Constitutional Supremacy and Judicial Review in Post-Colonial Contexts: The Commonwealth Caribbean and Macau–Hong Kong Experience

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Abstract

This article compares how two post-colonial regions – the Commonwealth Caribbean and the Special Administrative Regions of Macau and Hong Kong – have addressed the constitutionality of laws and the role of judicial review. Despite shared histories of European colonization and inherited legal frameworks, the two regions have developed distinct constitutional trajectories. In the Commonwealth Caribbean, constitutions modeled on the Westminster-Whitehall system coexist uneasily with doctrines of parliamentary sovereignty and "saving law clauses" that preserve pre-independence legislation. By contrast, Macau and Hong Kong, under China's "One Country, Two Systems" arrangement, operate under Basic Laws that assert clear constitutional supremacy while maintaining limited continuity with pre-existing colonial norms. The article explores how courts of final appeal for these regions – particularly the Caribbean Court of Justice (CCJ) in Trinidad and Tobago, and the Privy Council in the United Kingdom – interpret the boundaries between constitutional supremacy and legislative authority. It argues that these divergent approaches reveal broader questions about post-colonial constitutional identity and the evolving relationship between law, sovereignty, and legitimacy in transitional legal orders.

1. Introduction

The constitutional experiences of the Commonwealth Caribbean and the Special Administrative Regions of Macau and Hong Kong illustrate two

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contrasting paths taken by post-colonial societies confronting inherited legal systems. Both regions share a colonial past, marked by constitutional transplantation and limited local participation in the formation of their foundational laws. Yet, their respective strategies for reconciling these legacies differ fundamentally: while the Commonwealth Caribbean has struggled to define the balance between *constitutional supremacy* and *parliamentary sovereignty*, Macau and Hong Kong have institutionalized a model of conditional continuity under the principle of *One Country, Two Systems*.

The Commonwealth Caribbean comprises twelve independent states – among them Barbados, Jamaica, Trinidad and Tobago, Belize, and Guyana – and six British Overseas Territories. Their constitutions were drafted largely in London during the independence movements of the 1960s and 1970s. Scholars have described these as *"constitutions by transfer"*, written not through participatory national processes but by British officials (and, sometimes, members of local elites) under the Westminster–Whitehall model.[1] This model, characterized by a fusion of executive and legislative powers, parliamentary responsibility of ministers, and a non-executive head of state, was transplanted to those newly independent Caribbean nations with minimal adaptation.[2] As McIntosh observed, this gave rise to an enduring "identity problem": legally valid constitutions yet not "our own".[3]

A central tension in these constitutions arises from the coexistence of *parliamentary sovereignty* – as classically articulated by Dicey[4] – with an explicit declaration of opposing nature that "this Constitution is the supreme law of the land".[5] The result is a hybrid constitutional framework where courts must mediate between inherited doctrines of legislative supremacy and modern commitments to constitutional review. The problem is deepened by the inclusion of *saving law clauses*, which preserve pre-independence statutes even when inconsistent with post-independence constitutional rights.[6] While intended to ensure legal continuity and stability during the transition to independence, these clauses have often perpetuated colonial-era laws authorizing corporal punishment or mandatory death

1) Richard Albert, Derek O'Brien & Se-shauna Wheatle (eds.), *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press, 2020), ch. 2, 47–49.
2) Stanley de Smith, *Constitutional and Administrative Law* (London: Penguin, 1971), 52.
3) Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (Kingston: Caribbean Law Publishing, 2002), 37–40.
4) A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885), 39–40.
5) Robinson, Bulkan & Saunders, *Fundamentals of Caribbean Constitutional Law* (Kingston: Caribbean Law Publishing, 2018), ch. 4.
6) Albert et al., *Oxford Handbook of Caribbean Constitutions*, 61–63.

penalties, thereby constraining judicial enforcement of human rights.

In recent decades, this tension has played out in divergent judicial philosophies. The Judicial Committee of the Privy Council (JCPC), still the final court of appeal for many Caribbean states, has often adopted a textual or formalist approach to constitutional interpretation. By contrast, the Caribbean Court of Justice (CCJ), established in 2005, has advanced a more purposive and principle-based jurisprudence that emphasizes the constitution's living nature and its alignment with contemporary human rights norms.[7)]

A different trajectory has unfolded in Asia. Macau and Hong Kong, former Portuguese and British colonies respectively, became Special Administrative Regions (SARs) of the People's Republic of China in 1997 and 1999. Each operates under a Basic Law that functions as a quasi-constitution, guaranteed by the Chinese Constitution under the principle of "One Country, Two Systems."[8)] These Basic Laws ensure a "high degree of autonomy" and continuity with pre-existing legal institutions, while simultaneously affirming the supremacy of the Basic Law over inconsistent colonial statutes.[9)] This structure stands in marked contrast to the Caribbean's general saving law clauses: while both mechanisms preserve elements of the past, the Basic Laws explicitly subordinate continuity to constitutional supremacy.

By examining these two regions in parallel, this paper aims to illuminate the relationship between constitutional design and post-colonial identity. In the Commonwealth Caribbean, the endurance of British legal structures and interpretive habits reflects an incomplete break from the colonial constitutional order. In Macau and Hong Kong, continuity is carefully confined by a framework that subordinates inherited norms to a new constitutional authority. The comparison underscores how post-colonial societies confront the dual imperatives of stability and autonomy, continuity and rupture, in defining their constitutional futures.

7) *McEwan v. Attorney General of Guyana*, [2018] CCJ 30 (AJ); see also Peter Jamadar, "The Basic Structure Doctrine and Its Implications Concerning the Belize Constitution," Caribbean Court of Justice, 2022.

8) Denis D.C. Halis, *Rule of Law in the Mainland and in Macau...With "Chinese Characteristics"?* In: M. Chan, J. Rangel, C. Mendes, et al. E. Yu & R. Ramos (eds). Macau in Coimbra. (International Institute of Macau, 2015), 85-101; Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong University Press, 1999), 24–26.

9) Denis D.C. Halis,*"Post-Colonial" Legal Interpretation in Macau, China: Between European and Chinese Influences.* In: S. Miyazawa, W. Ji, et al (eds.). East Asia's Renewed Respect for the Rule of Law in the 21st Century. (Brill, 2015), 68-86; Albert H.Y. Chen, *The Basic Law and Constitutional Development in Hong Kong* (Hong Kong University Press, 2011), 18–21.

This introduction is followed by five sections. Section 2 examines the constitutional framework of the Commonwealth Caribbean, tracing its Westminster-Whitehall inheritance and the resulting tensions between parliamentary sovereignty and constitutional supremacy. It analyses the identity problem that followed independence, the role of entrenchment clauses, and the persistence of colonial statutes through saving law clauses. Section 3 explores the jurisprudential dialogue between the Judicial Committee of the Privy Council and the Caribbean Court of Justice, contrasting their approaches to constitutional interpretation and the balance of judicial review. Section 4 turns to the constitutional experience of Macau and Hong Kong under the Basic Laws, outlining the "One Country, Two Systems" framework, the principles of autonomy and continuity, and the operation of judicial review within the Special Administrative Regions. Section 5 offers a comparative analysis of these two post-colonial models, highlighting how each manages constitutional continuity, legitimacy, and identity. Section 6 concludes by reflecting on the broader implications of these contrasting trajectories for post-colonial constitutionalism and the ongoing negotiation between inherited authority and constitutional transformation.

2. The Commonwealth Caribbean Constitutional Framework

The constitutional systems of the Commonwealth Caribbean are among the most distinctive products of the British decolonization process. Between the 1960s and early 1980s, twelve Anglophone Caribbean territories transitioned to independence, adopting written constitutions largely drafted in the United Kingdom.[10] These texts, sometimes appended as schedules to the British *Orders in Council* that conferred independence, reflected the *Westminster-Whitehall model* – a design centered on parliamentary government, executive accountability, and adherence to the rule of law as understood in the British tradition.[11]

2.1. The Westminster–Whitehall Model

The "Westminster model" denotes a system in which the head of state is not the effective head of government; the executive authority lies in a prime minister and cabinet drawn from, and accountable to, the legislature.[12] The

10) Albert et al, *Oxford Handbook*, ch. 2.
11) Ibid., 47–49.
12) De Smith, *Constitutional and Administrative Law,* 52.

arrangement presupposes a parliamentary culture of responsible government and constitutional conventions developed over centuries in Britain. Its transplantation into newly independent Caribbean societies occurred without the accompanying political and social foundations that had sustained it in its original context.

While the model was intended to preserve familiarity and stability, it also imported structural tensions. Westminster constitutionalism rests on the principle of *parliamentary sovereignty*, which in its pure form posits Parliament's right "to make or unmake any law whatever."[13] Yet Caribbean constitutions, unlike the unwritten British constitution, are formal written instruments that explicitly declare their own supremacy. Each begins with a clause asserting that "this Constitution is the supreme law of the land," and that any inconsistent law "shall, to the extent of the inconsistency, be void."[14] The coexistence of these doctrines, sovereignty and supremacy, created a hybrid system that would later test judicial interpretation and constitutional coherence.

2.2. The Identity Problem

This hybrid inheritance has produced what Caribbean scholars describe as a persistent *identity problem*.[15] Constitutional texts, though the legal foundation of sovereignty, were not the product of local political imagination or popular will. As one commentator quipped regarding the Constitution of St. Vincent and the Grenadines, independence appeared to have been bestowed by "some Duke of Something-or-the-other who came down and supposedly gave us this new independence constitution."[16] Such accounts underscore the sense of detachment between formal independence and constitutional authorship. Simeon McIntosh argues that because these constitutions originated externally, they lacked the transformative legitimacy necessary to ground a new constitutional order; they represented continuity rather than rupture.[17]

The legal consequences of this externally imposed design were significant. Many constitutional provisions, including those governing fundamental rights, were framed in language drawn almost verbatim from British co-

13) Dicey, *Law of the Constitution*, 39–40.
14) Robinson et al, *Fundamentals,* ch. 4.
15) Albert et al., *Oxford Handbook*, ch. 1, 59–61.
16) Ibid.
17) McIntosh, *Caribbean Constitutional Reform*, 37–40.

lonial instruments.[18] Consequently, even after independence, local legislatures and courts often continued to rely on British precedents and interpretive methods, perpetuating the colonial legal culture that the constitutions ostensibly displaced.

2.3. Entrenchment and the Structure of Constitutional Amendment

To reconcile parliamentary sovereignty with constitutional supremacy, the framers introduced a system of *entrenchment*. Entrenchment clauses impose heightened procedural requirements for constitutional amendments, varying according to the importance of the provision.[19] For ordinary amendments, a two-thirds parliamentary majority may suffice; for entrenched provisions – such as those protecting fundamental rights, the separation of powers, and the office of the judiciary – a referendum or supermajority in both legislative chambers is required.[20]

This mechanism, while preserving stability, also restricts flexibility. Alexis describes the paradox succinctly: although Parliament may alter "any of the provisions of this Constitution," it may do so only "subject to the provisions of the Constitution."[21] Thus, Parliament's authority to amend the Constitution is itself constitutionally limited. The doctrine of *constitutional entrenchment* embodies the principle that certain constitutional elements are not merely procedural but substantive, thereby defining the basic structure of the constitutional order.

Justice Peter Jamadar of the Caribbean Court of Justice (CCJ) has elaborated this concept through the analogy of a tree and its roots.[22] The visible text of the constitution (i.e., the trunk and branches) rests upon deeper, often unarticulated principles such as the rule of law, the separation of powers, and respect for fundamental rights. These principles form the *basic structure* of the constitution, without which the legal order would collapse. Amendments that seek to uproot this structure, even if procedurally valid, would therefore be unconstitutional in substance. The CCJ's developing jurisprudence increasingly reflects this understanding, aligning with comparative doctrines in India and other jurisdictions that recognize substantive limits

18) Ibid., 38.
19) Francis Alexis, *Changing Caribbean Constitutions* (Bridgetown: Carib Research & Publications, 1983).
20) Ibid.
21) Ibid.
22) Jamadar, "Basic Structure Doctrine".

to constitutional amendment.

2.4. The Preservation of Colonial Laws: Saving Law Clauses

If entrenchment represents the effort to secure the future of constitutionalism, *saving law clauses* reflect an attempt to preserve its past. Nearly all Commonwealth Caribbean constitutions contain clauses safeguarding laws enacted prior to independence from constitutional challenge.[23] Two principal forms exist. *General saving clauses* protect all laws in force at independence, while *partial saving clauses* immunize specific categories, such as criminal punishments, from review under the new bill of rights.[24] The rationale was to ensure legal continuity and prevent the immediate invalidation of colonial legislation upon independence.

However, the long-term effects have been deeply problematic. Many saved laws – including those prescribing mandatory death sentences and corporal punishment – conflict with modern human rights standards.[25] The courts have thus faced the dilemma of reconciling the constitutional protection of fundamental rights with clauses that insulate pre-independence laws from scrutiny. In *Reyes v. The Queen* and *Boyce v. R*, the Privy Council acknowledged the tension but adopted a cautious, textual approach, deferring to the letter of the savings clause.[26] By contrast, the CCJ in *McEwan v. Attorney General of Guyana* interpreted the clause narrowly, holding that not all pre-independence laws could be preserved if inconsistent with the spirit of the post-independence constitution.[27]

This judicial divergence reflects a deeper philosophical divide between *formalism* and *purposivism* in constitutional interpretation. For the Privy Council, constitutional authority is bounded by text; for the CCJ, it is animated by principles. In the Caribbean context, this tension encapsulates the broader struggle between continuity and transformation: the colonial inheritance and the aspiration for a truly indigenous constitutional identity.

23) Albert et al., *Oxford Handbook*, 61–63.
24) Ibid.
25) Robinson et al, *Fundamentals,* ch. 5.
26) *Reyes v. The Queen* [2002] UKPC 11; *Boyce v. R* [2004] UKPC 32.
27) *McEwan v. Attorney General of Guyana* [2018] CCJ 30 (AJ).

3. Judicial Review and the Tension Between Supremacy and Sovereignty

The coexistence of *constitutional supremacy* and *parliamentary sovereignty* has produced one of the most distinctive jurisprudential debates in the Commonwealth Caribbean. While the constitutions expressly affirm their supremacy, the region's inherited Westminster tradition continues to influence judicial attitudes toward legislative authority. The result is an evolving dialogue between two courts – the Judicial Committee of the Privy Council (JCPC) in London and the Caribbean Court of Justice (CCJ) in Port of Spain – over how to interpret and enforce constitutional limits.

3.1. From Westminster to Written Constitutions

Under the British constitution, parliamentary sovereignty is a foundational principle. Dicey famously declared that "no person or body is recognized by the law as having a right to override or set aside the legislation of Parliament."[28] In the United Kingdom, the absence of a written constitution means that Parliament's authority remains legally unbounded, constrained only by political convention. By contrast, every Commonwealth Caribbean constitution is a written instrument that declares its own supremacy and grants the courts explicit authority to strike down laws inconsistent with it.[29] This transformation from an unwritten to a written constitutional order introduced a conceptual rupture in the inherited model.

Yet, despite this formal shift, early post-independence jurisprudence remained hesitant to embrace robust judicial review. Many judges, trained in or influenced by the English tradition, viewed Parliament as the primary guardian of constitutional values.[30] Consequently, courts often exhibited deference to legislative intent, interpreting constitutional rights narrowly and upholding the validity of colonial-era statutes preserved under savings clauses.[31] The persistence of this interpretive restraint revealed the enduring pull of the Westminster ethos within the Caribbean's new constitutional order.

28) Dicey, *Law of the Constitution*, 39–40.
29) Robinson et al, *Fundamentals*, ch. 4.
30) McIntosh, *Caribbean Constitutional Reform*, 42–44.
31) Albert et al., *Oxford Handbook*, 61–63.

3.2. The Privy Council: Textualism and Deference

For much of the post-independence period, the JCPC remained the final appellate court for most Caribbean states. Its jurisprudence has been marked by formalism and textual fidelity. In *Reyes v. The Queen*, the Privy Council invalidated the mandatory death penalty in Belize, but its reasoning was cautious, rooted in the text of the Constitution and the specific wording of the savings clause.[32] Similarly, in *Boyce v. R* (Barbados), the JCPC emphasized the limited scope of judicial intervention, holding that courts could not invalidate pre-independence laws expressly protected by constitutional savings provisions, even when these conflicted with human rights norms.[33]

This textual approach reflects the Privy Council's broader philosophy: constitutional interpretation must remain within the bounds of the written text, not guided by judicial perceptions of morality or social progress.[34] As a judge, Lord Hoffmann, stated in *Matthew v. State of Trinidad and Tobago*, the function of the court is "to apply the law as it is written, not as it might ideally be."[35] Critics have argued that such formalism constrains the transformative potential of post-colonial constitutions and perpetuates the colonial logic of deference to legislative power.[36]

3.3. The Caribbean Court of Justice: Holism and Transformation

The establishment of the CCJ in 2005 marked a turning point. Conceived as both an appellate and a regional integration court, the CCJ symbolizes constitutional self-determination. Its jurisprudence has articulated a distinct interpretive philosophy grounded in *constitutional holism* and *living constitutionalism*.[37] In *McEwan v. Attorney General of Guyana* (2018), the Court invalidated a colonial-era statute criminalizing cross-dressing, holding that it could not be shielded by the savings clause because it offended the post-independence constitutional order.[38] The Court reasoned that the Constitution must be interpreted "in a manner that gives life to its spirit," emphasizing dignity, equality, and evolving standards of human rights.[39]

32) *Reyes v. The Queen* [2002] UKPC 11.
33) *Boyce v. R* [2004] UKPC 32.
34) *Matthew v. State of Trinidad and Tobago* [2004] UKPC 33.
35) Ibid.
36) Alexis, *Changing Caribbean Constitutions*.
37) Jamadar, "Basic Structure Doctrine".
38) *McEwan v. Attorney General of Guyana* [2018] CCJ 30 (AJ).
39) Ibid.

Similarly, in *Nervais v. The Queen* (2018), the CCJ struck down mandatory death sentences in Barbados, reaffirming that constitutional supremacy prevails over pre-independence laws.[40] The Court's reasoning invoked the *basic structure* of the Constitution, including respect for human dignity and proportionality in punishment. Justice Peter Jamadar described this interpretive orientation as one that "resists the fossilization of colonial norms under the guise of continuity."[41]

Through these decisions, the CCJ has redefined judicial review as an instrument of constitutional transformation rather than mere textual interpretation. Its method integrates rules and principles, echoing Ronald Dworkin's jurisprudence, which conceives law not simply as a set of commands but as a coherent expression of moral and constitutional integrity.[42] The Court thus conceives the Constitution as a *living document* that evolves alongside social values, rather than a static artifact frozen at the moment of independence.

3.4. Competing Paradigms of Legitimacy

The divergence between the JCPC and the CCJ is not merely interpretive; it also reflects competing understandings of judicial legitimacy. One may argue that the Privy Council's authority rests on its distance: thus, it can claim to be a neutral space of deliberation as a court external to regional politics. Many Caribbean states have retained the JCPC precisely because it is perceived as insulated from domestic pressures.[43] The CCJ, by contrast, draws its legitimacy from proximity: from its commitment to regional values, post-colonial identity, and an indigenous constitutional culture.[44]

The debate over which court better safeguards constitutionalism mirrors the broader tension between *textual certainty* and *principled flexibility*. The JCPC's formalism ensures predictability but risks ossifying outdated norms. The CCJ's purposive approach promotes adaptation and justice but exposes the judiciary to accusations of activism. In this ongoing dialogue, Caribbean constitutionalism oscillates between two poles: deference to inherited authority and assertion of interpretive autonomy.

40) *Nervais v. The Queen* [2018] CCJ 19 (AJ).
41) Jamadar, "The Basic Structure Doctrine," 2–3.
42) Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 22–28.
43) Albert et al., *Oxford Handbook*, ch. 6, 112–114.
44) Richard Albert, "Caribbean Constitutionalism at the Crossroads," (2020) 5 *Caribbean Law Review* 201–205.

Ultimately, the *supremacy–sovereignty tension* encapsulates the unfinished project of Caribbean constitutionalism. Written constitutions proclaim a new order of supremacy, yet the gravitational pull of Westminster continues to shape judicial consciousness. The gradual evolution of CCJ jurisprudence suggests that the region is moving toward a more self-confident constitutional identity: one in which judicial review serves not as an exception to parliamentary power but as its necessary complement in a truly post-colonial rule of law.

4. The Macau and Hong Kong Model: Basic Laws and Continuity

The constitutional structures of Macau and Hong Kong offer a contrasting paradigm to that of the Commonwealth Caribbean. Like the Caribbean states, both regions experienced European colonial rule – Macau under Portugal and Hong Kong under Britain – but their post-colonial transition unfolded within a different constitutional framework. Rather than attaining independence, Macau and Hong Kong were reintegrated into the People's Republic of China (PRC) as Special Administrative Regions (SARs). Their governance is regulated by the *Basic Laws*, quasi-constitutional instruments enacted under the authority of the Chinese Constitution, pursuant to the principle of "One Country, Two Systems."[45]

4.1. The "One Country, Two Systems" Framework

The doctrine of *One Country, Two Systems* was devised by Deng Xiaoping in the 1980s to facilitate the peaceful reunification of territories that had previously been under different political and economic systems.[46] Under this formula, the PRC maintains sovereignty (*one country*), while Macau and Hong Kong retain a *high degree of autonomy* and continue operating capitalist economies and common law legal systems (*two systems*). The arrangement is constitutionally entrenched in Article 31 of the Chinese Constitution, which authorizes the creation of special administrative regions governed by "systems prescribed by law by the National People's Congress."[47]

45) Ghai, *Hong Kong's New Constitutional Order*, 12–14; Halis, *Rule of Law in the Mainland*, 85-101.
46) Albert H.Y. Chen, *The Basic Law and Constitutional Development in Hong Kong* (Hong Kong University Press, 2011), 20–22.
47) Constitution of the People's Republic of China (1982), art. 31.

Each SAR has its own *Basic Law* – the *Basic Law of the Hong Kong Special Administrative Region* (effective 1997) and the *Basic Law of the Macau Special Administrative Region* (effective 1999). These instruments operate and occupy the position of constitutions in their legal systems, establishing the governmental structure, the rights framework, and the relationship between the region and the central authorities in Beijing.[48] The Basic Laws guarantee local self-governance in most domestic affairs, including legislation, taxation, the judiciary, and immigration, while reserving defense and foreign affairs to the central government.[49]

4.2. Constitutional Supremacy and Continuity

Unlike the Westminster-derived constitutions of the Caribbean, which balance between parliamentary sovereignty and constitutional supremacy, the Basic Laws unequivocally assert their superior normative status. Article 11 of each Basic Law stipulates that "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law," and that "No law, decree, administrative regulation or normative act of the Macau Special Administrative Region shall contravene this Law"[50]. These provisions establish a clear hierarchy: the Basic Law functions as the supreme constitutional instrument within the SAR, subordinate only to the PRC Constitution in a formal sense but autonomous in substantive operation.

Continuity, however, remains a defining feature. Both Basic Laws provide that "laws previously in force shall be maintained," provided they do not conflict with the Basic Law.[51] This *conditional continuity* stands in marked contrast to the Caribbean *saving law clauses*, which shield pre-independence laws from constitutional challenge regardless of inconsistency. In Macau and Hong Kong, by contrast, continuity is *permissive rather than absolute*: pre-existing colonial legislation survives only insofar as it aligns with the new constitutional order. This difference reflects distinct political and jurisprudential objectives. The Caribbean constitutions sought to preserve stability through deference to the colonial legal framework; the Basic Laws sought to reassure local and international communities that the transition to Chinese sovereignty would not destabilize the rule of law or

48) Halis, *Rule of Law in the Mainland*, 85-101.
49) Chen, *The Basic Law and Constitutional Development*, 27–30.
50) *Basic Law of the Hong Kong Special Administrative Region*, art. 11; *Basic Law of the Macau Special Administrative Region*, art. 11.
51) Ibid., art. 8.

economic systems, while maintaining an explicit constitutional hierarchy that ensures the primacy of the new order.

4.3. The Principles of Autonomy and Local Leadership

The *high degree of autonomy* granted to the SARs includes legislative, executive, and judicial independence within defined limits. The Basic Laws guarantee the continuation of the capitalist system and existing social and legal institutions for fifty years after the handovers – until 2047 for Hong Kong and 2049 for Macau. In practice, autonomy includes several key elements, such as:

1. High Separation of their Legal Systems – Both SARs maintain the legal traditions inherited from their colonial periods: Hong Kong continues to operate under common law, while Macau retains a civil law system derived from Portuguese law.
2. Independent Judiciary – Each SAR has its own court hierarchy, culminating in a Court of Final Appeal (CFA), which possesses the power of constitutional review within the region.
3. Local Leadership – The principle of "Hong Kong people ruling Hong Kong" and "Macau people ruling Macau" ensures that key offices, including the Chief Executive and judges, must be filled by permanent residents with substantial local ties.

This arrangement constitutes an unprecedented experiment in comparative constitutional design: two autonomous regions, under the sovereignty of a socialist state, preserving capitalist economies and legal systems distinct from the mainland. The Basic Laws, in this sense, function both as a constitutional charter and a treaty-like assurance of continuity.

4.4. Judicial Review and the Role of the Basic Law

Judicial review in the SARs is entrusted to the Courts of Final Appeal, which interpret and apply the Basic Law within the boundaries of autonomy. In the early years of Hong Kong as a SAR, the CFA has exercised this authority actively, developing a sophisticated body of constitutional jurisprudence on rights and the separation of powers.[52] In *Ng Ka Ling v. Director of Immigration* (1999), the Court affirmed its power to review

52) Johannes Chan, "Hong Kong's Constitutional Interpretation: The Court of Final Appeal and the NPCSC," (2015) 15 *Hong Kong Law Journal* 195–197.

legislative acts and government decisions for consistency with the Basic Law, characterizing the Basic Law as "the constitutional instrument for the Hong Kong Special Administrative Region."[53] However, the decision also exposed the limits of autonomy: the National People's Congress Standing Committee (NPCSC) in Beijing retains the ultimate authority to interpret the Basic Law under Article 158.[54] The resulting dynamic, a local judiciary exercising constitutional review subject to central interpretive control, illustrates the tension between autonomy and sovereignty embedded in the *One Country, Two Systems* formula.

In Macau, judicial review has been more restrained, reflecting both its civil law tradition and a less contentious political environment. Nevertheless, Macau's courts have similarly treated the Basic Law as the supreme legal norm and invalidated inconsistent local legislation when necessary.[55]

4.5. Comparative Reflections: Continuity, Supremacy, and Post-Colonial Order

The contrast between the SARs' Basic Laws and Caribbean constitutions reveals two divergent conceptions of constitutional transition. In the Caribbean, independence entailed *political separation but legal continuity, i.e.,* the transfer of sovereignty accompanied by the preservation of colonial law. In Macau and Hong Kong, reintegration entailed *political continuity but legal differentiation, i.e., t*he restoration of sovereignty accompanied by the maintenance of distinct legal systems under a new constitutional framework. Both approaches seek to balance legitimacy and stability, but they prioritize different values.

The *saving law clauses* of the Caribbean emphasize caution and preservation; the *continuity clause* of the Basic Laws emphasizes adaptation within constitutional supremacy. The Caribbean experience reflects ambivalence toward colonial legal inheritance; the SARs' model represents a negotiated reaffirmation of that inheritance within a sovereign framework. In both contexts, judicial review serves as the critical mechanism for mediating the boundaries between past and present – between inherited authority and emergent constitutional identity.

53) *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315 (CFA).
54) Ibid.; see also Albert Chen, "The NPCSC's Power of Interpretation and the Autonomy of Hong Kong's Legal System," (2000) 30 *Hong Kong Law Journal* 151.
55) Halis,*"Post-Colonial" Legal Interpretation in Macau*, 68-86.

5. Comparative Reflections: The Legacy of Empires and Constitutional Identity

Both the Commonwealth Caribbean and the Special Administrative Regions of Macau and Hong Kong illustrate the profound and enduring influence of empires on constitutional design. Each region inherited institutional and normative frameworks from its colonial predecessor, but the paths they took to reconcile those inheritances diverged markedly. The Caribbean model embodies *independence without rupture*, while the Macau-Hong Kong model represents *reunification through differentiation*. These distinct trajectories highlight how constitutional identity is negotiated in post-colonial contexts, between the desire for stability and the aspiration for autonomy.

5.1. Colonial Continuities and Constitutional Transfers

The constitutions of the Commonwealth Caribbean were born from what Albert and his collaborators have called *"constitutional transfers"* – arrangements designed in the United Kingdom and adapted minimally to local circumstances.[56] These transfers imported not only the institutional architecture of Westminster government but also the ideological assumptions underpinning it: a reverence for parliamentary sovereignty, faith in the political process as the ultimate safeguard of rights, and the subordination of judicial power to legislative supremacy.[57]

In contrast, Macau and Hong Kong's Basic Laws were negotiated instruments, drafted to reconcile two different political systems within a single sovereign state.[58] They too preserved colonial structures – the judiciary, economic order, and language of law – but reconstituted them under a new constitutional hierarchy that explicitly affirmed the supremacy of the Basic Law. Thus, whereas the Caribbean constitutions inherited the Westminster model largely as a finished product, the Basic Laws represent a *constitutional synthesis*: they preserve the colonial legal order within a framework of Chinese sovereignty and constitutional supremacy.

Both models demonstrate the paradox of decolonization: independence or reintegration rarely begins with a constitutional blank slate. Instead, colo-

56) Albert et al, *Oxford Handbook,* ch. 2.
57) Dicey, *Law of the Constitution*, 39–40.
58) Halis, *Rule of Law in the Mainland*, 85-101; Ghai, *Hong Kong's New Constitutional Order*, 24–26.

nial legacies persist as legal, institutional, and even epistemic continuities that shape how sovereignty and legitimacy are understood.

5.2. The Role of Judicial Review in Reimagining Sovereignty

Judicial review has become the principal site where these post-colonial continuities are contested and reinterpreted. In the Caribbean, the CCJ has assumed this role by reasserting the supremacy of the Constitution over colonial-era statutes and by rejecting the formalist legacy of the Privy Council. Its jurisprudence in cases such as *McEwan v. Attorney General of Guyana* and *Nervais v. The Queen* reflects a deliberate effort to transform the Constitution from a transplanted instrument of governance into an indigenous source of normative authority.[59] The CCJ's interpretive philosophy – the view of the Constitution as a *living document* grounded in principles of dignity, equality, and the rule of law – represents an act of constitutional self-definition that is aligned with important trends within constitutional interpretation.

In Hong Kong and Macau, judicial review functions within a more complex hierarchy. The Courts of Final Appeal interpret the Basic Laws as supreme within the regions but subject to the ultimate interpretive power of the National People's Congress Standing Committee (NPCSC). This asymmetry embodies a tension between *autonomy and central control*, a defining feature of the "One Country, Two Systems" model. Yet, within those limits, the SAR courts have cultivated an impressive constitutional jurisprudence that affirms local autonomy and the rule of law as essential components of the Basic Laws' constitutional identities.[60]

In both regions, then, judicial review operates as the principal mechanism for negotiating constitutional meaning in light of inherited norms. Courts are not merely arbiters of legality; they are architects of post-colonial legitimacy.

5.3. Constitutional Identity and the Management of Continuity

The management of continuity is at the heart of post-colonial constitutionalism. In the Caribbean, continuity was guaranteed through *saving law*

59) *McEwan v. Attorney General of Guyana* [2018] CCJ 30 (AJ); *Nervais v. The Queen* [2018] CCJ 19 (AJ).

60) Albert H.Y. Chen, *The Basic Law and Constitutional Development in Hong Kong* (Hong Kong University Press, 2011), 34–36.

clauses, which preserved pre-independence legislation regardless of its consistency with new constitutional rights.[61] These clauses, once justified as a stabilizing measure, have come to symbolize the persistence of colonial legality within independent states. In Macau and Hong Kong, continuity was structured differently: all pre-existing laws remain valid only insofar as they are consistent with the Basic Law.[62] The distinction is more than technical: it reflects two contrasting conceptions of constitutional identity.

The Caribbean approach embodies a *defensive continuity*: a reluctance to depart from inherited structures for fear of instability. The SAR approach embodies a *conditional continuity*: preservation coupled with subordination to a higher constitutional norm. Both systems, however, reflect a cautious pragmatism, recognizing that legitimacy in transitional orders often depends as much on continuity as on change. As Ackerman has noted in the context of constitutional transformations, legitimacy arises when continuity and innovation are reconciled through institutionalized processes rather than revolutionary breaks.[63]

5.4. The Post-Colonial Quest for Legitimacy

At its core, the comparative experience of the Commonwealth Caribbean and the Chinese SARs reveals the post-colonial quest for *constitutional legitimacy*. For the Caribbean, the challenge lies in transforming constitutions that were granted rather than created: turning "paper constitutions" into expressions of local sovereignty. For the Macau and Hong Kong SARs, legitimacy rests on maintaining trust in the Basic Law as a genuine guarantee of a high degree of autonomy within the unitary state of China. In both contexts, legitimacy depends on the perceived capacity of constitutional institutions – especially courts – to interpret the constitution as more than a technical instrument, but as an evolving statement of political community.

In this sense, post-colonial constitutionalism is less about the origin of the text than about the practices of interpretation that sustain it. Whether through the CCJ's assertion of regional judicial authority or the CFA's invocation of constitutional rights under the Basic Law, courts perform the work of *re-constitutionalization*: they transform inherited legality into an indigenous and legitimate constitutional order.

61) Albert et al., *Oxford Handbook of Caribbean Constitutions*, 61–63.
62) *Basic Law of the Hong Kong SAR*, arts. 8–11; *Basic Law of the Macau SAR*, arts. 8–11.
63) Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), 6–8.

6. Conclusion

The comparative trajectories of the Commonwealth Caribbean and the Special Administrative Regions (SARs) of Macau and Hong Kong reveal two distinct paradigms of post-colonial constitutionalism. Both emerged from the shadow of European empire and sought to balance continuity with transformation, stability with autonomy. Yet they diverged fundamentally in how they conceived of constitutional supremacy, judicial authority, and the management of inherited legal orders.

In the Commonwealth Caribbean, independence produced a paradox. While political sovereignty was achieved, the constitutional framework remained tethered to the Westminster–Whitehall model, preserving doctrines of parliamentary sovereignty and colonial-era legislation through *saving law clauses*. The judicial response to this hybrid order has been evolutionary: the Caribbean Court of Justice (CCJ) has gradually asserted a jurisprudence of constitutional supremacy and living constitutionalism, transforming constitutions drafted abroad into instruments of regional self-definition. Judicial review, in this context, has become the vehicle through which sovereignty is reimagined and the colonial inheritance reinterpreted.

Macau and Hong Kong followed a different path. Their Basic Laws, products of negotiation between European countries (Portugal and the United Kingdom) and the People's Republic of China rather than decolonization, established a model of *conditional continuity* under the doctrine of *One Country, Two Systems*. The Basic Laws affirm the supremacy of a new constitutional order while maintaining much of the colonial legal system within that hierarchy. Judicial review within the SARs, though limited by the interpretive power of the National People's Congress Standing Committee, nonetheless operates as a meaningful expression of autonomy and rule of law. The Basic-Law model thus represents a constitutional synthesis: continuity constrained by supremacy, autonomy within unity.

Placed side by side, these two paradigms illuminate the diversity of post-colonial constitutional experience. The Commonwealth Caribbean model demonstrates how inherited institutions can evolve toward autonomy through reinterpretation; the SAR model shows how continuity can be preserved within a framework of sovereignty through constitutional design. Both, however, reveal that post-colonial legitimacy is not achieved by discarding the past but by reconstituting it: through institutions, interpretation, and judicial imagination.

Ultimately, the challenge common to both regions lies in sustaining the

transformative promise of constitutionalism amid the enduring legacies of empire. Whether through the CCJ's assertion of regional judicial authority or the SAR courts' defense of autonomy, each experience underscores the same truth: that the authority of the constitution, in any post-colonial society, depends not only on its text but on the ongoing dialogue between legislation, legal interpretation and philosophy, historical approaches, and the collective will to govern oneself.