Constitutional Principles: The Caribbean Constitution in the World

Se-shauna Wheatle
Durham University

'Since I am what I am, how was I made?'

Derek Walcott, *The Prodigal*

I. Introduction

In the Caribbean fundamental constitutional principles serve as a conduit between the past and present as well as between the region and the wider constitutional world. Constitutional principles—primarily the separation of powers and rule of law—played a central role in shaping the institutional structures and relationships of Caribbean states in the immediate post-independence periods, as evident in both the constitutional design of new Caribbean states as well as early judicial interpretations of their new constitutions. The place of constitutional principles in establishing the region's institutional arrangements and serving as a site of communication in intra- and inter-regional constitutional discourse, prompts two reflections that are central to this Chapter. First, in ascribing such import to constitutional principles in their nascent constitutional development, Caribbean states simultaneously adopted a project and pattern of retention of European law. Second, beyond the role of such principles in navigating the early years of written constitutionalism, there remains a need to assess their current and potential effect as constitutional norms and as representations of the place of Caribbean constitutions in the world.

Constitutional principles characteristically bear elements of both the local and the external, being abstract and flexible enough to travel across states, but simultaneously capable of distillation into more specific rules applicable at the local level. This dual capacity ideally positions constitutional principles to mediate between external influences and local socio-legal imperatives. This Chapter seeks to situate constitutional principles within the construction of Caribbean constitutional identity and interrogate their role in shaping the relationship between Caribbean constitutionalism and constitutional law in related jurisdictions. In Part II of this Chapter, I outline initial efforts at developing a Caribbean constitutional identity through constitutional drafting as well as judicial discovery and use of

constitutional principles in early constitutional interpretation in the region. Part III then analyses the friction between recourse to unwritten norms and a new constitutional direction built on codified constitutions, by examining the extent to which constitutional principles function as vessels for incorporation of foreign law and the potential for such principles to stimulate judicial creativity and the growth of a distinctly Caribbean constitutional identity.

Part IV charts a path forward, advocating a 'creolized' Caribbean constitutionalism that blends the varying local and global influences on Caribbean law and society. Creolization represents the process by which political and legal actors in the region can recognize colonial era influences while creatively devising and tailoring norms that reflect a Caribbean post-colonial dispensation. Moreover, with a view to the future of legal development, creolization is proposed to generate meaningful interaction among Caribbean, foreign and international actors, facilitating the maintenance of close affinity between Caribbean constitutionalism and the world, while ensuring the continual development of a truly Caribbean vision of constitutional law. The creolization process is therefore proposed as a means by which constitutional principles can engender Caribbean constitutional innovation in the midst of both the external influences emanating from the past (through colonialism) and the future (through globalization).

II. Judicial Discovery and Recognition of Constitutional Principles

Judicial affinity for constitutional principles in Caribbean constitutional adjudication must be understood against the backdrop of the design and early attempts at interpretation of, constitutional instruments in the region. As explained below, the transition to independence was largely achieved through retention of European models.[1] This transition was therefore partly managed through maintaining traditional moorings. In this sense, it is perhaps unsurprising that in the new era of written constitutionalism, judicial interpretations continued to be guided by unwritten principles that spanned geographical boundaries and, with respect to Britain, were central to constitutional understanding in a jurisdiction with an uncodified constitution. To explore the place of constitutional principles in the birth of the newly independent Caribbean states, this Part of the Chapter first briefly discusses the features of constitutional design in the region and subsequently, makes the case that

[1] Derek O'Brien, 'The Caribbean Court of Justice and reading down the independence constitutions of the Commonwealth Caribbean: the empire strikes back' [2005] European Human Rights Law Review 607, 609-10.

constitutional principles were utilised as part of a referential posture towards early constitutional interpretation in the region.

i. Constitutional Design

Postcolonial Caribbean constitutions were largely attempts at adoption and retention, rather than invention and departure. The Constitutions in some cases cemented in textual form constitutional conventions that structure the relationship between the elected branches of government in Britain. For instance, section 64(5) of the Constitution of Jamaica and section 55(4) of the Constitution of St Lucia empower the Governor General to dissolve Parliament on the advice of the Prime Minister. The big picture is that the organization and division of powers in Caribbean states was a tale of adoption of European design, with a Westminster plus model of allocation of powers in Anglophone jurisdictions and a similar Dutch parliamentary model adopted in the former Dutch colony of Suriname. Thus, the new states adopted a parliamentary model whereby Parliament and the Executive were intertwined, with the Prime Minister and most members of Cabinet selected from, and accountable to, Parliament. While this model was 'suited to managing political and ideological pluralism and conflict', it was markedly 'less appropriate for mediating conflict originating in both class and race.'[2] This parliamentary design established to balance political power did not address the actual or perceived power cleavages in newly independent Caribbean states—divisions that originated in, and persisted from, the colonial era. Race and colour were central to political debate and conflict in Trinidad and Tobago, Guyana and Suriname, for instance; the tensions existing largely between Afro-Caribbean and Indo-Caribbean sections of the population. Divisions between these ethnic groups arose in the post-emancipation period during which indentured servants were brought to the Caribbean to work on the plantations in place of the newly freed African (and Afro-Caribbean) slaves. The majority of indentured servants were recruited to work in Eastern Caribbean states including Trinidad and Suriname. Indian indentured workers primarily worked in the plantation fields, working for lower wages than those demanded by former slaves. The resultant wage reduction helped to drive the Afro-descendant population away from rural areas and towards towns and surrounding villages. Moreover, the result was a persistent labour division that developed along ethnic lines.[3] The mutual animosity that emerged from Afro-Caribbean disdain of Indians

[2] Anthony P. Maingot, 'Independence and its Aftermath: Suriname, Trinidad, and Jamaica' in Stephan Palmié and Francisco A Scarano (eds) *The Caribbean: A History of the Region and Its Peoples* (University of Chicago Press 2011) 523.

[3] Donald Horowitz, *Ethnic Groups in Conflict* (University of California Press 1985) 109-110.

'willingly' submitting to plantation work and Indo-Caribbean disdain of Afro-Caribbean peoples adopting the cultural influences of European masters, was to endure for decades.[4]

These historical tensions in countries such as Trinidad and Tobago and Suriname are now reflected in the divide between major parties and political factions, which primarily run along racial, rather than ideological lines.[5] The danger of such racially determined political party divisions is explained by Horowitz: "There is thus a certain fixity that sets in where parties are ethnically based that is conducive either to stalemate or to fears of permanent domination. The ascriptive predictability of party outcomes fosters conflict.'[6] Yet, the institutional design selected failed to identify or seek to resolve this centre of conflict. Two hallmarks of parliamentary, first past the post systems loom large in this context: 'winner takes all' election results and the potential for long periods of one party—and often one leader—rule. Both features of this form of political system, in their capacity to entrench patterns of political inclusion and exclusion, can serve to deepen and cement racial divisions. Accordingly, in Trinidad and Tobago, the material consequences were such that 'each election tended to raise anew all the unresolved issues of ethnic identity'.[7] With the stakes so high, there is the further deleterious effect of increased tension and potentially violence resulting from apprehension about election outcomes.[8] Therefore, if constitutional design is viewed3 as the architecture erected to manage political conflict,[9] the division of power adopted in Caribbean states has failed at the outset, by failing to address the forms of political conflict prevalent in the region. Creative institutional design and renovation might have led to a venture more akin to consociationalism- a method of power sharing which requires he participation of the representatives of all significant groups in political decision-making, especially at the executive level'[10] -, elements of which have been in use since at least the 1950s. Conscious adoption of consociationalism in Northern Ireland, implemented through grand coalitions and power sharing between Catholic and Protestant communities, has sought

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[4] Ralph R. Premdas, 'Ethnicity And Elections in the Caribbean: A Radical Realignment of Power In Trinidad And the Threat of Communal Strife' (Working Paper 224, Kellogg Institute) 8-10.

[5] The persistent reflection of racial divisions in politics also remains a feature of the Bermudan system. See C. Walton Brown Jr, 'Race and Party Politics in Bermuda' (1989) 27 Commonwealth & Comparative Politics 103.

[6] Horowitz (n 3) 298.

[7] Ralph R. Premdas, 'Elections, Identity and Ethnic Conflict in the Caribbean: The Trinidad Case' (2004) 14 Pouvoirs dans la Caraïbe 17, 19.

[8] Horowitz (n 3) 330.

[9] Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009) 4-8.

[10] Alan Lijphart, 'The Wave of Power-Sharing Democracy' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press 2002) 39.

to give voice and representation to the ethnic and religious communities in the country.[11] With a similar legacy of external rule and internal ethno-religious divisions, Caribbean states were also likely to benefit from constitutional experimental rather than adoption.[12]

In one sense, the conflicting influences of the nation's past and its future apparent in Caribbean constitutional design is unexceptional inasmuch as this paradox inheres in the very nature of the constitutional project. As Rosenfeld explains, 'all constitutions depend on a constitutional identity that is distinct from national identity and from all other relevant pre-constitutional and extra constitutional identities'.[13] The conflict is notably heightened in a newly constituted nation transitioning from colonial to self-governance. Despite the obvious rupture represented in the adoption of entrenched constitutionalism in the Caribbean, this conflict was largely resolved in favour of proximity to the pre-constitutional identity. By 1966 the UK government had developed a blueprint for Caribbean constitutions, as revealed in a Government Command Paper regarding constitutional proposals for several Eastern Caribbean states, which included a section headed 'Outline Constitution For _____').[14] Despite being an outline, the blueprint was described in the Proposals as 'comprehensive' and did indeed cover a range of issues including the structure of government, continued association with Britain, fundamental rights and citizenship.

Nonetheless, the preference for affinity to the colonial era constitutional identity was shared by European and domestic actors. The independence constitutions, while 'drafted in Whitehall',[15] were not imposed by Whitehall; contemporary accounts and subsequent research indicate involvement of local politicians and lawyers in the formulation of the constitutions' contents.[16] An array of constitutional drafters and national(ist) leaders frankly and unabashedly defended the decision to retain the frameworks of their former European rulers. Eric Williams of Trinidad and Tobago, who championed the abortive West Indies

[11] John McGarry and Brendan O'Leary, 'Consociational Theory, Northern Ireland's Conflict, and its Agreement. Part I: What consociationalists can learn from Northern Ireland' (2006) 41 Government and Opposition 43.
[12] This is not to suggest that consociationalism would be a panacea. For analysis on the problems faced by consociational power-sharing, see Donald Horowitz, 'Ethnic Power Sharing: Three Big Problems' (2014) 25 Journal of Democracy 5.
[13] Michel Rosenfeld, *The Identity of The Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 10.
[14] Constitutional Proposals for Antigua, St. Kits/Nevis/Anguilla, Dominica, St. Lucia, St. Vincent, Grenada (Command Paper 2865, 1965) 5.
[15] William Dale, 'The Making and Remaking of Commonwealth Constitutions' (1993) 42 International and Comparative Law Quarterly 67, 67;
[16] Norman Girvan, 'Assessing Westminster in the Caribbean: Then and Now' (2015) 53 Commonwealth & Caribbean Politics 95, 97.

Federation and was a vocal critic of capitalism and colonialism, advanced the case in 1955 that 'the time has come when the British Constitution, suitably modified, can be applied to Trinidad and Tobago. After all, if the British Constitution is good enough for Great Britain, it should be good enough for Trinidad and Tobago.'[17] Perhaps there was more than a hint of subversion in this argument, since it was underpinned by a desire for independence, but the overarching spirit of his claim was that of adoption of British institutions and norms, rather than design of Caribbean models. More vivid was the position of Norman Manley of Jamaica, who professed:

> I make no apology for the fact that we did not attempt to embark upon any original or novel exercise in constitutional building … Let us not make the mistake of describing as colonial, institutions which are part and parcel of the heritage of this country.[18]

Thus, the project of retention was made explicit and public. Such conscious preference for pre-constitutional design necessarily challenged (and continues to challenge) the emergence of a distinct constitutional identity in independent Caribbean states.

ii. Constitutional Interpretation

Forging a Caribbean constitutional identity from a document that, in the case of Jamaica, began with the words 'At the Court in Buckingham Palace' and a draft version of which made no reference to the people of Jamaica would be a monumental task. Even the innovation of constitutional bills of rights were cast in terms of adoption, Patchett having observed in 1963 that the constitutional rights chapters 'appear to state well recognised rules developed at common law' with the expectation that 'resort will be had to English authorities on these matters'.[19] This was vividly demonstrated in the early interpretation of the constitutions, in which both local judges and the Judicial Committee of the Privy Council set a referential tone by interpreting constitutional rights with reference to common law and with a reluctance to embrace and operationalize the rights enumerated in the constitutions of the region.

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[17] Eric Williams, Constitution Reform in Trinidad and Tobago, Public Affairs (Pamphlet No. 2, Teachers' Educational and Cultural Association, Trinidad, 1955) 30, cited in Hamid Ghany, 'The Constitutional and Political Aspects of Strategic Culture in Trinidad and Tobago' in W. Andy Knight, Julián Castro-Rea and Hamid Ghany, *Re-mapping the Americas: Trends in Region-making* (Routledge 2014) 234.

[18] Norman Manley, Proceedings of the Jamaican House of Representatives 1961-62, 24th January, 1962, 766.

[19] K.W. Patchett, 'English Law in the West Indies: A Conference Report' (1963) 12 International and Comparative Law Quarterly 922, 955.

It was in this vein that the Court of Appeal of Trinidad and Tobago concluded in *Collymore v AG*[20] that despite the constitutional right to freedom of assembly and to form trade unions, a right to strike did not exist under the Constitution of Trinidad and Tobago because there was no such right at the common law. This view was echoed in the Privy Council's judgment in *DPP v Nasralla*, Lord Devlin effectively freezing rights development by stating:

> This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected 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.[21]

As late as 1996, in a restrictive interpretation of the rights to due process of law and protection of law, the Privy Council maintained that 'the rights in question are rights which were enjoyed at common law before the Constitution … came into force.'[22] This reasoning led the court to find that there was no constitutional right to trial within a reasonable time in Trinidad and Tobago.

However, the approach of limiting rights by reference to their common law existence ebbed over successive decades, culminating in domestic courts' and the Privy Council's rejection of this particular colonialist frame in *Thornhill v AG*.[23] It was Georges J in the lower court in Trinidad and Tobago who initiated the dramatic change in approach, explicitly seeking answers from the Constitution rather than English common law and—revolutionarily—in the layman's understanding of the Constitution.[24] Nonetheless, a more lasting manifestation of the disposition towards continuity in Caribbean constitutionalism can to some extent be seen in judicial discovery of, and reliance on, unwritten or implied constitutional principles, chief among these being separation of powers and rule of law. Less abstract, more substantive constitutional principles have had less purchase in judicial

[20] (1967) 12 WIR 5
[21] *DPP v Nasralla* [1967] 2 AC 238 (JCPC, Jamaica) 247-48.
[22] *DPP v Tokai* [1996] AC 856 (Trinidad and Tobago) 862.
[23] (1974) 27 WIR 281 (HC, Trinidad and Tobago), 285; (1976) 31 WIR (JCPC, Trinidad and Tobago)
[24] (1974) 27 WIR 281, 284; Leighton Jackson, *Transitions in Caribbean Law: Law-making, Constitutionalism and the Convergence of National and International Law* (Ian Randle Publishers) 19.

decisions, possibly because they have more concrete expression in the words of the constitutions. Thus, principles such as equality have made some appearance in jurisprudence but have not had the impact of the separation of powers or rule of law.[25] Principles with greater claim to a foundational role in the constitution and historical longevity in both legal and political theory and practice are both more visible and impactful. It is partly due to this combination of factors that separation of powers and rule of law have been able to exert greater influence on Caribbean constitutionalism. Their foundational status and historicity make these principles inseparable from the colonial period and from Caribbean constitutional tradition.

The separation of powers was one of the paramount principles to garner such recognition in the region, starting with *Hinds v R. Hinds* was undoubtedly ground-breaking in being the first judgment of the Privy Council invalidating legislative provisions of a Caribbean state on constitutional grounds. More specifically, by basing the invalidation on the separation of powers principle, the Privy Council established the foundational and fundamental role of the principle in the design of the Constitution, proclaiming in immortal words that 'the basic principle of separation of powers' is 'implicit in a constitution on the Westminster model'.[26] The message of *Hinds* for early Caribbean constitutional interpretation was that of discomfort with substantive constitutional limitations on parliamentary power, such that the rights provisions—including what was then the section 20 right to trial by an independent and impartial tribunal—were not the focal or determinative features of the decision. This discomfort signifies retention of strong elements of a parliamentary sovereignty-based constitutional framework, which eschews substantive review and restraint of, parliamentary legislation. Further, the implications of *Hinds* for the nascent constitutional jurisprudence of the region were lack of constructive and instructive engagement with the terms of the constitution to discover and elucidate their meaning.

The most potent facet of the broader separation of powers principle—judicial independence—has resurfaced in jurisprudence in the region, speaking to issues ranging from taxation to juvenile sentencing to, most recently, security of tenure for judges.[27] *DPP v*

[25] See examples of the use of the principle of equality in *Yassin v Attorney of Guyana*, GY 1996 CA 3, (30 August 1996); *R v Hughes (Peter)* (2001) 60 WIR 156 (CA) [86]–[100].
[26] *Hinds v R* [1977] AC 195 (JCPC, Jamaica) 225.
[27] *Astaphan v Comptroller of Customs* (1996) 54 WIR 153 (Eastern Caribbean CA, Dominica); *Mollison v DPP* [2003] UKPC 6, [2003] 2 AC 411 (JCPC, Jamaica); *Bar Association of Belize v Attorney General of Belize* (2017) CCJ 4.

Mollison witnessed a triumph of separation of powers principle, upending a statutory rule requiring the sentence for young persons ('juvenile' offenders) convicted of murder to be fixed by the Governor General and simultaneously limiting the reach of the insulation of colonial laws provided by constitutional savings clauses. Mollison's sentence to detention during the Governor General's pleasure, pursuant to the colonial-era Juveniles Act 1951, was ruled by the Court of Appeal and the Privy Council to be in violation of 'the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other'.[28] On the face of the Constitution, the statute would appear to be saved by the 'general savings law clause' of section 26(8) of the Constitution of Jamaica, which preserves 'any law in force immediately before' independence from being held inconsistent with 'any of the provisions' of the Fundamental Rights and Freedoms chapter of the Constitution. Relying on a principle rather than a provision allowed colonial laws on youth sentencing to be truly tested against modern constitutional metrics. The constitutional precept of judicial independence was unpacked in greater detail by the Caribbean Court of Justice in *Bar Association of Belize v Attorney General of Belize* with expansive reflection on comparative approaches to judicial independence.[29] By contrast, early cases such as *Hinds* were more restrictive in their references, relying on British (English) and Privy Council authorities.

The rule of law has also assumed pride of place, becoming central to delineating the scope of due process protections guaranteed to accused and convicted criminals (including, most significantly, prisoners on death row) as well as overall judicial administration and access to justice.[30] In this vein, the Privy Council has held that the rule of law would be undercut by a law that permitted the government unconstrained power to limit the pursuit of rights claims.[31] Accordingly, legislation protecting parliamentary privileges by affording the Speaker discretion over admission into evidence of proceedings in Parliament effectively served as 'a source of protection of the executive from the courts and the rule of law' and must therefore be read down to achieve consistency with the constitutional right to access court proceedings for the determination and redress of fundamental rights.[32] Though the full importance of the rule of law's assistance in Caribbean constitutional pursuits emerged later than that of the separation of powers, there were some early signs of its potential, including

[28] *DPP v Mollison* (n 27) [13].
[29] *Bar Association of Belize v Attorney General* (n 27) [20] – [43].
[30] Se-shauna Wheatle, *Principled Reasoning in Human Rights Adjudication* (Hart 2017) Chapter 3.
[31] *Toussaint v (Randolph) v Attorney-General of St Vincent and the Grenadines* [2007] UKPC 48, (2007) 70 WIR 167 (JCPC).
[32] Ibid [26]-[34].

Philips JA's evaluation of the Bill of Rights in Trinidad and Tobago's Constitution as a means of "securing the rule of law in independent Trinidad and Tobago".[33]

The importance that ought to be accorded to the rule of law and separation of principles in constitutional interpretation rests in large part on their utility as background principles facilitating the interpretation of constitutional provisions and as a port of last call—a constitutional backstop providing clarity and rights protection where the express terms of the constitution are unclear or incomprehensive. Using constitutional principles in this way would facilitate development of Caribbean constitutionalism, permitting proper understanding and application of the terms of the constitution without allowing constitutional principles to overshadow or stifle the potential of the written constitution.

III. Tensions Between Unwritten Constitutionalism and Independent Constitutionalism

As constitutional interpretation evolves, constitutional principles have been at the forefront of navigating between retention of European constitutional hallmarks and formation of an independent constitutional identity. Part III maps the path from retention and adoption to creativity and invention through the lens of constitutional principles. First, it is argued that constitutional principles often function as a gateway to foreign law, and in so doing, can further an imbalanced cross-jurisdictional interaction which subjugates Caribbean states. Second, this section of the chapter discusses the extent to which fidelity to the legal and constitutional language of the former colonial power can cement dominative narratives, but then suggests the potential for traditional constitutional and legal language to create and transform, and resist entrenched patterns of control. The potential deployment of the creative capacity of constitutionalist language is discussed, with attention drawn to the rule of law and separation of powers as constructive tools in the project of Caribbean constitutionalism. The key concept in articulating this creative path for Caribbean constitutionalism, including constitutional principles, is creolization- understood as a mixture of cultures and systems that stimulates creativity and renewal.[34]

[33] *Lassalle v AG* (1971) 18 WIR 379, 395 (Phillips JA).
[34] Leighton Jackson briefly advocated 'creolization of English law' in Jackson (n 24) 6-7.

i. *Constitutional Principles as Colonial Law*

Constitutional principles are often cited as a bridge to refer to foreign law.[35] As relatively abstract concepts that have wide acceptance, constitutional principles possess the capacity for cross-jurisdictional engagement and application. Principles can be accepted at a high level of generality that further permits flexibility in translating their imperatives into concrete constitutional results.[36] They thereby serve to connect the Caribbean to the wider constitutional world. However, there is a foreboding sense that the migration and adoption of foreign law may represent a modern, new age colonialist strain in transnational law.[37] This sense derives in part from a lopsided flow of norms from developed (former ruling) states to less developed (former colonised) states. The result is that rather than benign transfers reflected in metaphors such as dialogue, in reality there can be observed a rather more asymmetrical movement of norms. Dialogue connotes statement and response, necessitating an interchange between speakers. On the contrary, the current dynamic is that of Europe speaking to the subaltern.[38] It was imbalance that formed the core of colonialism, and the current predominant flow of legal norms and decisions from Europe to the Caribbean creates such an imbalance that it conjures an image of neo-colonialism. This dynamic calls to mind Ania Loomba's perception that 'contemporary imbalances' mean that 'A country may be both postcolonial (in the sense of being formally independent) and neo-colonial (in the sense of remaining economically and/or culturally dependent) at the same time.'[39]

In this sense, a 'hierarchy of comparative law' is perpetuated, which positions Caribbean law and institutions near the bottom ranks of desirable or even acceptable comparative sources.[40] This hierarchical dynamic pervades comparative constitutional discourse to the extent that it has prompted Ran Hirschl to observe that 'The privileging of the global north and the view that it upholds the most advanced and most desirable set of values and practices is as common in comparative legal and constitutional inquiry as it is in economic or political

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[35] See, eg, *Reference re Manitoba Language Rights* [1985] 1 SCR 721 [60] – [105]; *Bar Association of Belize v Attorney General* (n 27) [33]-[39]; *DDP v Mollison* (n 27) [12] – [13]; *Fuller v Attorney General of Belize* [2011] UKPC 23, (2011) 32 BHRC 394 (JCPC, Belize) [38]-[46].

[36] Wheatle, *Principled Reasoning* (n 30) Chapter 7.

[37] Werner Menski, *Comparative Law in a Global Context* (2nd edn, Cambridge University Press 2006) 37-49; Wheatle, *Principled Reasoning* (n 30) 162.

[38] See discussion in Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 208-17.

[39] Ania Loomba, *Colonialism-Postcolonialism* (Routledge 1998) 7.

[40] See Diego López Medina, 'The Latin American and Caribbean Legal Traditions: Repositioning Latin America and the Caribbean on the contemporary maps of comparative law' in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 361-64.

development circles.'[41] Asymmetrical or imbalanced cross-citation is a feature of judicial comparativism that has been identified with more frequency in recent comparative scholarship.[42]

This asymmetry calls to mind the international dimension of colonialism. The construction of modern international law was largely in service of the structures of colonialism and in turn shaped by the relationships and attitudes of the colonial era.[43] The hierarchies of international law and relations that emerged from the colonial period have undoubtedly and unsurprisingly impacted on other transnational legal interactions. The most basic of the hierarchies on which international law rested and which it cemented is that of a demarcation between civilized and uncivilized states. The demarcation was at the very core of colonialism, claiming that occupation of land by uncivilized peoples did not establish sovereignty by those peoples; sovereignty over territory could only accrue to the civilized. One identifier of civilization was a system of law and the rule of law; both of which were deemed lacking in non-European societies.[44] This distinction, while certainly less direct and explicit in current legal doctrine and interactions, still finds less direct expression in judicial language and judicial exchange. Lord Millett's assertion in *Thomas v Baptiste* that due process of law in the Constitution of Trinidad and Tobago speaks to "the universally accepted standards of justice observed by civilised nations which observe the rule of law"[45] therefore inadvertently echoes centuries of calibration of transnational legal relations.

The rhetoric and objectives of the rule of law in comparative and international law undoubtedly contribute to the subordinate position of Caribbean law in transnational communications. Rule of law observance in development literature and practice perceive the developing state as the pupil and the developed state as the instructor, the developed state as the police and the developing state as the policed. This construct contributes to the idea that European states are the main bases of the rule of law and exporters of its values, while Caribbean states are scrutinized and measured for their observance of the rule of law. Seen through the postcolonialist lens, there is a sense that such scrutiny is designed to examine the

[41] Hirschl (n 38) 208.
[42] Ibid; Martin Gelter and Mathias Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts' (2012) 8 Utrecht Law Review 88; Se-shauna Wheatle, 'Comparative Law and the *Ius Gentium*' (2014) 3 Cambridge Journal of International and Comparative Law 1060, 1075.
[43] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004).
[44] Anghie (n 43) 58-61.
[45] *Thomas v Baptiste* [2000] 2 AC 1 (JCPC, Trinidad and Tobago) 22.

proximity of former colonies to the European ideal. The rule of law, in this sense, is seen as a reincarnation of the civilizing mission that underpinned and justified colonialism. On a more conceptual level, there is also widespread understanding of the rule of law as a distinctly European creation. Thus, subscribing to this understanding means that however commendable rule of law compliance in post-colonial states, such compliance will inevitably be perceived as satisfaction of European standards.

Both the developmental and conceptual understandings of rule of law conformity must be confronted to facilitate local (post-colonial) ownership of the rule of law, its objectives and compliance. The developmental framework is certainly a driving factor in the proliferation of rule of law language and objectives, but local imperatives and demands for adherence to rule of law values must not be ignored. Local rule of law driven initiatives include Integrity Commissions which have been established in at least 12 Caribbean states and an Association of Integrity Commissions and Anti-Corruption Bodies in the Commonwealth Caribbean, and the creation of an Anti-Corruption Working Group by the Government of Suriname. Conceptually, the traditional conventional view is that the rule of law has European origins. Yet, such an assumption presents a linear and unidimensional narrative that is belied by evidence of respect for similar values in broader non-European (both Eastern and Western) populations and governance structures. The Amerindians who inhabited the Caribbean region prior to European conquest[46] had developed legal norms which governed their civilizations.[47] For instance, their societies prescribed specific penalties for offences which tended to reflect the ethos of *lex talionis* (law of retribution).[48] In the East, Hindu philosophy teaches that individuals must fulfil worldly obligations according to their *dharma*—right action under the law—and comply with sanctions.[49] Significantly, in ancient India, the law was placed above the king and courts, and judges were respected and required to be impartial.[50] Chinese thinking saw rule of law requirements reflected in the rules of proper behaviour (‘*li’*) of Confucian philosophy.[51] Regarding the African continent, from the observation that African societies did not reflect the formal institutions present in European states, African societies

[46] The term ‘conquest’ is used in preference to ‘discovery’ as a more accurate and modern description of European arrival in, and establishment of rule over, the region.
[47] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge Cavendish 2008) 188-89.
[48] Ibid 189.
[49] R.P. Anand, ‘Role of the "New" Asian-African Countries in the Present International Legal Order’ (1962) 56 American Journal of International Law 383, 397.
[50] Ibid 397-99.
[51] Ricardo Gosalbo-Bono, ‘The Significance of the Rule of Law and Its Implications for the European Union and the United States’ (2010) 72 University of Pittsburgh Law Review 229, 280-81;

were said to possess custom and religion only, but not law.[52] However, in reality, ancient Africa possessed developed legal systems and structures, giving the lie to the myth that Africans lacked a legal history or a history of rule of law.[53] Though ancient Egypt stands in stark contrast to the conventional denial of African legal systems, respect for law in Yoruba societies also presents evidence of the pre-colonial existence of law and legal systems in Africa.[54] Accordingly, evidence suggests that in both the conceptual and practical developmental dimensions, European and local perspectives ought to permeate our constitutionalist discourse and practice.

ii. *Language and Ideology*

Assessment of governmental and legislative acts against the standard of widely accepted constitutional principles serves to express fidelity to an ideology of democratic constitutionalism and project the legitimacy of the constitutional sate in question. The language of a constitutional principle allows the judge, speaking as a member of the judicial institution, to reinforce belief in the legitimacy of that institution. This, in turn, contributes to the maintenance of respect for, if not agreement with, a decision in a hard or controversial case.[55] In this way, there may be consensus that a judicial decision in a hard case ought to be accepted and respected, regardless of disagreement with the position actually taken by the court. Echoes of such ideological assertions can be found, for instance, in *AG of Belize v Zuniga*, through the Caribbean Court of Justice's claim that 'application of the separation of powers doctrine upholds the Constitution, advances the rule of law and promotes the description of Belize as a sovereign democratic State.'[56]

The linguistic expression of ideology has special significance in the post-colonial state. It is often through the language of the former coloniser that the new state expresses that it is civilized and its officials (including judges) express their own maturity and the maturity of the institutions they represent.[57] The extent to which language is bound up with the acceptance of a people as civilized has been noted by Frantz Fanon, who, in his celebrated

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[52] William Idowu, 'Against the Skeptical Argument and the Absence Thesis: African Jurisprudence and the Challenge of Positivist Historiography' (2006) 6 Journal of Philosophy, Science and Law 34, 36.
[53] Ibid.
[54] William Idowu, 'Law, Morality and the African Cultural Heritage: The Jurisprudential Significance of the Ogboni Institution' (2005) 14 Nordic Journal of African Studies 175, 184-87.
[55] A hard case, according to Dworkin, is one in which there is no clear binding authority regarding the issue and lawyers are divided over the result: Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 74.
[56] [2014] 5 LRC 1 (CCJ, Belize) [40].
[57] On the connection between notions of maturity and colonialism, see Alastair Pennycook, *English and the Discourse of Colonialism* (Routledge 1998) 60-61.

'Black Skin, White Masks', remarked that, 'To speak means to be in a position to use a certain syntax, to group the morphology of this or that language, but it means above all to assume a culture, to support the weight of a civilization.'[58] In invoking the legal language and legal architecture of the European state, the new post-colonial state signals acceptance of the structure, rationality and institutions that were deemed lacking in indigenous Caribbean and Eastern populations. Fidelity to the language, specifically the legal constitutional language of Europe is, in this sense, the marker of civilisation. Thus, in former colonies, linguistic expression of fidelity to democratic constitutionalism is meant to project the institutional and constitutional maturity of the new state.

The idea of fidelity to tradition as an expression of constitutional legitimacy is apparent in the affirmations of 'continuity' in the case law, with Lord Diplock speaking as a member of the Privy Council in *Hinds v DPP*, on appeal from Jamaica, stating authoritatively that the new constitutions in the Caribbean 'provided for the continuity of government through successor institutions'.[59] In that case the Privy Council invalidated sections 8 and 10 of the Gun Court Act 1974, Jamaica, on the ground that they violated the constitutional principle of the separation of powers by vesting sentencing powers in the Governor General of Jamaica and a Review Board comprised mainly of non-judicial appointees. Lord Diplock, delivering the Opinion of the Judicial Committee, held that the 'principle of separation of legislative, executive and judicial powers' is 'implicit in a constitution on the Westminster model' and that that principle was violated by conferring the power to determine sentences on an executive body.[60] The central place of constitutional principles derived from England as a marker of constitutional maturity is vivid in *Hinds*. Thus, we get the striking imagery of Lord Diplock's declaration that Westminster constitutions 'were negotiated as well as drafted by persons *nurtured in the tradition of that branch of the common law* of England that is concerned with public law'.[61] This presents England and the common law as the embodiment of mature statehood and constitutionalism and the former colonies with their new constitutions as legal offspring, aspiring towards but not yet possessing the qualities of full-fledged democratic constitutionalism.

[58] Frantz Fanon, *Black Skin, White Masks* (Paladin 1970) 17-18.
[59] *Hinds* (n 25) 212.
[60] Ibid 225, 226.
[61] Ibid (Emphasis added).

Yet, language is not immutably fixed as 'a source of control'. It is also, as George Lamming posits, 'a source of invention.'[62] Creolization, in the sense of the intermixture of peoples in new locales to create new linguistic and cultural patterns, reveals such potential for invention in language in general and the language of law specifically. Creolization encapsulates both the mixture of culture and peoples and, significantly, the *creation* of communities and identities. From displacement, uncertainty and conflict, the process of creolization generates diversity, syncretism and complex identities.[63] In the French Caribbean, in particular, creolization (créolité) is articulated as a foundation from which 'creativity which is distinctive, original to the area itself, and better adapted to capture the realities of daily life in the postcolony can be … produced.'[64] Thus, from linguistic roots, the concept of creolization has since expanded to address the arts, and in modern discourse, resonates in socio-cultural studies more generally. Accordingly, the creativity encapsulated and encouraged by creolization can take root not only in linguistic and cultural artistic expression, but also in legal expression. The legal language of constitutional principles can therefore be marshalled to represent Caribbean constitutionalism and to develop a more distinct Caribbean version of separation of powers, rule of law and related principles. Thus, while the term 'rule of law' or 'état de droit' may be formally expressed in the language of Europe, its meaning and functions can speak with a creole, Caribbean voice. In this way, creolization can seek to supply the invention and innovation that was lacking at the point of independence and in early constitutional interpretation.

The potential for creolized interpretation and application of constitutional principles is seen in the robust substantive meaning given to the rule of law doctrine and the normative impact of separation of powers in Caribbean jurisprudence. Nonetheless, this potential is somewhat undercut by the methods used to supply the content and impact of these versions of the rule of law and separation of powers; if the principles are underpinned (exclusively) by external forces and actions, they have less claim and capacity to speak for and through Caribbean nation states. These facets of the judicial use of rule of law and separation of powers are explored in the section below.

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[62] George Lamming, 'The Sovereignty of the Imagination', cited in Stuart Hall, 'Créolité and the Process of Creolization' in Okwui Enwezor (ed) *Créolité and Creolization* (Distributed Art Pub Incorporated 2003) 35.
[63] Cristina-Georgiana Voicu, 'Caribbean Cultural Creolization' (2014) 149 Procedia -Social and Behavioral Sciences 997, 998.
[64] Hall (n 62) 35.

iii. Judicial Creativity through Separation of Powers and Rule of Law

Notwithstanding the deep-rooted historical and conceptual concerns regarding Eurocentrism in the meaning and application of constitutional principles—particularly in the use of such principles as a conduit to foreign law—this view of constitutional principles is not fixed. The question is whether there is a means of pushing past this conceptualization of the use of constitutional principles and using (and viewing) principles to achieve more autochthonous constitutional development. There is encouraging evidence that constitutional principles can be generative of such constitutional advancement. While supplying foundational mooring to the mainstays of the constitution, fundamental principles such as the rule of law and separation of powers have been a source of constitutional innovation in the region. Such innovation has, at times, enhanced individual rights and brought Caribbean law closer to prevailing trends in international and foreign law. Yet, this innovation is also open to the criticism that it serves not to innovate in order enhance consistency with the nation's own constitutional values, but rather, to secure or further fealty to a distant constitutional master.

Louis Lindsay has argued that 'the core of the myth of independence centres on the substitution of procedural and legalistic criteria for functional and substantive ones.'[65] These comments can be transposed as a reflection on the force and content conveyed by the rule of law as a constitutional principle. Orthodox portrayals of the rule of law champion a largely procedural vision of the doctrine, with emphasis on requirements of government through and under law, clarity and the avoidance of retrospectivity. Yet, a more fulsome substantive valorized version can be seen in action in Caribbean case law, a version that places requirements on the content of the law, including observance of human rights.[66]

Yet, in death penalty cases that saw the Privy Council ameliorating the death penalty through the use of a substantive vision of the rule of law, one can hardly escape the impression that the decisions were a foreign imprint on the Constitution rather than an interpretation of the Constitution. This impression was most vivid in *Lewis v R*, where the principle was invoked to afford convicted persons the right to have international human rights petitions determined before their execution.[67] In two ways, this interpretative technique could be said to subvert independent constitutionalism. First, the interpretation was not rooted in the constitutional text. As the right to "protection of the law" was said to invoke the concept

[65] Louis Lindsay, *The Myth of Independence: Middle class politics and non-mobilization in Jamaica* (Sir Arthur Lewis Institute of Social and Economic Studies (SALISES) Working Paper No. 6).
[66] See Wheatle, *Principled Reasoning* (n 30) 51-53.
[67] *Lewis v AG of Jamaica* [2001] 2 AC 50 (PC, Jamaica) 81-85.

of the rule of law, the textual terminology became subsumed and subordinated to more nebulous understandings of this principle. This necessarily makes judicial assessments of the principle's content and reasonable application at least as consequential as the textual phrasing, but it has further consequences. Reliance on the rule of law potentially places greater emphasis on discovery of past understandings of the principle, which, in light of the age of the post-colonial state, necessitates heavy reliance on pre-colonial and European precedent. Second, this approach arguably accomplished back door incorporation of international rights treaties—specifically in the *Lewis* case, the American Convention on Human Rights. The domestic political backlash to *Lewis* and other amelioration case law was dramatic and there was subsequently measured judicial reaction by an autochthonous Caribbean court (the Caribbean Court of Justice (CCJ)). The CCJ achieved the same result in *Joseph and Boyce*, on appeal from Barbados, while also placing reliance on the rule of law, but used reasoning that prioritised actions and statements of the Barbadian executive and Parliament.[68] The CCJ's decision that the applicants had a legitimate expectation not to be executed prior to a determination of their rights petitions was constructed through reliance on and governmental statements in support of the American Convention on Human Rights and the government's practice of allowing condemned prisoners to have their international human rights petitions processed before execution.

As a more fundamental innovation on the traditional common law approach to rights protection, constitutional principles have evolved in Caribbean jurisprudence to impose positive obligations on the government. So, for instance, the Caribbean Court of Justice, through *Maya Leaders Alliance v Attorney General of Belize*—and *Joseph and Boyce*, as discussed above—moved beyond the protection of the law and the rule of law underpinning it, as a guarantee of bare access to courts towards a broader requirement for relief for constitutional rights infringements. In *Maya Leaders Alliance*, the traditional procedural focus adopted by the majority of the Court of Appeal, limiting protection of the law to 'the availability of processes for the vindication of rights rather than to the substantive rights themselves' was soundly rejected.[69] The CCJ held in *Maya Leaders Alliance* that the textual guarantee of protection of the law, interpreted consistently with the rule of law, 'may, in appropriate cases, require the relevant organs of the state to take positive action in order to

[68] *AG v Joseph and Boyce* (2006) 69 WIR 104 (CCJ, Barbados).
[69] *Maya Leader Alliance v AG of Belize* [2015] 2 LRC 355 [316].

secure and ensure the enjoyment of basic constitutional rights.'[70] This innovation was all the more dramatic as the Court, in crafting a remedy for breach of protection of the law, addressed the oppression of Mayans as indigenous people and the ills of colonialism. The Court spoke to a need to provide 'redress for centuries of oppression endured by the Maya people since the arrival of the European colonisers.'[71]

The CCJ found in favour of the Mayan claimants in respect of the right to protection of the law but denied their claim to damages for breach of the right to property. The rejection of the property rights claim could be read as an indictment of traditional property rights encapsulated in Caribbean constitutions, with their roots in dynamics of dominance. Alternatively, reliance on protection of the law to the exclusion of property rights might also signal a failure to repurpose the right to property in a manner that respects customary and indigenous (or indigenous-like) rights. The claim to relief for arbitrary deprivation of property failed on the ground that while the Maya did suffer loss, the nature and extent of the property rights to which they are entitled remained undefined, as evidenced by a Consent Order accepting the government's undertaking to take measures to concretely define those entitlements. In pursuing this line of reasoning, there is a sense that despite the advances made in providing more fulsome protection of the law, the Court missed an opportunity to explore the full potential of the right to property and reclaim this right for indigenous populations.

IV. Creolization in the Midst of Globalization

Creating a Caribbean constitutional identity requires reckoning with the history of law politics and culture in the region as well as with the future of legal development in the world. The previous section confronted the challenge of using constitutional principles to foster judicial creativity and constitutional transformation, rather than the traditional adoption of European law and legal constructs. In developing an independent constitutional identity, the Caribbean must also contend with the drive of global constitutionalism, understood as a burgeoning exchange and developing consensus among constitutional states. Again, constitutional principles have the potential to play a crucial role in this process.

i. *To-ing and Fro-ing: The Global and the Local*

Communications, transactions and ideas have become more globalized in recent decades, and legal issues and interactions are increasingly viewed in transnational and even global terms.

[70] Ibid [47] (Byron P and Anderson J).
[71] Ibid [75] (Byron P and Anderson J).

Constitutional principles have been at the vanguard of connecting legal norms, institutions and jurisdictions. Yet, there is a countervailing inclination towards localization, which provides a restraint on tendencies towards harmonization and adoption of foreign laws. That blend of the global and the local is often described in current literature as 'glocalization'.[72] Another means of labelling and describing this phenomenon in the post-colonial sphere is creolization. This section maintains that the process of creolization is capable of marshalling comparative analysis and international law as mediated through the mechanism of constitutional principles. Thus the constitutional project can and ought to be transformed from one of adoption to one of adaptation.

Creolization in a broad sense addresses the hybridization of cultures, particularly the cross-fertilization between indigenous and introduced, or immigrant, cultures. The concept has deep roots in Caribbean history, designating the process by which primarily African and European cultures interacted in their new locale.[73] Moreover, it eschews firm boundaries between cultures and languages; it is about mixing rather than differentiating. However, as with other processes and interactions born in the colonial era, creolization did not produce a mixture of equal (in status) parts; interactions incorporated the familiar dynamics of domination and subordination. Finally, creolization is useful in the context of developing national constitutionalism because it rests not only on that which went before; it is ultimately creative, building on the past and present to generate something new. It is active, continuing, and incomplete.

In sum, the goal of achieving meaningful creolization in constitutional law must harness the creative qualities of the concept—what Stuart Hall refers to as "the good side of creolization" while rejecting "the bad side" of domination and subjugation.[74] Thus, this endeavour requires a similar approach to that of marshalling and creating national and regional understandings of constitutional principles. Indeed, the process of creolization marks a path forward for Caribbean understandings and applications of constitutional principles and of their own constitutionalism. The ongoing, incomplete nature of creolization permits the transformation of Caribbean constitutionalism in a manner that accentuates a Caribbean identity while rejecting hegemonic interactions.

[72] See, eg, Menski (n 37) 12.
[73] Hall (n 62) 28-30.
[74] Hall (n 62) 31.

The CCJ's analysis in *Maya Leaders Alliance* features the rupture and recognition that are essential in creolizing Caribbean constitutional law. Moreover, while implicitly rejecting Eurocentric notions of property ownership—that is, the denial of recognition of property ownership by indigenous populations[75]—the judgment was not an embrace of jurisprudential insularity. The Court engaged international and foreign law in its effort to meet the current demands of the constitutional text in the context of the socio-economic history of the state. Reference was made to case law from the Supreme Court of Canada, the European Court of Human Rights, the Constitutional Court of Indonesia and the United States Supreme Court.[76] International legal agreements, recommendations and judicial decisions provided evidence to support the land rights of the Mayans and their claim to remedy. Most significant among these international references was the Inter-American Commission of Human Rights Report in the *Maya Communities Case*, which concluded that the Government of Belize had violated the Maya people's rights to property, non-discrimination and protection of the law. The Court produced a prototype for an internationally conscious but distinctly Caribbean constitutional approach, warning that 'the international jurisprudence does not and cannot alleviate the duty of this court to have regard to the actual wording and context of the constitutional provisions in question' and explaining that 'international jurisprudence must be mediated through the peculiar legal traditions and constitutional arrangements which this court is sworn to uphold.'[77] The protection of the law was thereby interpreted in accordance with the rule of law as informed by international standards and domestic norms.

ii. *Bringing the Caribbean to the World*

It has been rightly commented that the Commonwealth Caribbean has made an 'unrecognised contribution to the Privy Council's jurisprudence'.[78] The unrecognised contribution is stark in setting standards for the interpretation of a constitution. There has been wide and authoritative acceptance in common law states that a constitutional text demands a 'generous and purposive interpretation' but there has been correspondingly less attribution or reference to *Minister of Home Affairs v Fisher*[79] and other Caribbean case law that helped to concretize this interpretative standard. Adoption of this standard has been helpful in developing the

[75] See also *Aurelio Cal and Maya Village of Santa Cruz v Attorney General of Belize* (SC, Belize, 18 October 2007)[79]

[76] *Maya Leaders Alliance* (n 69) [32]-[35].

[77] *Maya Leaders Alliance* (n 69) [8].

[78] Rose-Marie Belle Antoine, 'Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems' (2005) 29 Nova Law Review 141, 150.

[79] [1980] AC 319, 328.

fledging British doctrine on constitutional statues, with Lord Bingham in *Robinson v Secretary of State for Northern Ireland*, explaining that as the Northern Ireland Act of 1998 'is in effect a constitution', its provisions are to 'be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody'.[80]

Alongside that missing recognition, there are also missed opportunities for Caribbean jurisprudence to influence comparative understanding and articulation of constitutional principles. The United Kingdom in particular, which has a fledging constitutionalist jurisprudence, ushered along in part by European commitments in the form of the European Convention on Human Rights and the European Union, and partly by the recent march of common law constitutionalism, could be guided by the lengthy constitutional experience of local Caribbean courts as well as the Privy Council. Yet, there is a statistically evident preference in the UK Supreme Court judgments for comparative guidance from states such as Canada and Australia.[81] This preference is supported by extra-judicial statements, such as those by Lord Reed, who at a symposium at the Cambridge Public Law Conference in 2016, defended the special relevance of Canadian and Australian jurisprudence.[82] Lord Kerr in *R (SG (previously JS)) v Secretary of State for Work and Pensions* argued that Convention rights could be informed by international instruments which expressed standards that were internationally recognised.[83] Lord Kerr referred to Caribbean Privy Council case law but not the CCJ judgment and no other member of the Supreme Court noted relevant Caribbean case law. This was undoubtedly a missed opportunity given the scope of analytical and jurisdictional coverage in the CCJ judgment.

iii. Reconciling Creolization and Globalization

Constructing a coherent and stable Caribbean constitutional identity requires both invention and adoption: this combination is the essence of creolization. A creolized Caribbean constitutional identity therefore necessitates acceptance of the inevitability of adoption, an inevitability that stems from both the past and the present. The historical and precedential progress of constitutional law in the region makes some acceptance of pre-constitutional and

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[80] [2002] UKHL 32 [11].

[81] See, eg, Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013) 206; Hélène Tyrell, The Use of Foreign Jurisprudence in Human Rights Cases before the UK Supreme Court (DPhil Thesis, 2014, unpublished) 166.

[82] Chief Justice French and Lord Reed, 'Inter-Jurisdictional Dialogue', Public Law Conference: The Unity of Public Law (12 September 2016). Available at https://www.youtube.com/watch?v=k-pmfynqbko.

[83] [2015] UKSC 16 [247]–[257].

foreign norms inescapable. The current march of global constitutionalism speaks to the inevitability of adoption in the present and future. Globalization—and glocalization—permeates law and legal interactions to such an extent that it must reach the very fundamentals of the law in constitutionalism and the foundational principles of that constitutionalism. Though most of this Chapter has critiqued the dominant impact of colonial era laws, structures and approaches, there is a corresponding potential for domination by globalization. The threat that globalization—including globalization of law—operates to undermine national identity has been sounded in multiple fields, with the concern that claims of universality will mask Eurocentric and Anglo-American domination,[84] and that such domination will then unduly affect and undermine domestic law.

Certainly, globalization and the march of 'global law' places pressure on local Caribbean constitutional growth but it undoubtedly also presents an opportunity. If conversations across the legal world, so to speak, are expanding, there is potentially room for more voices to be heard. As more jurisdictions contend with legal cross-fertilization, hybrid laws and systems, multi-layered systems and overall expanded legal audiences, there is much to be learned from jurisdictions that were forged in cultural and legal interactions. George Lamming has said of moments in Caribbean history that '[t]he world met here',[85] poetically describing the confluence of cultures and nations that emerged from the forced, indentured and imperialist migrations to the region. Caribbean states' experience with legal and cultural mixing is indeed testament to many manifestations of globalization through history and may be instructive in the effective negotiation of streams of legal influences and construction of common (legal) languages. Moreover, facets of the Caribbean experience are now arguably reflected in globalization discourse and practices, as foreshadowed by James Clifford's prescient declaration in 1988 that 'we are all Caribbeans now in our urban archipelagos'.[86] Of course, caution must be exercised in applying the Caribbean experience to other locales, but the themes of mixture, creation, and new identities that emerge in Caribbean creolization undoubtedly echo in current waves of globalization. The Caribbean experience of negotiating and navigating these arenas ought to be encouraged as a point of reference for those fields—including the legal field—affected by globalization's march.

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[84] See, eg, Se-shauna Wheatle, 'Bounded Cosmopolitanism and a Constitutional Common Law' (2016) Journal of Comparative Law 235.

[85] George Lamming, 'The Occasion for Speaking' in Bill Ashcroft and others (eds), *The Post-Colonial Studies Reader* (Routledge 1995) 16.

[86] James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* (Harvard University Press 1988) 173.

In the midst of bringing the Caribbean constitutions and constitutionalism to the world and engaging in the creation of globalized iterations of law, there remains a necessity for independent constitutionalism. Autochthonous constitutionalism can best be achieved through (re)design of constitutional text, institutional patriation and through locally tailored constitutional techniques, including the glocal elaboration of constitutional principles. The analysis above reveals furtive attempts towards developing these elements of independent constitutionalism, but there is a need for more ardent commitment to each. Constitutional redesign in the region has been limited geographically and substantively. In the Commonwealth Caribbean, only Guyana and Trinidad and Tobago have promulgated new constitutions, with the only other major reform overhaul being the replacement of Jamaica's fundamental rights chapter in 2013. The French Caribbean has restricted its constitutional assertion to increased autonomy without independence.[87] Efforts towards institutional patriation have borne fruit with respect to the creation of the Caribbean Court of Justice however its full potential has been stymied. To date, only Barbados, Belize, Dominica and Guyana have subscribed to the appellate jurisdiction of the CCJ, with three quarters of the eligible jurisdictions continuing to send appeals to the Judicial Committee.[88] Moreover, in a bruising rejection, the Grenadian populace voted 'no' in November 2016 on a referendum to accept the CCJ's appellate jurisdiction.[89] It is, accordingly, through judicial reasoning that Caribbean constitutionalism has achieved most of its significant post-independence reform and it is likely that courts will remain the most promising forums for further constitutional patriation and creolization. Local judicial tailoring of constitutional principles and other interpretive techniques provides a fruitful avenue for continued deliberative constitutional development.

[87] Derek McDougall, 'The French Caribbean during the Mitterrand Era' (1993) 31 Journal of Commonwealth and Comparative Politics 92; William Miles, 'The irrelevance of independence: Martinique and the French presidential elections of 2002' (2003) 77 New West Indian Guide 221.

[88] Tracy Robinson and Arif Bulkan, 'Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights' (2017) 80 Modern Law Review 379, 380.

[89] Regardless of the outcome, referendums, with their binary framing, are often ill-suited to facilitate deliberation of complex issues of constitutional reform. See Lawrence LeDuc, 'Referendums and Deliberative Democracy' (2015) 38 Electoral Studies 139, 141-43; House of Commons Public Administration and Constitutional Affairs Committee, *Lessons Learned from the EU Referendum* (12 April 2017) paras 13-16.

V. Conclusion

The history of the Caribbean is partly one of movement and cultural mixture. These dynamics are vividly reflected in constitutional principles and their usage in Caribbean jurisprudence. It is unsurprising, then, that constitutional principles such as separation of powers and rule of law helped to inform the germinal cases in Caribbean constitutional law. What remains to be settled is the role that these constitutional principles will play in the continuing formulation of Caribbean constitutionalism. While the rule of law and separation of powers ideas have traditionally been viewed and indeed used as European and Eurocentric inventions, there is emerging of evidence of Caribbean courts imbuing these principles with locally influenced content. Further, in applying these principles, Caribbean courts have fostered a budding creativity in Caribbean constitutionalism.

This Chapter has argued that this creativity and invention is pivotal to development of a distinctly Caribbean constitutional jurisprudence, and that the concept of creolization provides an optimal means of harnessing the creative potential in Caribbean constitutionalism. The process of creolization represents the mixture of cultures, systems and peoples to create syncretic identities, ideas and norms. Creolization is thereby reflective of hybridization and adaption; it continually builds on the past to generate the future through perpetual transformation. By emphasizing mixture, creolization implicitly rejects Eurocentricity and over-reliance on colonial structures. Creolization is further representative of the future of constitutional development, by mapping onto glocalization trends, to generate constitutionalism that blends global and local influences. By advancing a creolized understanding of constitutional principles, which are global in their appeal, and adapting those principles to local imperatives, Caribbean courts can foster a Caribbean constitutionalism that is simultaneously equipped for the region it serves and consistent with the values of the wider constitutional world.