SSRC
Conflict Prevention and Peace Forum

Constitutional Reform in the English-Speaking Caribbean: Challenges and Prospects

A report prepared for the Conflict Prevention and Peace Forum
January 2011

The Constitutional Design Group

Principals
Zachary Elkins | zelkins@austin.utexas.edu
Tom Ginsburg | tginsburg@uchicago.edu

Lead Research Associate
Justin Blount | jblount2@illinois.edu

CONTENTS

INTRODUCTION

Constitutional laws of countries in the English-speaking Caribbean (ESC) have changed very little, at least in relative terms, since the independence of these countries. Nevertheless, the institutional and political environment of the ESC presents some unique challenges to constitutional reform in the contemporary era. This paper examines the constitutional trajectory of these countries in comparative perspective and anticipates the prospects and challenges of constitutional reform in the region.

The paper is divided into three parts. The first part chronicles constitutional reform processes in the ESC over the last fifty years. We describe the wave of constitutional design that produced the independence constitutions in the ESC from 1962-1983, and conduct a review of post-independence constitutional reform, which has typically occurred in the form of amendments to existing constitutions rather than the wholesale replacement of texts. The section closes with a post-mortem of the short-lived West Indies Federation, an aborted experiment in collective autonomy.

Informed by the historical analysis in the preceding section, the analysis in section two of the report examines the content of ESC constitutions. The section explores these themes in comparative perspective through the review of other Caribbean states and non-Caribbean Commonwealth members, which share a similar institutional legacy. We divide our analysis here into three broad substantive areas. The first explores the relationship between the executive and legislature, an issue that typically occupies much of the attention of constitutional drafters. In this context, the paper examines the institutional legacies and constraints that have resulted from the region's shared colonial history and Commonwealth membership and assesses the potential for modifications to the Westminster system of parliamentary government. As part of our analysis of executives and legislatures, we also review the structure and power of the judiciary, the design of which may be sometimes neglected by constitutional scholars and historians but which is increasingly consequential. Next, the paper investigates the "vertical" set of constraints in ESC constitutions – that is the relationship between national and subnational entities, which perhaps surprisingly, is an active arena of dispute even among these island states. Though St. Kitts and Nevis is the only official federation in the ESC, the extent of political decentralization and local autonomy is debated in a handful of these states. In many cases, these debates are foundational but continue to express themselves periodically in discussions of reform. The report then turns to human rights provisions, often the most relevant area for citizens and their relationship with the state. It is this area that is arguably most ripe for reform, since the provision and adjudication of rights worldwide has undergone steady change in the years since the majority of ESC constitutions were drafted.

In section three we look systematically at patterns of change in ESC constitutions. We begin with an accounting of the chronology of ESC constitutions and provide some sense of their comparative stability. We then provide some detail on the extent and nature of change among those constitutions that have undergone reform. We conclude with a discussion of the prospects and challenges for further constitutional reform in the region.

HISTORICAL PERSPECTIVES ON CONSTITUTIONAL REFORM IN THE ESC

Beginning in the 1940s, the United Kingdom initiated simultaneous efforts to both increase local political autonomy and orchestrate the regional federation of a number of their colonial possessions. Over the course of four decades, these moves toward increased autonomy would result in the independence of the twelve states that compose the English-speaking Caribbean (ESC). These states, by typical classification rules, include the island states of Antigua and Barbuda, The Bahamas, Barbados, Dominica, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago, as well as the mainland Caribbean states of Belize and Guyana.

DECOLONIZATION AND THE INDEPENDENCE CONSTITUTIONS

With the notable exceptions of Fiji and Grenada, the island states of the Commonwealth are generally politically stable, free of military interference in civilian affairs, and relatively respectful of their citizens' civil and political rights.[1] Scholars have pointed to several features that endowed the ESC with a very favorable set of circumstances for post-colonial political success. These factors include a relatively long colonial experience that involved a comparatively direct role for British authorities as well as the countries' compact island setting. In fact, democracy has been more durable in the ESC than in almost any other part of the developing world. Elites enjoyed an extended tutelage and period of political socialization under the Westminster system that included the incubation of political parties, the holding of competitive elections and even changes in government in some cases while still under the colonial umbrella. One can point to a natural contrast with Britain's African possessions, whose colonial inheritance had demonstrably more negative effects.

Along with Trinidad and Tobago, Jamaica in 1962 was the first of the British Caribbean colonies to achieve independence. In doing so, it established the pattern of de-colonization and constitution-making that would, with only minimal deviations, be repeated throughout the ESC. The general pattern is summarized below:

1. Increasing internal political self-government in the post-war period including elected legislatures and responsible Cabinet government.
2. Petition by the domestic legislature to the UK government for the initiation of independence proceedings, or termination of association as it was officially called.
3. Constitutional conference(s) in London involving the Colonial Office and representatives of the leading territorial political parties. These conferences included either the initial drafting of a potential independence constitution or discussion of a draft prepared by the territorial government.
4. Continued drafting and deliberation of the proposed independence constitution leading to adoption of a final text by a popularly-elected territorial legislature.

---

[1] Unlike Fiji, the political instability in Grenada was more exogenous in origin and not necessarily the result of recurring institutional crises.

5. Introduction of the Independence Order in Council, approval in the Houses of Commons and Lords, followed by the promulgation of the Order by HM in Council. The constitutional texts were published as an annex/appendix to the Independence Order.

These steps were eventually codified by the UK parliament in the West Indies Act of 1967 (WIA). With the exceptions of Jamaica (1962), Trinidad and Tobago (1962), Barbados (1966) and Guyana (1966), the WIA governed and regulated the process of independence and constitution-making in the ESC. These steps reveal a number of key points about the de-colonization of the ESC. First, the process leading to independence and a new constitution was routinized and transparent. Because of this, the timing and pace of independence was largely indigenous. The first step in seeking independence was a petition from the domestic legislature to the British Parliament. That the passage of the WIA was not accompanied by a flurry of petitions is indicative of the fact that the metropolitan power had not been actively working to keep the colonies in the imperial fold. In all, the process of de-colonization under the WIA took sixteen years with St. Kitts and Nevis being the last territory in the ESC to achieve independence as a sovereign state in 1983.

Independence petitions frequently included indigenously drafted proto-constitutions that served as the basis for negotiations at the London Constitutional Conferences. The British government was scrupulous in ensuring that opposition parties participated in the Constitutional Conferences held in London per the WIA, though this was not always the case. In addition, the UK by outward appearances, at least, displayed a pro-independence bias so long as it was satisfied that the majority of the population supported independence and that the opposition was not being railroaded. Indicative of this sentiment as well as of the large degree of internal political autonomy already present prior to independence, Evan Luard, the UK Under-Secretary of State for Foreign and Commonwealth Affairs, who presided over the independence proceedings of Dominica, noted that "it can truthfully be said that the termination of association will amount to very little more than the formalization of the status quo" (Keesing's 1979, 29525).

THE RISE AND FALL OF THE WEST INDIES FEDERATION

To many, it is not obvious that the twelve ESC states would, or should, be themselves sovereign. After all, these are small territories that are geographically clustered with similar material endowments and a relatively similar cultural heritage. Why do we now observe twelve ESC states instead of one federal state? Famously, the thirteen British colonies a little bit further north had opted for the federal option 200 years earlier. India, Indonesia, and Brazil – just to name a few -- remained intact even with arguably stronger centrifugal factors in play. In fact, officials in the UK had envisioned a federal state for the ESC and had advanced a formal plan to construct one. The West Indies Federation (WIF) came into formal existence on January 3, 1958 under the authority of the British Caribbean Federation Act of 1956. One of its primary purposes was to serve as the vehicle to independence for most of the British West Indies. The federation comprised ten provinces and was intended to be an internally self-governing, federal state with full sovereignty.

A number of political conflicts arose, however, that would ultimately lead to the Federation's collapse in 1962. The formation of a single customs union was contentious as the smaller provinces were concerned about the relatively dominant economic positions of Jamaica and Trinidad and Tobago, who in turn sought restrictions on the freedom of movement within the Federation over concerns about mass internal migration. Geographic remoteness, tepid popular support, and nationalism all played a role as well in the Federation's demise.

The primary conflict was fiscal, however. Even with grant support from the United Kingdom, Jamaica and Trinidad and Tobago were together responsible for funding more than three quarters of the Federation's budget. As other provinces called for the two largest economies to contribute an even larger share, opposition to the Federation arose within Jamaica and Trinidad and Tobago. In June 1960, the opposition Jamaica Labour Party reversed course, signaling its opposition to continued Jamaican membership in the WIF. As a means of securing independence, the WIF was taking too long to fulfill this aspiration; other overseas colonies such as Ghana (self-governing from 1954), Sierra Leone (self-governing from 1958) and Nigeria were already independent as stand alone states by the end of 1960. Coupled with the anticipated financial obligations of the Federation, public opposition within Jamaica to the country's membership began to mount. Even as plans for federal independence proceeded with a final Constitutional Conference in London and subsequent debate in the Jamaican House of Representatives on the penultimate federal constitution in the summer of 1961, 54% of Jamaican voters approved a concurrent referendum in favor of secession on September 19 of that year. Four months later, the ruling People's National Movement party of Trinidad and Tobago opted out of the Federation for many of the reasons cited by Jamaican opponents. Following the loss of the two wealthiest and most populous provinces from the Federation, the WIF was a dead letter and was formally dissolved by the British Parliament in 1962.

CHARACTERISTICS OF ESC CONSTITUTIONS

In many ways the ESC constitutions are products of their generation and their institutional heritage. Constitutions written since World War II tend to be more verbose, with an expansive set of rights (including the modern social and political ones) and enhanced opportunities for public participation. Meanwhile, we know that ex-colonies tend to replicate the institutional structure of their metropole and the countries of the ESC have largely been faithful to the Westminster system. Ironically, this fidelity comes despite the UK's well-known lack of a single written constitution that could serve as a template. Since ESC constitutions have been remarkably stable, much of the institutional structure set down at independence remains, which means that constitutional reform will largely entail revising institutions that have lasted for at least two generations and which bear the strong stamp of the UK.

ESC Constitutions are also part of a set of microstates. Globally, there are forty three microstates, defined as countries with a population less than one million; twenty three of these are also Commonwealth members. Of these forty three microstates, only ten have bicameral legislatures. Seven of these are Commonwealth countries with an eighth (Fiji) an episodic member. Of the seven Commonwealth microstates with a bicameral legislature, six are part of the ESC: Antigua and Barbuda, Bahamas, Barbados, Belize,

Grenada, and St Lucia.[2] Among the small and/or island states of the world, the Caribbean states of the Commonwealth virtually constitute their own category. A likely reason for this is, again, the more direct nature and greater intensity of British colonial rule in the ESC relative to the African and Pacific colonies. Post-colonial institutions in those colonies tended to be more hybrid creations representing a grafting of British institutional traditions onto indigenous ones. Democracy in the Pacific, for example, tends to be more consensual than in the ESC where, as we shall see below, the majoritarian impulse is more entrenched (Anckar 2000).

SOME GENERAL NOTES ON THE NATURE OF ESC CONSTITUTIONAL TEXTS

The constitutional texts of the ESC bear striking similarities and so it is possible, at least in some substantive areas, to speak of them almost monolithically. In other analyses we have calculated the similarity of any two constitutions in a variety of ways, usually based on the percent of provisions for which any two given constitutions match. According to these analyses, ESC constitutions are as similar to one another as are any two constitutions drawn from the historical series of constitutions from the same country.

One need look no further than the first line of the ESC constitutions for evidence of their similarity. Nearly all of them begin with the same phrase acknowledging the supremacy of God and the principle of equality. The similarities do not stop there, of course.

Unlike the framework constitutions written by states in the 19th century ESC constitutional texts tend – like others of their generation – to be quite lengthy. Since 1789, the average length of a constitution is 13,300 words. The 16 ESC constitutions average 38,000 words in length from the Trinidad and Tobagan constitution 1962 (24,866 words) to the St. Kitts and Nevis constitution of 1983 (49,643 words). But even by the standards of their generation, the ESC constitutions are long. The average non-ESC constitution written since 1960 averages 16,000 words, which is less than half the length of the ESC tomes.

This length implies that the constitutions may be highly detailed, in the sense of providing a level of text typical of ordinary legislation, and/or they may exhibit a high level of scope, in that they say something about a large number of topics. In fact, the ESC constitutions are both. We can measure the scope of a constitution by calculating the percent of a given set of topics (in our case 92) upon which they say *something*. ESC constitutions, the data suggest, are both detailed and broad, especially those of the late 1970s and early 1980s, which cover a sizable number of topics – many in some detail.

[2] Jamaica and Trinidad and Tobago are the only non-microstates in the ESC.

EXECUTIVES, LEGISLATURES, AND THE JUDICIARY

FIDELITY TO THE WESTMINSTER PARLIAMENTARY SYSTEM

One of the most striking features of the ESC is its conformity with the Westminster System style of majoritarian, parliamentary government. Nine of the twelve countries practice parliamentary democracy, whose core (and defining) attribute is that the head of government is accountable to the legislature. The only exceptions are the semi-presidential regimes of Dominica, Guyana, and Trinidad and Tobago, whose constitutions provide for a directly elected head of state.

While many scholars view the classification of constitutions as presidential or parliamentary as a highly systematic distinction, in that the classification is thought to be associated with a host of other institutional characteristics, there is actually a fair amount hybridity across the world's parliamentary systems. Indeed, in other analyses, we have shown that simply knowing whether constitutions provide for executives subject to assembly-confidence or not tells us very little about what *other* powers the executive wields. The constitutions of the ESC, while nearly all parliamentary, exhibit some of this hybridity. Table 2 reports the distribution of a set of key powers of executives and legislatures, for presidential and parliamentary constitutions since 1789 as well as for the 13 parliamentary ESC constitutions written. In many respects, the ESC constitutions appear quite distinct from the typical parliamentary model, if not the Westminster model. Note that what we report here are the powers *as stipulated* in the constitution. In some cases, actual practice deviates from these hard-wired provisions. Nevertheless, the table suggests that ESC executives differ from their parliamentary counterparts worldwide (and historically) in four important powers: executive veto, executive decree, executive initiation of legislation, and constitutional amendment proposal. For each of these powers, ESC executives are significantly less powerful than parliamentary executives elsewhere. Some of these powers such as decree power, are ones are typically provided to executives in parliamentary regimes. Indeed, in general, the table suggests that executives in ESC – at least in terms of de jure power – are not especially muscular.

Eight of the twelve countries have bicameral legislatures, a somewhat curious fact given the general association of bicameralism with larger states. In no case are the upper house members (senators, in most cases) elected. Instead, throughout the region, these members of parliament are appointed, in varying proportions, on the advice of the prime minister, the leader of the opposition, and occasionally, at the governor-general's discretion.[3] Dominica, Guyana, St Kitts and Nevis, and St Vincent and the Grenadines are unicameral states though Dominica and St Vincent each have senators who sit in the lower chamber. Like the metropolitan power, all except St Kitts and Nevis are unitary states though a degree of regional autonomy is present in at least a quarter of the ESC countries (see the discussion of Political Decentralization below).

---

[3] Article 34 of the Dominican constitution empowers the Parliament to provide for the election of Senators but the default provision is for the President to appoint five members on the advice of the Prime Minister and four on the advice of the Leader of the Opposition.

The most obvious explanation for this institutional pattern is colonial inheritance, and that these features reflect the cultural and historical context of British colonialism. It is a persuasive argument. Putting aside the question, which cannot be answered here, of whether the individual cases represent instances of mimicry or coercion on the part of the metropolitan power, the fact remains that given the context in the ESC of extended periods of internal political autonomy, the Westminster system was the only political system in which colonial elites were trained. The ESC states did not face a blank institutional slate but a path dependent choice in which the adoption of a Westminster system presented increasing returns to the institutional knowledge of existing elites and parties cultivated within the constraints of that system over the course of several decades (Anckar 2007b).

A number of functionalist explanations abound as well though these have a post-hoc air about them. Bicameralism can be an institutional response to high levels of ethnic or societal fragmentation, though the two do not appear to co-vary within the ESC. A more plausible functionalist explanation is that bicameralism serves a moderating function, not on regional grounds but on partisan ones (Anckar 1998; Anckar 2007b). Consistent with a plurality electoral system, lower house elections often produce disproportionate seat distributions. By allowing the Leader of the Opposition to nominate anywhere from 1/5 to 1/3 of the members of the upper chamber, this imbalance of representation is mitigated. The Granadian example is illustrative. As the single opposition member elected to the Grenadian House of Representatives following the restoration of parliamentary government, the Leader of the Opposition, representing 1/15 of the lower chamber, was able to nominate three persons to the thirteen member Senate (Anckar 1998). Thus, it does appear that bicameralism serves a moderating function in Caribbean parliaments though as noted, this appears to be a post-hoc rationalization.

Exceptions to the pattern of Westminster dominance do appear, however. On the surface, deviations appear to be linked with organized opposition to the terms of independence and the independence constitution or are context specific. The semi-presidential regime in Dominica resulted from concessions by the ruling Dominica Labour Party to the opposition Dominica Freedom Party which had sought a directly elected president. The Antigua Labour Party, however, was able to resist demands for unicameralism and proportional representation made by the Progressive Labour Movement, even though the latter made common cause with the Barbudan delegation in opposing the draft independence constitution.

Guyana represents a special case for a number of reasons. Institutionally, it was unicameral with a proportional representation electoral system at independence. Four years later in 1970, it became the Cooperative Republic of Guyana and adopted a semi-presidential form of government. Geographically, its mainland status sets it apart from rest of its ESC brethren, Belize excepted. In addition, partisan politics acquired distinct ethnic overtones during the 1950s with identity issues between Afro-Guyanese and Indo-Guyanese often trumping policy or ideology. Finally, internal self-government prior to independence was problematic with a number of crises and conflicts marking the period. In this context, it was the British Government, after a petition by the three leading political parties to arbitrate their constitutional differences that decided upon both unicameralism and proportional representation. These institutional arrangements were not indigenous modifications of the Westminster system but rather imposed by the metropolitan power.

Trinidad and Tobago is the most constitutionally active state in the ESC (see Table 1). Following a series of amendments to the independence constitution that established a Westminster system with a bicameral parliament and plurality voting, the Government embarked on its wholesale replacement by appointing a Constitutional Commission to make recommendations on changes to the constitution and constitutional reform. The most noteworthy recommendations made by the Commission in its report to the Government in 1974 were the replacement of the existing parliament with a unicameral one and the adoption of a proportional representation electoral system. The Government ignored the proposed restructuring of Parliament and was positively hostile to the idea of proportional representation noting their belief that it was likely to lead to racially determined voting. In this, it may have been guided by the experience of Guyana. The constitution of 1976 drafted by the Government and approved by the Parliament maintained both bicameralism and plurality voting while opting for republic status with a president chosen by Parliament

The process of constitutional reform also reduces the likelihood of substantive change to the Westminster system. Befitting the region's colonial heritage, constituent power has never been located with the people. ESC parliaments are sovereign in this regard and are the gatekeepers to constitutional change. As with the adoption of the parliamentary system in the first place, sitting legislators are unlikely to propose or accept institutional changes that could threaten their positions. There is an intuitive expectation, and some preliminary evidence, that the most fundamental institutional and political reform is accomplished through specially convened constituent assemblies operating independent of the existing government (Ginsburg, Elkins, and Blount 2009). The experience of Trinidad and Tobago in the 1974-1976 period is instructive as is the fact that calls for unicameralism and/or proportional representation during the independence process originated with opposition parties. Governments may prefer in the abstract the greater efficiencies and reduced redundancies that unicameralism may permit but their concrete willingness to pursue it is likely dependent on their risk tolerance. The first-past-the-post electoral system coupled with the small number of constituencies can lead to severely skewed seat distributions in lower chambers. The upper house apportionment procedures do appear to provide a balance of representation that opposition parties will be hesitant to relinquish.

THE JUDICIARY

The ESC states have, for the most part, utilized the British style of judicial system. The structure typically consists of three or four levels of courts, though for some of the smaller states the pattern has been modified in light of the size of the judiciary. Primary jurisdiction in minor civil and criminal cases is before district-based magistrates courts. A Supreme Court has original jurisdiction; appeal is to the High Court or Court of Appeal. Somewhat confusingly, the nominal Supreme Court in many of the jurisdictions is actually one level below that of the Court of Appeal. In addition, many of the states have retained, even after independence, a link with the Privy Council in London as the court of final appeal. This no doubt served to signal the continuing commitment to judicial independence and to a high quality judicial decision-making.

Two developments in regional jurisdiction have helped to economize on the costs of judicial decision-making. First, six of the ESC states (along with three current British

overseas territories) set up the Eastern Caribbean Supreme Court in 1967: Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines. This Court serves as a traveling court of appeal for the microstate members, and decisions can be appealed to the Privy Council in London. (These states formed the Organization of Eastern Caribbean States in 1981.)

A potentially more wide-ranging constitutional reform through the region came with the establishment of the Caribbean Court of Justice (the CCJ) in 2001, replacing the Privy Council in London as the court of final appeal for many Commonwealth Caribbean nations. This represented a major break from one of the last institutional vestiges of the colonial era.

The idea for a regional court dates back to at least 1901, when the Jamaica Gleaner published an editorial rejecting the Privy Council and calling for a Caribbean Court. The independence period saw continued interest in the concept, but the trigger was the 1993 case of Pratt and Morgan v. Attorney General of Jamaica, in which the Privy Council declared that it would be a violation of the constitutional rights of the appellants to execute them after the prolonged delay which followed their conviction for murder. This was perceived as an imposition of standards developed by the European Court of Human Rights on the very different context of the Commonwealth Caribbean nations. In reaction, Jamaica along with several other states (Antigua and Barbuda; Barbados; Belize; Grenada; Guyana; St. Kitts and Nevis; St. Lucia; Suriname and Trinidad and Tobago) signed an agreement to establish a regional court in 2001. Dominica and St. Vincent and The Grenadines also signed the agreement on February 15, 2003. The CCJ was inaugurated in April 16, 2005 in Port of Spain, Trinidad and Tobago. In February 2010, the Senate in Belize passed the Belize Constitution 7th Amendment Bill in order to abolish the Privy Council as Belize's final court of appeal.

In addition to replacing the Privy Council as the court of final appeal, the CCJ is vested with original jurisdiction in respect of the interpretation and application of the Treaty Establishing the Caribbean Community and Common Market (CARICOM). Thus it is a hybrid institution of a municipal court of last resort and an international court with compulsory and exclusive jurisdiction with regard to the interpretation and application of the Treaty.[4]

Given its origins, there was some fear that the CCJ would be particularly prone to upholding death sentences, but in fact, the CCJ upheld a challenge to the death penalty in one of its first decisions.[5] It seems to be functioning tolerably well in the cases in which it has jurisdiction, chiefly appeals from the judicial systems of Guyana and Barbados. But the CCJ has not yet reached its potential because the member states have not completed their acceptance of it as a court of final appeal.

---

[4]The Treaty of Chaguaramas came into force on August 1, 1973. The Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy entered into force on January 1, 2006.

[5]http://www.caribbeancourtofjustice.org/judgments/cv2_2005/judgment/5.%20Judgment%20-%20Hon.%20Justice%20Nelson.pdf. See also http://www.caribbeanpressreleases.com/articles/767/1/Death-warrants-rash---Caribbean-Court-of-Justice-Ruling/Page1.html . Judgments of the CCJ to date are available on http://www.caribbeancourtofjustice.org/judgments.html.

Interestingly, the Jamaican legislation implementing the Agreement on the establishment of the Caribbean Court of Justice was declared unconstitutional by the Privy Council in Independent Jamaica Council for Human Rights (1998) Limited and Others [2005].[6] The case was brought by a human rights organization and supported by the opposition party. The Privy Council identified procedural violations in the constitutional amendment process, and also observed that the protection accorded to the independence of the CCJ was less stringent than that provided for by the Constitution of Jamaica for the higher Jamaican Judiciary. Members of the senior Jamaican judiciary can only be removed with the advice of the Privy Council but the CCJ judges can be removed, albeit only for narrow grounds, by a majority vote of all the members of the Regional Judicial and Legal Services Commission. (Removing the President also requires qualified majority of three-quarters of the contracting states.) This constitutional issue remains unresolved at the moment: the Privy Council is still the court of final appeal, but Jamaica remains a party to CARICOM and the Agreement setting up the CCJ.

The trend toward regional judicial bodies makes good sense given the size of the various countries, and the economies of scale from having a single, high quality court of appeal. We expect that as time goes on and the CCJ continues to prove itself, we will observe an increasing number of jurisdictions join it. The judiciary may thus be a channel for deepening regional integration, as well as ensuring uniform jurisprudence on common national questions.

Altogether, however, one must conclude that the region has not to date experienced the trend toward constitutional judicialization that has been found in other regions of the world. This may be because of the vitality of the parliamentary traditions as well as the lack of abrupt constitutional breaks that might allow pressure for designated constitutional courts. The combination of a relatively high quality judiciary, which has nevertheless remained relatively insulated from politics, is a distinctive one.

POLITICAL DECENTRALIZATION

Small states, including island ones, are almost exclusively unitary though a handful of federal archipelagos can be found in the Indian and Pacific Oceans. Within the ESC, St Kitts and Nevis is the only federal state. Antigua and Barbuda, Trinidad and Tobago, and St Vincent and the Grenadines meanwhile, can be classified as unitary states with decentralized features (Richardson 1992). This is not surprising given the geographic non-contiguity of these four states (Anckar 1996; Anckar 2007a).

Three of these states have local legislatures and, in some cases, executives that administer the day to day domestic activities of their islands, providing significant amounts of local political autonomy for their inhabitants: the Barbuda Council, the Nevis Island Legislature and the Tobago House of Assembly. At the national level, legislative apportionment incorporates a regional dimension in each of these countries (Anckar 1996).

---

[6] *Judicature (Appellate Jurisdiction) (Amendment) Act, 2004*, the *Caribbean Court of Justice (Constitutional Amendment) Act, 2004* and the *Caribbean Court of Justice Act, 2004.*

As a federal state, devolution is most extensive in St Kitts and Nevis. The inclusion of the island of Anguilla in the newly internally self-governing dependency of St Kitts and Nevis in 1967 sparked a series of rebellions by Anguillans resulting in the formation of a quasi-independent state before the British were able to re-establish control in 1971. As a result of this experience, Nevisians were able to wrest considerable concessions for themselves from the British during the independence negotiations. Under Article 113 of the constitution, the island of Nevis, but not St Kitts, has a right of secession from St Kitts and Nevis. Per constitutional procedure, a secession referendum was held in 1998 following passage of a bill for that purpose by the Nevis Island Legislature but failed. The matter was discussed again in 2004 but did not reach the referendum stage.

Antigua and Barbuda's unitary status was a point of contestation throughout the independence process with the status of Barbuda dominating the December 1980 Constitutional Conference. The Barbudan delegation sought to maintain the local system of land tenure, a separate police force, and financial and administrative autonomy. The Antiguan and British governments made concessions but the Barbudan delegation refused to sign the draft constitution and break away from Antigua. These separatist claims were rejected by both the Antiguans and the British and the new constitution came into force on November 1, 1981 over their objections. Nevertheless, Barbuda continues to enjoy a degree of political autonomy from Antigua. The Barbuda Council, for instance, possesses veto power over any changes to the Barbuda Local Government Act of 1976 that the national parliament may propose – a somewhat rare consensual democratic instrument in the otherwise majoritarian ESC.

HUMAN RIGHTS

Constitutions vary in what they choose provide, but certainly one of the most common elements is a set of rights. Only 13 of the 632 constitutions in our sample (of the universe of 826 written since 1789) do not provide at least some small set of human rights. The rights sections of the ESC constitutions are quite extensive, again as one would expect from constitutions of the era. Constitutions, on average, have provided for 22 rights since 1789. Constitutions from the ESC provide for an average of 28. As one would expect, the newer ESC constitutions tend to have a larger set of rights. While the Trinidad and Tobagan constitution of 1962 includes only 15 rights, the constitutions of Belize (1981) and the last constitution of Guyana (1980) include 33 and 40 rights, respectively.

Like other aspects of the constitution, the ESC constitutions tend to converge on the same set of rights. All include the basic core civil and political rights such as freedom of expression, religion, assembly, and association. Interestingly, however, only seven of the fifteen constitutions include property rights (70% of constitutions written since 1960 include property rights). Of course, property rights figure prominently in political discussions in developing countries that are concerned with nurturing economic growth (which property rights theoretically assist) at the same time that wish to maintain the flexibility to reallocate assets, which is obviously complicated by entrenched property rights. The strength of property rights has also come into play in some of these countries that have large diaspora communities in the U.S. and the U.K., some of whom own significant assets in ESC countries.

Finally, it is interesting to note the weakness of social and economic rights in the region. For the most part, the rights agenda in ESC constitutions is largely limited to civil and political rights. The only constitutions to have included items such as the right to health and shelter are the two reformed constitutions of Guyana (1970 and 1980). By contrast, 45 and 27 percent of constitutions written since 1980 include the right to health and shelter, respectively. One would expect that any large-scale constitutional reform in the ESC would mean a serious consideration of these sorts of social and economic rights, undoubtedly a highly consequential reform.

CONSTITUTIONAL CHANGE AND CONTINUITY IN THE ESC

THE CHRONOLOGY OF CONSTITUTIONAL REFORM IN THE ESC

A logical point of entry into understanding the change and continuity of constitutional reform in the ESC is to explore the rate of change in the years since independence. In prior work, we engaged in a comprehensive epidemiological analysis of the duration of constitutional systems and the factors that influence constitutional change (Elkins, Ginsburg, and Melton 2009). As a conceptual matter, it is useful to distinguish between wholesale constitutional replacement and constitutional amendment, between which the core distinction is that the amendments utilize the amendment process laid out in the text of the constitution, while replacements ignore the formal amendment procedure. Constitutional replacements, then, mark the beginning of a new constitutional system. On average, constitutional systems have lasted nineteen years across the worldwide constitutions since 1789. ESC constitutions exceed this life expectancy by a considerable margin. Table 1 lists the date of "new" constitutions (replacements) as well as the date of amendments for each of the twelve countries. The region has produced a total of sixteen new constitutions with Guyana and Trinidad and Tobago the only countries no longer operating under their independence constitutions.[7] Including amendments, just four countries account for approximately seventy percent of all constitutional events (amendments or replacements) since 1962: Barbados, Guyana, Jamaica, and Trinidad and Tobago.

To some degree, we can take this stability as an indicator of the relative success of the ESC constitutions. The ESC is not, by any means, a region of constitutional churn and instability, as some might characterize the Latin Caribbean. (The Dominican Republic and Haiti, with about thirty constitutions each, together have produced about one tenth of the world's constitutions since 1789). What is responsible for this stability? In general, environmental factors such as wars, economic swings, and other "crises" induce constitutional replacements, but importantly, aspects of the process and content of the initial constitutional founding have a decided impact on constitutional longevity. Certainly, the factors that influence stable democracy that we identify above most likely play some role as well.

---

[7] Grenada re-instated its independence constitution, with modifications, following the restoration of parliamentary government.

CHALLENGES AND PROSPECTS FOR CONSTITUTIONAL REFORM IN THE ESC

The empirical record appears to validate the above intuition. Despite a flurry of rhetoric and constitutional reform efforts in virtually every Caribbean country over the past two decades, the fundamental institutional structures remain unchanged. One of the recurring themes in the constitutional reform discourse of this period is the need to strengthen and/or revitalize democracy in the ESC. Issues of participation, legitimacy, accountability, local governance and the people's constituent power are at the heart of this discussion (Griner 2005; Trujillo 2002; McIntosh 2008). More concretely, constitutional reform efforts in The Bahamas, Barbados, Guyana, St Vincent and the Grenadines, and Trinidad and Tobago have addressed the topics of separation of powers, the fusion of the executive and legislative branches, the lack of parliamentary oversight of the Government in small legislatures when Cabinet members are also MPs, and the disproportionality of electoral results under the first past the post system (Griner 2005; Ragoonath 2010; The Bahamas Constitutional Commission 2003; Trujillo 2002; Wickham 1998; Wilson 2009). A central concern has been republic status and the role of the executive. These two questions merge on the issue of whether to adopt a hybrid system such as Trinidad and Tobago's parliamentary republic or the more Washington-inspired presidential republic as found in Guyana.

The proposed St Vincent and the Grenadines constitution rejected at referendum in November of 2009 would have established a republic with an elected president and would have replaced the jurisdiction of the Privy Council with that of the CCJ. It would also, under Article 100, have provided for a Senate elected via proportional representation. The New Democratic Party-led opposition was able to argue successfully, however, that the proposed constitution did nothing to weaken the power of the Prime Minister or strengthen democracy, and that proposed agencies such as the Ombudsman, Integrity, Human Rights, and Electoral and Boundaries Commissions were insufficiently independent to fulfill their state-constraining functions. These arguments, apparently, were persuasive as the text failed to achieve the requisite two-thirds majority required for ratification in an election the OAS certified as conducted properly.

The now-stalled constitutional reform process in Trinidad and Tobago, in a reflection of contemporary practice, embarked upon a series of 51 public consultations on the draft constitution in 2009. Again, opposition centered upon the role of the "executive president" with critics charging that the draft granted the office too much power, in part due to the continued fusion of executive and legislative elections: the president would be a member of the party winning the most parliamentary votes.[8] The proposed text would also maintain the existing first-past-the-post electoral system, contrary to the wishes of the United National Congress, then in opposition though now in Government following elections in May 2010 and pledged, by their Manifesto, to restart the constitutional reform process with extensive public consultation.

---

[8] This is reminiscent of the plan by Seychelles President Albert Rene to enhance presidential authority by linking the executive vote to legislative seat shares that was rejected by voters at referendum in 1992.

In Guyana, the Joint Opposition Political Parties (JOPP), a multi-party alliance planning to contest the upcoming 2011 elections, is proposing constitutional reforms including an end to the executive presidency through a separation of executive powers between the head of state and head of government, a modified PR electoral system, and increased political decentralization.

As the above vignettes illustrate, political parties have an important role to play in constitutional change. One of the critiques of the prevailing Westminster system in the ESC is the disproportionality of legislative seat shares caused by the first-past-the-post electoral system, possibly magnified by the small number of constituencies. In a number of cases, ruling parties have the capacity to change or replace the constitution unilaterally, without any opposition votes whatsoever. On at least thirteen occasions since independence, the first place party has won 100% of the seats in parliament (Griner 2005). Procedurally then, the existing legislative-centric constitutional reform model is capable of producing transformational or radical change.

In spite of this capacity for unilateral action, parliamentary activity in terms of amending existing texts has been limited to the margins of the texts though important shifts with regard to the conduct of elections, accountability, and public corruption exist. The 2002 amendments to the Bahamian constitution created the office of the Parliamentary Commissioner to supervise voter registration and the conduct of elections. In addition, a new Director of Public Prosecutions (DPP) position was created with discretion as to case selection and prosecution, independent of the more political office of the Attorney General. The 1995 Barbudan amendment provided salary protection to judges, member of the judicial council, the public prosecutor and other civil servants, in fulfillment of a 1984 campaign manifesto by the Barbudan Labour Party. Three of the five amendment episodes in Belize have addressed the issue of citizenship or criminal procedure (1985, 1988, 2001). More substantively, the 1988 amendments reduced the appointment power of the Governor-General with respect to the membership of the Elections and Boundaries Commission by mandating that he or she share that power with the Prime Minister. Amendments in Grenada concerned the restoration of the constitution of 1974 (1991) and an increase in the mandatory retirement age of the Director of Public Prosecutions (1992). A series of amendment acts in Guyana (three in 1991 and one each in 1992 and 1995) were passed in an attempt to resolve issues relating to electoral rolls and the Elections Commission. These difficulties necessitated at least two extensions of parliamentary terms. The Tobago House of Assembly was formally entrenched by amendment in 1996. Another constitutional change of note in Trinidad concerns the powers of the anti-corruption Integrity Commission. Section 138 was amended in 2000 to expand the number of public officers subject to the constitution's asset and income reporting requirements.

In light of this, partisanship appears a more formidable obstacle to constitutional change than the institutional context. Time and again, constitutional reform efforts launched in the wake of institutional or political crises as in St Vincent and the Grenadines (2001), Trinidad and Tobago (2002) and Antigua (2004) peter or come to naught as the enthusiasm for change among ruling elites dampens (Griner 2005). The motivations of these elites is by no means necessarily nefarious or unscrupulous, though they may well be. In addition to the seemingly blatantly self-serving dropping of support for PR by former opposition parties once in power, it may be the case that the one model in the ESC for the proportional representation electoral system, local elections and directly elected president

championed by civil society groups and constitutional reform commissions, Guyana, is a less than stellar endorsement for changing the institutional status quo. It is perhaps not clear to political elites that these institutional features have brought greater inclusion, more representation and good governance to Guyana as their proponents claim will be the case (Griner 2005; Wickham 1998). If, as then-OAS Secretary General Trujillo noted in 2002, the ESC countries and leaders are proud of their tradition of political stability and democratic governance, then a move away from the Westminster model may not be perceived to be worth the risk. To cite but one example, Barbudan elections in 1991 and 1994, if conducted under the auspices of proportional representation, might not have produced a working majority and introduced the possibility a string of weakly supported coalition governments (Wickham 1998). While this is not an unremarkable occurrence in many countries, developing or otherwise, it would be an anomaly in the relatively politically tranquil ESC.

CONCLUSION

The watchword of ESC constitutionalism is one of stability. This is a region in which most constitutions remain intact from the initial independence era, albeit with modest revisions. Most observers would probably view this stability as an indicator of institutional success. Indeed, this stability stands in stark contrast to the churn and burn of constitutions in the Americas, where constitutions exhibit exceedingly low life expectancy. Moreover, constitutional stability in the ESC has gone hand in hand with democratic stability. Of course, constitutional designers often try to find a careful balance between stability and flexibility. Certainly, architects will want to modernize their institutions, when appropriate. In the case of the ESC constitutions, these new architectural stylings would conceivably take the form of expanded social and economic rights, which represent the most obvious difference between ESC constitutions and those of their generation.

With respect to these sorts of reforms, it seems that the ESC offers a uniquely suitable environment for considering constitutional reform. These are countries that have experienced comparatively little inter-state or intra-state conflict, that have experienced long stretches of uninterrupted democracy, and whose judiciaries are of remarkably high quality.

TABLES AND FIGURES

Table 1. Constitutional History of the English-Speaking Caribbean

Country	New Constitutions	Amendment Years
Antigua and Barbuda	1981	NA
Bahamas	1973	1977; 2002
Barbados	1966	1974; 1980; 1981; 1989; 1990; 1992; 1995; 2000; 2002; 2003
Belize	1981	1985; 1988; 1998; 1999; 2002
Dominica	1978	1984
Grenada	1974	1991; 1992*
	1979	1980; 1981
Guyana	1966	1969
	1970	1973; 1976; 1978
	1980	1984; 1987; 1988; 1990; 1991; 1992; 1995; 1996; 2001
Jamaica	1962	1971; 1975; 1977; 1986; 1990; 1993; 1994; 1999; 2002; 2009
St. Kitts and Nevis	1983	NA
St. Lucia	1978	NA
St. Vincent and the Grenadines	1979	NA
Trinidad and Tobago	1962	1964; 1965; 1968; 1970
	1976	1978; 1979; 1981; 1982; 1983; 1987; 1988; 1994; 1995; 1996; 1999; 2000; 2006; 2009

*The 1974 constitution was re-instated following the restoration of parliamentary government

N.B. All data from the Comparative Constitutions Project (Elkins, Ginsburg, Melton 2010)

Table 2. Executives and Legislative Attributes: ESC Constitutions in comparative perspective
Universe: Constitutional systems from 1789-2006, by various groups

Constitutional Provision	Percent of constitutions with a given power		
	Presidential Constitutions	Parliamentary Constitutions (non-ESC)	Parliamentary Constitutions (ESC)
Executive Decree	69	59	8
Emergency Power	60	67	100
Dissolve Legislature	22	79	92
Oversight of Executive	85	62	8
Executive Initiate legislation	67	68	0
Executive Veto	85	62	92
Executive selects Cabinet	93	94	100
Executive proposes amendment	35	36	0
Executive Pardon	69	59	8
Executive Immunity	37	63	31
Bicameralism	54	49	69
Legislative Immunity	91	83	69
Executive proposes budget	63	64	77
Number of constitutions	203	99	13

N.B. All data from the Comparative Constitutions Project (Elkins, Ginsburg, Melton 2010)

References

Anckar, Dag. 1996. Noncontiguity and Political Architecture: The Parliaments of Small Island States. *Political Geography* 15 (8):697-713.

Anckar, Dag. 1998. Bicameral microstates: A Commonwealth category. *Round Table* 347 (1):367.

Anckar, Dag. 2000. Westminster Democracy: A Comparison of Small Island States Varieties in the Pacific and the Caribbean. *Pacific Studies* 23 (3/4):57-76.

Anckar, Dag. 2002. Why are Small Island States Democracies. *The Round Table* 365:375-390.

Anckar, Dag. 2004. Regime Choices in Microstates: The Cultural Constraint. *Commonwealth and Comparative Politics* 42 (2):206-223.

Anckar, Dag. 2006. Islandness or Smallness? A Comparative Look at Political Institutions in Small Island States. *Island Studies Journal* 1 (1):43-54.

Anckar, Dag. 2007a. Archipelagos and Political Engineering: The Impact of Non-Contiguity on Devolution in Small States. *Island Studies Journal* 2 (2):193-208.

Anckar, Dag. 2007b. Westminster Lilliputs? Parliaments in Former Small British Colonies. *Parliamentary Affairs* 60 (4):637-654.

Bahamas Constitutional Commission, The. 2003. The Bahamas Constitution: Options for Change. Nassau: The Government of the Bahamas.

Baldacchino, G. 1997. *Global tourism and Informal Labour Relations: The Small-scale Syndrome at Work*. London: Mansell.

Caldwell, John C., Graham E. Harrison, and Pat Quiggin. 1980. The Demography of Micro-States. *World Development* 8:953-967.

Ferguson, Niall. 2002. *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power*. New York: Basic Books.

Ginsburg, Tom, Zachary Elkins, and Justin Blount. 2009. Does the Process of Constitution-Making Matter? *Annual Review of Law and Social Science* 5:201-223.

Griner, Steven. 2005. Political Parties of the Caribbean: Changing the Rules Inside and Out. Paper read at Government and Opposition - Roles, Rights and Responsibilities, July 25-27, 2005, at Port of Spain, Trinidad and Tobago.

McIntosh, Simeon C. R. 2008. West Indian Constitutional Authorship: The Role of the Caribbean Court of Justice. Paper read at Conference to Mark the 40th Anniversary of the OECS Supreme Court, February 8, 2008, at St. Lucia.

Olsson, Ola. 2009. On the Democratic Legacy of Colonialism. *Journal of Comparative Economics* 37:534-551.

Payne, D.W. 1993. Caribbean Democracy. *Freedom Review* 24 (3):1-19.

Ragoonath, Reshma. *PM: Constitutional reform talks on hold* Trinidad and Tobagao Guardian Online, 2009 [cited November 17, 2010. Available from http://guardian.co.tt/news/politics/2010/04/16/pm-constitutional-reform-talks-hold

Richardson, B.C. 1992. *The Caribbean in a Wider World: 1492-1992*. Cambridge: Cambridge University Press.

Srebrnik, Henry. 2004. Small Island Nations and Democratic Values. *World Development* 32 (2):329-341.

Trujillo, Cesar Gaviria. 2002. Inauguration of the Constitutional Reform in the Caribbean Conference. Paper read at Conference on Constitutional Reform in the Caribbean, January 20, 2002, at Bridgetown, Barbados.

Wilson, Sascha. *Ghany heads team to work on draft constitution* Trinidad and Tobago Guardian Online, 2009 [cited November 17, 2010. Available from http://guardian.co.tt/news/general/2009/09/06/ghany-heads-team-work-draft-constitution.