

The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the 'Perfect Nation'

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Commonwealth Caribbean constitutions were famously likened by Francis Alexis to "birth certificates" – striking imagery that conveyed the paradigmatic shift occasioned at independence where written constitutions with entrenched Bills of Rights supposedly heralded the decline of parliamentary sovereignty. However, recent changes to Jamaica's constitutional regime of fundamental rights, which entrench discrimination against historically marginalized communities by narrowly defining marriage and insulating capital punishment, are of doubtful political and moral legitimacy and call into question the scope of constitutional supremacy. This article explores these issues through an examination of the basic structure doctrine and its parallels in constitutional theory, which suggest that certain types of constitutional change are beyond the authority of constituted powers. It argues that the idea that constitutions contain an inviolable core embodying a central identity would render these constitutional amendments unconstitutional, because of the extent to which they disrupt the coherence of the Jamaican constitution and its ideals of equality, fairness and social justice.

Les constitutions des pays des Caraïbes membres du Commonwealth ont été comparées à des « certificats de naissance » par Francis Alexis – une image frappante qui reflète le changement de paradigme occasionné par l'indépendance par lequel les constitutions écrites comprenant des chartes de droits enchâssées auraient supposément mené au déclin de la souveraineté du Parlement. Cependant, certains changements récents au régime constitutionnel jamaïcain des droits fondamentaux enracinent la discrimination à l'encontre des communautés historiquement marginalisées en donnant au mariage une définition très étroite et en conservant la peine capitale. Ces changements, d'une légitimité politique et morale douteuse, remettent en question la portée de la suprématie constitutionnelle. Cet article explore ces questions par une analyse de la doctrine de la structure basique de la constitution et ses parallèles en théorie constitutionnelle, qui suggèrent que certains types de changements constitutionnels vont au-delà de l'autorité des pouvoirs constitués. L'article soutient qu'à la lumière de l'idée qu'une constitution comprend un noyau incarnant une identité centrale inviolable, ces amendements constitutionnels seraient inconstitutionnels puisqu'ils perturbent la cohérence de la constitution jamaïcaine et ses idéaux d'égalité, d'équité et de justice sociale.

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I. INTRODUCTION

In his whirlwind review of Commonwealth constitutions, William Dale affably concludes that the British drafters “appear to have anticipated the needs of most of the Caribbean countries”.² In truth, the absence of systematic constitutional reform across the region cannot be taken either as an endorsement of the legitimacy of drafting processes or as an indication of the suitability of the result. A persistent critique of the boilerplate constitutions bequeathed by Whitehall drafters to each of the nation states of the Commonwealth Caribbean upon attaining independence was that these constitutions were not autochthonous, or well-suited to the needs of the diverse collection of peoples transplanted, in the majority of cases forcibly, from around the globe.³ In attempting to address these shortcomings several postcolonial Caribbean nations have embarked on reform processes of varying breadth and scope, but with decidedly mixed results. Constitution-making (or re-making) is treacherous terrain, and as illustrated by Jamaica’s recent exercise in constitutional reform, the costs of attaining indigeneity have been high for some.

The Jamaican Charter of Fundamental Rights and Freedoms, long in the making and passed into law in April 2011,⁴ addresses several of the deficiencies of the original version in the 1962 Independence Constitution which it replaced. Substantive reforms include the addition of expanded equality rights,⁵ the express articulation of political rights, such as the right to vote, and new guarantees of certain key social rights pertaining to children and the environment. The Charter also makes several explicit references to human dignity, which has been described as a fundamental human value⁶ and held by the European Court of Human Rights to constitute the “very essence” of the European Convention on Human Rights.⁷ Procedurally, it ushered in certain important reforms, such as the narrowing of the application of the state action doctrine, possibly expanded standing requirements for litigating violations, and the repeal of the provision permitting the passage of extraordinary legislation that had come to be dubbed Special Acts. In several ways, therefore, the 2011 Charter embodies a progressive realization of rights,

² William Dale, “The Making and Remaking of Commonwealth Constitutions”, (1993) 42 ICLQ 67 at 80.

³ Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (Cayman Islands: Caribbean Law Publishing Co, 2002) at 1-45.

⁴ *Jamaican Charter of Fundamental Rights and Freedoms Act (Constitutional Amendment)*, 2011, no 12, [Charter].

⁵ Such as, for the first time, the prohibition of discrimination on the grounds of being male or female and a general right to equality before the law.

⁶ *State v Makwanyane*, [1995] 1 LRC 269 (S Afr Const Ct) [*Makwanyane*]; *National Coalition for Gay & Lesbian Equality v Minister of Justice*, [1999] 1 SACR 6 (S Afr Const Ct).

⁷ *Christine Goodwin v UK*, (2002) 35 EHRR 18 [90], No 28957/95 (11 July 2002).

precisely the kind of evolution that is expected to occur in a maturing society.

Juxtaposed alongside these reforms, however, are a number of retrograde provisions that dilute previously existing constitutional protections. For example, the Charter stipulates that no delay in carrying out capital punishment is henceforth to constitute a violation of the prohibition against “inhuman and degrading treatment”.⁸ By freezing the meaning of this provision the Charter frustrates an established technique of interpreting constitutional bills of rights as living documents, which are responsive to society’s changing needs.⁹ Additionally, the Charter continues saving pre-independence punishments,¹⁰ and precludes redress for condemned prisoners in relation to conditions of their incarceration pending execution.¹¹ It also retains a general savings provision, albeit of more limited scope than its predecessor, which nonetheless immunizes certain pre-independence laws¹² from challenge on the ground of inconsistency with the Charter. Furthermore, for the first (but presumably not the last) time in a Caribbean constitution, a definition of both formal and common law marriage as the union of two people of opposite sex has been included, which completely forecloses the possibility of any recognition of rights for same-sex couples.¹³ The effect of these changes, which reveal an undisguised animus against some of society’s most vulnerable populations, is to nullify, at least in one instance, one of the most seminal decisions in Caribbean constitutional jurisprudence,¹⁴ and in another to entrench discrimination in the law.

As perverse as some of these changes are, they cannot be categorized and thereby dismissed as the extremism of one Caribbean state. On the contrary, despite the geographical spread of the twelve nations making up the Commonwealth Caribbean,¹⁵ their shared colonial ancestry with its attendant common law base have combined to foster a degree of fluidity in substantive legal norms and culture across the region. This fluidity is facilitated by an established inter-governmental structure and a gradual dismantling of barriers to movement - factors which ensure that policy-makers are acutely

⁸ Charter, *supra* note 4, s 13(8)(a).

⁹ *Minister of Home Affairs v Fisher*, [1979] 2 WLR 889 (PC Bahamas); *R v Lewis*, (2007) 70 WIR 75 at para 74, [2008] 2 LRC 608 (CCJ, Barbados).

¹⁰ Charter, *supra* note 4, s 13(7).

¹¹ *Ibid*, s 13(8)(b).

¹² Charter, *supra* note 4, Laws relating to sexual offences, obscene publications, and offences regarding the life of the unborn: s 13(12).

¹³ *Ibid*, s 18.

¹⁴ *Pratt and Morgan v A-G*, [1993] UKPC 37, [1994] 2 AC 1 (PC Jamaica).

¹⁵ These are the independent nations of Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Christopher & Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

aware of developments across the region. Legal reform in one territory is keenly observed and sometimes copied in another, as has taken place in a gamut of areas spanning both private and public law. Thus the reversal of *Pratt and Morgan* in the 2011 Jamaican Charter was not unprecedented, for it had first been done almost a decade before in Barbados. The latter's bill of rights was amended in 2002 to ensure that no delay in carrying out a death sentence would thereafter constitute a violation of the prohibition against the imposition of inhuman or degrading treatment or punishment.¹⁶ In addition, this constitutional prohibition was also excluded from applying to mandatory sentences and prison conditions, constituting yet another reversal of evolving Caribbean human rights jurisprudence in states where there was no general savings law clause.¹⁷

There are other examples of dubious constitutional reform proposals. In the last decade St Vincent and the Grenadines embarked on an expansive process of constitutional reform, which resulted in a draft constitution wherein marriage was defined as a "legal union only between two persons each of the opposite sex".¹⁸ This draft was eventually rejected in a referendum in November 2009, but only because of what was widely considered to be the declining popularity of the incumbent government as well as an indication of the populace's desire to retain links with Britain (a major proposal was the abolition of the monarchical form of government).¹⁹ Significantly, however, what survived the Vincentian process was its draft constitution's overtly homophobic definition of marriage, which reappeared in the Jamaican Charter a mere two years later.

There can thus be no assumption in the region that rights – of whatever standing in international or even domestic law – are secure from legislative interference. The relatively undemanding procedural prerequisites are invariably effective in forestalling intemperate change because of deep partisan divides, but as in Jamaica in 2011, differences can sometimes be overcome. This possibility, therefore, dictates that it is not only the formal machinery for constitutional change which must be scrutinized, as has been comprehensively done in the Commonwealth Caribbean.²⁰ Equally deserving of analysis is the issue of substantive constraints on constitution drafting and reform.

¹⁶ *Barbados Constitution (Fifth Amendment) Act, 2002*, no 14.

¹⁷ *Reyes v The Queen*, [2002] UKPC 11, [2002] 2 WLR 1034 (PC Belize); *R v Hughes*, [2002] UKPC 12, [2002] 2 WLR 1058 (PC St Lucia).

¹⁸ *Draft Constitution of St Vincent and the Grenadines 2009*, clause 17(2) (SVG).

¹⁹ Matthew Bishop, "Slaying the 'Westmonster' in the Caribbean? Constitutional Reform in St Vincent and the Grenadines", (2011) 13 BJPIR 420 at 433.

²⁰ Francis Alexis, *Changing Caribbean Constitutions* (Antilles Publications, 1983).

To this end, I propose in this article to undertake a modest examination of the central problem raised by some of the provisions of the 2011 Jamaican Charter, namely whether the plenary power of the legislature is sufficient to effect constitutional change. As a springboard for this discussion, I begin in section two by examining *Bowen v AG*, a first instance decision from Belize where this very issue was recently litigated.²¹ In that case, the Belizean Supreme Court relied on the basic structure doctrine formulated in the landmark Indian case of *Kesavananda Bharati v State of Kerala*²² to hold that a proposed amendment to the property right in the Belizean Constitution was unconstitutional.²³ I then examine similar decisions in other jurisdictions along with relevant commentary, with the aim of identifying key elements of this doctrine and its theoretical foundations.

This examination lays the background for determining whether there is room for the application of the basic structure doctrine in the Caribbean, an issue I address in the remainder of the article mainly by posing and answering a series of questions. What evidence is there for reading any principle or doctrine into a Caribbean constitution? By which methods or techniques have courts been able to discern the existence of unwritten or foundational principles? Assuming that Caribbean constitutions are not exhausted by the written text, what is the status (as distinct from effect) of unwritten principles – in particular, are they intrinsic to the entire document, constituting an unamendable core? Based on an examination of Caribbean constitutional jurisprudence in the context of these inquiries, I argue that the provisions of the 2011 Jamaican Charter identified above, which reverse long-standing precepts and have an overtly discriminatory effect, destroy the overall coherence or identity of the Jamaican Constitution and thereby render their constitutionality patently dubious.

II. LIMITATIONS OF CONSTITUTIONAL REFORM

A. INNOVATIONS BY THE BELIZEAN SUPREME COURT

In *Bowen v AG*, the Belizean government purported to amend the constitutional right to property to exclude it from applying to petroleum, minerals and accompanying substances. The relevant Bill was duly passed in both Houses with the required majorities for amending an entrenched constitutional provision, but before it could receive the assent of the Governor

²¹ *Bowen v AG*, (13 February 2009) BZ 2009 SC 2 (Bze) [*Bowen*].

²² *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461 [*Kesavananda Bharati*].

²³ *Belize Constitution (Sixth Amendment) Bill 2008*, clause 2.

General two private landowners challenged clause 2 on the ground that it violated the Constitution. At first instance, the Chief Justice granted the declarations sought, finding that the clause as worded “would not be in consonance with the Constitution”.²⁴ He reasoned that by excluding the protection of property from applying to the specified sub-surface resources, the amendment foreclosed access to the courts to test the validity of any appropriation under the law and thereby violated the basic structure of the Constitution regarding separation of powers, the rule of law and the protection of fundamental rights. This constitutional amendment was therefore found to be unconstitutional.

The attorney general had argued that all amendments to the Constitution are valid so long as they conform to the procedures stipulated by section 69 of the Belizean Constitution. However, Conteh CJ described section 69 as setting out mere “manner and form” requirements for the alteration of the Constitution, derisively terming it a procedural handbook.²⁵ The Chief Justice held that in addition to the formal procedures, any prospective amendment of the Constitution also had to conform to the Constitution’s normative requirements as captured by section 68, which provides that all laws must be subject to the Constitution.²⁶ According to the Chief Justice, if the attorney general’s view were to prevail, constitutional supremacy would be dethroned in favour of parliamentary supremacy. Once the required majority for an amendment is obtained then absolutely no constitutional provision would be beyond alteration or revocation.²⁷

To forestall any such eventuality Conteh CJ relied on the concept of a basic structure, as originally formulated by the Indian Supreme Court in the 1970s. The essence of this doctrine is that no amendment to the Constitution is valid if it is destructive of the Constitution’s essential features or its overall identity. Part of that basic structure involved the fundamental rights regime, so that these rights could not be deleted from the Constitution. In Conteh CJ’s words, “the basic structure doctrine is at bottom the affirmation of the supremacy of the Constitution in the context of fundamental rights.”²⁸ Elaborating as to what specifically this doctrine entailed, he identified the following features: (i) that Belize is a sovereign, democratic state; (ii) the supremacy of the Constitution; (iii) the protection of fundamental rights and freedoms as enumerated in the Constitution; (iv) the separation of powers; (v) the limitation of parliamentary

²⁴ Bowen, *supra* note 21 at 134.

²⁵ *Ibid* at 101.

²⁶ *Ibid* at 105-107.

²⁷ *Ibid* at 120.

²⁸ *Ibid* at 119.

sovereignty; and (vi) the rule of law.²⁹

An appeal from this decision was dismissed because, in the interim, the proposed amendment was modified to preserve the right of royalty and the right of access to the Court to vindicate that right. Since the issue being appealed had now become, to an extent, academic, the Court of Appeal refused to proceed.³⁰ Conteh CJ's views on the applicability of the basic structure doctrine thus remain unreviewed. This is potentially problematic since compounding the decision's novelty is the failure of the Chief Justice to describe the methodology or process by which he was able to identify those elements of the Belizean Constitution that were said by him to make up its basic structure. Moreover, having identified these so-called "basic features", the Chief Justice provided no rationale to support why their scope would be as far reaching as to invalidate a constitutional amendment, as distinct from having simply interpretive value. These are not minor deficiencies, and unless addressed they will ensure that *Bowen* remains an isolated experiment of a maverick judge. That would be unfortunate, however, because the doctrine it advances is rooted in respected and credible constitutional theory. While its most famous expression has occurred in a series of Indian cases from the 1970s, courts within and outside of the Anglo-American fold have acknowledged its existence or even applied some version of it. Given the Caribbean's shared colonial history with India, as well as the commonality of their respective legal systems and institutions, the concept of an unamendable core is not necessarily alien or inapplicable to Caribbean constitutions. At the very least, these factors preclude a summary dismissal of *Bowen* and demand instead a closer examination of its roots.

B. THE INDIAN BASIC STRUCTURE DOCTRINE

The basic structure doctrine was forged out of epic confrontations in the 1960s and 1970s between the executive and the judiciary in India, and is unquestionably one of the most enduring and influential outcomes of judicial resistance to strong executive rule. The vision of India's postcolonial government was one that ambitiously aimed for a radical social transformation, encompassing the dismantling of caste whilst seeking a measure of substantive equality. In pursuing these aims the government embarked on a number of economic and redistributive land reforms which inevitably conflicted with

²⁹ *Ibid.*

³⁰ *AG v Bowen*, Civil Appeal No 7 of 2009, 19 March 2010. A further appeal to the Privy Council in a related action (see *Prime Minister of Belize v Vellos and others*, [2010] UKPC 7) considering this and other constitutional amendments focused only on the requirement to hold a referendum.

the economic rights of wealthy landowners.³¹ As the latter turned to the courts for protection, Indira Gandhi's government responded by amending several of those rights, including the protection of private property, to preclude them from applying to any laws concerned with land and agricultural reform.³² This precipitated the first wave of litigation challenging the constitutional amendments, most of which were unsuccessful.³³ This pro-government stance was to shift significantly in 1964, when in the case of *Golaknath v State of Punjab* the Indian Supreme Court overruled its earlier decisions, holding that the fundamental rights provisions of the Constitution were inviolable. Section 368 of the Indian Constitution (equivalent to Belize's section 69) was held not to empower Parliament to remove the fundamental rights, because it was subject to section 13(2) which provided that no "law" could be made to take away or abridge any of the fundamental rights in Part III of the Constitution.³⁴

The war, however, was far from over, and *Golaknath* was followed by renewed and intense legislative activity. A number of further amendments were made to the Constitution, notable among them being the 24th Amendment which reasserted Parliament's unlimited power to amend the Constitution under article 368.³⁵ This move led to and culminated in the monumental *Kesavananda Bharati* case, where a 13-judge bench of the Indian Supreme Court heard a series of challenges to the 24th Amendment, among others.³⁶ Any Indian text or article that discusses this case never fails to mention – even in the fourth decade after it was handed down – that eleven separate opinions were delivered, amounting in all to 1,002 pages. *Golaknath* was overruled, the Supreme Court holding this time around that a categorical ban could not be imposed on Parliament's ability to amend the fundamental rights provisions. However, a majority of judges led by Justice Khanna found that while there were no implied limits on constitutional amendment, the very nature of the word "amend" meant that Parliament could not abrogate or destroy the foundation or the basic structure of the Constitution. In other words, India's Constitution contained an inviolable core. This did not necessarily include a specific right, for any provision in the Constitution was held to be susceptible to amendment, but what the concept of a core captured instead was the document's essence or identity, which could not be destroyed under the guise

³¹ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi: Oxford University Press, 1999) at 69-98.

³² *Ibid* at 69-122.

³³ V Sripathi, "Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to see Ahead (1950-2000)" (1998-1999) 14 Am U Int'l L Rev 413 at 440.

³⁴ *Golaknath v State of Punjab*, AIR 1967 SC 1643.

³⁵ Austin, *supra* note 31 at 244.

³⁶ *Kesavananda Bharati*, *supra* note 22.

of amendment. The amendment power was therefore not a purely plenary one exhausted in article 368, for there were normative constraints on its exercise.³⁷

While the majority in *Kesavananda* identified certain principles as comprising the Constitution's basic structure – namely federalism, the rule of law, separation of powers, and judicial independence – a major shortcoming of the decision is that there was no agreement on the methodology for discerning its specific components. The majority adopted a textual approach, relying principally on the meaning of the word “amend”. As was put by Justice Khanna, “amendment” postulated that the Constitution must survive without loss of its identity. Other judges making up the majority echoed this reasoning, ultimately making a linguistic distinction between amendment and dismemberment.³⁸ This leaves us no closer to the means of discerning that identity.

That said, *Kesavananda* possibly hinted at one means of ascertaining what is essential, through a consideration of both context and tradition. In his opinion, the Chief Justice rationalized that the power conferred by article 368 of the Constitution was confined to changes designed to effect the “basic objectives” of the Constitution, thereby introducing the idea that the Constitution's substantive provisions themselves function as guideposts by which to determine what could be validly included (or removed). This signals that the Constitution is to be regarded as a holistic document, undergirded by common values and advancing a consistent or coherent vision. This idea was developed in later cases, most clearly so in *Ganpatrao v Union of India*.³⁹ *Ganpatrao* involved a challenge to the 26th Constitutional Amendment, another in the series of post-independence reforms aimed at dismantling India's feudal structure. The 26th Amendment abolished the Privy Purses, which had been negotiated with the princely rulers of the various native states at the time of independence. These states had never been colonized by Britain and were only indirectly ruled by the British Crown. At the time of independence, almost all of them acceded either to India or Pakistan, but in return the rulers negotiated annual tax-free payments from the Consolidated Fund as well as the continued recognition of their personal rights and privileges. These concessions were incorporated in the Constitution, only to be repealed by Gandhi's government in 1971.⁴⁰

In *Ganpatrao*, which was brought by a number of princely rulers, the

³⁷ Given the length of the decision it is not surprising that opinions as to what was held differ. Doubts exist even on such matters as how many judges comprised the majority. This summary represents the barest essentials of the decision, and is taken from Austin, *supra* note 31 at 258-77.

³⁸ S Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, (New Delhi: Oxford University Press 2009) at 135-6, and see Chapter 4 generally.

³⁹ *Ganpatrao v Union of India*, AIR 1993 SC 1267.

⁴⁰ This summary is loosely based on the judgment of Pandian J in the Supreme Court, *ibid* at 2-3 and 10-13.

argument was that since the annual payments constituted the consideration for the surrender of their ruling rights and enabled the formation of the Dominion of India, the provisions which guaranteed these payments formed part of the Constitution's basic structure and were beyond Parliament's power of amendment.⁴¹ Despite their apparent ingenuity, these arguments were dismissed. Pandian J contested the historical narrative advanced by the plaintiffs. In his view, accession to the Union of India by those semi-autonomous states was less a voluntary act in response to the various concessions, and took place instead because of the pressure exerted by the majority of their subjects who wished to be part of the Dominion. Integration thus came about because of increasing democratization within the states and not because of sacrifices by the rulers for which they became obliged to "permanent" compensation.⁴² More importantly, abolition of the Privy Purse was consistent with the ethos of the new constitutional order promoting democracy, equality and social justice.⁴³ This judgment thus reinforces the idea of an irreducible minimum content in a constitution, centred on an identity which is shaped by the totality of its provisions. As put by Krishnaswamy, a constitution's basic features are not necessarily externally determined, but rather can be found in "political, moral, and legal principles, which are reflected in several articles in the Constitution, which together make the core normative identity of the Constitution."⁴⁴

Much the same idea was acknowledged in the landmark *Naz Foundation* case,⁴⁵ where the High Court of Delhi rejected popular morality as a legitimate state interest for restricting constitutional rights, since it is based on shifting and subjective notions of right and wrong. Instead, the Court referred to the concept of constitutional morality, which it described as emanating from constitutional values.⁴⁶ Referring to the writing of Granville Austin, the Court adopted his description of the fundamental rights and directive principles as the "conscience of the Constitution". Extrapolating from these cases, it is clear that basic structure is not to be equated with specific rules or articles in the constitution. Instead, the concept of a basic structure seeks to capture the overall philosophy of the document or the ethos of the new constitutional order. In a later case Chandrachud CJ cautioned that, although amendment is permissible to suit the needs of each generation, "the Constitution is a

⁴¹ *Ibid* at 19-25.

⁴² *Ibid* at 97-98.

⁴³ *Ibid* at 96.

⁴⁴ Krishnaswamy, *supra* note 38 at 146.

⁴⁵ *Naz Foundation v Delhi*, WP(C) No 7455/2001 (2 July 2009) [Naz].

⁴⁶ *Ibid* at 79.

precious heritage; therefore, you cannot destroy its identity.”⁴⁷

A recurring feature of post-independence governance in India was the actual and attempted manipulation of the Constitution, which by the end of the century had survived some 78 amendments.⁴⁸ Without the vigilance of the Indian judiciary, this number would have been higher as a determined executive pushed through with its legislative agenda of social and economic reforms. However laudable these objectives were, it was steady judicial oversight which ensured that developmental goals did not obliterate democratic values. Originally dismissed as illegitimate judicial activism, the basic structure doctrine has endured through successive political administrations, earning its place as a valuable component of Indian constitutional law.

C. THEORETICAL FOUNDATIONS OF BASIC STRUCTURE REVIEW

To speak about the constitutionality of constitutional change produces immediate suspicion because of the implications that arise for majoritarian democracy. Often the concerns raised relate to who is doing the questioning and by what authority - familiar ones in connection with the legitimacy of judicial review in general. These suspicions are compounded by derision if the basis of review contains any association, however faint, with natural law theories. The latter are simply too nebulous and contested, it would seem, to anchor a credible challenge to any law duly enacted.

A constitution, however, is fundamental law, and there is a long tradition of treating it as superseding ordinary legislation where the two conflict, at least in the case of written constitutions.⁴⁹ An assertion that the plenary power of the legislature is enough to effect constitutional change would substitute legality in place of legitimacy, an enormous power for temporary majorities.⁵⁰ A rejection of this premise, therefore, does not necessarily involve an appeal to natural law, religious doctrine, or divine law – what it does is recognize that law itself must contain certain attributes in order to qualify as law. To speak about the constitutionality of constitutional change, then, is to acknowledge that constitutional texts are not fully controlling, and that above them is a realm of superior law that is critical to rational law-making.⁵¹

⁴⁷ *Minerva Mills v Union of India*, 1981 SCR (1) 206 at 239, 1980 AIR SC 1789.

⁴⁸ Sripathi, *supra* note 33 at 473.

⁴⁹ *Marbury v Madison* 5 US 137 (1803), 1 Cranch 137 [*Marbury*].

⁵⁰ As to the ease of so doing in relation to Caribbean constitutions, see AR Carnegie, “On Comparing American and West Indian Constitutional Law” (conference paper delivered at Boscobel, Jamaica, 7 August 1987), (unpublished paper on file with author), 7-12.

⁵¹ Mark Walters, “Written Constitutions and Unwritten Constitutionalism” in Grant Huscroft ed, *Expounding the Constitution: Essays in Constitutional Theory*, (Cambridge: Cambridge University Press 2008) 245 at 261.

Canadian Chief Justice Beverly McLachlin, writing extra-judicially, has likened unwritten constitutional principles to “norms of justice”.⁵² She posits that they are fundamental to “just governance”, and are rooted not in theology but in the “history, values, and culture of the nation...viewed in its constitutional context.”⁵³ These references to fundamental constitutional values and identity place McLachlin CJ squarely in the company – not just of Indian jurists who have acknowledged the same idea through the basic structure doctrine – but also of her own predecessors who have repeatedly acknowledged the existence of unwritten principles, finding them to be both central to the Constitution and to possess binding effect. In one of the earliest cases following the repatriation of the Canadian Constitution, Wilson J adverted to its “essential features”, which she modestly identified as the separation of powers, responsible government and the rule of law.⁵⁴ This was then taken up and received more extensive treatment by the Supreme Court over the following decade.

In *Re Provincial Judges' Reference*, at issue was the reduction of judges' salaries in various provinces. Lamer CJ invoked what he described as “organizing principles” of the constitution identified in the Preamble, which functioned to fill “gaps in the express terms of the constitutional text”.⁵⁵ Continuing, he declared that the “express provisions of the Constitution should be understood as elaborations of the underlying, unwritten and organizing principles found in the preamble.”⁵⁶ On this basis he was able to interpret a standard procedural guarantee of a fair hearing before an independent and impartial tribunal, enumerated in s. 11(d), as an instantiation of the wider notion of judicial independence, and it was through this process that the provincial measures were struck down. In another case, *Re Quebec Secession Reference*, the Court referred to unwritten constitutional principles as “vital unstated assumptions upon which the text is based”.⁵⁷ Despite the difference in terminology, the effect was the same, giving rise to substantive legal obligations binding upon both courts and the government.⁵⁸

The Canadian Supreme Court has stopped short of invoking unwritten principles to invalidate legislation, though they are yet to foreclose this possibility altogether. In *BC v Imperial Tobacco*, for instance, the Supreme

⁵² Beverly McLachlin, “Unwritten Constitutional Principles: What is Going On?” (2006) 4:2 NZJPIL 147 at 148.

⁵³ *Ibid* at 148-49.

⁵⁴ *Operation Dismantle v the Queen*, [1985] 1 SCR 441 at para 104, 18 DLR (4th) 48.

⁵⁵ *Re Provincial Judges' Reference*, [1997] 3 SCR 3 at para 104, 150 DLR (4th) 577.

⁵⁶ *Ibid* at 107.

⁵⁷ *Re Quebec Secession Reference*, [1998] 2 SCR 217 at para 49, 161 DLR (4th) 385 [*Re Quebec*].

⁵⁸ *Ibid* at 54.

Court rejected a challenge to provincial legislation for its alleged inconsistency with the rule of law.⁵⁹ The legislation in question authorized suits against manufacturers of tobacco products for recovery of health care costs incurred by the government in treating persons exposed to those products, which the defendants claimed violated several aspects of the rule of law. However, the basis of the decision lay in the court's limited view of what the rule of law entailed, so it never got to the question whether the rule of law could, if applicable, invalidate legislation.⁶⁰ Moreover, Major J expressly left this question open, stating: "...considerable debate surrounds the question of what *additional* principles, if any, the rule of law might embrace, and the extent to which *they* might mandate the invalidation of legislation based on its content."⁶¹

Such guardedness on the effect of unwritten constitutional principles does not diminish the Court's endorsement of their existence and importance. In the *Quebec Secession Case*, it held that these principles were essential to the survival of the Constitution,⁶² breathing "life"⁶³ into it. Expressly making the link with these principles and a "higher" law, the judgment asserted: "Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional *values*."⁶⁴ Recognition of a body of principles informing the written law is thus an idea which is firmly established in Canadian jurisprudence. Its rationale and basis are not dissimilar to India's basic structure doctrine, and in both countries the recognition of an unwritten superstructure has compelled broadly similar outcomes.⁶⁵

Similar recognition can also be found in other constitutional regimes, either through express textual reference in the constitution⁶⁶ or through judicial acknowledgement. South Africa's Constitutional Court accepted early on that "a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not

⁵⁹ *BC v Imperial Tobacco*, 2005 SCC 49, [2005] 2 SCR 473.

⁶⁰ *Ibid* at 59.

⁶¹ *Ibid* at 61 (emphasis in original).

⁶² *Re Quebec*, *supra* note 57 at 32.

⁶³ *Ibid* at 50.

⁶⁴ *Ibid* at 67.

⁶⁵ V Krishnamurthy, "Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles" (2009) 34 *Yale J Int'l L* 207.

⁶⁶ Richard Albert, "Nonconstitutional Amendments" (2009) 22 *Can J L & Juris* 5 at 9.

qualify as an 'amendment' at all."⁶⁷ While the possibility of fundamental constitutional change (or destruction) was not raised by the constitutional amendments at issue in that case, and was accordingly not pursued in the court's judgment, the express reference to Indian jurisprudence and its potential applicability to South Africa convey a sense of the solid conceptual foundation of the basic structure doctrine as well as its wider acceptance.

These cases and accompanying commentary by constitutional theorists indicate that limits to constitution (re)-making originate from two types of constraints. One type of constraint relates to the nature of law itself, imposing substantive requirements with regard to what can be validly enacted as fundamental law, while the other is a procedural constraint arising from the nature of representative democracy and the limits of a constituted power (such as legislatures) to effect transformative changes. This latter constraint possibly embodies substantive limits as well, but at an uncontroversial minimum it advances the proposition that legislatures do not have untrammelled power to create or re-create a society's juridical forms and essential precepts.

One of the clearest expositions of substantive constraints of the former kind is to be found in the work of Canadian constitutional scholar Mark Walters. In an extensive historical examination of the development of the common law, Walters asserts that it has always been influenced by unwritten constitutional principles.⁶⁸ Such principles, he posits, are superior to positive law, and functioned to guide the law's development in important ways, providing "moral ballast for the legal system."⁶⁹ Walters asserts further that this theory of unwritten fundamental law forms "part of a rich intellectual tradition that has informed common law thinking from medieval times."⁷⁰ In reaffirming the influence of unwritten principles Walters' gaze extends further than that of the Indian Supreme Court, which focuses on the central identity of a constitutional text, for, according to Walters, the law itself must be aligned to certain principles in order to retain its essential character.

These ideas have adherents even among English judges and academics, a development of note given the traditional paradigm of parliamentary sovereignty in British constitutional law. Foremost among the former is Sir John Laws, who has written extra-judicially that as a matter of principle parliament is subject to a "higher order law", which helps to entrench the

⁶⁷ *Premier of Kwazulu-Natal and others v President of South Africa and others* CCT 36/95 at para 47 [S Afr Const Ct]; and see also Gary Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4:3 ICon 460.

⁶⁸ Mark Walters, "The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law" (2001) 51 U Toronto LJ 91 at 108.

⁶⁹ *Ibid* at 93.

⁷⁰ *Ibid* at 136.

fundamental rights of citizens.⁷¹ A democratic state cannot be imagined in purely formal terms, and its institutions are necessarily bound by certain limits which include fundamental rights.⁷²

The other way of understanding the Indian basic structure doctrine lies in its connection to the theory of constituent power. Surprisingly, there is very little commentary on Anglo-Indian jurisprudence which explores this angle, but the parallels are striking. The idea here, that the power of law-making is inherently constrained by the existence of certain fundamental limits, is an established one in constitutional theory, popularized in the seminal work of German philosopher Carl Schmitt. Essential to Schmitt's theory is a distinction between the constituent and constituted powers, with only the former having the capacity to engage in constitution-making.⁷³ Since it is the constituent power which makes a constitution (and other juridical institutions), this power necessarily predates the constitution. Constituent power is an incident of a people's sovereignty, and therefore assumes (or requires) the existence of an organized polity possessing a political consciousness.⁷⁴ Thus the exercise of constituent power is often associated with a "legal beginning",⁷⁵ though it is possible for it to occur at other times of a polity's existence. By contrast, constituted powers owe their existence to the constituent power, and are embodied by legal and political institutions such as the legislature and executive.

This distinction and its accompanying limitations were recently applied to Kenya's constitutional reform process with devastating effect. A Constitution Reform Commission had been established to conduct public consultations and compile the recommendations made by the people. However, a draft constitution produced at the end of this process was invalidated by the Kenyan Supreme Court on the basis that the reform commission was not representative of the people.⁷⁶ Ringera J relied on Schmitt's conception of constituent power, which he accepted as referring to the people's power to constitute or reconstitute their framework of government. Since the membership of the commission was largely unelected, it could not trace its roots to the people and, therefore, could not validly exercise constituent power. Significantly, Ringera J accepted that constituent power need not be

⁷¹ John Laws, "Law and Democracy" (1995) PL 72.

⁷² Trevor Allan, "Parliamentary Sovereignty: Law, Politics and Revolution" (1997) 113 LQR 443 at 449.

⁷³ Richard Stacey, "Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process", (2011) 9 Int'l J Const L 587 at 601-02.

⁷⁴ *Ibid.*

⁷⁵ Joel Colon-Rios, "The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform" (2010) 48 Osgoode Hall LJ 199 at 206.

⁷⁶ *Njoya v A-G*, (2004) AHRLR 157 [CA, Kenya].

expressly enumerated in a constitutional text, and in this case he found it to arise from declarations of Kenya as a “sovereign republic” and “democratic” state. In his words, a constitution is supreme because it is “made by a higher power, a power higher than the constitution itself or any of its creatures. The constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves.”⁷⁷

This does not mean that legislatures cannot engage in constitutional reform. Constitutions invariably contain detailed procedures for effecting amendments, requiring popular affirmation only in extreme cases. However, an important consequence of the distinction between constituent and constituted powers is the qualitative nature of their respective authority. Whereas constituent power is sovereign, first in time, and at the least norm-creating, constituted powers come from the constituent power and are therefore bound by limits laid down in the constitutional regime.⁷⁸ These limits do not refer only to the textual procedural requirements, but extend also to the essence of the polity as captured or reflected in the document.⁷⁹ As Simeon McIntosh explains, the amendment provisions cannot destroy the source of their power; “nor do they represent the verbal warrants to unmake other commitments of the document in which they are situated or to undo the conditions for its political meaningfulness.”⁸⁰ This is precisely the point made by Schmitt, namely that constituted powers (like the legislature) can effect “ordinary” constitutional change, whereas profound legal or political transformations can only be exercised by the constituent power itself.⁸¹ Where legislatures exceed this mandate, Schmitt is clear that a resulting constitutional amendment can be unconstitutional.

The distinction between constituent and constituted powers seems to raise purely procedural limits, suggesting that the people in the exercise of the former are free to amend or dismember the constitution as they please. However, Schmitt’s theory of constituent power is more nuanced than this, and even a minimalist interpretation would have to concede some limits on the exercise of constituent power. Joel Colon-Rios points out that a society’s juridical structure must have in place certain institutional mechanisms as well as basic political guarantees in order for constituent power to be exercised and survive. Those guarantees include rights of political participation, such as the right to free speech and the right to vote, form associations and assemble freely,

⁷⁷ *Ibid* at 29.

⁷⁸ Colon-Rios, *supra* note 75 at 208-9.

⁷⁹ Stacey, *supra* note 73 at 603.

⁸⁰ Simeon McIntosh, *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* (Cayman Islands: Caribbean Law Publishing Co, 2005) at 74-5 [McIntosh, *Fundamental Rights*].

⁸¹ Colon-Rios, *supra* note 75 at 222-23.

without which the people cannot mobilise, reflect on and debate the existing system. Without such rights, democratic reconstitution would be difficult, if not impossible.⁸² Thus removing certain substantive political rights would be inconsistent with the future exercise of constituent power and impermissible in a constitutional democracy.⁸³

Other commentators go even further. Richard Stacey argues that there are at least two aspects to Schmitt's theory that would limit constituent power. The first is similar to Walters' view about the nature of law, for one reading of Schmitt is that law must possess certain inherent qualities in order to qualify as law. Those qualities are manifested in specific guarantees such as a prohibition on retroactive punishments.⁸⁴ Second, Stacey posits that Schmitt's theory treats certain fundamental rights as essential components of a constitutional regime. Any act removing these altogether would be incompatible with the rule of law and presumably beyond even the reach of the people.⁸⁵

Either of these interpretations of Schmitt's ideas ironically places him in the company of modern liberal theorists. Most famously of them all, Rawls articulated the concept of "constitutional essentials" which are intrinsic to a constitutional democracy. Rawls justified amendments to the US Constitution like the abolition of slavery and extension of the franchise as adjustments designed to bring the document into line with evolving social and cultural norms. However, change in the other direction, abrogating the Constitution's "essentials", would be outside of the legislative power and therefore subject to invalidation by the Supreme Court.⁸⁶

A similar position is taken by McIntosh, one of the Caribbean's leading constitutional theorists. Building on the work of Rawls and Dworkin, McIntosh describes the principle of integrity as the most appropriate interpretive technique, according to which the constitution is viewed as expressing a coherent vision of justice and fairness.⁸⁷ Written constitutions, as an exercise of constituent power, represent an original commitment by the people to be governed by certain fundamental laws and live within a certain juridical structure. In so binding themselves, the people cannot use the constitution's power to amend – which means to 'correct' or 'improve' – in order to change the constitution's nature or transform the society.⁸⁸ This, as will be recalled, was precisely the point made in *Kesavananda* by Chief Justice Khanna.

⁸² *Ibid* at 217.

⁸³ *Ibid* at 217-18.

⁸⁴ Stacey, *supra* note 73 at 609.

⁸⁵ *Ibid* at 610.

⁸⁶ Colon-Rios, *supra* note 75 at 225-26.

⁸⁷ McIntosh, *Fundamental Rights*, *supra* note 80 at 69.

⁸⁸ *Ibid* at 74-5.

Ultimately, multiple versions of constitutional theory accept that the power of constitutional change is not unlimited. At one end, the nature of a constitutional democracy or, more fundamentally, that of the law itself is viewed as requiring a certain minimum content, which includes certain fundamental rights. A more moderate version of this theory would put those fundamental rights, or at least the ones that embody a society's identity, beyond the reach only of constituted powers. Wherever one's position lies on this continuum, what is uncontroversial is that legislatures do not have untrammelled power to re-constitute a society's foundations, so that legislative acts which distort a constitution's identity can be invalidated. As Gary Jacobsohn nicely puts it, "what a constitution becomes can never be considered separately from what it has been."⁸⁹ This explains why temporary legislative majorities in India have been held to be incapable of effecting fundamental constitutional change.

III. UNWRITTEN CONSTITUTIONAL PRINCIPLES IN CARIBBEAN CONSTITUTIONAL LAW

As established as the basic structure doctrine is in India, is there scope for its application in Caribbean constitutional law? *Bowen* provides little or no justification for adopting the principles it did from *Kesavananda*, so the task of working out a credible theory for the Caribbean lies in uncharted territory. However, the terrain is not as barren as one might imagine, and a survey of constitutional jurisprudence of the Caribbean reveals that while it contained no expressly articulated basic structure doctrine prior to *Bowen* in 2009, the seeds of one are clearly there.

From almost the very inception of constitutional adjudication in the Commonwealth Caribbean, courts have looked beyond the actual text of the constitutions. Sometimes this merely involved interpreting the language of the document, in a process that can be described as identifying "text emergent unwritten constitutional norms"⁹⁰ or extrapolating from "theory laden words".⁹¹ On occasion, however, the process has been more complex, as unwritten norms have been identified as flowing not from specific clauses but from the document as a whole, either its overall content or structure, or divined from its history or purpose, or a combination of one or more of these aspects. While the former method should not be minimized merely as a form of textualism, since even here it can be influenced by the constitution's specific

⁸⁹ Jacobsohn, *supra* note 67 at 486.

⁹⁰ Walters, *supra* note 68 at 98.

⁹¹ Frederick Schauer, "An Essay on Constitutional Language" (1981-82), 29 UCLA L Rev 797 at 825.

history and informed by particular doctrines,⁹² the latter is not as dependent on specific provisions and is undeniably a bolder process. Through either of these approaches, a number of principles (not all of them exclusively unwritten) have been identified as underpinning the text and, as I shall demonstrate later, invested with special significance. These are discussed below.

A. CONSTITUTIONAL SUPREMACY AND JUDICIAL REVIEW

Among the first of these principles to have been asserted are those of constitutional supremacy and, by extension, the power of judicial review. In *Collymore v Attorney General*,⁹³ the applicant trade union challenged certain provisions of a statute on the ground that they violated the right to freedom of association, enshrined in section 1(j) of the independence Constitution of Trinidad and Tobago. Curiously, this Constitution contained no supreme law clause, a feature no doubt related to its distinct British origins, which led to the bold argument of the state that the relevant section of the bill of rights contained therein merely embodied a rule of construction. The Court of Appeal unanimously rejected this argument, basing its conclusion on a literal reading of the provision which declared that “no law shall...abrogate...any of the rights and freedoms hereinbefore recognised”.⁹⁴ Both Wooding CJ and Phillips JA contrasted this formulation with that of its Canadian prototype, which directed instead that “every law shall...be so *construed and applied* as not to abrogate...any of the rights and freedoms hereinbefore recognised”.⁹⁵ The court found the change of language to be significant, compelling the conclusion that the Trinidadian version was not merely “interpretative” as the Canadian version plainly was.⁹⁶ Moreover, relying on the insertion of a further clause empowering recourse to the High Court for redress in relation to any contravention of one of the fundamental rights enshrined therein, Wooding CJ famously declared

Our Supreme Court has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is *ultra vires* and therefore void and of no effect because it abrogates, abridges or infringes or authorises the abrogation, abridgment or infringement of one or more of

⁹² Consider, for example, the invocation of tradition and the characterization of West Indian constitutions as embodying a Westminster model by which a relatively plain word such as ‘court’ came to take on a highly specific and contextualized meaning: *Hinds v The Queen* [1976] 1 All ER 353, [1977] AC 195 [PC, J’ca] [*Hinds*].

⁹³ *Collymore v Attorney General*, (1967) 12 WIR 5 [CA, Trinidad & Tobago] [*Collymore*].

⁹⁴ *Constitution of Trinidad and Tobago* 1962, s 2.

⁹⁵ *Canadian Bill of Rights* 1960, c 44, s 2.

⁹⁶ *Collymore*, *supra* note 93, per Wooding CJ at 8-9 and Phillips JA at 21-22.

the rights and freedoms recognised and declared by s 1 of the chapter.⁹⁷

In retrospect this ruling seems unexceptional, given the relative clarity of the provisions in issue, not to mention the availability of influential precedents from other common law jurisdictions that had already settled the issue.⁹⁸ Indeed, it is hard to miss in Wooding CJ's conclusion quoted above the echoes of Chief Justice John Marshall in *Marbury v Madison*,⁹⁹ the American equivalent of *Collymore*. However, when the omission of a supreme law clause is considered alongside the entire context of the Constitution and the era in which the dispute was litigated, then the result no longer seems inevitable. The continued retention in some Caribbean constitutions of disabling mechanisms such as savings provisions for pre-independence laws and the ouster of judicial review for certain executive actions, combined with ambivalent procedures for redress and in some instances the complete omission of any procedure at all, mean that the contours and implications of constitutional supremacy are not well-defined.¹⁰⁰ Almost half a century later it is still possible to encounter judicial decisions where the existence of a supreme law clause has not been determinative.¹⁰¹

While Trinidad's Republican Constitution addressed the omission of its predecessor by explicitly including a supreme law clause, none of the constitutions of the older Caribbean territories (that is, those which obtained independence between 1962 and 1966) contain a provision empowering redress for breach of non-bill of rights provisions. For these, the existence of judicial review is therefore an implicit power, one which had to be recently asserted in relation to the Guyana Constitution.¹⁰² In *Baird*, where a retired public servant alleged non-payment of his superannuation benefits guaranteed in a non-bill of rights provision, the Guyana Court of Appeal held that the lack of a specific enforcement mechanism in relation to the right invoked did not inhibit it from granting redress. Chang JA rejected the suggestion that the maxim *inclusio unius est exclusio alterius* could have any application, asserting robustly that if "the High Court cannot find a statutory remedy, it must fashion one."¹⁰³ Thus the assertion of a power of judicial review is not only of historical note; it is an

⁹⁷ *Ibid* at 9.

⁹⁸ *Harris v Minister of Interior* [1952] SALR 428; *Bribery Commissioner v Ranasinghe* [1965] AC 172, [1964] 2 ALL ER 785.

⁹⁹ *Marbury*, *supra* note 49.

¹⁰⁰ Tracy Robinson, "Our Inherent Constitution" in D Berry & T Robinson eds, *Transitions in Caribbean Law: Lawmaking, Constitutionalism and the Confluence of National and International Law* (Kingston: Caribbean Law Publishing Company, 2012) 251 at 252-53.

¹⁰¹ *Campbell-Rodrigues v A-G* [2007] UKPC 65, [2008] 4 LRC 526 [PC, Jamaica] [*Campbell-Rodrigues*].

¹⁰² *Baird v Public Service Commission*, (2001) 63 WIR 134, [2003] 3 LRC 41 [CA, Guyana].

¹⁰³ *Ibid* at 60.

implicit right that continues to have contemporary significance.

B. SEPARATION OF POWERS

The most extensive treatment of implicit constitutional principles in Caribbean constitutions to date is to be found in *Hinds v The Queen*, where at issue was the constitutionality of legislation establishing a special court in Jamaica dubbed the “Gun Court”.¹⁰⁴ One of the challenges related to a mandatory sentence of detention at hard labour prescribed for certain firearm offences under the Act, the actual length of which was to be determined by the Governor General acting on the advice of a non-judicial Review Board. The Gun Court was relegated to a subordinate role in relation to these sentences, allowed to make ‘recommendations’ which the Review Board was not obliged to follow. A majority of the Privy Council characterized this sentencing procedure as constituting a transfer of judicial power to members of the executive, which it found to be inconsistent with “the provisions of the Constitution relating to the separation of powers”.¹⁰⁵

But which provisions were those, given that the principle of separation of powers is not expressly articulated anywhere in the Jamaican Constitution? In fact, Lord Diplock, writing for the majority, considered much more than the Constitution’s actual provisions. He adverted to the subject-matter and structure of the Constitution, the circumstances of its making, its uniquely fundamental nature, the drafting process, and most critically, the constitutional tradition that already existed. Based on these multiple factors, Lord Diplock concluded that the Jamaican Constitution (along with those of the other newly independent territories) was “evolutionary not revolutionary” where “a great deal can be, and ...often is, left to *necessary implication*”.¹⁰⁶ This meant that it was “taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by [the] three organs of government.”¹⁰⁷

Admittedly, Lord Diplock’s reasoning was not unreservedly embraced. Almost immediately several distinguished commentators disputed his premise that the separation of powers is a feature of the British Constitution, with scepticism springing from the notoriously blurred boundaries between the executive and legislative arms of government in the UK.¹⁰⁸ Lord Diplock’s

¹⁰⁴ *Hinds*, *supra* note 92.

¹⁰⁵ *Ibid* at 372.

¹⁰⁶ *Ibid* at 378.

¹⁰⁷ *Ibid* at 359 (emphasis supplied).

¹⁰⁸ O Hood Phillips, “A Constitutional Myth: Separation of Powers”, (1977) 93 LQR 11 at 12; R Carnegie, “Floreat the Westminster Model? A Commonwealth Caribbean Perspective” (1996) 6 Carib L Rev 1 at 1.

successors have themselves had some trouble with this doctrine, retreating from it expressly in *Boyce*¹⁰⁹ and *Matthew*,¹¹⁰ two separate challenges to the mandatory death penalty originating from Barbados and Trinidad and Tobago respectively. In both of these cases, where savings law clauses in the countries' constitutions preclude reliance on bills of rights provisions to invalidate pre-independence punishments, the Privy Council rejected an alternative argument based on the separation of powers. They reasoned that since the constitutions themselves saved the mandatory punishments and made provision for commutation of death sentences by the executive, then those arrangements could not themselves be characterized as unconstitutional. Emphasizing the distance travelled since *Hinds* was decided, the majority in *Boyce* declared: "To say that a constitution is based upon the principle of the separation of powers is a pithy description of how the constitution works."¹¹¹

While these recent developments are incompatible with *Hinds*, their relevance to the issue at hand must not be exaggerated. In the first place, these decisions are especially glaring examples of the desultory decision-making that increasingly emanates from the Privy Council. Both *Matthew* and *Boyce* perpetrated a deft sleight of hand – the issue in question was not the constitutionality of the constitutional procedures for the exercise of the prerogative of mercy, but rather it was the constitutionality of the ordinary legislation that provided for a mandatory death sentence in the first place. It was the sentence itself that clearly violated the separation of powers, as the Privy Council had itself previously acknowledged, so that references to the constitutional arrangements for mercy were unnecessary.

In any event, it is difficult to rely on recent statements from the Privy Council, given the extent of their prevarication on this subject. In *Mollison* (No. 2), which was delivered around the same period as *Boyce* and *Matthew*, they held that the selection of punishment is an integral part of the administration of justice and cannot be committed to the executive.¹¹² Lord Bingham, easily the judge to have succeeded Lord Diplock in terms of his command of Caribbean jurisprudence, declared that based upon the rule of law and the nature of democracy itself, the separation of judicial from legislative and executive powers is "total or effectively so".¹¹³ Earlier, in an appeal originating from St. Christopher and Nevis, Lord Hobhouse writing for a unanimous

¹⁰⁹ *Boyce v R*, [2004] UKPC 32, [2005] 1 AC 400 [PC, Barbados] [*Boyce*].

¹¹⁰ *Matthew v The State*, [2004] UKPC 33, [2005] 1 AC 433 [PC, TT].

¹¹¹ *Boyce*, *supra* note 109 at 70.

¹¹² *DPP v Mollison* (No 2), [2003] UKPC 6, [2003] 2 WLR 1160 [PC, Jamaica]. By the same token, a sentence pre-determined by the Legislature and stripping the Judiciary of any discretion is a different kind of violation of the same principle.

¹¹³ *Ibid* at 13.

Board declared expansively that “these constitutions [referring to those of St. Christopher’s and Jamaica’s] are *drafted upon* the principle of separation of powers.”¹¹⁴ Moreover, in appeals originating from elsewhere in the Commonwealth the Privy Council has reinforced the principle of separation of powers as an integral feature of constitutions that closely resemble those of Caribbean countries. In *Ahnee*, after outlining the structure of the Mauritius Constitution, Lord Steyn declared that it “entrenches” the principle of separation of powers.¹¹⁵ And just two years after describing the separation of powers as a “pithy description of how the constitution works”, in *Khoyratty* the Privy Council re-converted to its long-standing view of separation of powers as an implicit constitutional principle, once again in relation to the Mauritius Constitution.¹¹⁶

Ultimately, while these various decisions indicate some dispute surrounding the doctrine of separation of powers, the uncertainty relates to the doctrine’s scope, as distinct from its existence. In relation to the criticisms made of Lord Diplock’s judgment in *Hinds*, Colin Munro cautions that “ideas of the separation of powers have shaped constitutional arrangements and influenced our constitutional thinking, and continue to do so. The separation in the British Constitution, although not absolute, ought not to be lightly dismissed.”¹¹⁷ Far from being dismissed, other final appellate courts in the region have fully embraced this doctrine. Thus, it has been held in the Guyana Court of Appeal that “Guyana is a democratic State under article 1 of the Constitution and the principle of separation of powers underlies the very structure of the Constitution and inheres in its contents”,¹¹⁸ while Wit J in the Caribbean Court of Justice, the recently established final court of appeal for the region, declared that separation of powers is “firmly enshrined” in the Barbados Constitution.¹¹⁹ In arriving at this conclusion, Wit J pointed to such features as the structure of the Constitution, its strong procedural safeguards for the judiciary, the principle of supremacy and the rule of law, before declaring expansively that separation of powers forms “the backbone of any constitutional democracy”.¹²⁰

C. JUDICIAL INDEPENDENCE

¹¹⁴ *Browne v R*, [1999] UKPC 21 at para 6, [2000] 1 AC 45 (PC, St Christopher-Nevis).

¹¹⁵ *Ahnee v DPP*, [1999] UKPC 11, [1999] 2 WLR 1305 (PC, Mauritius) [*Ahnee*].

¹¹⁶ *State v Khoyratty*, [2006] UKPC 13, [2007] 1 AC 80 (PC, Mauritius).

¹¹⁷ Colin Munro, *Studies in Constitutional Law* 2nd ed (UK: Oxford University Press, 1999) at 210-11.

¹¹⁸ *Chue v AG* (2006) 72 WIR 213 at 221 [CA, Guyana] [*Chue*].

¹¹⁹ *Joseph and Boyce v Attorney General*, [2006] CCJ 3 at para 41 (2006) 69 WIR 104 [CCJ, Barbados] [*Joseph*].

¹²⁰ *Ibid* at 19.

Far less controversial is the principle of judicial independence, which has routinely been acknowledged, whether directly or indirectly, as an integral feature of Caribbean constitutions. The principle is most commonly found as part of the guarantee of protection of the law, which specifies that both civil and criminal matters are to be determined by an “independent and impartial court”.¹²¹ The Guyana Constitution uniquely goes further, providing comprehensively for the independence of courts, their freedom from political and executive control, and guaranteeing administrative autonomy.¹²² Nonetheless it has been established quite clearly that judicial independence transcends these written guarantees, constituting an implicit, underlying feature of these constitutions.

The decision that settled this definitively was *Hinds*, where another issue concerned the legality of the jurisdiction conferred on the branches of the newly established Gun Court. This court was to sit in three divisions, the one styled “Full Court” being comprised of three magistrates whose jurisdiction was extended to all offences except murder and treason, and whose sentencing powers extended in some cases to imprisonment for life. The Privy Council found by a majority that this entailed conferring on members of the lower judiciary an extensive jurisdiction previously exercisable only by members of the higher judiciary, who enjoyed a range of entrenched constitutional protections designed to secure their independence. They held that the jurisdiction of the lower judiciary could not be extended by ordinary legislation, and to do so would violate the principle of judicial independence preserved in the Jamaican Constitution. Crucially, however, this principle was not traced to a single provision, but was held to flow from the structure of the Constitution and the arrangements it made for the exercise of judicial power, as well as the constitutional tradition of Jamaica upon which the drafters had drawn. According to Lord Diplock:

What ... is implicit in the very structure of a constitution on the Westminster Model is that judicial power, however it is to be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the Judicature, *even though this is not expressly stated in the Constitution*.¹²³

Judicial independence is not guaranteed simply because the constitutions say so – rather, this principle is integral to the history, context and structure of these documents. Moreover, this feature does not arise from one provision alone, but emanates from the entire chapter dealing with the judicature. And unlike the principle of separation of powers which is contested in several

¹²¹ *Constitution of Grenada* 1973, s 8(1).

¹²² *Constitution of Guyana* 1980, Article 122A.

¹²³ *Hinds*, *supra* note 92 at 332 (emphasis supplied).

important respects, judicial independence has been repeatedly reaffirmed in subsequent cases.¹²⁴

D. THE RULE OF LAW

Almost all Caribbean constitutions explicitly acknowledge the rule of law, usually in a preamble. While preambles have traditionally been regarded as unenforceable, the rule of law occupies a special place therein, for like the principle of judicial independence it is viewed as transcending the written text. Indeed, of all the constitutional principles discussed as arising from Caribbean constitutions, the rule of law is the one most closely identified, not just with the constitution, but with democratic constitutionalism as a whole. What is striking about the rule of law is how expansively it has been interpreted in Caribbean jurisprudence. The Constitution of Trinidad and Tobago links it to the preservation of freedom itself,¹²⁵ and subsequent jurisprudence has extrapolated from this principle to find substantive guarantees of judicial independence,¹²⁶ fundamental rights of due process¹²⁷ and even the concept of justice.¹²⁸

According to Lord Bingham “the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself”.¹²⁹ More expansively, in the course of explaining the meaning of the term ‘due process of law’, Lord Millett distinguished it from a mere rule or specific statute, stating instead that “it invokes the concept of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law”.¹³⁰ But perhaps the clearest exposition of these connections was given by Wit J of the Caribbean Court of Justice, who described the rule of law as importing into the constitution certain “fundamental requirements”, including fairness, rationality and reasonableness, as well as concepts like natural justice, due process and the protection of law. These requirements, Wit J said, are “inherent in the Barbados Constitution.”¹³¹ Despite its written expression, the rule of law is a principle or value that undergirds the entire document, providing both meaning and direction.

¹²⁴ See, for example, *Independent Jamaica Council for Human Rights and others v Marshall-Burnett*, [2005] 2 WLR 923 (PC, Jamaica) and *R v Jones*, (2007) 72 WIR 1 (HC, Bahamas).

¹²⁵ *Constitution of Trinidad and Tobago* 1976, Act 4, Preamble (d).

¹²⁶ *A v Secretary of State for the Home Department*, [2004] UKHL 56 at para 42, [2005] 2 AC 68 (HL) [A].

¹²⁷ *Lasalle v A-G*, (1971) 18 WIR 379 (CA TT) [Lasalle].

¹²⁸ *Thomas v Baptiste*, [1999] UKPC 13, [1999] 3 WLR 249 (PC, TT) [Thomas].

¹²⁹ *A*, *supra* note 126 at 42.

¹³⁰ *Thomas*, *supra* note 128 at 22.

¹³¹ *Joseph*, *supra* note 119 at 226.

Thus Caribbean courts have identified a number of important principles as integral to their respective constitutions, several of which are not expressly articulated at any point therein. But despite the confidence of Conteh CJ in *Bowen*, at least two crucial issues remain unsettled – first, what is the status of these underlying principles, and second, assuming that they do possess some supra-constitutional value, do they include *written* provisions such as the bill of rights?

IV. THE STATUS OF UNWRITTEN CONSTITUTIONAL PRINCIPLES

Each Caribbean constitution outlines detailed procedures for amendment of the text, with differing degrees of difficulty (described as levels of entrenchment) which vary according to the provision being amended. Requirements include ordinary and enhanced majorities, delaying periods between the introduction of bills and their passing, and for certain exceptional provisions in some constitutions, even approval by the electorate in a referendum.¹³² Where a constitutional principle is unwritten, however, and is said to be an implicit part of the document, what is the parliamentary majority needed for amendment? This is a conundrum of no mean proportion, for the aforementioned procedural requirements refer only to written provisions. The same difficulty applies to those principles which, although they may find expression somewhere in the text, are simultaneously described as inherent to the entire document. This unique characteristic points to the connection between implicit constitutional principles and the concept of a basic structure: not only can certain principles *not* be amended because they are unwritten, but more crucially, those principles need not be in writing because they cannot be amended.

This conclusion is reinforced by the techniques courts have deployed to source unwritten principles. One of these is through resort to the structure of the constitution. In a multiplicity of cases, as discussed earlier, courts have extrapolated from the fact that there are distinct chapters which deal with the different organs of government to arrive at the principle of separation of powers.¹³³ Similarly, in at least one case, the principle of judicial independence has been derived from the entire chapter in the Jamaican Constitution dealing with the judicature.¹³⁴ Thus to get rid of either of these principles radical constitutional change would be required. Such a step necessitates deleting

¹³² See *Constitution of Jamaica* 1962, s 49.

¹³³ *Hinds*, *supra* note 92; *Ahnee*, *supra* note 115; *Joseph*, *supra* note 119; *Chue*, *supra* note 118.

¹³⁴ *Hinds*, *supra* note 92.

not just one provision, but excising an entire chapter (in the case of judicial independence) or re-structuring the document (in the case of separation of powers).

Even if such radical constitutional change were to be effected, it is unclear whether that would be enough to rid Caribbean constitutions of certain principles. This raises a qualitative as distinct from a mere procedural impediment. Some constitutional principles, and certainly all of those described above, have consistently been described as “vital”, “characteristic”, “underlying”, “necessary”, and the like. Such language indicates that these principles are not merely unwritten, but that they are central to the document’s content, purpose and philosophy. This explains the metaphors used to describe them: they constitute a “backbone” or “architecture”¹³⁵ (that is, the frame upon which the written text is constructed) as well as a superstructure (embodying values that are integral to the document’s purpose). Because these principles are suffused throughout the document, to get rid of them would necessitate getting rid of the entire document. Looked at in this light, it seems as if these principles are unwritten *because* they are so foundational. Since they do not owe their existence to the constitution, but are incidents of a constitutional democracy, it does not matter whether they are explicitly stated in the document. This is pellucidly clear from Lord Diplock’s judgment in *Hinds*, where he described Caribbean constitutions as embodying the systems, institutions and procedures already existing. These constitutions form part of a larger tradition, and by definition must contain certain values.

Professor Laurence Tribe, in articulating the concept of an “invisible” constitution, contemplates the existence of certain premises that are so “deeply embedded” in the US Constitution that they could only be changed by revolution.¹³⁶ This is precisely the idea captured in Caribbean jurisprudence where certain constitutional principles are treated as essential and vital, so integral to constitutionalism that they do not require explicit enumeration in the text. At a minimum, those values include some of the very principles discussed above such as the rule of law, guarantees of judicial independence, and even some degree of separation of powers among the principal organs of government. There may be more constitutional essentials, to use the term popularized by Rawls, but it is difficult to ignore five decades of jurisprudence that has consistently identified those named principles as central to Caribbean constitutions. It seems unlikely that they could be annihilated without destroying at the same time, not just the structure of the document but also its essence, and, by extension, the very identity of the society itself

¹³⁵ *Re Quebec*, *supra* note 57 at 51.

¹³⁶ Laurence Tribe, *The Invisible Constitution* (USA: Oxford University Press, 2008) at 33; and see *Re Quebec*, *supra* note 57 at 51.

as a constitutional democracy. Assuming then that the existence of a basic structure cannot be denied, a trickier question is whether fundamental rights are included therein. It is only by taking a broader look at the issues of rights and constitutionalism that this question can possibly be answered.

V. FUNDAMENTAL RIGHTS AS PART OF THE CONSTITUTION'S BASIC STRUCTURE

Constitutions delineate the structure of government, chiefly by establishing its organs and institutions, outlining procedures of operation, conferring powers, and so on. But they do much more than this. Crucially, they articulate goals and aspirations of the state, they limit governmental powers in relation to the citizenry, and they are for the most part organized around and reflect certain fundamental values. Those values are most directly discerned from the preambles. For example, the preamble to the Constitution of St Vincent and the Grenadines begins with an acknowledgement that the state is founded on the "freedom and dignity of man", before expressing "a desire that their society be so ordered as to express their recognition of the principles of democracy, free institutions, social justice and equality before the law" as well as "a desire that their Constitution should enshrine the above mentioned freedoms, principles and ideals".¹³⁷ Notice here that the aspirations relate not just to the content of the Constitution, but more widely to the values upon which the society should be based. In these respects, the preamble to the Vincentian Constitution is no different from those which exist in constitutions of other Caribbean states. The Guyana preamble expresses the essential commitment with powerful simplicity, stating that the Constitution is "inspired by our collective quest for a perfect nation".¹³⁸

Within this framework, the entrenched regime of fundamental rights and freedoms occupies a particularly important position. Early fundamental rights' adjudication was quick to point out that Caribbean postcolonies were beneficiaries of the ancient British tradition of constitutionalism, which included respect for the rule of law and important civil liberties – albeit in hitherto unwritten form.¹³⁹ Phillips JA put it this way in the Trinidadian Court of Appeal: "The fundamental rights and freedoms guaranteed by the Constitution do not owe their existence to it. They are previously existing rights, for the most part derived from the common law, the continuation of which is sought to be protected by the Constitution for the purpose of securing the rule

¹³⁷ *Constitution of St. Vincent* 1979, Preamble.

¹³⁸ *Constitution of Guyana* 1980, Preamble.

¹³⁹ *DPP v Nasralla*, [1967] 2 All ER 161, [1967] 2 AC 238; *Thomas*, *supra* note 128 at 3.

of law in independent Trinidad and Tobago.”¹⁴⁰ Nonetheless, the inclusion of bills of rights in the constitutions of the early independent states was fraught with uncertainty and controversy, principally because of their implications for legislative and executive power.¹⁴¹ Indeed, written constitutions represented a paradigmatic shift from British constitutional practice and tradition, so the decision to include and entrench fundamental rights in the Caribbean constitutions is the ultimate recognition of the importance attached to them in these newly independent states.

In light of this background, the centrality of fundamental rights to Caribbean constitutions is impossible to deny. Referring to the Barbados Constitution, Wit J describes it as “undoubtedly a qualitative and normative document”,¹⁴² of which the bill of rights and the preamble in particular set the benchmark against which the document “as a whole has to be understood and interpreted as these words fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general and that of Barbados in particular.”¹⁴³

The clearest illustration of this ethos lies in *Gairy v AG*, a decision from Grenada involving the property rights of a disgraced former Prime Minister upon his return from exile.¹⁴⁴ Eric Gairy, who had led the island to independence in 1974, was widely regarded as corrupt, his administration marked not only by dismal economic performance¹⁴⁵ but also by severe police brutality and victimisation of anti-government leaders.¹⁴⁶ Gairy was overthrown in a revolution in 1979, but the revolutionary government collapsed after an internal uprising in 1984 which left at least 17 dead and which prompted military intervention by the United States.¹⁴⁷ After the suppression of this uprising elections were eventually held and the 1973 Independence Constitution was reinstated, but the country was left facing severe fiscal and economic challenges. Despite this, on his return from exile, Gairy was able to secure judgment for almost EC\$3.7 million in respect of the compulsory acquisition of his property by the intervening revolutionary government. This was a fantastic sum that the economy could ill afford, as evidenced by delays

¹⁴⁰ Lasalle, *supra* note 127 at 395.

¹⁴¹ Ann Spackman, “Constitutional Development in Trinidad and Tobago”, (1965) 14 Social and Economic Studies 283 at 301.

¹⁴² Joseph, *supra* note 119 at 225.

¹⁴³ *Ibid.*

¹⁴⁴ *Gairy v A-G*, [2001] UKPC 30, [2001] 3 WLR 779 [*Gairy*].

¹⁴⁵ M. Shahabuddeen, *The Conquest of Grenada: Sovereignty in the Periphery* (University of Guyana, 1986) at 6-7.

¹⁴⁶ As detailed in the Report of the Duffus Commission of Inquiry into the Breakdown of Law and Order and Police Brutality in Grenada 1974.

¹⁴⁷ Shahabuddeen, *supra* note 145 at 11.

in payment that stretched out for years. Nonetheless, Gairy's estate managed to obtain an order against the state compelling payment on the basis that those delays amounted to a further violation of Gairy's constitutional right to property.¹⁴⁸

From a purely jurisprudential point of view, *Gairy v AG* is a seminal decision for its rejection of technical common law doctrines impeding relief against the state. However, by facilitating the enrichment of a questionable ex-leader out of a depleted treasury, it came at a tremendous social and economic cost. The only way to make sense of this perverse outcome is through an appreciation of what the entrenchment of fundamental rights in the supreme law entailed. In the Privy Council Lord Bingham adverted to the preamble to the Constitution, which expressed the respect of the Grenadian people for the rule of law and the desire that it should ensure the protection of fundamental rights.¹⁴⁹ In his view, chapter 1 of the Constitution, containing the bill of rights, represented the establishment of a "new constitutional order".¹⁵⁰ Here was concrete expression of the values and aspirations as documented in the Constitution; not just empty rhetoric, but a real commitment to the rule of law, which meant access to justice for all – even undeserving citizens.

Acknowledging the central place occupied by fundamental rights in constitutional documents does not necessarily mean that the *entire* regime of rights is sacrosanct, entrenched for all time. Since constitutions can be changed then power must be reposed somewhere to alter the bill of rights, a possibility acknowledged by Conteh CJ in *Bowen*. Describing the procedural requirements of the Belizean Constitution regarding amendments as "lax", he agreed with the claimants' proposition that:

To disapply the fundamental right against arbitrary deprivation of property contained in the Constitution and indeed, any of its fundamental rights guaranteed in it, the people of Belize should have a say either through a referendum or a General Election in which such a change is put to them for their views in exercise of their constituent power by which they had set up both the State of Belize and its Constitution.¹⁵¹

While this overstates the position, as no Caribbean state was created through an exercise of constituent power, the rest of the proposition is consistent with theories of constituent power discussed above. As an incident of their sovereignty, it is the people, if anyone, who are empowered to make (and re-make) not just the constitution, but all juridical institutions.

The crucial question, therefore, is the extent of constitutional change permissible. One reading of Schmitt is that while an exercise of constituent

¹⁴⁸ *Gairy*, *supra* note 144.

¹⁴⁹ *Ibid* at 11.

¹⁵⁰ *Ibid* at 19.

¹⁵¹ *Bowen*, *supra* note 21 at 126.

power is sufficient to achieve transformative constitutional change, in a democracy some fundamental norms are beyond the reach even of the people themselves. This is a position solidly endorsed by liberal theorists, who posit that certain essentials, which include a number of fundamental rights, are too intrinsic to democratic constitutionalism to be amended out of existence. The remaining task then is to determine what fundamental rights, if any, can be so described as to protect them from abrogation by the legislature, and possibly even by the people as well.

Despite conventional descriptions of modern human rights as universal and indivisible, it is clear that a hierarchy of sorts exists wherein some rights inhabit a more privileged realm than others. This is a reality suggested by the way rights have been described, by the varying levels of scrutiny applied to breaches, and in values associated with or promoted by different rights. Simply put, there are unmistakable differences in how rights are conceptualized and enforced. That some rights are therefore more integral to the document than others is a conclusion which is difficult to resist.

One of the most vivid illustrations of this hierarchical treatment can be found in relation to the bundle of protections that relate to a fair trial, which are known by a variety of appellations, the most common being due process or the protection of the law. Interestingly, the term protection of the law appears only in two places in Caribbean constitutions, both traditionally regarded as unenforceable: in the opening section to the bill of rights, and in the marginal note of one subsequent right which details protections associated with criminal and civil trials. As for due process, this right is guaranteed only in the Constitutions of Trinidad and Tobago and, since 2011, Jamaica. Despite these slim, fairly tentative references, courts have consistently accorded both due process and protection of the law a supra-constitutional status far beyond anything suggested by the text. Long ago in the Trinidadian Court of Appeal Phillips JA described due process as an abstract notion that did not necessarily refer to a specific law. According to him: "...the term 'law' as used in the expression 'due process of law' is not a mere synonym for common law or statute... It appears to me that 'due process of law' embraces what has been described [in an American case] as 'the concept of ordered liberty'."¹⁵² This ambitious interpretation was sanctioned by the Privy Council almost three decades later, when in *Thomas v Baptiste*, a death penalty appeal from Trinidad and Tobago, Lord Millett stated (using almost identical language as Phillips JA) that due process is a "compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the

¹⁵² Lasalle, *supra* note 127 at 384.

universally accepted standards of justice observed by civilised nations which observe the rule of law.”¹⁵³

The right to protection of the law has been described in equally expansive terms. Shortly after *Thomas*, a similar issue arose in *Lewis v A-G*, an appeal from Jamaica whose Constitution at that time contained no reference to due process. This proved to be no impediment to the Privy Council, which treated protection of the law as covering the same ground as due process.¹⁵⁴ More importantly, the Privy Council insouciantly gave effect to this right, even though it was mentioned only in the opening section to the bill of rights – a section they had earlier suggested was unenforceable.¹⁵⁵ The Privy Council provided no explanation for their inconsistent approaches to the opening section (even reverting to their original position of its unenforceability in a subsequent case)¹⁵⁶ and the only way of reconciling these cases is by recognizing the special status of the right to protection of the law. In *Lewis*, it was described as interchangeable or synonymous with common law rules of fairness and natural justice, and as a sweeping protection influenced by international human rights norms.¹⁵⁷ As Tracy Robinson carefully explains, protection of the law was treated in these cases as the written instantiation of a pre-existing precept; because its history revealed it to be central to democratic constitutionalism, its enforceability did not depend on where it was located in the constitution.¹⁵⁸

This approach was endorsed by the Caribbean Court of Justice in its first major case, where in the leading judgment it was stated: “...the right to protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed.”¹⁵⁹ In this case it was held that the right to protection of the law mentioned in the opening section to Barbados’ constitutional bill of rights was not exhausted by the subsequent detailed section enumerating specific procedural protections associated with a fair trial, and according to de la Bastide P and Saunders J “the right to Protection of the law is much wider in the scope of its application”; it would be “a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18.”¹⁶⁰

¹⁵³ *Thomas*, *supra* note 128 at 22.

¹⁵⁴ *Lewis v A-G*, [2000] UKPC 35 at para 86, [2000] 3 WLR 1785.

¹⁵⁵ *Grape Bay v A-G*, [1999] UKPC 43, [2000] 1 WLR 574 [*Grape Bay*].

¹⁵⁶ *Campbell-Rodrigues*, *supra* note 101.

¹⁵⁷ *Ibid* at 1806.

¹⁵⁸ *Robinson*, *supra* note 100 at 258-261.

¹⁵⁹ *Joseph*, *supra* note 119 at 136 [emphasis supplied].

¹⁶⁰ *Ibid*.

Caribbean courts have also accorded disproportionate emphasis to rights of a political nature, at least as compared to the treatment of those rights with economic implications. This is evident from the nature of scrutiny attached to alleged violations of the former type of rights, particularly those which touch on expression and assembly and association, where limiting measures must undergo a rigorous test to pass constitutional muster.¹⁶¹ Local courts have been heavily influenced by comparative jurisprudence in which both the goals and reasonableness of inconsistent legislative and executive acts are carefully scrutinized. This has not happened in relation to breaches of property rights, where *Bowen* is a glaring anomaly and courts have shown instead a marked deference to legislative goals and executive policies, while sheltering behind devices such as the presumption of constitutionality or institutional incompetence.¹⁶²

Moreover, public interest concerns have not been strong enough to obstruct the dismantling of death penalty regimes across the majority of Caribbean territories. In *Higgs*, Lord Steyn highlighted the absolute nature of the prohibition against torture and inhuman and degrading treatment at international law, describing the guarantee as prescribing a “universal minimum standard” which could not be limited even in times of violent crime, war, public emergencies or scarce resources. This prohibition, Lord Steyn declared, is “absolute and unqualified”, and cannot be justified by claims of cultural relativism.¹⁶³ Anchoring the multiplicity of judgments which have vindicated rights to life and protection against the imposition of inhuman and degrading treatment is a consensus regarding the importance of human dignity.¹⁶⁴ This is a core objective, sufficient to ensure the enforcement of constitutional guarantees even in the context of strident public opinion clamouring for draconian measures to combat rising levels of crime.

Although it is not obvious that all Caribbean constitutions would have the same basic structure, it is indisputable that any essential content must include equality rights. Caribbean societies were founded and built on bloody divisions of race, colour and class, a past pointedly rejected by many of the preambles. The language of all the bills reinforces their all-encompassing nature, recognising rights in “every person” and making provision for “all persons”. Most important of all, as pointed out by Lord Bingham, these documents were meant to usher in a new political order, one promoting values of social justice,

¹⁶¹ *de Freitas v Permanent Secretary*, [1998] UKPC 30, [1998] 3 WLR 375 (PC, Antigua & Barbuda).

¹⁶² *Grape Bay*, *supra* note 155; *Campbell-Rodrigues*, *supra* note 101; *King v AG* (1993) 45 WIR 50; and see Tracy Robinson, “Those Awkward Rights: The Protection of Property in Caribbean Constitutions”, unpublished paper dated November 26, 2008 (on file with author).

¹⁶³ *Higgs v Minister of National Security*, [1999] UKPC 55 at para 52, [2000] 2 WLR 1368 (PC, Bah).

¹⁶⁴ *Makwanyane*, *supra* note 6.

inclusionary democracy, and human dignity – all values that are incompatible with substantive inequality and the existence of irrational status distinctions. As it has been expressed by the High Court at Delhi in relation to the Indian Constitution, words that are just as applicable to Caribbean constitutions, fundamental rights “were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few.”¹⁶⁵ Fundamental rights, then – or at least those that promote the values of fairness, equality, political participation, human dignity and the rule of law – are emphatically a part of the identity of Caribbean constitutions, central to their values and the goal of perfection as envisaged in the Guyana model.

VI. CONCLUSION

The idea of an unconstitutional constitutional amendment is not a novel or outlandish one. It is rooted in credible constitutional theory and applied in a diverse variety of legal systems. One of its most famous articulations has come from the Indian Supreme Court, which has relied on the concept of a constitution’s basic structure to ensure that the constitution’s central identity is not distorted by amendment. Courts in other jurisdictions have acknowledged and even applied a version of this doctrine, whose conceptual roots are as deep as those of democracy itself.¹⁶⁶ Certainly, modern constitutional theory acknowledges that certain fundamental principles are critical to constitutional regimes. As summarized by McIntosh, the principle of integrity means that constitutions must advance a coherent vision of justice and fairness, which simultaneously limits the amendment power beyond any change that would undo the document’s essentials or its central identity. Whether explicitly or implicitly acknowledged, these fundamental principles cannot be abrogated by ordinary means of constitutional change, and are possibly vulnerable to change only by revolutionary means.

For these reasons, the amendments to the Jamaican Charter which restrict the meaning of inhuman and degrading treatment and define marriage so as to exclude same-sex unions are impossible to defend. The first of these legalizes treatment that has long been regarded as inhuman and degrading. It sanctions brutality, requires no accountability in the justice system, and is inimical to cardinal notions of human dignity. The second measure entrenches discrimination in the constitution, further marginalizing a class of persons

¹⁶⁵ Naz, *supra* note 45 at 80.

¹⁶⁶ Jacobsohn, *supra* note 67 at 478.

because of inherent, immutable characteristics possessed by them.

Caribbean constitutions solemnly affirm and espouse certain values, notably among these being freedom, democracy, social justice, human dignity and equality. These values have been enshrined in preambles, and breathe life into the substantive provisions. They have been repeatedly invoked and enforced by the courts. The 2011 amendments to the Jamaican bill of rights, which freeze the meaning of the prohibition against inhuman and degrading treatment and entrench discrimination against one group of persons, savagely undermine these cherished values. These changes do not amend, they dismember, and are at least an invalid exercise of constituted power, if not beyond the constituent power itself. By disrupting the overall coherence of the constitution they are the antithesis of a perfect nation, and must surely be unconstitutional.