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Historical Introduction

The constitutional history of Jamaica has not always been one of orderly growth. It has been sometimes erratic but always has been characterized by a paradoxical inclination to appeal to precedent and at the same time to indulge in constitutional experimentation.¹

The history of the Constitutional Law of Jamaica begins for all practical purposes with the acquisition of the Island by an English fleet in 1655. The earlier occupation of the Island by the Arawak Indians² with their rudimentary government under a system of chieftainship and subsequently by their Spanish discoverers, conquerors and exterminators,³ who administered the settlement under a limited palatine jurisdiction, left no legal or constitutional traces in the institutions of the English period.

1. The British Acquisition of Jamaica

The circumstances of the conquest of Jamaica in 1655 were peculiar and immediately sowed the seeds of a legal problem of far-reaching constitutional importance. The constitutional status of a British colony varied in accordance with whether it should be classified as settled or conquered.⁴ Several factors militated against the application of this legal dichotomy to Jamaica. Firstly the capture of the Island was effected by a Cromwellian expedition and it was doubtful whether, on the restoration, the King could adopt and ratify an act of 'illegal warfare'. Secondly although the Island was formally ceded by Spain to England in the Treaty of Madrid fifteen years later, the title of the Spanish Crown had itself been the subject of legal dispute.⁵ Thirdly the Spanish Administrators had negotiated an agreement with the English invaders by which the Spanish were permitted to withdraw freely from the Island leaving no settlement or administrative structure.⁶ From the beginning therefore Jamaica came to be treated as a settled Colony.

The early constitutional history of Jamaica is to a large extent concerned with

1. A student of the constitutional history of Jamaica was thus led to give as a title to his B.Litt. (Oxon.) dissertation, 'Constitutional Experiments in Jamaica' (1948), H.L. DaCosta.
2. On the Arawaks, see Robert Penny *History of Jamaica* (1807) p. 6 *et seq.*; J.S. Tyndale-Biscoe 'The Jamaican Arawak: his origin, history and culture' *Jamaica Historical Review*, 1962, vol. 3, p. 1; C.V. Black *The Story of Jamaica* (1965) chaps. I, II.
3. On the Spanish period, see Bryan Edwards *History of the West Indies* (1793) vol. 1, bk. 2, ch. 1; F. Cundall and J.L. Pieterse *Jamaica under the Spaniards* (1919); H.P. Jacobs, 'The Spanish Period of Jamaican History,' *J.H.R.* 1957, vol. 3, no. 1, pp. 88-90; Black, op. cit. chap. III.
4. See Blackstone 1 *Comm.* 100.
5. For an account, see B. Edwards, op. cit. vol. 1, p. 117 *et seq.*
6. See H.P. Jacobs, loc. cit. p. 79; E. Long *History of Jamaica* (1774) vol. 5, p. 584; W.J. Gardner *A History of Jamaica* (1873) p. 13. For a copy of the Articles of Capitulation, see the *Jamaica Historical Review*, 1945-8, vol. 1, pp. 112-5.

the struggle of the inhabitants under an early form of representative government to assert their claims to the privileges and rights of English settlers.

2. The Early Representative System (1661-1886)

From the Capitulation to the Restoration Jamaica suffered a military government administered by the commanders of the invading forces. As a result of the political uncertainties in England, Edward D'Oyley, an officer of the original expedition of 1655 who had survived his superiors continued to administer the affairs of the Island under a military jurisdiction. D'Oyley ruled with the firm hand of a military commander. He was assisted by a sort of Executive Council of Officers. On the Stuart Restoration Charles II allowed D'Oyley to continue in the governorship and after a period of considerable uncertainty he was finally confirmed in the position in 1661. The King appointed a Special Committee of the Privy Council to prepare a constitution for the Government of the Island. He also promised 'that all children of our natural born subjects of England to be born in Jamaica, shall from their respective births be reputed to be, and shall be, free denizens of England, and shall have the same privileges to all intents and purposes as our free-born subjects of England.'⁷ D'Oyley was instructed to arrange immediately for the election of a Council of twelve persons, eleven of whom were 'to be chosen fairly and indifferently . . . as the representatives of the military officers, the planters and the inhabitants . . . To assist and advise him in the conduct of the colony's affairs'.⁸ It appears that writs were actually issued in the King's name for the summoning of such a Council but there is no extant record as to the manner of its selection. D'Oyley, who was predominantly a soldier, did very little to develop civil institutions although the Councillors were sworn in as Justices of the Peace and Courts were established in the three leading towns. This situation was however quickly remedied by the arrival of Lord Windsor in 1662 as Governor in place of D'Oyley. The Royal Commission⁹ and Instructions¹⁰ to Lord Windsor have been of tremendous constitutional significance. He was empowered to govern in accordance with 'all such reasonable laws, customs and institutions as are exercised and settled in our other colonies and plantations, or such others as shall upon mature advice and consideration be held necessary and proper for the good government and security of our said Island of Jamaica the said Islands adjacent, provided that they be not repugnant to our laws of England, but agreeing thereto as near as the conditions of affairs will permit'. Paragraph 20 of his Instructions stated: 'You shall have power, with the advice of the Council, to call assemblies together according to the custom of our plantations, to make laws and upon eminent necessities to levy monies . . . provided that they be not repugnant to any of our laws of England, and that such laws shall be in force for two years, and no longer, unless they shall be approved and confirmed by us'. These provisions were the foundation of the constitutional structure of Jamaica for two

7. See Royal Proclamation, 14 Dec. 1661, C.O. 1/15, ff. 181-184 and C.O. 139/1, f. 8. The Privy Council had recommended that the conferment of the rights of citizenship should be 'declared by Act of Parliament' See Calendar of State Papers, Colonial Series, 1661-8, No. 107.
8. C.O. 1/15, f. 185.
9. For a copy see Journal of the House of Assembly of Jamaica, vol. 1, app. p. 4.
10. Ibid. p. 5.

hundred years and in that period provided the main basis for the claim of the planters that they were entitled to regulate their own affairs.

The prerogative restricted

The Assembly which met in 1664 immediately gave notice of the constitutional doctrines to which it would subscribe. One of its first enactments was a Law¹¹ declaring that the laws of England were in force in Jamaica. Another Law¹² not only confirmed various Ordinances that had previously been promulgated by the Governor and the Council but also declared that other similar Ordinances were invalid. It passed two money bills to provide for the new administration and declared illegal any further imposition of taxation 'without the assent of the Governor, Council and Assembly'. The Assembly subsequently asserted a right to examine estimates, appropriate supplies, audit accounts, and even to control the appointment and conduct of finance officers.¹³ The Assembly by reason of its control over finances was able to enact legislation dealing with its own organization, the regulation of the judicial system, the collection of fees and the execution of public works.

In 1675 the Crown decided on a strong policy in colonial affairs and appointed a Special Committee of the Privy Council to assume the functions of the Council of Trade and Plantations. The Committee amended several of the Assembly's Bills and, these as well as others drafted in England, were sent out to Jamaica with Carlisle, the newly appointed Governor, who was instructed to introduce the Poyning's System.¹⁴ The Assembly, led by Samuel Long, the Chief Justice, rejected these Bills. The Governor had to summon the Assembly regularly in order to secure supplementary votes to take care of the increasing costs of the administration. The Assemblymen employed the resultant opportunities to claim the customary rights and privileges of English subjects. In the heat of the controversy the Governor had dismissed Long, sending him to England on a charge of misprision of treason.

These events led to a re-examination of the legality of the Assembly's claims.¹⁵ After an examination of the constitutional history of the Island the Lords of Trade and Plantations announced that 'after consideration of divers documents, their Lordships agree that the present method of making laws in Barbados . . . be applied to Jamaica.'¹⁶ Long was exonerated and reinstated. The victory of Long and the Assembly was hailed in Jamaica. Nearly a hundred years later the constitutional doctrines of the Assemblymen received judicial blessing in the celebrated

11. C.O. 139/1, ff. 117-118.
12. C.O. 139/1, f. 41.
13. Egerton *Origin and Growth of the English Colonies* (1903), p. 102 *et seq.*; A.M. Whitson *The Constitutional Development of Jamaica - 1660 to 1729* (1929), pp. 17-18, 166-67; F.G. Spurdle *Early West Indian Government*, p. 11 *et seq.*; H. DaCosta 'The First Constitutional Struggles J.H.R. 1957, vol. 3, p. 22.
The Assembly's exclusive right to initiate money bills, raise and appropriate taxes was only finally conceded in 1715. For the developments in this interesting struggle, see generally the Debates of the Assembly for the period, Journal of the House of Assembly of Jamaica, vols. 1-11.
14. Calendar of State Papers, Colonial Series, 1677-80 nos. 480-481, 641. Under Poyning's Law, 10 Hen. VII c. 4. the government of Ireland was brought under rigid control. No Bill could be introduced in either Legislative Chamber without the prior approval of the English Privy Council, and the Irish Parliament had to reject or enact the Bill in its approved form without amendment.
15. Calendar of State Papers, Colonial Series, 1677-80, nos. 1538, 1540, 1550-52, 1559-60.
16. Calendar of State Papers, Colonial Series, 1677-80, no. 1561.

case of *Campbell v Hall*¹⁷ when Lord Mansfield held that Jamaica was a settled colony and therefore its English inhabitants were entitled to the ancient privileges of English subjects.

The early constitutional structure was described by Sir Thomas Modyford, who had been Governor from 1664 to 1671, in a reply to the King's Commissioners in the following terms:

The legislative power of making and repealing laws is settled in the Governor as His Majesty's commissioner, and in His Majesty's Council, as representing the Lords House, and in the Assembly, composed of the representatives of the freeholders, two persons elected out of every parish, and these chosen as the commons in England, being an humble model of our high court of parliament, each of these representative bodies enjoying a negative as well as an affirmative vote . . .

Right reason, which is the common law of England, is esteemed and of force amongst us, together with Magna Charta and the ancient statutes of England, so far as they are practicable.¹⁸

The members of the Council were appointed by the Governor and held office at the pleasure of the Crown. Functionally, the Council was a sort of combination of the House of Lords and the Privy Council, exercising legislative, advisory and judicial functions. Its assent to legislation was necessary, the laws being enacted by the Governor, Council and Assembly.

Under the Chairmanship of the Governor¹⁹ the Council, as the Court of Errors, performed the functions of an appellate court for the entire Island. In practice its most important function was probably that of advising the Governor and for this purpose it had to discuss all administrative matters relating to the Island.

The law-making powers of the local legislature were subject not only to the Governor's right to veto, the effect of which was reduced by the threat of withholding supplies, but also to the Crown's power of disallowance which naturally took considerable time to take effect. At first local laws were effective for only two years unless confirmed by the Crown. Often these Laws were allowed to 'lie by' without confirmation and this produced uncertainty and inconvenience when they lapsed on the effluxion of the two-year period. In 1681 the Royal Instructions were amended to allow the local laws to remain in force indefinitely unless disallowed.²⁰ In 1728 the Assembly surrendered some of its financial power by granting a 'perpetual revenue' to the Crown but this was in return for the confirmation of a local statute which declared valid all the earlier enactments of the Assembly and claimed as enforceable in Jamaica 'all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted, or received as laws of this Island'.²¹

The plantocracy also dominated the field of local government. A leading estate

owner would normally be appointed by the Governor as Chief Magistrate or Custos Rotulorum in each parish and, on the recommendation of this official, the Governor appointed the local Justices of the Peace. The Custos, with the assistance of the local Justices, was responsible for the maintenance of peace and the administration of justice in the petty sessional courts as well as for the calling up and organization of the local militiamen. Together with the Justices, the Rector of the Parish Church and ten vestrymen elected annually by the freeholders, he also saw to the upkeep of roads, gaols and the church. As a planter, the Custos was usually in sympathy with the views of the Assembly, of which he was often a member, and the vestrymen would also be members of the same landed aristocracy. The landowners also controlled the inferior courts. Although the judges of the superior courts were appointed by the Governor they eventually reduced the Governor's authority in this field by passing a Law,²² which secured Imperial approval, declaring it unlawful for a Governor to dismiss or suspend any judge without the consent of five members of the Council and even then only till the pleasure of the Crown was known.

The system of government which had thus developed survived until the middle of the nineteenth century when social and economic forces, inefficient administration and the intransigence of the Assembly caused its collapse. By the end of the eighteenth century the plantation system had passed its peak. The economic and social structure of the Island was undergoing fundamental changes. The economy of the sugar plantations demanded large importations of Negro slaves from Africa. The estate owners on the other hand looked forward to returning to England and as the white indentured workers were unable to survive the climatic conditions in the circumstances of plantation labour the Negro population grew in rapid disproportion to the white. It was impossible to enforce the Deficiency Law, which required the planters to maintain a minimal proportion of whites to Negroes. At the beginning of the eighteenth century there were about 8,000 whites to 10,000 Negroes. By 1773 there were 200,000 Negroes to 16,000 whites. This racial imbalance was to prove a decisive factor in the future constitutional development of the Island.

Intervention by the British Parliament: the struggle for abolition

The Imperial authorities although jealous to preserve the royal prerogative and essential Imperial interests generally conceded that the colonists were entitled to conduct their own affairs. Gradually however the doctrines and interests of the Imperial and colonial governments moved into irreconcilable conflict.²³ There were disputes about the control of military matters. In 1807, despite strong protests by the colonists the slave trade was abolished by an Act²⁴ of the British Parliament. The Assembly also waged a struggle against the exercise of the Crown's power to disallow its legislation.

In the meanwhile the inefficiency of the estates and the reduction in the supply of cheap labour which resulted from the abolition of the slave trade were reducing the economic bases of the plantation system.²⁵ Moral ideals propagated largely by

17. 1 Cowp. 104 (98 E.R. 1045); *R v Vaughan* (1796) 4 Burr 2494 (98 E.R. 308); *Burdett v Abbott* (1811) 14 East 137; cf. *Beaumont v Barrett* (1836) 1 Moo. P.C. 57 affirming a local decision, Macdougall's Jamaica Reports 1839, 75.

18. Journal of the House of Assembly, vol. 1, app., pp. 22-23.

19. The Council's right to be presided over by its own President when it sat as a legislative body was eventually conceded.

20. The power of disallowance was exercised with moderation excepting where the law encroached on the prerogative: see, for instance, a law in 1779 regulating the composition of Councils of War; Journal of the Commissioners for Trade and Plantations, vol. 86, pp. 90, 101.

21. This clause, which was regarded as a local Magna Charta, survives in s. 41 of the Interpretation Act 1968, no. 8.

22. See Laws of Jamaica 1770-83, no. 70.

23. For an account of these developments, see George Metcalf *Royal Government and Political Conflict in Jamaica 1729-83* (1965); D.J. Murray *The West Indies and the Development of Colonial Government* (1965), chaps. I, II.

24. 47 Geo. III, c. 36.

25. See P.D. Curtin *Two Jamaicans: The Role of Ideas in a Tropical Colony, 1830-65*.

the Evangelical Movement strengthened the arguments against slavery.²⁶ The Assemblymen resisted all Imperial requests for the introduction of reforms in the treatment of the slaves, who were growing increasingly discontented. Finally, when it seemed that there was no hope that the local Legislature would give in the British Government passed the Abolition of Slavery Act²⁷ which became effective in August 1833.

The Assembly continued to be resistant to change and refused to adjust themselves to emancipation. They opposed schemes for the social and economic improvement of the black majority who were now legally free but economically subservient.

Proposals for responsible government

The constitutional impasse continued as the economic conditions of the country steadily worsened. In 1849 a tentative attempt was made to solve the problem on the basis of responsible Government as enunciated in the Durham Report, but the Assemblymen refused to co-operate. Instead they appointed a Committee to report on constitutional changes and as a result the Act for the Better Government of Jamaica²⁸ was passed. It provided for a bi-cameral legislature and separated the legislative and executive functions of the Council. A Privy Council with advisory functions and composed of sixteen members was set up and the old Council was increased to seventeen and invested with the legislative functions of a second chamber. The members of both the Privy and Legislative Councils were nominated. The most important innovation was an Executive Committee for four salaried members, three appointed by the Governor from among the members of the Assembly, which continued to be elective, and one appointed in the same way from the Legislative Council. The members of the Committee were responsible for introducing Government measures and the introduction of financial Bills was especially entrusted to the Assemblymen on the Committee. The responsibility for the conduct of certain public works was vested in the Executive Committee. It was provided however that the responsibility for the executive government of the Island should continue to be vested in the Governor.

The problem of the segregation of legislative and financial power from administrative responsibility had not been solved.²⁹ This embryonic Cabinet system worked for a short time but this relative success was only possible because of the cordial relationship established between the Governor, Sir Henry Barkly (1853-56), and the legislators. When the system was introduced he persuaded George William Gordon, an able coloured politician of considerable influence, to leave the Legislative Council and seek a seat in the elected House, where he could represent the interests of the emancipated peasantry.³⁰ Barkly's successor, Captain Charles Darling (1857-62), soon incurred the wrath of the Executive Committee when he alleged that they were responsible for the unauthorized expenditure of public funds. The members of the Executive Committee were dismissed but the new members were in turn criticized by the Assemblymen.

The Assembly had become divided into unstable factions, the 'country party'

26. See generally, Eric Williams *Capitalism and Slavery*; J.H. Parry and P.M. Sherlock *A Short History of the West Indies*, p. 142 et seq.

27. 3 & 4 Will. IV, c. 7.

28. 17 Vict. c. 29 (Ja.).

29. See H. Wrong *Government of the West Indies* (1923), p. 67.

30. See Barkly's despatch to Sir George Grey, no. 7, 19 Oct. 1854 (copy in C.O. 137/385).

and the 'town party' became current terms, the former referred to those who supported the interests of the rich planters and the latter those who represented the rising coloured middle class.³¹

The new Governor, Edward Eyre, was suspected by the town party of being biased in favour of the planters. The relationship between the Governor and the former group grew bitter and soon dominated the political scene. The situation was aggravated because Eyre on account of his temporary status was hesitant in taking decisive action without prior reference to the Colonial Office.

The political struggle developed into a personal war between the Governor and the townsmen. In 1864 the Assembly complained that several of its Laws had been disallowed because of the Governor's failure to make adequate and favourable representation to the Crown, that he had constantly referred matters of purely local concern to the Colonial Office, and had introduced measures contrary to the advice of the Executive Committee.³²

The abolition of the Assembly now became a frequent topic of discussion. The Governor was urged by some to make representations to the British Government to suspend or abolish the Constitution.

In reporting on the operation of the constitutional system the Governor stated that the legislature 'in no respect reflect the wishes or opinions of the colonies, either as regards number, influence, or wealth'; and the legislators used the parliamentary institutions 'as a means of securing private objects or to gratify personal feelings at the expense of the best interests of the community'.³³

Indeed, the Assembly represented only an extremely small proportion of the inhabitants. The franchise had hardly been extended since the abolition of slavery.³⁴ The white planters were afraid that any electoral reform would eventually lead to the transferring of power to the coloured and Negro majority. The coloured group advocated the extension of the franchise in the hope of gaining a majority in the legislature but no one really considered that reform should be effected with a view to giving the Negro majority any effective voice in the choice of the legislators. The franchise was now limited to freeholders with a net annual income of £150 from land and a net income of £200 per annum derived partly from land and partly from any office or business or to persons in receipt of a net income from office or business of £300 or who paid taxes of at least £10 per year. In a population of over half a million adults only 1903 persons were qualified to vote in 1864, and in the general election of that year only 1457 persons voted.³⁵

The Morant Bay uprising

In these conditions of administrative chaos, financial bankruptcy, and sharp animosities, with the Assembly in disrepute, the discontent of the Negro peasantry erupted in revolt in October 1865. Low wages, the inconsiderate eviction of the ex-slaves from land on which they were settled, lack of social welfare schemes and the frequent injustices of the corrupt Magistracy fanned the flames of discontent. One dis-

31. See generally, R.V. Sires, 'Constitutional Change in Jamaica 1834-60' *Journal of Comparative Legislation & International Law*, 3rd series, vol. 22, pp. 178-190.

32. Votes of the House of Assembly, 1863-4, pp. 385-7.

33. See Despatch of 18 March 1864, C.O. 137/380, f. 373.

34. In 1850 the franchise had actually been reduced and although some concession was made in the Franchise Act of 1858, the qualifications remained very restrictive.

35. Blue Book of Jamaica, 1863, s. K.

pute over the occupation by Negroes of idle lands, which they claimed belonged to the Crown, but for which some white planters demanded rent, resulted in a large gathering of Negroes at the Morant Bay Court House in St. Thomas where the issue was being litigated. A minor disturbance led to the issue of warrants for the arrest of Paul Bogle and other Negro leaders, and in this explosive situation there was an outburst of violence. The town was attacked by a band of poorly armed Negroes, a number of persons were killed and several assaulted. There were minor sympathetic outbursts in other parts of the Island. The white inhabitants were panic-stricken and although the rebellion was quickly quelled the severest punishment was inflicted. The Governor took the view that 'it was necessary to make an example which by striking terror might deter other districts from following the example of St. Thomas in the East'.³⁶ Many were shot without trial and at least 350 were executed after court-martial. Gordon, who had been among the critics of the Governor, was illegally arrested and executed.

The excesses of the measures adopted attracted strong criticism in England. Demands for an inquiry resulted in the appointment of a Royal Commission to investigate the matter. The Commission concluded that the disturbance originated in a planned resistance to lawful authority but the original design was confined to a small section of the parish of St. Thomas and was principally motivated by the desire to obtain land free from rent, and lack of confidence in the judicial tribunals. The Commission although commending the Governor for acting with promptness in suppressing the revolt and preventing its likely spread to other parts of the Island, declared that the punishment inflicted was excessive, capital punishment was executed with unnecessary frequency, the floggings were barbarous, that some had been convicted on insufficient evidence and there was no evidence that Gordon had been a party to the outbreak, and that the burning of 1,000 houses had been wanton and cruel and had injured many innocent people.³⁷

The Governor was eventually recalled, placed on trial and acquitted.³⁸

In the meanwhile the Legislature had been hastily summoned and the Governor contrived to maintain the tension and sense of urgency. He advocated radical constitutional changes and invited the legislators 'to make a great and generous sacrifice for the sake of their country, and in immolating on the altar of patriotism the two branches of the legislature, of which you are the constituent parts, to hand down to posterity a noble example of self-denial and heroism'.³⁹ Moved by the Governor's rhetoric, its own apprehensions and mounting criticism, the Assembly promised its

36. Despatch no. 321, 8 Dec. 1865, from the Governor to the Secretary of States, C.O. 137/396.

37. Report of the Jamaica Royal Commission, 1866, C.O. 137/411. pp. 243-247.

38. For varying views on the Governor's culpability, see Finlason *Justice to a Colonial Governor* (1868). *A History of the Jamaica Case* (1868); Lord Olivier *The Myth of Governor Eyre* (1933); and B. Simmel *The Governor Eyre Controversy* (1962). That the Governor had very little sympathy for the Negro population is shown by the tenor of his despatches: he reported to the Secretary of State that 'the retribution has been so prompt and so terrible that it is never likely to be forgotten', see Despatch dated 2 Nov. 1865 (C.O. 137/394); and, when the earliest criticisms of his measures were made, he defended himself by stating, *inter alia*, that 'it is scarcely necessary to point out that the Negro is a creature of impulse and imitation, easily misled, very excitable, and a perfect fiend when under the influence of an excitement which stirs up all the evil passion of a race little removed in many respects from absolute savages', see Despatch dated 8 Dec. 1865 (C.O. 137/396).

39. Journal of the Legislative Council, 1860-5, pp. 325-7 (7 Nov. 1865).

co-operation and voted extensive powers to the Governor to detain persons without trial⁴⁰ and to declare martial law.⁴¹

The Assembly then proceeded, with the constant exhortation of the Governor, to examine proposals for constitutional reforms and eventually decided to surrender its powers to the Crown. The final instrument of its constitutional suicide consisted of two Laws.⁴² The first provided that 'from and after the coming into operation of this Act the present Legislative Council and House of Assembly, and all and every Functions and Privileges of these two Bodies respectively shall cease and determine absolutely', and substituted a unicameral legislature in their place. But the second by way of amending the first provided that in place of the Legislature so abolished 'it shall be lawful for Her Majesty the Queen to create and constitute a Government for this Island in such Form and with such Power as Her Majesty may best seem fitting and from Time to Time alter or amend such Government'. In the debates⁴³ in the British Parliament it was clear that the Assembly had already exhausted all feelings of sympathy and respect and the Government's Bill was amended so that instead of approving the suspension of the Constitution for a provisional period of three years its total abolition was sanctioned.⁴⁴

3. Pure Crown Colony Government (1866-84)

From the abolition of the Assembly to 1884, constitutional progress ceased. The British Government which was being increasingly called upon for financial assistance welcomed the introduction of the Crown Colony system which gave the Colonial Office complete control over financial administration. Nothing had been done to prepare the emancipated for the duties and responsibilities of citizenship. A Legislative Council was established by an Order in Council in 1866⁴⁵ to fill the constitutional vacuum left by the abolition of the Assembly and Council. It consisted of the Governor, six official members,⁴⁶ and such unofficial members, not exceeding six, as the Governor chose to nominate. The Governor had an original as well as a casting vote. As he controlled the official members and the tenure of office of the nominated members, who held their seats 'during pleasure', his status was virtually that of an autocrat. By virtue of his control of the Legislative Council ultimate legislative as well as executive power was vested in him, he alone could initiate financial measures and all legislation was subject to his assent. He had the right to appoint judicial and public officers whom, subject to the overriding powers of the Secretary of State, he could dismiss at will. He was responsible only to the Colonial Office and was the sole channel of communication with the British Government.

40. 29 Vict. c. 2. (Ja.).

41. 29 Vict. c. 3. (Ja.).

42. 29 Vict. c. 12 and 29 Vict. c. 24. Subsequent constitutions were expressed to be granted in accordance with these Laws which were retained in the 1953 Revised Edition of the Laws of Jamaica. See the Political Constitution (Jamaica) Law, Cap. 296 and pp. 101-4, *post*.

43. See Parl. Deb. 3rd s. CLXXXI, cols. 581-3 (15 Feb. 1866) (1st reading) cols. 918-27 (22 Feb. 1866) (2nd reading); cols. 1173-7 (26 Feb. 1866) (motion for the amendment); cols. 1264-8 (28 Feb. 1866) (3rd reading).

44. See The Jamaica Act, 1866, 29 & 30 Vict. c. 12.

45. The Order in Council is dated 11 June 1866.

46. Unless the Crown otherwise directed, the official members were to be the Senior Military Officer, The Colonial Secretary, the Attorney General, the Financial Secretary, the Director of Roads and the Collector of Customs.

In the ensuing period the affairs of the Island, particularly during the governorships⁴⁷ of Sir John Peter Grant (1866-74) and Sir Anthony Musgrave (1877-83), were administered with greatly increased efficiency. Considerable reforms were undertaken. The judicial system was re-organized.⁴⁸ in the field of local government the elected Vestries and Road Boards, which were minor facsimiles of the Assembly, were abolished and local administration reorganized under Municipal and Parochial Boards composed of the Governor's nominees.⁴⁹ The Health Services were systematized and placed under Local Boards of Health.⁵⁰ The police force was also reorganized.⁵¹ Most important to the future development of democratic forms of government was the reorganization of the educational system and the promotion of land settlements, which strengthened the foundations for a stable and intelligent peasantry⁵² and went some way towards providing a bridge between the upper and lower strata of society. This process was assisted in the last quarter of the century by the rapid decline in the price of sugar which operated against the large estates, and a simultaneous growth in the relative economic value of crops like bananas, coffee and citrus in which the small farmers specialized.

The system of government was no more than a form of benevolent despotism. It was officially recognized as a temporary expedient⁵³ and since its policies of social reforms involved increased taxation the planters and merchants began to criticize the Crown colony system and to make representations for constitutional reforms. In 1884 moderate reforms were granted.

4. Partly Representative Crown Colony Government (1884-1944)

There was no change in the basic constitutional structure but an elected element was introduced in the existing Legislative Council. The Order in Council of 1884⁵⁴ provided that there should be four ex-officio members, five nominated unofficial members and nine other members who had to satisfy high property qualifications and were to be elected on a franchise only slightly in advance of that existing before the introduction of the Crown colony system.⁵⁵ The Governor had an original and casting vote. His ascendancy was secured by the provision that the official members should vote in accordance with his directions. It was provided that the votes of the non-elected members should not be recorded in support of a money Bill if all the

47. It is noteworthy that the Governors were now allowed to remain in the Island for longer terms. A characteristic problem of colonial administration, which was very evident in the previous period, was the shortness of the Governors' tenure of office, which prevented them from acquiring the necessary familiarity with their tasks.

48. See the Laws of Jamaica 1867, nos. 24, 25, 35-39.

49. Laws of Jamaica, 1866, no. 8.

50. Laws of Jamaica, 1867, no. 6.

51. Laws of Jamaica, 1867, no. 8, and 1869, no. 28.

52. Cf. p.6 *ante*, and see W. Arthur Lewis *Evolution of the Peasantry in the British West Indies* (Colonial Office Library, pamphlet no. 656 dated 30 Jan. 1936).

53. See the Secretary of State's Despatch no. 285, 1 Dec. 1883, Minutes of the Legislative Council 1884, vol. 18, app. 1.

54. Dated 19 May 1884. For a copy, see Minutes of the Legislative Council, vol. 19, app. E. pp. 3-7. It was published with subsequent amendments in S.R.O.(Rev.) 1904, vol. IV, p. 290.

55. The recommendation of the Royal Commission that a literacy qualification should be combined with the property qualification was rejected by the Secretary of State. See Letter of Instructions to the Governor of Jamaica, no. 161 dated 28 May 1884, and appended to the 1884 Order in Council.

nine elected members voted against it. On the other hand, no Bill imposing taxes or placing a charge on the public revenue could be passed by the Council unless it had the approval of the Governor. Finally the Governor had the overriding power despite opposition by the Legislative Council to give effect to any Bill which he declared to be of 'paramount importance in the public interest'. He had however to report this declaration and the reason therefor to the Secretary of State. He was required by the Order in Council to reserve, for the significance of the royal pleasure, all Bills which appeared to be inconsistent with its provisions and he was given the power to reserve other Bills whenever he thought it desirable to do so. Under his Instructions his discretion was limited by specific provisions requiring him to reserve a wide range of Bills.⁵⁶ The Governor retained the right to appoint judicial and public officers and could, pending the notification of the royal pleasure, suspend them from office. This form of constitution was clearly far behind that which the Assemblymen had jettisoned in 1865 and indeed, for the next two generations the Jamaican legislators were dominated by a desire to revert to the position under the earlier system.

In 1893 the Governor ceased to be a member of the Legislative Council which was given the power to elect its own President,⁵⁷ but this modest reform was revoked after only one session.⁵⁸ Further representations, particularly by the now influential coloured businessmen lead by Robert Love, produced constitutional changes in 1895. The 1884 Order in Council was amended⁵⁹ to provide for an increase in the number of elected members to 14. The Governor remained in control of the administration but now the elected members were in the majority. Subject to the Governor's overriding power to declare a bill to be of 'paramount importance' the votes of the non-elected members could not be recorded if nine or more elected members voted against a money bill or if all fourteen voted against any other bill. These concessions came to be called 'the power of the nine' and the 'power of the fourteen'. The lessons of the old representative system had not been learnt: power was again divorced from responsibility. The struggle over finances continued. The elected members renewed the call for retrenchment and repeatedly opposed increased taxation and expansion of the public services. They frequently put forward schemes for the reorganization and minimization of the public services and the reduction of salaries.⁶⁰ As the Secretary of State had apprehended in granting the moderate reforms of 1884, there were not 'sufficient grounds for believing that the sudden and complete transfer of control over public affairs to a Council containing a large number of Unofficial Members would secure the various interests which had to be regarded'.⁶¹

56. Among the Bills usually required to be reserved were those which related to divorce; bank notes or currency; the establishment or constitution of Banking Associations, the imposition of differential duties; the diminution or increase in the number, salary or allowances of public officers; which appeared to be inconsistent with British treaty obligations, interfered with the discipline or control of the armed forces, the prerogative, trade and shipping; which affected the rights and property of British subjects not resident in Jamaica; which imposed special disabilities on persons of European descent; or which had previously been disallowed. See e.g. Letter of Instructions to Sir Henry Norman, dated 29 July 1887.

57. S.R. & O. 1893, p. 422.

58. S.R. & O. 1894, p. 189.

59. S.R. & O. 1895, p. 369 (no. 406).

60. See e.g. Minutes of the Legislative Council, 1899, vol. 42, p. 128.

61. See the Secretary of State's Despatch no. 185, 1 Dec. 1883, Minutes of the Legislative Council, 1884, vol. 18 app. 1.

Occasionally under a Governor who, like Sir Henry Blake (1889-98), was able to combine tact and firmness with administrative ability, it was possible to carry out schemes for the development of the Island. The Legislative Council however remained unrepresentative and largely unsympathetic to the interests of the black majority. Little popular interest was shown in the general elections and the property qualifications rendered the Negro votes of little account. Slight variations⁶² were made in the franchise from time to time but it remained substantially as stated in the Constitutions of 1884 and 1896⁶³ when it was limited to the owner or tenant of a dwelling-house who paid taxes or rates of at least £1 per annum or a person who was otherwise in possession of property in respect of which he paid rates or taxes of not less than thirty shillings in the preceding twelve months. Thus, of a population of over 600,000 only 9,176 were registered voters in 1884⁶⁴ and in 1901 when the population was estimated at 756,000 there were only 16,256 registered voters.⁶⁵

In 1866 these changes were extended to local government by the introduction of elected members to the Boards.⁶⁶ It was hoped that the coloured and black members of the community would be induced by this reform to take an active interest in the administration of public affairs.

The continued refusal of the legislators to grant increased taxes brought the financial crisis to a head in 1899. The Governor was obliged to exercise his 'paramount importance power' to enact the Tariff Bill.⁶⁷ The Secretary of State felt obliged to instruct the Governor to exercise freely his discretion to declare Bills to be of paramount importance and to revoke the convention by which the full number of nominated members had not been appointed.⁶⁸ In truth, Crown colony government was being restored at its full strength and there were outcries that the people's rights had been destroyed.⁶⁹

No further constitutional changes of importance occurred before the climacteric events of the late 1930s led to the introduction of the 1944 Constitution. In 1919 the franchise was extended to women, but they were required to satisfy even more rigid property qualifications than men. The population growth and the inflationary effects of the war years however, brought increasing numbers within the restricted scope of the electoral laws. By 1921 when the population was estimated at 858,000 the number of registered voters had risen to 42,267.⁷⁰ As a result the character of the elective membership was changing gradually. The rising middle-class of professional men, merchants and small farmers began to replace the estate owners as the dominant element among the elected members of the Legislature. This new group was less unsympathetic to social reforms and although the struggles over financial matters continued they were reduced in intensity. In the 1920s constitutional

62. See the Registration of Voters Law, no. 7 of 1886 as amended by Laws 15 and 22 of 1886 and Law 18 of 1891.

63. See s. 14 of the 1895 Order in Council.

64. See Minutes of the Legislative Council, 1884, vol. 19, p. 2.

65. See *Blue Book of Jamaica* (1900-1) s. L.

66. See Laws of Jamaica, 1885, no. 16.

67. See Legislative Council Minutes, 1899, vol. 39, pp. 2-5.

68. See Secretary of State's Despatch, no. 313, 22 Aug. 1899, published in *The Jamaica Gazette*, no. 39 dated 20 Sept. 1899.

69. See *The Daily Gleaner*, 29 Sept. 1899; F.L. Casserly 'Crown Colony Crisis', *J.H.R.* 1957, vol. 3, p. 39.

70. See *Blue Book of Jamaica* 1921, s. 10, p. 24.

changes were again discussed⁷¹ but the Jamaican legislators objected to the elected members being represented on the Executive Council although they desired increased legislative and financial powers. The Secretary of State would not accept the constitutional imbalance inherent in the proposals and no changes were made.⁷²

The labour movement of the 1930s and the growth of national consciousness

In the 1930s, the economic depression, high birth rate, unemployment, and low wages led to labour disturbances throughout the West Indies. The black majority was growing more articulate.⁷³ But the unrepresentative Legislative Council did very little to avert the impending storm.⁷⁴ The constitutional mechanism did not permit the legislators to participate in the administrative processes. Accordingly, they sometimes rejected proposals because of minor objections to details although they agreed with their general principles.

At this time a person was entitled to vote who

- (a) if a male, pays taxes or rates on real property amounting to ten shillings per annum, or if a female, £2 per annum, or
- (b) if a male, pays rates amounting to thirty shillings per annum on personal property, or, if a female, £2 per annum'.

For both males and females there was also a salary qualification of £50 per annum and an income qualification of the same amount but the latter had to be allied to the occupation of premises rented at not less than £10 per annum. These qualifications were high in relation to the income of the Jamaican population and had the effect of restricting the electorate to a small number of comparatively prosperous persons. In the general election of 1930, when the population was estimated to 863,000 the number of registered voters was 78,611, and in the contested constituencies out of a possible 66,626 voters only 28,178 voted.⁷⁵ Clearly no one could, or in fact did, expect any measures for the radical alteration of the social and economic structure to emanate from such a Legislature.

At the same time many fell under the influence of Marcus Garvey who inspired incipient feelings of self-confidence and national consciousness among the black and poor classes.⁷⁶ In 1938, the centenary of Emancipation, the Island arrived at a turning point in its political history. The deplorable socio-economic conditions of the masses were becoming intolerable and the simmering lava of discontent rose to boiling point and erupted in labour disturbances. The year's first tremors were felt in January when labourers in St. Thomas, the scene of the historical uprising in 1865, went on strike. At the beginning of May there were strikes and minor outbreaks of rioting on a sugar estate in Westmoreland at the other end of the Island. These were followed by numerous demonstrations by the unemployed, rioting and other strikes throughout the Island. When the dockers in Kingston went on strike

71. The Wood Report, Report on the West Indies, Cmd. 1679 (1922) recommended the gradual substitution of elected for nominated members in the West Indian Legislatures.

72. See the correspondence between the Governor and the Secretary of State published in *The Jamaica Gazette* no. 64, 8 Nov. 1923, pp. 1173-5.

73. See generally, Eric Williams *The Negro in the Caribbean* (1946).

74. For a contemporary but clear appreciation of the political implications of the prevailing socio-economic climate, see W.M. Macmillan *Warning from the West Indies* (1936).

75. See *Blue Book of Jamaica*, 1930, s. 10, p. 115.

76. See A.J. Garvey *Garvey and Garveyism* (1963) p. 194 *et seq*; Adolph Edwards *Marcus Garvey* (1967).

they proclaimed Mr Alexander Bustamante as their leader. Bustamante was by this time active in condemning the exploitation of labour and in organizing various groups of workers. On 23 May all business in the Island virtually came to a standstill and essential services were threatened. Bustamante was arrested on charges of sedition, inciting to unlawful assembly and obstructing the police. After repeated unsuccessful applications for bail, which the Crown had opposed, he was finally granted bail when three weeks elapsed and a *nolle prosequi* was entered by the Attorney-General. In fact, Bustamante had constantly counselled the workers that united and determined but peaceful and orderly industrial action was the proper and more efficacious plan of action. In the meanwhile, during the temporary confinement of Bustamante, Mr Norman W. Manley offered his services to put forward the case for labour and took over the negotiations on behalf of the dockers. Workers in transport, agriculture and industry were rapidly organized and from this nucleus the Bustamante Industrial Trade Union grew and in a short time established itself on a national rather than an industrial basis.⁷⁷

The disturbances created a new spirit. The workers could now see that the withdrawal of their labour had immediate financial consequences for their employers and they stood firm, insisting on their demands. The occasional resort to violence was not by design but was merely incidental.

In constitutional matters there had so far been little sign of progress but now the labour movement gave new stimulus and added support to the few intellectuals who had been advocating radical constitutional reform. Many of those who had been urging constitutional changes became engaged in trade union activities. Bustamante himself concentrated on labour questions and economic problems; but the political aspects could not be segregated and eventually in 1944 his trade union provided him with a facile basis for the launching of a national political party. In 1936 Jamaican immigrants in the United States of America had formed the Jamaica Progressive League with the specific aim of advocating universal adult suffrage, self-government and dominion status.⁷⁸ In the following year a group of middle-class political thinkers founded a newspaper named *The Public Opinion* which soon began to propagate the ideals of the League. In 1938, following upon the labour disturbances, the first truly nationally orientated party was formed under the leadership of Manley and was given the name 'The People's National Party' to indicate that it was intended to foster nationalistic aspirations in the Island. The party included among its proclaimed aims the securing of universal adult suffrage and responsible government for Jamaica.

The privileged classes were however largely opposed to any extension of the franchise or reform of the Constitution. On the other hand the elected members of the Legislative Council were not unmoved by the growing force of the external influences and at the end of 1938 passed a resolution in favour of the adoption of universal adult suffrage.⁷⁹

The demands for constitutional reform increased and were strengthened by the

77. Bustamante eventually became the first Prime Minister of Jamaica on the attainment of Independence and Manley who had been Premier on the grant of Internal-Self-Government was the Leader of the Opposition. Both Bustamante and Manley (the latter posthumously) have been made National Heroes with the title Right Excellent.

78. See Adolphe Roberts *Self-government for Jamaica* (1936).

79. Ibid. p. 38 (13 Dec. 1938). There were 12 votes in favour and one against the resolution, the nominated and official members declining to vote.

views formed by the Royal Commission which had been sent out to investigate the causes of the labour disturbances. The Commission again pointed out the defects in the Crown colony system which gave the legislators power but no administrative responsibility. They also agreed that the franchise should be extended with the object of making the Legislature representative of all important sectors and interests in the community.⁸⁰

The limited proposals of the Commissioners were rejected at mass meetings sponsored by the People's National Party. The legislators led by J.A.G. Smith, and the non-parliamentary reformers led by Manley worked out compromise proposals which, after considerable delay occasioned by war, were finally accepted with modifications by the British Government.⁸¹ The new Constitution which was introduced in 1944 was, as we shall see, successful in providing a relatively smooth transition to responsible status. Indeed it was generally greeted as a leap forward from an oppressive plantocracy towards a progressive pantisocracy.^{?panglosium}

5. Representative Crown Colony Government: The Road to Responsibility

The Constitution of 1944⁸² had two vital innovations: the elected members were chosen on the basis of universal adult suffrage,⁸³ and an Executive Council which included elected members was established not merely as an advisory body but as 'the principal instrument of policy'.⁸⁴ The Executive Council was given the right to prepare the Island's Estimates and to decide what measures should be dealt with in the Legislature and at what times. No Money Bill or Bill intended to implement government policy could be introduced without the approval of the Executive Council.⁸⁵ The radical change in the traditional functions and status of the Executive Council was the result of the insistent demands by the Manley group that elected members should share in the formation of policy.⁸⁶

The nominated Privy Council had the function of advising the Governor in the exercise of the powers relating to the prerogative of mercy and discipline of the Civil Service.⁸⁷

The Legislature was bi-cameral, consisting of a Legislative Council and a House of Representatives. The former comprised three official members and ten unofficial members nominated by the Governor and holding office 'during pleasure'. The

80. See the Report of the West India Royal Commission, Cmd. 6607 (1945), pp. 57-8. The Commissioners found that 'a substantial body of public opinion in the West Indies is convinced that far reaching measures of social reconstruction depend both for their initiation and their effective administration upon greater participation of the people in the business of the government', and were themselves sympathetic to this view. Ibid. pp. 373, 449-50.

81. The Secretary of State, Colonel Oliver Stanley, stated that, in offering what 'indubitably represent a far-reaching constitutional advance', he had been 'actuated by a desire to meet as far as possible the views placed before me on behalf of the people of Jamaica'. See his Despatch of Feb. 1943, quoted in *The Daily Gleaner*, 12 Sept. 1950.

82. The Jamaica (Constitution) Order in Council, 1944 (S.I. 1944, no. 1215).

83. See the Representation of the People Law, no. 44 of 1944.

84. Constitution, 1944, s. 9.

85. Ibid. s. 55.

86. See the account given 19 years later in the House of Representatives, Proceedings of the House of Representatives, 1961-2, vol. 4, pp. 749-50 (24 Jan. 1962, Mr. V.L. Arnett).

87. Constitution, 1944, s. 6; Royal Instructions 1944, art. 10.

House of Representatives consisted of thirty-two members elected on the basis of single-member constituencies. This House elected its own Speaker as well as five of its members to serve on the Executive Council, which was presided over by the Governor, and also contained three Official Members (the Colonial Secretary, the Attorney-General and the Financial Secretary and Treasurer), and two Unofficial Members nominated by the Governor from among the members of the Legislative Council.⁸⁸ The Nominated Members held their seats on The Executive Council during pleasure. The Elected Members apart from the automatic vacation of seats consequent on dissolution could only be removed by a vote supported by two-thirds of all the Members of the House of Representatives.⁸⁹

The legislative power was vested in the Governor acting 'with the advice and consent of the Legislative Council and House of Representatives'.⁹⁰ Subject to the Governor's reserve power to enact without such consent any measure which he declared to be 'expedient in the interest of public order, public faith or good government', and the Crown's power to disallow laws,⁹¹ the elected House had the real legislative authority. In case of a disagreement between the two Chambers the Legislative Council could only delay a Bill for one year.⁹² The Governor's reserve powers were also circumscribed. He could not make the declaration of expediency without first submitting the question to the Executive Council and if the Executive Council did not approve he had to obtain the prior approval of the Secretary of State or 'certify in writing that urgent necessity requires that the declaration be made without such approval'. In this case he had to explain his reasons for the declaration and the grounds of the urgency. He was also obliged to forward any Member's objection which had been lodged within seven days.⁹³

The Governor had only a casting vote in the Executive Council⁹⁴ and he was instructed to act on its advice unless he considered it was 'expedient in the interest of public order, public faith or good government' to disregard it, and in such cases he had to justify his actions to the Secretary of State.⁹⁵ Although the ultimate executive responsibility remained with the Governor and the Departments remained under the Colonial Secretary and the Financial Secretary and Treasurer, an embryonic Ministerial system was introduced by means of the device of allotting certain areas of the administration to the Elected Members of the Executive Council who would introduce into the Elected House relevant government measures and explain policy in relation to those matters. The subjects so allotted covered important areas of the administration and were divided into the following five groups: (1) Finance and General Purposes, (2) Communication, (3) Agriculture, Land and Commerce, (4) Education, and (5) Social Welfare.

The actual operation of the new constitutional system was of the greatest importance to future developments in Jamaica. At the general elections in 1944 the Jamaica Labour Party, which Bustamante had formed in that year to oppose Manley's People's National Party, gained 22 seats, the P.N.P. won only five seats

88. Constitution, 1944, ss. 10, 11, 12, 13.

89. Ibid. s. 14.

90. Ibid. s. 44.

91. Ibid. s. 50(1).

92. Ibid. s. 45.

93. Ibid. s. 47.

94. Ibid. s. 20.

95. Royal Instructions 1944, art. 13.

and Independents the remaining five seats.⁹⁶ Although there were frequent disputes within the newly formed J.L.P. a hard core of J.L.P. representatives nonetheless remained loyal to Bustamante and in the main the House was divided into the Majority Party Members who supported the Government and the Minority Party representatives who criticized it.

The delicate equipoise between the Governor's powers and the political strength of the Elected Members of the Executive Council also posed special problems. The legislators and the public found it difficult to ascertain whether the Governor (with the assistance of the Official and Nominated Members) or the Elected Members were responsible for Government policies. Bustamante constantly blamed the Governor and civil servants for failing to take action to solve the social and economic problems of the country.

In 1947 the Governor, Sir John Huggins, publicly stated that in practice he had not been in a position to control the decisions of the Executive Council. He disclosed that most decisions were unanimous and, where votes were taken, the Nominated Members voted freely and did not form a block with the Official Members.⁹⁷ The greatest handicap to the application of the principle of Cabinet responsibility was not the composition of the Council but the relationship between the Elected Members and the Government Departments. They had no authority over or close relationship with the administrative agencies.

The practice was for the decisions of the Executive Council and departmental proposals to be introduced into the House of Representatives by the Elected Councillors, but in the form of Messages from the Governor. The Elected Councillors sometimes opposed these measures although they had previously agreed to them in the Executive Council. This caused a strain in the relationship between the Governor and the Elected Executive Councillors as well as in the relationship between the Executive and the Legislature.

In the second general election held under the new system in 1949 the developing two-party system had been strengthened. The J.L.P. were again victorious, gaining seventeen seats to the P.N.P.'s thirteen and the Independents' two. The important constitutional feature of the elections was the failure of the Independents and minor parties whose combined share of the polls slumped from 35.1 per cent in 1944 to 13.8 per cent.⁹⁸ Party political organization in the country had improved and Party cohesion grew in the House which became clearly divided between the J.L.P. Majority and the P.N.P. Opposition. Although personalities continued to play a vital role, programmes and policies had been put forward in the elections and increasingly formed the basis of debates in the House.

The attitude of the Governors in this period was also important. Sir John Huggins (1943-51) and Sir Hugh Foot (1951-57) used their powers with restraint and gave the Elected Executive Councillors some opportunity to participate in the conduct of the Government. Only twice was the reserve power to certify laws exercised: once in 1947 when the House of Representatives refused to provide the salary of an ex-patriate civil servant whose appointment was already confirmed by the Secretary of State, and on the second occasion when in 1950 the House's Finance Committee refused to sanction the advance of £10,000 to Jamaica Utilities Ltd. so that it could

96. See app. A. table I; and the Report of the Chief Electoral Officer for 1944.

97. See *The Daily Gleaner* 25 Oct. 1947; See also statement by Mr. J.A. McPherson at a meeting of the St. Thomas Parochial Board, reported in *The Daily Gleaner* 29 Dec. 1947.

98. See app. A. Table I; Report of the Chief Electoral Officer for 1949.

continue to operate the public passenger transport system on which the Corporate Area depended. On both occasions the approval of the Executive Council, including the Elected Members, was obtained.

Some effort was also made to bring the Elected Councillors into closer touch with the administration by appointing them to Sub-Committees of the Council which were given the functions of preparing the measures to be introduced in the House and also as members of statutory administrative authorities. As the Ministers assumed greater responsibilities and exercised more influence on the administration the principle of Cabinet responsibility came to be acknowledged and practised to a greater extent but the system remained defective and produced occasional friction.

The P.N.P. had persisted in its demand for self-government, and Bustamante and his supporters who felt that their ability to implement their schemes was weakened by the present system had also joined in the demands for constitutional reforms. After some inter-Party disputes on the subject⁹⁹ the Governor took the initiative and a draft Constitution was prepared on the basis of proposals which represented the highest common factor of agreement between the Parties. These proposals were accepted by the Secretary of State and brought into operation in May 1953.¹

6. Partial Responsibility: An Incipient Cabinet System

The 1953 Constitution² effected an important alteration in the balance of power. In place of the five Elected Members of the Executive Council it created eight Ministers who were to be selected from among the Members of the House of Representatives. The new provisions relating to the appointment and tenure of office of the Ministers gave greater recognition than formerly to the party system. One of the Ministers was designated as the Chief Minister. The Governor was required to submit for approval of the House of Representatives the name of one of its members whom he proposed to appoint as Chief Minister and was obliged to appoint the person whose selection the House approved. The other seven Ministers were appointed by the Governor on the recommendation of the Chief Minister.³ The Chief Minister's appointment was revocable by a resolution supported by the votes of a majority of all the members but this would result in the automatic termination of the appointment of the other Ministers.⁴ The appointment of the Ministers was also revocable on the recommendation of the Chief Minister⁵ and the Governor could instead of revoking the Chief Minister's appointment dissolve the Legislature.

Another important provision enabled the Governor, on the recommendation of the Chief Minister, to 'charge any Minister with the responsibility of any Department or subject' but this was subject to the Governor's discretionary powers to make the assignment to any of the Official Members of the Executive Council.⁶

99. For an account of these disputes see *The Jamaica Times* 24 Jan. 1953, 14 Feb. 1953.

1. During the discussion of the proposal for constitutional advance the public were invited to submit their views to the Special Committees of the House.
2. The Jamaica (Constitution) Order in Council 1953 (S.I. 1953 no. 747).
3. S. 3(2).
4. S. 4(1).
5. S. 4(2).
6. S. 6. While the Elected Executive Councillors who had been called 'Ministers' by courtesy were designated as 'Ministers for' the relevant subjects, their change of status was indicated by the designation 'Ministers of'.

In order to exercise further control of the Elected Members who now had a majority in the policy-making Executive Council the Governor was empowered, subject to the usual safeguard of reporting to the Secretary of State, to use his reserve power without the consent of the Executive Council.⁷ Thus the conventional arrangements for assigning subjects to the Elected Members of the Executive Council was given legal sanction, and the Elected Ministers, who now clearly had the decisive voice in the Council, became collectively responsible for government policy.

There had been some reorganization of the administrative machinery in preparation for the constitutional changes. In 1950 the House of Representatives had accepted the proposals of the Mills Report for the establishment of an Administrative Service.⁸ Dissatisfaction with the existing system of promotion and discipline led to the establishment of a Public Service Commission in 1952.⁹ The Commission was appointed by the Governor. Legislators and public officers were disqualified from appointment by the constituent statute and politicians by convention. The Administrative machinery of the Colonial Secretariat was decentralized by the setting up of separate Ministerial offices.¹⁰

The next general election was held in 1955 and again demonstrated the strength of the two-party system. On this occasion the P.N.P. had a majority of four members, having won eighteen seats to the J.L.P.'s fourteen. Independents and minor parties failed to gain a seat, together attracting only 10.47 per cent of the votes polled.¹¹ The election was significant, too, in that it brought about the first change of government since the introduction of universal adult suffrage; and the smooth transition enhanced the arguments for further constitutional advance.

In 1955 the number of Ministers was increased to nine.¹² In 1956 the composition of the Legislative Council was altered so that it comprised three ex-officio Members (the Colonial Secretary, Attorney-General and Financial Secretary) and 'such number of Unofficial Members not being less than twelve' as the Crown might appoint.¹³ In 1957 the Constitution was finally amended¹⁴ to give statutory expression to the conventional development¹⁵ by which the Ministers had been meeting in a separate Ministerial Conference to discuss and formulate a joint review on administrative questions. A Council of twelve Ministers presided over by the Chief Minister was set up in the place of the Executive Council which was abolished. Ten of the Ministers were to be Members of the House of Representatives and the other two selected from the Unofficial Members of the Legislative Council.¹⁶ The Council was appointed in the same manner as the Executive Council under the 1953 formula, but now there would be no official members present at its meetings, which

7. S. 9; cf. Constitution 1944, s. 47.

8. The Report of the Commission on the Public Service in Jamaica 1949 (E. Mills) (Ja. Govt. Printer).

9. See the Public Service Commission Law 1951, no. 45 of 1951.

10. See *Proposals for the Establishment of Separate Ministries 1951* (Hon. — now Sir Donald — MacGillivray) (Jamaica Govt. Printer).

11. See app. A, table 1 and Report of the Chief Electoral Officer for 1955.

12. The Jamaica (Constitution) Order in Council 1955 (S.I. 1955 no. 1214).

13. The Jamaica (Constitution) Order in Council 1956 (S.I. 1956 no. 1209).

14. The Jamaica (Constitution) Order in Council 1957 (S.I. 1957 no. 1744).

15. The Governor, Sir Hugh Foot, who believed in the encouragement of constitutional advance, had apparently approved the extra-legal amendment of the Constitution. See Foot *A Start in Freedom* pp. 125-8.

16. *Ibid.*, ss. 8, 16.

were summoned by the Chief Minister. The Governor however had the discretion to summon a special meeting at which he could attend and preside.¹⁷

It was provided¹⁸ that 'the Governor on the recommendation of the Chief Minister may, by direction in writing—

- (a) charge any Minister who is a Member of the House of Representatives with responsibility for any Department or subject, and
- (b) revoke or vary any directions given under this section: Provided that the Governor shall not be obliged to assign any Minister responsibility for any business relating to 'Defence, External Affairs, the audit of government accounts, the appointment and discipline of the Public Service,¹⁹ and the administration of the Dependencies.

It seems clear from the language of the proviso that apart from the subjects specifically exempted the Governor was required to make the assignments in accordance with the recommendations of the Chief Minister. The responsibility for criminal matters was, however, expressly excluded from the responsibility of the elected Ministers and explicitly vested in the Attorney-General.²⁰ The number of Unofficial Members of the Legislative Council was increased from twelve to fourteen and the number of official Members decreased from three to one (the Attorney-General).²¹

This gradualism in constitutional reform engendered little national enthusiasm²² as it was appreciated that for most practical purposes the administration of the Island's affairs had fallen, at least since 1955, under the control of the people's representatives and public attention was being directed to federal issues.

7. Internal Self-Government

The 1959 Constitution²³ is important not only because it marks an important point in the Island's constitutional development but also because it formed the direct structural foundation of the constitutional system erected by Jamaica on Independence.

A Cabinet was established 'as the principal instrument of policy' and 'charged with the general direction and control of the government of Jamaica', for which its members were made 'collectively responsible' to the Legislature.²⁴ The Governor was required to 'appoint as Premier the Member of the House of Representatives who, in his judgement, is best able to command the confidence of a majority of the members of that chamber'.²⁵ The other Ministers, who should be at least eleven in

17. Ibid., s. 16.

18. Ibid., s. 18.

19. In relation to the Public Service the Governor continued to act on the recommendation of the Public Service Commission. In 1957 a similar Commission was set up for the Police Force. See Law 45 of 1957.

20. S.I. 1957 no. 1744, s. 19.

21. Ibid., ss. 4(1), 14(1)(d).

22. This phenomenon was commented on in the debate on the Financial Administration and Audit Bill; see Proceedings of the House of Representatives 1959-60 vol. 1, pp. 5 *et seq.* (2 Apr. 1959, Messrs. Manley and N.N. Nethersole).

23. The Jamaica (Constitution) Order in Council 1959, S.I. 1959 no. 862.

24. Ibid., s. 47.

25. Ibid., s. 48(1).

number, were to be appointed by him on the advice of the Premier. Provision was also made for the appointment of Parliamentary Secretaries to assist the Ministers.²⁶

The Constitution provided that as hitherto the Legislature 'shall consist of Her Majesty, a Legislative Council and a House of Representatives'.^{26a} The delaying power of the Legislative Council was now reduced to seven months.²⁷ The Governor, unless authorized by the Secretary of State to give his assent, was required to reserve all Bills which appeared to him to be inconsistent with the Queen's international obligations, prejudicial to the royal prerogative or repugnant to the Constitution Order in Council. Any law assented to by the Governor was subject to be disallowed if, in the opinion of the United Kingdom it prejudicially affected Jamaican Government Stock.²⁹ As Jamaica was now part of the Federation the legislative power was naturally subject to the provisions of the West Indies (Federation) Order in Council, 1957.³⁰ Apart from these limitations the Jamaican Legislature had plenary powers to legislate in respect of all internal affairs.

The composition of the Legislature was also altered in important respects. The Legislative Council was to be composed of two or three persons appointed by the Governor on the advice of the Premier and eighteen other persons appointed 'after consultation with such persons as, in his discretion, he considers can speak for the differing political points of view represented in the House of Representatives'.³¹ The power of the Premier to appoint three members of the Legislative Council ensured that he would have his own nominees in that Chamber for appointment to the Cabinet.

The membership of the House of Representatives was increased to 45 and provision made for a Standing Committee of the House to keep the number and boundaries of the constituencies under continuous review.³² In the 1959 general election which was held under the new Constitution to fill the newly expanded House, the People's National Party gained 54.8 per cent of the polls and won 29 seats whilst the J.L.P. gained 44.3 per cent of the votes and the remaining 16 seats. Four minor Parties also contested the elections but failed to win a seat and together gained only 0.9 per cent of the ballot, thus re-emphasizing the pre-eminence of the two major Parties.³³ In the House too the members tended to be strictly partisan and the Ministers were assured of their solid and unwavering support. Special provision was made for the security of tenure of Judges who were now to be removable only on grounds of physical and mental incapacity or misbehaviour, and after a local judicial inquiry had been held and the matter referred to the Judicial Committee of the Privy Council. Judicial salaries were charged on the Consolidated Fund and a Judicial Service Commission was established to advise on the appointment of Judges.³⁴

26. Ibid., s. 57.

26a. S. 14.

27. S. 36.

28. S. 37.

29. S. 39. The power of disallowance had already become virtually dormant and had never been exercised since Jamaica embarked on the road to responsibility. See J.C. McPetrie 'Survey of Constitutions Drafted at the Colonial Office since 1944' in *Changing Law in Developing Countries* (ed. Anderson) p. 29.

30. S.I. 1957 no. 1364.

31. Constitution 1959, s. 15.

32. S. 45.

33. See app. A, table 1, and Report of the Chief Electoral Officer for 1959.

34. Ss. 68-73.

The provision relating to the establishment of Commissions for the Public Service and Police were written into the Constitution, and these bodies were now empowered to advise and not merely make recommendations to the Governor.³⁵

That Jamaica was already on the threshold of Independence was significantly demonstrated by an agreement between the Governor and the Secretary of State for the Colonies that a convention should be established whereby the Premier would be consulted on the appointment of future Governors,³⁶ as well as by the initiation of a practice by which local Ministers negotiated international aid agreements and arrangements for floating loans on the international money market.

8. The Federal Flirtation and the Attainment of Independence

Federalism had never been genuinely popular in the West Indies. In February 1947 the Secretary of State, Mr. Creech Jones, reaffirmed the established British policy that 'it is clearly impossible for the present separate communities, small and isolated as most of them are, to achieve and maintain full self-government on their own'.³⁷ It was this apprehension of the difficulty of the Islands attaining independence unilaterally that strengthened the advocacy for political federation. After a series of preparatory conferences, in 1956 the United Kingdom Parliament enacted the British Caribbean Federation Act³⁸ which provided for the federation of ten of the West Indian colonies. (British Guiana and British Honduras, the largest of the territories in the area, had opted to stay out).

It is not within the compass of this work to analyse the factors which brought about the Federal débâcle but it may be significant to note that the Annex to the Order in Council³⁹ which contained the Federal Constitution recited that the reasons for the formation of the Federation were (1) the people considered this association essential to their future well-being, (2) the need for the greatest possible freedom of movement of persons and goods, and (3) the necessity for an integrated trade policy.⁴⁰ By 1959 it had begun to appear obvious that so far as Jamaica was concerned Federation was not essential to political independence or economic survival, that there were great obstacles in the way of freedom of movement of persons as well as goods, and that political union was not a *sine qua non* of an integrated trade policy in the region. In addition the perennial problem of federal taxation appeared with all its psychological repercussions. In Jamaica it was widely feared that the smaller units, as in the case of the selection of the site for the federal capital, would generally tend to combine against Jamaica where insular interests conflicted.⁴¹

35. Ss. 75-88.

36. See *The Daily Gleaner* 17 June 1960.

37. Mr. A. Creech Jones' Introductory Memorandum to Cmd. 7120.

38. 4 & 5 Eliz. 2, c. 63.

39. The West Indies (Federation) Order in Council 1957, S.I. 1957 no. 1364.

40. For accounts of the socio-economic constitutional background to Federation, see A.H. Birch 'A British Caribbean Federation' in *Parliamentary Government in the Commonwealth* (1951), p. 183; S.S. Ramphal 'The West Indies-Constitutional Background to Federation' 1959 *Public Law* p. 128; J.C. McPetrie 'The Constitution of the West Indies' (1960) 13 *Univ. of Tor. L.J.* p. 135.

41. For discussions of the factors underlying the break-up of the Federation, see *The West Indies Federation* (1961) ed. David Lowenthal, O.R. Marshall; 'The Federation of the

In May 1960 on the eve of a federal by-election in Jamaica, the Opposition Party led by Sir Alexander Bustamante withdrew its candidate and declared itself opposed to Federation.⁴² As a result the Government decided that the issue should be determined in a Referendum.⁴³ On 19 September 1961, by a majority of 35,535 the Jamaica electorate voted against remaining in Federation. The British Government accepted⁴⁴ the referendum decision and in April 1962 the British Parliament enacted the West Indies Act⁴⁵ which provided for the termination of the Federation and the making of consequential and transitional arrangements by Orders in Council.⁴⁶

In July 1962 the Jamaica Independence Act⁴⁷ was passed 'to make provision for and in connection with the attainment by Jamaica of fully responsible status within the Commonwealth'. It provided that as from Independence day (6 August 1962) 'Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Jamaica'.⁴⁸ that no Act of the Parliament of the United Kingdom 'shall extend or be deemed to extend to Jamaica as part of the law thereof', and it terminated the application of the Colonial Laws Validity Act 1865 and the rules of repugnancy and extra-territoriality to Jamaica.⁴⁹

When the discussion began on the dissolution of the Federation and Jamaica's future there was apparently no doubt as to Jamaica's right to proceed to Independence on her own.⁵⁰ On 3 August it was announced⁵¹ that the Independent Members of the Commonwealth had all agreed that, simultaneously with Jamaica's attainment of Independence on 6 August, the country would be admitted to full membership of the Commonwealth association.

In the meanwhile as soon as the decision in the referendum was known, local arrangements were made for the preparation of an Independence Constitution.

West Indies: The End of the Experiment?' (1962) 15 *C.I.L.P.* 126; S.A. de Smith *The New Commonwealth and Its Constitution* pp. 259-62; Sir Harold Mitchell, 'Europe in the Caribbean' (1963) pp. 44-75; Mordecai *The West Indies: the Federal Negotiations* (1968). Although freedom of movement of goods had been one of the problems of Federation after its dissolution it was possible to conclude an agreement for its introduction. See *Caribbean Free Trade Association Agreement and Related Documents* (Ja. Govt. Printer).

42. See *The Daily Gleaner* 31 May 1959.

43. For the Premier's announcement see Proceedings of the House of Representatives 1960-1, vol. 2, p. 394.

44. See the statement of the Secretary of State for the Colonies in the House of Commons, H.C. Deb., vol. 453, cols. 230-1 (6 Feb. 1962).

45. 10 & 11 Eliz. 2, c. 19.

46. See the West Indies (Dissolution and Interim Commissioner) Order in Council 1962 (S.I. 1962 no. 1084) and the Proclamation made thereunder on 31 May 1962, appointing 1 June as the day on which the Federation should dissolve.

47. 10 & 11 Eliz. 2, c. 40.

48. S. 1(1).

49. S. 1(2).

50. See the Premier's statement, Proceedings of the House of Representatives 1961-2, p. 501 (12 Oct. 1961); and the Secretary of State's Answers to Questions in the House of Commons, H.C. Debates vol. 453, cols. 231-2 (6 Feb. 1962, Mr. Reginald Maudling). See also The Report of the Jamaican Independence Conference 1962, Cmd. 1638, pp. 5-6.

51. For the publication of the British Prime Minister's message to Sir Alexander Bustamante, Jamaica's Prime Minister designate, see *The Daily Gleaner* 4 August 1962.

Factors in Constitution-Making

1. Historical Source

A comparison of the Jamaica (Constitution) Order in Council 1962 with other Orders in Council¹ containing the basic rules and principles for the conduct of the governments of Commonwealth countries granted Independence in the post-war period, impresses one with their similarity in structure, language and general provisions. Yet the basic principles of the Jamaican Constitution are not the result of political plagiarism or a slavish adoption of current constitutional fashions but are rather the product of three centuries of historical development and a deliberate decision² to continue the pattern of a constitutional system which had gradually evolved and in the operation of which the country had acquired considerable experience. As Sir Ivor Jennings so aptly puts it: 'Every constitution has to be a product of history, even when it comes straight from the draftsman's pen; it is a product of the manner which [*sic*] the country concerned emerged as an independent State, of the conflicts which preceded that emergence and of the forces that have played upon it'.³

The predilections of the constitution-makers were demonstrated from the very beginning when the proposals to appoint Select Drafting Committees of both Houses were debated. In the House of Representatives the Premier declared that Jamaica understood the system of responsible Cabinet Government which had been in operation in the Island for some time and he would be unalterably opposed to any fundamental changes in the existing constitutional system.⁴

In the Legislative Council similar traditionalist proclivities were apparent.⁵ Mr Edward Seaga, an Opposition Member said:

I believe, and I hope, and I expect that we shall accept these traditions as our foundations and upon these foundations we shall seek to erect a structure of our own . . . that will fit the sociological pattern of this country'.

When the Premier presented the Report of the Joint Committee of the Legislature (of which he had been Chairman) he expressed satisfaction that the Draft represented an acceptance of this view.⁶

1. See in particular the Federation of Malaya (Constitution) Order in Council 1957 (S.I. 1957 no. 1533); Nigeria (Constitution) Order in Council 1960 (S.I. 1960 no. 1652) (Disregarding in both the federal provisions); Sierra Leone (Constitution) Order in Council 1961 (S.I. 1961 no. 741); Tanganyika (Constitution) Order in Council 1962 (S.I. 1961 no. 2274).
2. See a statement by the then Premier, Mr. N.W. Manley on the approach adopted in the drafting of the Constitution *The Daily Gleaner* 18 Nov. 1961, p. 1, and another on 23 Jan. 1962 regarding the proposals being presented to the Legislature, Proceedings of the House of Representatives of Jamaica 1961-2, vol. 4, p. 719; see further pp. 31-2 *post*.
3. *The Approach to Self-Government* (1958), p. 2.
4. Proceedings of the House of Representatives 1961-2 p. 506 (Mr. N.W. Manley, 12 Oct. 1961).
5. Proceedings of the Legislative Council 1961-2 vol. 3, p. 53 (20 Oct. 1961).
6. Proceedings of the House of Representatives 1961-2, vol. 4, p. 719 (23 Jan. 1962).

. . . I make no apology for the fact that we did not attempt to embark upon any original or novel exercise for constitution-building.

We had a system which we understand; we had been operating it for many years with sense. It is a system which has endured in other countries for generations successfully. It is a system which is consistent with the sort of ideals we have in this country, and it was not difficult to decide that we would follow that familiar system with those modifications which we thought the circumstances of Independence deserved.

2. Literary and Material Sources

'The Constitution defines and establishes the principal organs of government; it is the source of their authority; it prescribes the manner in which and the limits within which their functions are to be exercised, and it determines their inter-relationship'.⁷ In this functional sense as well as in the supremacy of its legal status, which operates to render void all laws inconsistent with its provisions, it is a body of fundamental law. In the Jamaican system 'the instrument which occupies this position of legal pre-eminence is the Jamaica (Constitution) Order in Council 1962, (the Second Schedule of which contains the written framework of Jamaican Constitutional law and is hereinafter referred to as 'the Constitution').

There are, however, important rules and principles relating to the choice of the government, the operations, functions, powers and privileges of its organs and their relationships with each other and with the public which are not expressly set out in the Order in Council. The sources of these rules and principles are to be found in statutes, judicial decisions, in conventions and usages, and in the commentaries of learned authorities on the principles incorporated in the Constitution.⁸ Thus the electoral system and the qualifications for the exercise of the franchise are governed by the Representation of the People Law,⁹ the structure, organization and jurisdiction of the Supreme Court are provided for by the Judicature (Supreme Court) Law,¹⁰ the rights of appeal in civil and criminal cases, and the jurisdiction and powers of the court of Appeal are regulated by the Judicature (Appellate Jurisdiction) Law 1962,¹¹ the relationship between central and local government is governed by the Kingston and St. Andrew Corporation Law¹² and the Parish Councils Law,¹³ the rights of the citizens to take legal proceedings against the Crown are derived from the Crown Proceedings Law 1958;¹⁴ the practice and procedure of Parliament are governed by its own Standing Orders,¹⁵ the rules for the appointment and organization of the Lay Magistracy are regulated by directions which were issued by the Minister of Home Affairs and approved by resolution of the House of Representatives,¹⁶ that the Queen will appoint as Governor-General the

7. S.A. de Smith *The New Commonwealth and Its Constitutions* (1960), p. 109; cf. E.C.S. Wade and G.G. Phillips *Constitutional Law* (8th ed.) p. 1.
8. As the Constitution follows the Westminster model and has marked similarities to other Commonwealth Constitutions there is widening scope for appeal to advisory sources.
9. Revised Laws of Jamaica 1953, cap. 342.
10. Cap. 180.
11. Law 15 of 1962.
12. Cap. 192 (as amended by Law 2 of 1956).
13. Cap. 271 (as amended by Laws 3 & 4 of 1956).
14. Law 68 of 1958.
15. See the Revised Standing Orders of the House of Representatives 1964, and the Revised Standing Orders of the Senate 1964.
16. See Proceedings of the House of Representatives 1962-3 pp. 318-322 (19 Feb. 1963).

nominee of the Prime Minister, and that the major trade unions are entitled to representation in the Second Chamber of the Legislature, are principles which depend on convention; probably, most important of all, the meaning given to the provisions of the Constitution itself depends in the final analysis on judicial decisions.¹⁷

In this study the term 'constitutional law' will therefore be used in contradistinction to 'the Constitution' in the generally accepted sense¹⁸ of covering the whole spectrum of constitutional rules and principles contained in the Order in Council as well as the legislation, common law principles, case law, and conventional usages which affect the machinery of government and relevant political relationships.

3. Legal Sources

The Constitution came into force immediately before Independence Day (6 August 1962).¹⁹ The Order in Council, which had been made on 23 July 1962, was laid before the United Kingdom Parliament on the following day, and is prefaced by a statement indicating the legal authority by which it purports to be made:

Her Majesty, by virtue and in exercise of the powers in that behalf by subsection (1) of section 5 of the West Indies Act, 1962, or otherwise in Her vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows . . .

The West Indies Act 1962, the statute specifically relied on is, as we have seen,²⁰ the Act which provided for the dissolution of the Federation. It also enabled 'fresh provision to be made for the government' of the constituent units of the Federation. Section 5(1) of the Act reads:

Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified.

The terms of the subsection are sufficiently wide to cover not only the authority to create a complete constitutional system but also the grant of the more limited and special type of legislative authority which was provided for by the West Indies (Dissolution and Interim Commissioner) Order in Council 1962.²¹

It remains to consider whether the words 'or otherwise in Her vested' in the above-quoted preamble to the Order in Council embraces any other legal source of the Constitution. Prior to the Independence Constitution all Jamaican constitutional instruments since 1866 had been expressed to be made under the authority not only of the United Kingdom Statute of 1866²² but also of the two local Laws by

17. See, for instance, *D.P.P. v Nasralla* [1967] 2 A.C. 238.

18. See Jennings *The Law and the Constitution* (5th ed.) pp. 33-41, 62-79; Wade and Phillips op. cit. p. 4; cf. Dicey *The Law of the Constitution* (10th ed. E.C.S. Wade) pp. 19-32; but see the Editor's comments p. 6 note 2.

19. S.I. 1962 no. 1550 s. 1.

20. p. 23, ante.

21. S.I. 1962 no. 1084.

22. The Jamaica Act 1866 (29 & 30 Vict. c. 12)

which the Jamaican Legislature had abolished itself and vested unrestricted constituent powers in the Crown.²³ Thus the 1959 Constitution²⁴ which granted internal self-government began with the following typical recital:

Her Majesty, by virtue and in exercise of the powers in that behalf by the Jamaica Act, 1866, the enactments of the Legislature of Jamaica therein mentioned, or otherwise in Her vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows . . .

The United Kingdom Act of 1866 had stated that it was 'expedient that the said Acts' (referring to the Jamaican statutes)²⁵ 'should be brought into operation under the authority of Parliament in the manner and to the extent' therein provided; and it provided that specified portions of the local Acts should come into operation in the island 'so soon as the Assent thereto of Her Majesty in Council shall have been proclaimed in the said island by the Officer administering the Government thereof'.²⁶ The principles of *Campbell v Hall*²⁷ had not yet been clearly enunciated and the power of the Crown to provide a non-representative Legislature even in these circumstances would naturally be subject to some doubt. It now seems clear that confirmation by United Kingdom legislation was unnecessary,²⁸ for as soon as the Jamaican Legislature ceased to exist or function the Crown was entitled to revive the prerogative and provide a constitutional machinery for the conduct of the affairs of the colony.²⁹ Furthermore the Jamaican Laws were capable of coming into operation without the aid of United Kingdom legislation as had been the case in 1854 when important constitutional changes had been made.³⁰

It is remarkable therefore that while the West Indies Act 1962 expressly repealed³¹ the United Kingdom Act of 1866 no reference is made to the two local Laws. The question arises whether the repeal of the United Kingdom Act of 1866 resulted in the abrogation of the Jamaican Laws. Section 38(2) of the United Kingdom Interpretation Law 1889³² provides that:

Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . .

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed . . .

23. See p. 9 ante.

24. S.I. 1959 no. 862.

25. Vict. c. 12 & 29 Vict. c. 24. (Jamaica).

26. Ibid., s. 1.

27. 1774, 1 Cowp. 104. See p. 4 ante.

28. For a contrary view, see Sir Kenneth Roberts-Wray in *Changing Law in Developing Countries* p. 26; but there the writer assumed that when the Jamaican Legislature passed the first of its two self-effacing Acts it had effectively abolished itself and was, therefore, legally non-existent when it passed the second Bill which purported (a) to revoke the sections by which it had sought to replace itself with a new uni-cameral Legislature and (b) to vest unfettered constitution-making powers in the Crown. In fact the first Law, as did the second, provided that it should not come into operation until the Queen's assent had been proclaimed. Since this had not been done, the Assembly continued to sit and legally enacted several measures including the second of the two suicidal Bills.

29. See *Sammut v Strickland* [1938] A.C. 678; *Sabally & N'Jie v H.M. Attorney-General* [1964] 3 W.L.R. 732; [1965] 1 Q.B. 273.

30. See pp. 6-7 (ante.)

31. Ibid., s. 10(2).

32. 52 & 53 Vict. c. 63

The Jamaican Laws were in operation by virtue of being the enactment of a competent Legislature as well as in accordance with the United Kingdom statute. The repeal of the latter does not in itself result in an automatic revocation of the Jamaican Laws. On the other hand, the circumstances are such that 'the contrary intention appears'. Firstly, the United Kingdom Act of 1866 had recited in its Schedule the sections of the colonial statutes which should come into operation, and its repeal suggests that the matters so set out should cease to operate simultaneously with its own repeal. Secondly, section 5(1) of the Act of 1962 gave ample constitution-making powers to the Crown and was clearly intended not only to encompass the powers previously comprised in the 1866 Act but also to replace those provisions. This is made clear by the terms of subsection 5 of the same section which states:

Any Order in Council under the Jamaica Act, 1866 . . . shall, in so far as it is enforced at the passing of this Act and could be made under this section, have effect as if so made . . .

The necessary implication is therefore that the Legislature in providing that the validity of an Order in Council made under the Jamaica Act 1866, which embraced the local Laws, should continue on the strength of this new enactment, intended to abolish and replace not only the United Kingdom Act but also the correlated colonial provision.

The words 'or otherwise in Her vested' may however have some significance apart from the draftsman's inclination to cover all possible contingencies *ex abundanti cautela*.³³ In the 1959 Constitution the Crown had reserved³⁴ the right to vary the Jamaican Constitution and the phrase could therefore be used as incorporating this prerogative right which subsisted until the Independence Constitution came into effect and, together with the West Indies Act 1962, would accordingly form the legal source of the present Constitution.

4. Formal Source

The expression 'formal source' is used here in the sense of that which gives the Constitution its validity and authority.³⁵ In this connection the principle of constitutional autochthony will be discussed as an element in the making of the Jamaican Constitution.

Dr. Wheare in introducing the word 'autochthony' to the vocabulary of political science and Commonwealth relations described the concept as involving the desire on the part of Members of the Commonwealth to be able to assert 'that their constitution has force of law and, if necessary, of supreme law within their territory through its own native authority and not because it was enacted or authorized by the parliament of the United Kingdom; that it is, so to speak, "home grown", sprung from their own soil, and not imported from the United Kingdom'.³⁶ Although

33. For the possible value of such a clause, see *Buck & Others v Attorney General* [1964] 3 W.L.R. 850 (857), affirmed by C.A. [1965] 1 A11 E. R. 882; and *Sabally's case*, note 29 *supra*.
34. S.I. 1959 no. 862, s. 122.
35. For a concise exposition of the different sources of law, see O. Hood Phillips *A First Book of English Law* (3rd ed.) pp. 76-77.
36. K.C. Wheare *The Constitutional Structure of the Commonwealth* p. 89.

Dr. Wheare discussed the success with which the Irish Free State, India and Pakistan achieved this ideal in terms of whether or not there had been a break in legal continuity it is clear that his application of this test resulted from the nature of the steps taken in those cases to claim that the respective Constitutions derived their force from an authority other than the Crown or Parliament of the United Kingdom.³⁷ In fact, he expressed doubts whether other Members of the Commonwealth—despite their inability to satisfy this test would 'accept without question the view that their own constitutions are not rooted in their own soil'; and it does not appear that Dr. Wheare aimed at restricting the concept to the sources of constitutional authority and validity as determined by the application of strict legal criteria.³⁸

We have seen³⁹ that in Jamaica's case the legal authority for the Constitution is directly attributable to the West Indies Act 1962, an enactment of the United Kingdom Parliament, and, to a lesser degree to the reserve constituent prerogative powers of the Crown. The position of supremacy which the Constitution occupies and the independent status of the country, in strict law, required Imperial legislation⁴⁰ and are accordingly provided for by the Jamaica Independence Act 1962. When preparations were being made for the drafting of the Constitution it had been suggested that Jamaica should seek a declaration of Independence by United Kingdom legislation which should also confer constitution-making powers on a constituent assembly in Jamaica and in this way demonstrate dramatically that Independence constituted a real break with the colonial past and that the Constitution was home grown.⁴¹ The basis on which the Legislature rejected these submissions is not clear although the Premier stated that he was 'not in a position to accept such a suggestion; it could never have been accepted by the British Government'.⁴² Why it would be unacceptable to the British Government was not explained and is not obvious, since there was little evidence to support any apprehensions that the constitutional instrument had to be vetted in Westminster in order to safeguard the interests of any conceivable minority group. The reason for the rejection may rest rather in the fact that the time factor was an important and vital political consideration and a rigid time-table for the unscrambling of the Federation and the attainment of Independence had been agreed with the British Government. Not only did Jamaica possess the usual desire to complete the road to Independence in the shortest possible time but the Government was being accused of having delayed Jamaica's Independence by supporting Federalism, and both major Parties were vying for the credit of having accelerated the progress to nationhood.⁴³ The legislators felt that the speediest and least controversial device for bringing an Independence Constitu-

37. *Op. cit.*, p. 108.

38. See, however, Kenneth Robinson 'Constitutional Autochthony in Ghana' (1961) 1 *Jl. Cwth. Pol. Stud.* 41. 'Constitutional Autochthony and the transfer of power' in *Essays in Imperial Govt.* (Oxford, 1963) p. 249; D.K. Fieldhouse 'Autochthonous Elements in the Evolution of Dominion Status: The Case of New Zealand' 1 *Jl. Cwth. Pol. Stud.* 85.

39. pp. 26-7 *ante*.

40. See de Smith, *op. cit.* pp. 1-9.

41. See, for instance, letters published in *The Daily Gleaner* 11 Nov., 5 Dec., 12 Dec. 1961, 2 Feb. and 8 Mar. 1962.

42. Proceedings of the House of Representatives 1961-2 vol. 4, p. 773 (Mr. Manley, 22 Feb. 1962).

43. It is not without significance that at the London Conference the only issue on which there was disagreement with the British Government was the question of whether the date of Jamaica's Independence should not for the sake of convenience be postponed so as to coincide with that of Trinidad and Tobago. See *The Daily Gleaner* 5-7 Feb. 1962.

tion into operation would be the traditional Order in Council.⁴⁴ But even if the advocated procedure had been adopted, in strict legal theory, the constitutional *fons et origo* would be found at Westminster.⁴⁵

The truth is that the thirst for autochthony is only a constitutional facet of the nationalist appetite and may be appeased not only by a revolutionary or ostensible break in legal continuity but by various less legalistic manifestations of nationhood which will vary according to the philosophical doctrines and political dogmas prevailing in the country concerned. In the last analysis it is not a legal but a political and ethical question.⁴⁶ Thus the concept has been extended to include any procedure which assists in making clear that a constitution results from the choice of the local people and their representatives.⁴⁷

The Jamaican Constitution was perceptibly made locally in circumstances in which the people and their elected representatives participated in the production process.⁴⁸ The procedure followed was to appoint a Committee of the House of Representatives comprising five Government Members and five Opposition Members and the Premier as Chairman⁴⁹ and another Committee of the Legislative Council, consisting of two Government Members, two Opposition Members and the Leader of Government business in that House, as Chairman.⁵⁰ Both Committees agreed to sit together under the Chairmanship of the Premier and to present a joint report.⁵¹ The result was that the Government Party had a majority of two, but the Committee approached their task on a national rather than a partisan basis and in the main, differences of opinion were not based on party alignments.⁵²

Since the entire exercise of drafting the Constitution came immediately after and as a direct result of the referendum decision it attracted an initial atmosphere of localism. Immediately after the referendum public proposals for an Independence Constitution began to be made and to be discussed. Many letters were published by the press during the weeks in which the drafting was being done. Many of those letters demanded the fullest possible public participation in the formulation of the proposals.⁵³ Public discussion groups were organized in many parts of the Island, and the public was specifically invited to submit written suggestions to the Committee. The questions on the agenda of the Constitution Committee were published and a special Sub-Committee was appointed 'to examine and report on all representations received and to advise as to which of the persons submitting

44. For comments on the advantages of the procedure by way of Order in Council, see de Smith 'The Independence of Ghana' (1957), 20 *M.L.R.* at pp. 355-6.

45. See Wheare *op. cit.* pp. 109-110; Robinson (1961) 1 *Jl. Cwth. Pol. Stud.* pp. 49-50.

46. See Bryce *Studies in History and Jurisprudence* vol. 2, pp. 52-57; Salmond *Jurisprudence* (11th ed. Dr. Glanville Williams) pp. 99-103; 15 *M.L.R.* at pp. 293-5.

47. See Robinson, *loc. cit.* pp. 49-50. For the adoption of the concept to the development of constitutional conventions in New Zealand, see D.K. Fieldhouse, *loc. cit.* p. 85; cf. Sir Kenneth Roberts-Wray in *Changing Law in Developing Countries* at pp. 60-2.

48. To a certain extent this is also true of the previous post-war constitutional developments.

49. Proceedings of the House of Representatives 1961-2 p. 501 (12 Oct. 1961).

50. Proceedings of the Legislative Council 1961-2 vol. 3, p. 53 (20 Oct. 1961).

51. See Report of the Committees of the Legislature on the Proposals for a Constitution to take effect on Independence (The Constitution Report).

52. Proceedings of the House of Representatives 1961-2 p. 781 (Mr Clement Tavares, 27 Feb. 1962).

53. See, generally, *The Daily Gleaner* Sept.-Dec. 1961; and the Premier's statement in the House of Representatives on 17 Oct. 1961, Proceedings of the House of Representatives, 1961-2 p. 528.

representations desiring to appear in person before the Committees might be invited to do so, due regard being had to what available time would allow'. The joint Committee reported that they were pleased with the considerable public response to their invitation and the quality of the memoranda received, that there had been complaints that the time allotted for submission of proposals was too short, but that the time had been extended and in fact no memorandum was rejected because it was received after the prescribed time had elapsed. The Committees stated that they were aided in their task by the public contribution and 'in many cases there was remarkable similarity of proposal with what the Committees had finally decided to recommend'.⁵⁴

It seems however that the opportunity for the masses of the people to feel that the Constitution was of their creation or belonged to them was not adequately utilized. The public were given a mere thirty days in which to make their representations. The public discussion groups which were organized received no government assistance or encouragement. Many of the important questions were settled before the public views were received by the Parliamentary Committees.⁵⁵ Nevertheless, the almost complete absence of external participation in the preparation of the Constitution is an important autochthonous feature of the Jamaican Constitution. When the resolution for the establishment of the Constitution Committee was discussed in the House of Representatives, Mr. Donald Sangster,⁵⁶ then the chief Opposition spokesman on constitutional matters said:

But one of the points I would like to make is that we feel on this side that the Constitution should be settled in Jamaica and agreed upon if possible here, . . .

When the Report of the Constitution Committee was presented to the Legislature the Members expressed satisfaction that a unanimous decision was possible on the constitutional proposals⁵⁶ and that these had been arrived at after full public discussions and without outside interference. One Member made the point with clarity and brevity:⁵⁷

The Constitution which is brought forward is something that has been moulded and shaped by Jamaicans in Jamaica.

Mr. Manley stated⁵⁸ that at the London Conference it was intended to present an agreed Constitution and that all matters of principle would be determined by the local representatives though they would examine the suggestions of the Colonial Office on technical details. On the return of the delegation from the London Conference he reported that the talks had been conducted in the manner anticipated.⁵⁹

In fact, the Constitution drafted in Jamaica and approved by the unanimous vote of both Houses of the Legislature⁶⁰ before the London Conference was only

54. See The Constitution Report pp. 17-18.

55. See Trevor G. Munroe 'Origins of the Jamaica Independence Constitution' 1972 *J.L.J.* 68.

55a. Proceedings of the House of Representatives 1961-2 p. 526 (17 Oct. 1961).

56. The Leader of the Opposition said that all the Premier had said in presenting the Report was with the 'entire agreement of both sides of the House and the only point of disagreement was whether the system for the identification of voters should be specifically provided for in the Constitution', *ibid.* p. 727 (Sir Alexander Bustamante, 23 Jan. 1962).

57. *Ibid.* p. 757. (Mr C. Tavares, 25 Jan. 1962).

58. *Ibid.* p. 767 (25 Jan. 1962).

59. *Ibid.* p. 774 (22 Feb. 1962).

60. *Ibid.* pp. 709-67 (17-24 Jan. 1962); Proceedings of the Legislative Council 1961-2 vol. 4, pp. 14-30 (26 Jan. 1962).

slightly varied in the final Order in Council.⁶¹ The alterations made after the departure of the delegation to London were subjected to public comments, debated and unanimously approved by the Legislature. The changes either comprised matters which had previously been raised in public discussions and in parliamentary debates in Jamaica or merely involved minor drafting changes of a technical nature.⁶²

The Constitution itself contains peculiar features indicating its distinct local 'grundnorm' as for example the provisions relating to the status of the Leader of the Opposition and the functions of the Second Chamber, the correlation of the entrenched fundamental rights to existing Jamaican Law, and certain of the efforts made to express traditionally conventional principles in the form of rules of strict law. Many of these features owe their existence as would be expected⁶³ to the fact that the Constitution reflects the dominant features and interests of Jamaican political and legal systems. Although the Constitution follows the monarchical form and the Westminster model of parliamentary government the Constitution Committee had considered alternative systems and, as we have seen,⁶⁴ decided in favour of that form with which they were conversant and which had roots in the country's history. The Constitutional tree had grown from a seed which belongs to a common Commonwealth species but it was sown in Jamaica three centuries ago and has been pruned (at one time almost completely hewn down) in accordance with the requirements of the local political climate. Its manner of growth is therefore distinguishable from that of an imperial engrafting or a direct transplantation from Westminster.

There were occasional criticisms that the legislators had been unduly orthodox but their rejection of any imputation of being addicted to colonialism was expressed forcefully by Mr. Manley:⁶⁵

Let us not make the mistake of describing as colonial, institutions which are part and parcel of the heritage of this country. If we have any confidence in our own individuality and our own personality we would absorb these things and incorporate them into our being and turn them to our own use as part of the heritage we are not ashamed of.

The people as a whole were satisfied that the final decision had been democratically arrived at and represented a national consensus of opinion. In closing the debate in which the amendments, which were made to the draft since the opening of the London Conference, were presented to the Legislature and unanimously approved, the Premier expressed the view that the unanimity in the House reflected the general acceptance throughout the country of the final decisions, and stated that while representations were received up to the announcement of the alterations made to the draft subsequent to the London Conference he had received no further complaints 'because I think the people are largely satisfied with the Constitution as it now is'.⁶⁶ This general acceptance combined with the fact that the power of

61. Cf. the Fourth Print of the draft Order in Council (Jamaica Govt. Printer) and see de Smith op. cit. pp. 54-55.

62. For an outline of these amendments see Mr. Manley's speech in the Legislature, Proceedings of the House of Representatives 1961-2 pp. 774-6 (22 Feb. 1962); and for further comments on the nature of the work done at the London Conference see Mr. Tavares' speech *ibid.* pp. 781-2.

63. See, generally, Wheare *Modern Constitutions* (1962) chap. 5.

64. See pp. 29-31 and the Constitution Report pp. 3, 17-18.

65. Proceedings of the House of Representatives 1961-2 p. 766 (24 Jan. 1962).

66. *Ibid.* p. 790 (27 Feb. 1962).

amending all the important provisions of the Constitution ultimately lies in the control of the electorate is a further feature of the autochthonous character of the Constitution.⁶⁷

5. The Design of the Constitution-Makers

In presenting the Report of the Constitution Committee the Chairman said:⁶⁸

The whole problem of constitution-making is always a question fundamentally where matters go to [*sic*] somebody who is the final repository of power and authority, and the question is what checks can be put upon that.

This clearly expresses the aim of the constitution-makers in Jamaica. The debates in the Legislature disclose a desire to leave Government free to perform the functions of economic and social reorganization necessary in a developing nation and at the same time a concern to provide such constitutional checks and balances as would make it difficult for a dictatorial regime to come into existence.⁶⁹

Thus a study of the provisions of the Constitution necessarily involves an examination of the constitutional mechanisms adopted for vesting power in specific persons or institutions and an analysis of the effectiveness of the devices employed for preventing the abuse of those powers.

67. See Wheare op. cit. pp. 208-9. For a less favourable view of these developments see Trevor G. Munroe *Political Change and Constitutional Development in Jamaica 1944-62* (unpublished Ph.D. thesis Oxon. Univ. 1969) pp. 289-94; The Politics of Constitutional Decolonization: Jamaica 1944-62, chap. 5.

68. Proceedings of the House of Representatives 1961-2 p. 720 (23 Jan. 1962).

69. The Editor of *The Daily Gleaner*, Mr. T. Sealy, reporting on the London Conference stated in an article entitled 'Too Timid for the Future' that 'constitutional thinking in England' was that Jamaica had attempted 'to provide for too many eventualities'; and alleged that those studying the Jamaican draft thought 'it too static in its reliance on the past and at the same time too timid in its caution for the future', *The Daily Gleaner* 7 Feb. 1962.