedural law. For an account of these problems in the criminal justice system in Jamaica by a British attorney working on capital trials in 2000, see Ali Bajwa, *Working in the Caribbean*, 1 Amicus J. 8 (2000).

incarceration.[86] Lawyers and judges were ill prepared to handle the cases, which are notoriously complex. Inadequate legal-aid programs[87] left defendants at the mercy of poorly trained, junior lawyers who were not paid to assist their clients during critical pretrial and post-trial proceedings and were not provided with adequate forensic, investigative, or medical expertise.[88] There was no right to legal assistance at the post-trial phase.[89] In consequence, the integrity of the system was undermined as flawed convictions were overturned by appellate courts. In Belize, more than half of those sentenced to death won their appeals; some of these defendants were likely innocent.[90] In a 2002 case from Jamaica, the Privy Council reversed a capital conviction for a Western Union office robbery and murder because the prosecution neglected to provide the defense with a videotape of the crime in progress that would have cleared the defendant.[91]

The precipitous increase in the number of executions and death row prisoners in the 1980s led to heightened scrutiny by the Inter-American Commission and Inter-American Court on Human Rights, the UN Human Rights Committee, the Privy Council, and the Eastern Caribbean Court of Appeal.[92] There are several useful accounts of the legal campaign to abolish or limit use

[86] For an account of the crisis in conditions in Jamaican prisons, see Stephen Vasciannie, *Human Rights in Jamaica: International and Domestic Obligations* 33–38 (Paper presented at United Nations Development Programme Roundtable 2001). In Hilaire, Ser. C No. 94 (Inter-Am. C.H.R. June 21, 2002), the Inter-American Court held that death row conditions in Trinidad and Tobago violated the American Convention on Human Rights. The Privy Council considered a constitutional challenge to death row conditions in Lewis v. Att'y Gen. of Jamaica, [2001] 2 A.C. 50. Although *Lewis* was decided on other grounds, the Privy Council observed that the allegations of abuse raised "serious matters which ought to have been investigated." *Id.* at 86.

[87] On the deficiencies of legal-aid programs in the region, see generally Derek O'Brien, *The Right to Free Legal Representation in the Commonwealth Caribbean*, 2 Oxford U. Commonwealth L. J. 197 (2002).

[88] In Barbados, for example, the Community Legal Services Act does not provide for counsel during pretrial or appellate proceedings. No competency standard is applied to screen counsel in death penalty cases, and there is no right to funds for medical or investigative expertise. *See* Adrian King, *Legal Aid and Access to Justice* (Commonwealth Caribbean Human Rights Seminar, 2000).

[89] The Inter-American Court ruled that the failure to provide legal aid to convicted prisoners on death row violated the American Convention on Human Rights in Hilaire, Ser. C No. 94 (Inter-Am. C.H.R. June 21, 2002) at ¶ 152(b).

[90] *See* Saul Lehrfreund, *The Death Penalty and the Continuing Role of the Privy Council*, 149 New L. J. 1299–1300 (1999).

[91] Sangster & Dixon v. The Queen, [2002] U.K.P.C. 58 (P.C.) (appeal from Jamaica).

[92] The Eastern Caribbean Court of Appeal has jurisdiction over final appeals from those countries belonging to the Organisation of Eastern Caribbean States (OECS). The countries are Antigua, Dominica, Grenada, St. Lucia, St. Vincent, St. Kitts and Nevis, Montserrat, Anguilla and the British Virgin Islands.

of the death penalty in the Commonwealth Caribbean,[93] and I merely offer a summary of that well-told history here, focusing instead on some of the constitutional questions the CCJ will face given the current state of the law.

Beginning in the 1990s lawyers in the Caribbean and in London implemented a litigation strategy that, in stages, engaged, first, the human rights regimes and thereafter the Privy Council.[94] Early on the intent was to address two Privy Council cases that effectively insulated capital punishment from review. In a 1981 Singapore case, *Ong Ah Chuan*, the Privy Council board held that a mandatory death penalty for drug trafficking was not unconstitutionally disproportionate, reasoning that the mandatory sentence was well within the prerogative of the legislature, given its legitimate purpose to deter such crime.[95] Two years later, in *Riley v. Attorney General of Jamaica*,[96] the board rejected a challenge to prolonged delay in sentencing, ruling that even if inhuman and degrading, delay per se did not contravene the Constitution of Jamaica because of the operation of a savings clause.[97]

Soering v. United Kingdom,[98] the landmark 1989 case in which the European Court of Human Rights condemned the death row phenomenon, provided the leverage necessary to engage evolving human rights norms in the Caribbean setting. As their constitutions were based on the European Convention on Human Rights, the new rule that *Soering* articulated was highly relevant to the Commonwealth Caribbean. The Privy Council would consider several other cases[99] before, in 1993, it would transform the landscape with its decision in *Pratt.*

[93] For an account of the human rights cases, see Lawrence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes,* 102 COLUM. L. REV. 1832 (2002). For a review of the mandatory death penalty cases, see Harrington, *supra* note 84. *See also* David Simmons, *Conflicts of Law and Policy in the Caribbean: Human Rights and the Enforcement of the Death Penalty—Between a Rock and a Hard Place,* 9 TRANS'L L. & POL'Y 263 (2000) [hereinafter Simmons, *Conflicts*], Julian Knowles, *Capital Punishment in the Commonwealth Caribbean: Colonial Inheritance, Colonial Remedy?* in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 282 (Peter Hodgkinson & William A. Schabas eds., Cambridge Univ. Press 2004) and Leonard Birdsong, *In Quest of Gender-Bias in Death Penalty Cases: Analyzing the English Speaking Caribbean Experience*, 10 IND. INT'L & COMP. L. REV. 317 (2000) and Birdsong, *Is There a Rush, supra* note 24.

[94] For an account of the strategy by one of the lawyers who litigated many of the cases, see Edward Fitzgerald, *Savings Clauses and the Colonial Death Penalty Regime* 114 (Commonwealth Caribbean Human Rights Seminar, Belize City, Belize 2000) [hereinafter Fitzgerald, *Savings Clauses*]. *See also* letter of Nicholas Blake to author, August 24, 2004 (on file with author).

[95] Ong Ah Chuan v. Public Prosecutor, [1981] A.C. 648 (P.C. 1980) (appeal from Singapore).

[96] Riley v. Att'y Gen. of Jamaica, [1983] 1 A.C. 719 (P.C. 1982) (appeal from Jamaica).

[97] *Id.* at 726–727.

[98] Soering v. United Kingdom, [1989] 11 Eur. Ct. H.R 439.

[99] *See* discussion *infra* note 135.

The prolonged imprisonment that was the defendants' central complaint in *Pratt* commenced with four years of delay between their conviction in 1979 and the opinion on their appeal. The Court of Appeal of Jamaica issued its written opinion four years after it rejected the appeal. Before the Privy Council took on the matter, the *Pratt* defendants petitioned the Inter-American Commission and the UN Human Rights Committee. In 1987 the Inter-American Commission held the delay violated the American Convention, and in 1988 the Human Rights Committee found a violation of the International Covenant on Civil and Political Rights on slightly different grounds.[100]

The Privy Council relied heavily on these developments in the human rights tribunals in its constitutional ruling that the lengthy incarceration in *Pratt* was inhuman and not protected from review by a "special savings clause." After *Pratt*'s five-year limitation on postconviction incarceration, the Caribbean jurisdictions found themselves in a catch-22, caught between the five-year rule and the duty to afford to the notoriously slow human rights tribunals a full opportunity to review the increasing numbers of petitions they were receiving from death row prisoners. Ultimately, the largest states, Jamaica in 1997 and Trinidad and Tobago in 1998, cut off review by these bodies by denouncing some of their treaty obligations.[101] Trinidad and Tobago made clear its displeasure with the rulings of the tribunals by executing death row prisoners while their appeals were pending.[102]

After *Pratt* had opened up some space in which to address the features of the death penalty systems that violated human rights, the legal strategists addressed other issues. They sought to impose due process on the mercy proceedings, and they focused attention on the mandatory sentence, chipping away at the savings clauses. The savings clauses, which I address in section 3.1 below, are prominent features of these constitutions and pose the most formidable obstacle to constitutionalizing the death penalty system. Two types of savings clauses hover over the generous guarantees of the bills of rights. The special savings clause, which featured in *Pratt*, insulates preindependence penalties from review, while the general savings clause protects all

[100] While the IAC held that the four-year delay was "tantamount to cruel, inhuman and degrading treatment," the HRC stopped short of adopting the death-row-phenomenon argument while nevertheless recommending commutation based on the length of the delay. *See* Helfer, *supra* note 93, at 1870.

[101] In 1997, Jamaica denounced the First Optional Protocol to the ICCPR, but it left open access to the Inter-American Commission. In 1998, Trinidad and Tobago denounced the Optional Protocol to the ICCPR and the American Convention. *See* Helfer, *supra* note 93, at 1881.

[102] Glen Ashby was executed in 1994, and another defendant was executed in 1999 while his appeal was still pending before the Inter-American Commission on Human Rights. Although at the time Trinidad and Tobago had withdrawn from the Inter-American Convention on Human Rights, the prisoner could appeal so long as Trinidad and Tobago was a member of the Organization of American States.

preexisting statutory laws. *Pratt* had rejected the *Riley* holding that prolonged delay in carrying out the sentence could not be deemed unconstitutional because of the special savings clause. The *Pratt* board reasoned that the penalty savings clause should be read narrowly and, where possible, in a manner compatible with human rights norms.[103]

In automatic capital punishment systems, like those in the Caribbean jurisdictions, the real sentencing power rests with the executive who holds the power to commute the death penalty. Before 2000, when the Privy Council decided *Lewis v. A. G. of Jamaica*,[104] another landmark case, the executive's discretion was wholly unfettered and the prisoner's ability to influence the process was highly restricted.[105] *Lewis* was a challenge against the procedure in Jamaica whereby a domestic privy council, appointed by the governor-general, could make a binding recommendation on a mercy petition to the governor-general without the representations of the prisoner and without providing the prisoner access to the materials on which the decision of the Jamaican Privy Council was based. In two earlier decisions the U.K. Privy Council gave constitutional sanction to this practice of nonjudicial decision making, grounded in the customary executive prerogative—historically the "royal prerogative"[106]—of mercy in capital cases,[107] declaring that "mercy is not the subject of legal rights."[108] But *Lewis* reversed this line of cases. It held that mercy proceedings are subject to judicial review, and it accorded to the accused the right to notice of the proceedings, to submit materials in mitigation, and to review materials submitted by the trial judge and others to the commutation decision maker, which in Jamaica is the Privy Council and elsewhere is an executive officer.[109] *Lewis* also established that it is unlawful to proceed with execution before a prisoner's appeals to international human rights bodies have concluded.[110]

[103] Here the board applied the Bangalore Principle of interpretation that a constitution should always be read consistently with international obligations if it is possible to do so. For a discussion of the Bangalore Principles, see COMMONWEALTH L. BULL. 1196 (1988). *See also* Lord Lester of Herne Hill, *The Challenge of Bangalore: Making Human Rights a Practical Reality*, COMMONWEALTH L. BULL. 47 (1999).

[104] Lewis v. Att'y Gen. of Jamaica, [2001] 2 A.C. 50 (appeal from Jamaica).

[105] For an account of the "Mercy" system in Caribbean jurisprudence, see Edward Fitzgerald, *Pardon and the Commutation of the Death Penalty: Judicial Review of Executive Clemency* (Commonwealth Caribbean Human Rights Seminar 2000).

[106] *See* HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 159 (Cavendish Publishing Ltd., 4th ed. 2002).

[107] DeFreitas v. Benny, [1976] A.C. 239 (P.C.) (appeal from Trinidad & Tobago); Reckley v. Minister of Public Safety, (No. 2) [1996] 1 A.C. 527 (P.C.) (appeal from the Bahamas).

[108] Lord Diplock in DeFreitas v. Benny, *Id.* at 247.

[109] Lewis v. Att'y Gen. of Jamaica, [2001] 2 A.C. 50 (P.C. 2000) (appeal from Jamaica).

[110] Lewis v. Att'y Gen. of Jamaica, *Id.* at 85.

The next major development in the Privy Council concerned the mandatory penalty. In a group of three cases[111] decided in 2002, the board, reasoning from *Pratt,* declared the mandatory penalty not saved by the special savings clause. Three months later in *Hilaire*, the Inter-American Court condemned the mandatory penalty in Trinidad and Tobago as an arbitrary deprivation of life and ordered the retrial of thirty-one prisoners.[112] After these cases firmly established that the mandatory penalty violated both human rights law and the Bill of Rights of Trinidad and Tobago, the attorneys turned their attention to the general savings clause, where they had less success. In 2004, again in a trilogy,[113] the Privy Council declined to strike the mandatory sentence where there was an operative general savings clause.

3.1. The problem of the savings clause

Intended to transport the colonial legal systems into the independence era gradually, the savings clause has become a constitutional Frankenstein's monster, destroying the founding instruments' central covenants and leaving behind a pitiful pile of unrealized hopes. The courts that have grappled with the clause have come up short, largely, I suggest, because of the intensity of the debate over the death penalty, which, here as elsewhere, has had grotesque consequences for constitutional law.[114] The Privy Council has tacked to and fro in interpreting the clause, leaving in its wake a confusing body of law that ultimately undermines the fundamental integrity of constitutionalism. It will be extremely important for the region's new court to clarify this area of the law.

The savings clause is a feature of all the constitutions of the region except Belize. Designed to ensure continuity from the colonial to the postindependence legal era,[115] the presumption behind the savings clause was that the

[111] Reyes v. The Queen, [2002] 2 A.C. 235 (P.C.) (appeal from Belize); R. v. Hughes, [2002] 2 A.C.259 (P.C.) (appeal from St. Lucia); Fox v. R, [2002] 2 A.C. 284 (P.C.) (appeal from St. Christopher & Nevis). *See also* Balson v. The State [2005] U.K.P.C. 6, applying Reyes and Hughes to Dominica.

[112] Hilaire, Ser. C No. 94 (Inter-Am. C.H.R. June 21, 2002) at 281 ¶ 103.

[113] Boyce v. The Queen, [2004] 3 W.L.R. 786 (P.C.) (appeal from Barbados); Matthew v. The State, [2004] 3 W.L.R. 812 (P.C.) (appeal from Trinidad & Tobago); Watson v. The Queen, [2004] 3 W.L.R. 841 (P.C.) (appeal from Jamaica).

[114] After trying for years to fix the flaws in capital punishment jurisprudence, Justice Blackmun finally threw up his hands in Callins v. Collins, 510 U.S. 1141, 1130 (1994), famously declaring that "[f]rom this day forward, I no longer shall tinker with the machinery of death."

[115] See Watson v. The Queen, [2004] 3 W.L.R. 841 (P.C.) (appeal from Jamaica) at ¶ 46, where Lord Hope of Craighead opined that the savings clause in the Constitution of Jamaica presumes the laws in existence gave full effect to the newly enshrined constitutional rights. He wrote: "It was a reasonable working assumption, in the interests of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy. So long as these laws remained untouched, they did not have to be scrutinized." For a general treatment of the savings clause, see DeMerieux, *supra* note 46, at 55–69.

common law extant at the time of independence was fully compatible with the fundamental rights protections in the new constitutions.[116] The drafters of the new constitutions faced the challenge of establishing guaranteed rights within an existing common law regime that afforded the executive the power to derogate common law rights in certain circumstances. It was feared that exclusive reliance on the new, written bill of rights regimes to define the scope of the rights might unduly interfere with what was understood at the time to be lawful executive practice.[117] Strictly applied, however, the savings clause device produces absurd results, trapping Britain's former colonies in a time warp, forever binding them to laws rejected as antiquated by Britain itself. As one death penalty litigator put it, "[u]nder a system dominated by savings clauses, constitutional lawyers in the death row field have the role more of historians and archivists than of human rights activists helping to develop more civilized standards and a better future."[118]

The savings clause has inhibited local courts from giving fundamental rights their full scope, retarding the goal of indigenizing individual rights. For example, in a 1997 case the Court of Appeal of Jamaica rejected a freedom of conscience challenge by a Rastafarian to laws criminalizing marijuana[119] because they had been in place long before the emergence of the Rastafarian religion. The Court ruled that even if the law violated the constitutionally protected right to free religious exercise, the preindependence-era drug law was saved. Here the savings clause inflicted on the right to freedom of conscience

[116] In D.P.P. v. Nasralla, [1967] 2 A.C. 238 (P.C.) (appeal from Jamaica). Lord Devlin gave this explanation for the savings clause in Jamaica's Constitution:

> This Chapter [on Fundamental Rights and Freedoms] proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica in existing law. The laws in force are not to be subject to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.

The Jamaican Court of Appeal held in *Nasralla,* per Mr. Justice Lewis, that "[The Bill of Rights] seeks in some measure to codify those 'golden' principles of freedom, generally referred to as the rule of law, which form part of the great heritage of Jamaica and are to be found both in statutes and in great judgments delivered over the centuries." Nasralla v. D.P.P., [1965] 9 W.I.R. 15 (C.A.) at ¶ 29.

[117] Lloyd Barnett has described the rationale for the Jamaican savings clause. He writes "[i]t was felt that these standards had generally been accepted and observed in Jamaica and therefore there was no need to disturb the *status quo.*" Barnett, *supra* note 43, at 380.

[118] Fitzgerald, *Savings Clauses, supra* note 94, at 380.

[119] Forsythe v. Att'y Gen. of Jamaica, (1997) 34 J.L.R. 512. Simeon McIntosh likens Forsythe to Employment Div., Dep't of Human Resources v. Smith 494 U.S. 872 (1990), where the Supreme Court declined to exempt peyote use by a minority religion from the general criminal prohibition against the drug. Simeon C.R. McIntosh, Fundamental Rights and Democratic Governance: Essays In Caribbean Jurisprudence 202–204 (Caribbean Law Publishing Co. 2005).

a double wound. It excluded from protection emerging minority religions, criminalizing their practice and thereby effectively pushing them out of the body politic. And it stunted the cultural and spiritual evolution of the Caribbean people, privileging imported European forms of religious practice over indigenous forms.

Initially, in the 1990s, appellate courts, seeking to avoid such anachronisms and to construe dynamically the generous fundamental rights provisions of these constitutions, showed some agility in interpreting the savings clause. Looking to the broad purpose of the fundamental rights provisions, the Privy Council increasingly sought to avoid the juggernaut created by the savings clause, as indeed was required lest these constitutions be stripped of any meaningful human rights content.[120] But in its attempts to reconcile the old preindependence-saved laws with current human rights norms, the Privy Council came under persistent criticism, within and beyond the legal community, for exceeding its proper function.[121] Critics contended that in ignoring the clear meaning and intent of the savings clause, a result-oriented Privy Council had manipulated and degraded Caribbean constitutional jurisprudence.[122] The Privy Council initially attempted to temper such criticism by situating its conclusions squarely within the norms of international law,[123]

[120] In Reyes v. The Queen, [2002] 2 A.C. 235 (P.C.) (appeal from Belize) ¶ 26, the Committee observed:

> . . . the court must begin its task of constitutional interpretation by carefully considering the language used . . . . A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. [The court must consider] the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society. [Citation omitted.]

[121] *See, e.g.*, Simmons, *Conflicts*, *supra* note 93, at 278, 283. In his article *The Case for a Caribbean Court of Appeal,* 5 CAR. L. REV. 401, 417 (1995), Michael de la Bastide proffered the words of the Calypsonian "Sugar Aloes," to convey the popular response of the Trinidad and Tobago "street" to the Privy Council:

> But if we still have to send quite up in London to get the O.K.
> to hang a criminal in we own land
> Then what's the use of having an Independence or Republic holiday?

[122] For example, in 2003 the prime minister of Jamaica complained that the Privy Council "has simply been making it impossible for the law to be carried out. Its actions are undermining the very foundation of our legal system." 6 AMICUS J. 4 (2003).

[123] The Privy Council is in the peculiar position of being neither a local nor a foreign court, and hence it was entirely appropriate for it to situate its constitutional decisions in the context of foreign and international law. The Privy Council's case law illustrates the interpretive challenges that have come with the irreversible entwinement of constitutional and human rights norms. *See generally* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

particularly in the death penalty cases, and by narrowly construing the savings clause.

Such quotidian methods of constitutional interpretation have provoked criticism from some of those urging severance from the Privy Council who have argued that, on general principle, the old imperial court ought not to superintend the constitutions of independent states.[124] Such a relationship all the more demeans the values of independence and sovereignty, these critics contend, when the imperial court deploys interpretive license to elide troublesome constitutional barriers and to recast the text so that it always mirrors the shifting ethos of the former imperial power. Worse yet, this occurs notwithstanding the protest of the purportedly independent former colonies, which may prefer the practices of the past and whose constitutions, by a quirk of legal history, protect that preference. Why, the argument goes, should all roads for all time lead back to Europe and its conceptions of human rights, and why should the more conservative mores of the former colonies not have purchase, at least in their own lands?[125]

On the other side of the coin, the support of Commonwealth Caribbean governments for capital punishment,[126] and their disdain for the judgments of the Privy Council, has hindered the ability of that tribunal to develop a cohesive jurisprudence that fully respects international law for the Commonwealth as a whole. When the Privy Council sustains, for any reason, a Caribbean death sentence, it does so in the face of the increasingly robust global consensus that the sentence is incompatible with human rights. Hence the Privy Council has found itself under pressure from two competing

[124] *See generally* Rawlins, *The CCJ*, *supra* note 13. Of course, it is also true that many who support delinking from the Judicial Committee approved of its death penalty rulings. *See, e.g.*, Speech of Telford Georges at Caribbean Rights Symposium, *in Caribbean Court of Justice: Critical Viewpoints from a Caribbean Rights Symposium* 13 (1998).

[125] This critique reprises the familiar divide between universalist and relativist theories of human rights. *See, e.g.*, Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995); Upendra Baxi, *Universal Rights and Cultural Pluralism: Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183 (2000); Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia,"* 14 IND. INT'L & COMP. L. REV. 1 (2003). But here the Caribbean critics of the Privy Council's decisions seek to resuscitate colonial legal practices, whereas human rights relativists generally decry the Western displacement of precolonial traditional value structures, such as communalism. The argument for Caribbean human rights exceptionalism relies not so much on a preference for authentic values purportedly threatened by alien mores but, rather, on the right to remain wedded to derivative norms since abandoned as outmoded in their home of origin.

[126] On the position of the governments toward the death penalty, see Simmons, *Conflicts*, *supra* note 93, at 283 (discussing the steps Caribbean governments took in response to *Pratt* and to the decisions of international bodies condemning their death penalty practices). For a critique of the Privy Council's attempts to reconcile international law with the Caribbean constitutions, see Derek O'Brien and Vaughan Carter, *Due Process – Philosopher's Stone or Fool's Gold*, L.Q.R. 2001, 117 (Apr), 220–224.

constituencies—its Caribbean customers on the one hand and the international human rights community on the other.

Other Commonwealth constitutional courts have likewise found themselves inhibited by the savings clause. In 1995, the Botswana Court of Appeal rejected a constitutional challenge to a sentence of death by hanging.[127] The court ruled that a savings clause insulated the method of penalty from challenge under the inhuman or degrading punishment clause. Nevertheless, observing that international law was headed in the direction of abolition, the court stated its "hope that . . . [legislature will consider changes] necessary to further establish the claim of this country as one of the great liberal democracies of the world."[128]

3.2. The savings clause and the death penalty

The appellate courts have addressed the general savings clause, which carries over all laws from the preconstitution regime, and the special savings clause, which insulates particular laws or penalties from constitutional scrutiny. Some of the constitutions deploy both the general and the special savings clause,[129] while others use one or the other, and one state's charter has no savings clause at all.[130] These variations make it challenging to develop uniform constitutional rules. The Privy Council has recently issued seven judgments on the legality of the mandatory death penalty.[131] The outcome of the seven cases does not portend well for the effort to harmonize Caribbean constitutional law. Because of the operation of the savings clauses, the mandatory death penalty was struck down in Belize, Saint Lucia, Saint Vincent, Dominica, and Jamaica but ruled constitutional in Barbados and in Trinidad and Tobago, in spite of the fact that all of the cases involved similar mandatory sentencing statutes and similar fundamental rights language.

The Privy Council first pried open the savings clause lock on constitutional protections in *Pratt*. There the board reasoned that the special savings clause in the Jamaican Constitution placed the penalty of death, but not other unfair practices in capital cases, outside the scope of judicial review. Even if death by hanging contravened the protection against cruel and inhuman treatment, the issue was nonjusticiable because of the special punishment savings clause. However, that clause did not shield from review the question whether prolonged delay constituted cruel and inhuman treatment. And hence in

[127] State v. Ntesang, [1995] (4) BCLR 426 (Botswana).

[128] *Id.* at 435.

[129] The Constitution of Jamaica, for example, includes a general savings clause and a special savings clause shielding existing penalties from review under the inhuman or degrading punishment clause. JAM. CONST. §17(2).

[130] The savings clause of the Belize Constitution expired after five years. BELIZE CONST. §21.

[131] See text at nn. 132–137 below.

Pratt the Court imposed constraints on the imposition of a sentence that was arguably cruel and inhuman but not per se unconstitutional. The *Pratt* Court rejected the reasoning of an earlier case, *Riley*, in which the Privy Council held that, on account of the savings clause, delay could never afford a ground for relief in a death penalty case.

The Court revisited the savings clause issue when it took up the constitutionality of the mandatory death sentence. In the three cases decided in 2002, the Court addressed, first, whether the special savings clause prevented review of the mandatory sentence. The lead case of the trilogy, *Reyes v. the Queen,*[132] involved a Belize statute subjecting to mandatory death all shooting murders. The Belize Constitution has no savings clause, and thus the Court had little trouble declaring the statute to be an unconstitutional infringement of the right to protection from cruel and inhuman treatment. As to the other two cases in the trilogy, *Hughes*[133] and *Fox*,[134] the Court determined that the special savings clauses in the constitutions of Saint Lucia and of Saint Vincent did not shield the mandatory death sentence from review, and the Court struck the penal laws authorizing the mandatory sentence in those two states, and later, on the same ground, in Dominica.

In 2004, the Privy Council took up the general savings clause in connection with appeals from Jamaica, Barbados, and Trinidad and Tobago that challenged the mandatory death penalty. The cases are *Boyce,*[135] on appeal from Barbados, *Matthew,*[136] on appeal from Trinidad and Tobago, and *Watson,*[137] on appeal from Jamaica. The Privy Council had established unambiguously in the 2002 trilogy that such a sentence violates the constitutional protection against cruel and inhuman treatment and international standards. However, the Court ruled the penalty beyond the reach of constitutional review in Barbados and in Trinidad and Tobago. Only Jamaica's statute was determined to be both unconstitutional and unlawful.

In December 2004, the Privy Council applied its *Boyce* decision in a capital appeal from Barbados challenging the constitutionality of the common law felony murder rule. In *Griffith*,[138] a group of men and youths were convicted of murder. The facts suggested that the victim met his death in the course of a robbery gone awry. The adult defendants, who received the sentence of death, appealed from a decision of the Barbados Court of Appeal, seeking to set aside

[132] Reyes v. The Queen, [2002] 2 A.C. 235 (P.C.) (appeal from Belize).

[133] R. v. Hughes, [2002] 2 A.C. 259 (P.C.) (appeal from St. Lucia).

[134] Fox v. R., [2002] 2 A.C. 284 (P.C.) (appeal from St. Christopher & Nevis).

[135] Boyce v. The Queen, [2004] 3 W.L.R. 786 (P.C.) (appeal from Barbados).

[136] Matthew v. The State, [2004] 3 W.L.R. 812 (P.C.) (appeal from Trinidad & Tobago).

[137] Watson v. The Queen, [2004] 3 W.L.R. 841 (P.C.) (appeal from Jamaica).

[138] Griffith and Ors. v. The Queen, [2004] U.K.P.C. 58 (appeal from Barbados).

their convictions and sentences[139] on the grounds that there was no determination of malicious intent on the felony murder charge, and no consideration of mitigating factors or of individual culpability for the death penalty under the mandatory murder statute. The board considered itself bound by precedent on both points. *Boyce,* decided in 2004, held the mandatory sentence law saved, and *Khan,*[140] an appeal from Trinidad and Tobago decided in 2003, upheld against a due process challenge[141] the ancient felony murder rule, the effect of which is to obviate the need to prove intent to murder. However, the *Griffith* defendants argued that even if the mandatory sentence was a saved law under *Boyce*, and the felony murder rule not unconstitutional under *Khan*, the combined effect of the two rules deprived them of the individualized treatment that fundamental fairness required. The board disagreed and affirmed the ruling of the Barbados Court of Appeal.

Griffith is the most recent and perhaps the starkest example of the serious harm the savings clause does to Caribbean constitutional jurisprudence. The common law felony murder rule was abandoned in England and Wales in 1957 in response, it appears, to the perception that the rule "operate[d] unfairly" because it "exposed to the risk of conviction of murder defendants lacking the intention otherwise necessary to convict of murder."[142] However, Trinidad and Tobago (and Barbados) retained felony murder. In *Khan* the Privy Council was pointedly deferential to the view of the chief justice of the Court of Appeal of Trinidad and Tobago, Michael de la Bastide, that, in effect, the rule was too ancient to be unlawful, as if longevity itself was the dispositive test of constitutionality.[143]

The death penalty was repealed in England in 1965; studies which informed the debate in England leading up to abolition suggested that the mandatory penalty was arbitrary because of the wide variation in the nature

[139] The death sentences of the three adults in *Griffith* were reduced to life terms while their appeal was pending, but before the judgment was entered by the Privy Council. The juveniles were sentenced to indeterminate terms.

[140] Khan v. The State, [2003] U.K.P.C. 79, [2004] 2 W.L.R. 692 (P.C. 2003) (appeal from Trinidad & Tobago).

[141] *Khan* dealt with the due process clause of the Constitution of Trinidad and Tobago. TRIN. & TOBAGO CONST. pt. I, 4(a). The provision of the Barbados Constitution guaranteeing "the protection of the law" provides the same protection as due process. *Griffith* ¶13 (section 11(c) of the Constitution of Barbados).

[142] Khan v. The State [2003] U.K.P.C. 79 ¶ 6.

[143] In *Khan* the common law rule had been displaced by a statute, which the Trinidad and Tobago Court of Appeal deemed presumptively lawful. In rejecting the due process claim, Trinidad's Chief Justice de la Bastide observed that the statute "re-introduced a rule of common law which had formed part of our jurisprudence (and that of England) for very many years." These views of the Justice de la Bastide, the Privy Council found, "command[ed] respect." *Id.* at ¶11. Justice de la Bastide is now President of the Caribbean Court of Justice.

of common law murder.[144] But the mandatory penalty was retained in Barbados and upheld as saved, even if cruel and inhuman, in *Boyce*. Here the fundamental premise of the savings clause—that the old regime should be preserved—can be seen to have infected other areas of constitutional interpretation, as exemplified by the approach of the Privy Council in *Khan* to the felony murder rule. Here two criminal law rules, long abandoned as unfair in other jurisdictions, combine to eliminate the opportunity to individualize the treatment of those criminal defendants exposed to the most severe penalty in a prosecutor's arsenal. The expectation in a murder case is that the defendant's motive will be, at some point in the proceedings—either during the trial on the merits, or at sentencing, or at both points—scrutinized. The upshot of *Griffith* is that intent is rendered irrelevant to both conviction and sentence. Under the rule of the case, an accused could be sent to the gallows without any consideration of *mens rea*, the cardinal classifier in criminal law.

In the wake of *Soering v. United Kingdom,*[145] the global abolitionist consensus is demonstrated by the increasingly widespread refusal of abolitionist governments to lend legal support of any kind to retentionist states.[146] The Privy Council's death penalty jurisprudence, shackled by the savings clauses, has put it in the impossible situation of enabling the Caribbean states to impose a penalty that the Privy Council's Judicial Committee considers in violation of customary norms—a position that erodes the committee's intellectual integrity, which, ultimately, is its principal currency. These heavy integrity costs may explain why some Privy Council jurists have encouraged the Caribbean states to establish the Caribbean Court of Justice.[147]

[144] *See* Reyes v. The Queen [2002] 2 A.C. 235, (P.C.) ¶11 (appeal from Belize), citing the Royal Commission on Capital Punishment 1949–1953.

[145] In Soering v. United Kingdom, [1989] 11 Eur. Ct. H.R. 439, the European Court of Human Rights held it violated art. 3 of the Convention's prohibition on inhuman or degrading treatment to extradite the national of a member state to a state where he would face the "death row phenomenon," or prolonged incarceration under harsh conditions. Since *Soering,* member states of the Council of Europe do not extradite to retentionist states. *See* William Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 Loy. L. A. Int'l & Comp. L. Rev. 581, 589 (2003) [hereinafter Schabas, *Indirect Abolition*]. The South African Constitutional Court took a similar position in refusing to remove the two suspects in the bombings of the U.S. embassies in Dar es Salaam and Nairobi, where they would face the death penalty in the United States. Khalfan Khamis Mohamed, [2001] 7 B.C.L.R. 685 (CC).

[146] For example, art. 9 of the Charter of Fundamental Rights of the European Union provides that "No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." While not binding under international law, the charter does codify European norms on the death penalty. *See* Schabas, *Indirect Abolition, supra* note 145 at 589. *See also* U.S. v. Burns, B.C.A.C. LEXIS 23, [2001] SCC 7 (Canada), holding extradition without assurances violative of the Canadian Constitution.

[147] Hugh Rawlins has cited the remarks of Lord Brown-Wilkinson and Lord Wilberforce urging termination of the link with the Privy Council. Rawlins, *The CCJ, supra* note 13, at 50.

Obviously, this uncomfortable dissonance is unlikely to disappear automatically with the launch of the Caribbean Court of Justice. Like the Privy Council, it, too, is an international tribunal construing municipal constitutional law, and it will need to reconcile conflicting constitutional law and international human rights norms, especially given the role international law will play on the court's original jurisdiction side.[148] The autonomous constitutional system, untouched by international law, may be a thing of the past.[149] Given the complementary nature of the state and federal organs at play in CARICOM and subject to the jurisdiction of the CCJ, it will be impossible to maintain a hermetic seal on the municipal side. The CCJ can hardly be entirely "international" when dealing with trade law while being, at the same time, purely "domestic" when coping with human rights.[150]

4. Conclusion

The integrationist ideal refuses to die in West Indian history. This ideal, newly embodied in the Caribbean Court of Justice, reflects the abiding hope that from the shared culture, history, and ethos of these consanguineous states, a homogeneous legal order can emerge. The new federalist court could knit together a progressive, responsive, constitutional jurisprudence suited to the diversity and the commonality of the region. It could join the global judicial conversation that is fashioning a wholly new legal science, neither purely constitutional nor exclusively international. It could advance the

Justice de la Bastide has noted that Lord Hoffman has observed that Caribbean needed a court of its own if it were to "have the full benefit of what a final court can do to transform society. . ." Address delivered by Mr. Justice Michael de la Bastide, 4, April 16, 2005, at http://www.caribbeancourtofjustice.org/inauguration-addresses/delabastide.pdf.

[148] See the comprehensive treatment of the relation between international and municipal law in respect to the CCJ in POLLARD, THE CCJ, *supra* note 14, at 158–190.

[149] Reem Bahdi offers five reasons why constitutional judges have increasingly engaged international human rights law:

> (1) [C]oncern for the rule of law; (2) desire to promote universal values; (3) reliance on international law to help uncover values inherent in the domestic regime; (4) willingness to invoke the logic of judges in other jurisdictions; and (5) concern to avoid negative assessments from the international community.

Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 556–557 (2002).

[150] In 1999, Prime Minister Basdeo Panday of Trinidad and Tobago found himself having to explain his government's death penalty practices to the OAS Council, although he was at the meeting in his capacity as chairman of CARICOM heads of government and seeking to strengthen the Caribbean trade position. *See* OAS press report at http://www.oas.org/OASpage/press2002/en/press99/092399.htm.

economic interests of the region as it contends with the pressures of neoliberal globalization. It could address the disadvantages that are the lot of tiny states with small budgets and large criminal dockets. It could harmonize constitutional law to promote integration. It could enhance democratic potential by holding states to their constitutional promises. And it could strengthen the rule of law domestically by engaging with international commitments and norms.

The obstacles to realizing this current version of the integrationist ideal are structural and ideological, but they are not insurmountable. An adequate account of the region's constitutional history must dwell on the formative period, for therein lies part of the answer to the structural paradox that could undermine the work of the new court. Seeking to preserve a legal order thought to be efficient and effective, and one that was familiar, the framers, both Caribbean and British, saddled future jurists with yesterday's laws, and thereby prevented them from engaging in principled interpretation, the cardinal feature of the constitutional project. I suggest that the conservative thrust of the savings clause—as deployed in this particular setting—is explained, in part, by the Cold War imperative of the independence era, and the fear that these new states would stray from the fold of the West. Judicial review was thus thwarted, fundamental rights dwarfed, and the constitutional tradition damaged, dire results that were certainly not intended and could hardly have been anticipated.

Simultaneously, the independence constitutions were, from the start, internationalist charters that sought to entrench human rights. They engaged the emerging postwar ethos, with its focus on universal dignity and humanity and its attempt to canonize these common principles. They borrowed their conception of rights from the new universal charters. Looking outward, they embraced the tradition of political liberalism and the idea that the constitution was not simply a domestic instrument but that it also expressed a commitment to, and membership in, a global community.

Ultimately, these two competing undertakings—at once parochial and universal—would be at war in a setting that calls for judicial courage, imagination, and wisdom—qualities critical to effective constitutional practice. The death penalty challenges all constitutional orders, because the issue is highly politicized and takes constitutional courts into a domain outside of majoritarian rule, and because capital cases test the safety of the criminal justice system. Under current case law the penalty cannot be judicially reviewed. But even as Caribbean constitutional law has retreated, international law has advanced to define and enforce the human rights of death row prisoners. And here lies the paradox: the Caribbean constitutions were meant to engage these states with the world, and the Caribbean Court of Justice is charged with adjudicating the new international legal order, but the structural barrier created by the savings clause casts a dark cloud over these internationalist ideals.

Constitutional orders differ from ordinary legal regimes because they trust judges to interpret open-textured principles, which then become entrenched norms. The structural flaw in the Caribbean constitutions created by the savings clause, which no court has yet been able to resolve, undercuts both the element of entrenchment and the interpretive task of the constitutional jurist. Moreover, the actions of some Caribbean governments have further emasculated the constitutional order. When the courts have managed to interpret the constitutional provisions consistently with global human rights norms, the governments have taken steps either to repudiate their international obligations or to amend their constitutions, thereby eroding the inviolability of constitutional process. These actions have been taken under the flag of sovereignty. But the Caribbean governments should not be able to have it both ways. They cannot engage the global economy and reject the global rights community. Regional integration dissipates, and globalization redefines, sovereignty. The constitutional project bleeds into the international law project, and both together have created a constitutional human rights regime that the new court should position itself to embrace and advance. It appears that reconsideration of the death penalty jurisprudence would be a natural starting point in meeting this challenge.