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Introduction

Making Our Constitutions Our Own

On the occasion of the 350th anniversary of the Barbados Parliament, the then Governor-General, the late Sir Hugh Springer, remarked that 'Our Constitution came from Britain but a dozen generations of Barbadians have made it their own.'[1] These words, in fact, tell the story of the historical relationship of the entire Commonwealth Caribbean with Britain, the imperial power, and more specifically, of the process of constitutional founding and of the method of acquiring our Independence Constitutions and the substance of their provisions. So although Sir Hugh Springer's words may hardly do justice to the profundity of the historian's enterprise of crafting the social memory of our *people*, they are nonetheless the most compelling part – the 'core' – of any possible narrative construction of our political identity. As Professor Norma Thompson remarks: 'The stories that succeed most compellingly in accounting for the "facts" of a people's past become the core of that people's political community.'[2]

West Indian Independence Constitutions, which are, for all intents and purposes, written versions of the constitutional arrangements that evolved in the United Kingdom over many centuries, have had their formal juridical origins in statutes of the British Imperial Parliament, and trace their historical beginnings back to July 1627, when the King of England granted letters patent to

James, first Earl of Carlisle, 'over the whole of the Caribee Islands, from 10° to 20° north latitude; a wide range which made express mention of Grenada, St. Vincent, St. Lucia, Barbados, Dominica, Guadeloupe, Montserrat, Antigua, Nevis, and St. Christopher, as well as smaller islands.'[3] Thus was born, according to Professor Lloyd Best, 'the political system of the West Indies', which was marked by a series of developmental changes through the centuries to the granting of political independence from the 1960s to the 1980s.[4] These developmental changes can be said to have begun in earnest with the emancipation of the slaves in the West Indian colonies in 1834; an event which Professor Rex Nettleford describes as 'the greatest watershed event in the history of this part of the Caribbean which millions have come to call "home."'[5] By this he means to say that the Abolition of Slavery Law on August 1, 1834, by which Caribbean society would have been emancipated from the 'debilitating transgressions of slavery', had 'made possible the emergence of an entire set of rules governing conditions of work and industrial relations, and safeguarding future society against the viler consequences of the wanton exploitation of labour which had persisted for two centuries before.'[6] We are then, the *creatures* of *that* Law; not merely in some abstract sense of being the subjects of law's empire, but rather in some more organic sense of relatedness, in that the abolition of slavery would have constituted the critical starting point, or at least set the stage, for the development of a new trend in colonial government in the West India colonies, which, over a century later, culminated in political dependence and the full restoration of civil status to all the inhabitants of this Archipelago. For, with the abolition of slavery, and the granting of civil status to those persons who lacked it prior to emancipation, the question of how these colonies were henceforth to be governed became a central concern of British colonial policy. Thus, for Professor Nettleford, the Emancipation Statute must

be accorded canonic status as the foundation document of modern Commonwealth Caribbean constitutionalism.

The historian D.J. Murray reminds us that in the late eighteenth and early nineteenth centuries, it was the current opinion that the West India colonies formed the heart of the British Empire. Among the colonies, they were the most prized. 'Their commercial worth and the contribution they made to the maintenance of British power is said to have led George III to regard the West India colonies as a jewel in his Crown.'[7] In the opinion of many who counted in British politics, the West India colonies constituted the hub of Britain's trading system. Clearly, Britain's fortunes were tied to the success of its West India colonies.[8]

In the early nineteenth century, however, though these colonies were still regarded of major importance in Europe, they were less and less regarded as an invaluable part of Britain's trading system. The Golden Age of the West Indies was fast coming to an end.[9] They remained important largely because they continued to be slave colonies. This, in consequence, made them the most time-consuming and troublesome part of the Empire with which the British Government and Parliament had to deal in the first third of the nineteenth century.[10]

By that time, the institutions and procedures of colonial government would already have been established in these West India colonies, which had been acquired by Great Britain between the early part of the seventeenth century and the beginning of the nineteenth, by settlement, conquest and exchange. The form of colonial government found in the old West India colonies conformed broadly to the same pattern: it was the 'old representative system' under which the power of initiative in colonial government, in everything that related to internal affairs, was left mainly with the colonists. This afforded the colonists the opportunity to fashion their government as they saw fit, and in their interest. This policy, by and large, dictated the outline and form of government

in colonies conquered from other European powers during the Revolutionary and Napoleonic Wars.[11] Trinidad and Barbados would have been the outstanding exceptions.

But, alas, this was government of the slave society in the West Indies by white colonists. From the standpoint of the slaves, given the horrid conditions under which they were forced to exist, such a system of government was hardly beneficent or liberal. Indeed, it would have been the evil practices of slavery in the West India colonies that had fueled the campaign for the amelioration of conditions of the slaves and, ultimately, for their full emancipation and for reform of colonial administration. Due to the pressure of the Anti-Slavery movement, and led by dissatisfaction arising from the ineffectiveness of the government in the colonies, Britain 'explicitly and intentionally remodelled first that in the conquered colonies, introducing Crown Colony government, and then began a reconstruction of that in the old West India Colonies.'[12]

With the emancipation of the slaves, however, the main stimulus for action was removed. British politics was no longer the major stimulus for action in the colonies. Crown Colony government remained in the conquered colonies but, for all intents and purposes, the institutions of colonial government in the West India colonies, developed in the seventeenth and eighteenth centuries, were claimed to be modelled on that of England, such that the Jamaican planter Bryan Edwards would describe the government existing in these islands 'as nearly conforming to that of the Mother Country'. Each colonial constitution had its own Governor, its Legislative Council and Legislative Assembly, just as England had its King, Lords and Commons.[13] The prevailing assumption would have been that, for the government of the colonies, English laws and institutions were the best in the world.[14] Murray writes that 'in Jamaica and the Lesser Antilles – Barbados, the Leewards Group, Grenada, St. Vincent and

Dominica – a Governor and appointed Council performed legislative, executive and judicial duties; as a third division of the legislature there was an elected Assembly; while there were Courts in theory modelled on those of Westminster, for the execution of justice.'[15] He notes that the greatest development in the machinery of government would have taken place in Jamaica but in all these islands development was comparable, and the more extensive powers of government in Jamaica matched the greater demands placed on government in the largest of the colonies.[16] In all the colonies, then, the machinery of government which existed at the end of the eighteenth century enabled the colonists to control to a considerable extent their own government. Colonists in the old West India colonies largely ruled themselves.[17]

But with the emancipation of the slaves, Colonial Office opinion was divided as to the most suitable form of government for the colonies. For some, a fundamental alteration in the system of government was inevitable since, as a practical matter, representative government was unsuitable for colonies where slaves had recently been freed.[18] It was thought that the form of government developed in the conquered colonies was more suitable for primarily black colonies; indeed, it was the development of this form of government which allowed for a separation in the Empire between white and black colonies and for the progress of the former to responsible government and dominion status.[19] The alternative view, however, is that it was the government in the Crown Colonies, and not that in the old colonies, which was called into question with the emancipation of the slaves. For, notwithstanding that there would have remained a number of problems regarding the form and working of the representative system in the old colonies, it was felt that, in the final analysis, the ultimate goal should have been to secure representative institutions for all West India colonies, along with an independent Judicature.[20]

But progress towards this goal was by no means swift. In fact, the influence of Henry Taylor's views on Colonial Office policy resulted in constitutional retrogression rather than progress, in some instances.[21] Taylor had advanced the view that in a society where property and knowledge were not widely diffused and the mass of society not yet fit to exercise the vote, elected assemblies would inevitably lead to government by an irresponsible oligarchy of either black or white. On the strength of such arguments, representative government was not extended to Trinidad or British Guiana. As H.A. Will writes, 'the final triumph of Taylor's views was reflected in the constitutional retrogression from representative to crown colony government which took place in Jamaica and other British West Indian Colonies during the 1860s and 1870s.'[22]

By the late nineteenth century, however, agitation for constitutional reform within the West Indian colonies would have been influenced to an important degree by the course of events and currents of thought in Britain and elsewhere in the Empire.[23] Will writes that 'Jamaicans advocating change drew encouragement from the climate of opinion in England, and from constitutional reform and unrest elsewhere in the Empire.'[24] But constitutional and political development in the Commonwealth Caribbean was to take place within a constitutional framework established or adopted by the British government and which could only be changed by its policy decisions.[25] In the event, the framework for constitutional development that was to emerge was that of a transition to semi-representative and representative government, and eventually semi-responsible and responsible government.[26]

Colin Hughes writes that constitutional reform in the British colonies has been based on the familiar British notion that 'the only form of self-government worthy of the name [was] government through ministers responsible to an elected legislature'.[27] He further notes that this goal was responsible government and that

> The major territories of the British Caribbean [had] reached that penultimate stage of development, the crucial one where for the first time power and responsibility are wedded in the persons of Ministers who have power over policy and administration, and are responsible to legislatures elected on the basis of universal adult suffrage, although certain subjects of state may be reserved for official Ministers. The struggle to reach this level lasted more than two decades, from the Wood Report of 1922 which restored elected representation to those territories of the eastern Caribbean which had lost it during the 19th century, to the Jamaica Constitution of 1944, under which semi-responsible government was first achieved.[28]

It is notorious that the social and economic conditions of the colonies at this time were tragic, and local negro leaders blamed imperialism in general and Crown Colony government in particular for their political frustration and their economic and social distress.[29] Disturbances and riots swept the West Indies, including Barbados, in 1935-38. Coupled with this, popular mass movements led by such figures as Bustamante of Jamaica or Uriah Butler of Trinidad would have heightened the pressure for constitutional reform. This was given due notice by the Moyne Commission of 1938, which reported that

> rightly or wrongly, 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 government.[30]

The Report rejected out of hand the notion of complete self-government for the colonies, and rather advised that in order to meet

the just aspirations of the people, they should have the right to a greater share in government and that the colonial Legislative Councils should be made truly representative. It approved the inclusion of elected members in the Executive Councils, and recommended that qualifications of both electors and representatives should be reduced and universal suffrage should become the recognized goal of policy. But above all, it was the considered opinion of the Commission that the future well-being of the West Indies lay in federation.[31] In this regard, it is instructive to note that a Labour Congress of the West Indies and British Guiana had recommended to the Moyne Commission that there be a federation, a wholly elected legislature based on adult suffrage, a Governor who would have the powers comparable to a constitutional monarch, nationalization of the sugar industry, state ownership of public utilities, and economic and social reforms compatible with the achievement of a welfare state.[32]

The outbreak of the Second World War is said to have marked a turning point in the history of all British colonial dependencies. 'Until then the advance of non-self-governing territories of the British Commonwealth to a status resembling that of the self-governing dominions had never been seriously considered as practical politics except in two instances. Only in India and Ceylon did constitutional reform, by the inter-war period, come to be recognized as part of a process of transition to independent status, thus involving a radical change in the structure of the Commonwealth.'[33] But in the British West Indies, as late as 1939, a special commission (the Moyne Commission) appointed to investigate disturbances throughout the islands in fact reaffirmed the traditional assumptions underlying British conceptions of permanent metropolitan responsibility for the control of the dependent part of the Commonwealth.[34] 'The principles of Crown Colony government were still unequivocally upheld.[35] The desideratum, in the judgment of the Commission, was not

the transformation of representative into responsible government or, in other words, an advance from colonial to dominion status.'[36] In essence, the Commission held that 'the formulation and execution of policy should remain an exclusive imperial responsibility even if combined with enlarged opportunities for more direct and comprehensive criticism of the measures of which the imperial government is to remain the arbiter.'[37]

The outbreak of the Second World War, however, occasioned a fundamental change in British colonial policy. Certainly, by that time, the West Indian colonies had ceased to be of any economic benefit to Britain. In addition, colonialism was now seen to be inconsistent with the principles Britain was to defend in the War, and decolonisation was thus emerging as the 'new' international law imperative. Thus, in the political sphere, British policy was declared to be the advancement of colonial dependencies to self-government within the British Commonwealth. Henceforward, constitutional reform reflected a process of transition from colonial subordination to colonial autonomy. As E.W. Evans puts it,

> In the Caribbean area Jamaica was selected for the first experiment in a transitional constitution under the new dispensation. In 1944 Jamaica was provided with a new constitution in which, apart from changes in the character of the legislature as a representative body, responsibility for the formulation of public policy became largely a colonial responsibility for the first time. It was laid down that the policy-making body, to be known as the Executive Committee, should consist of ten members of whom as many as five were to be elected by, and thus by implication responsible to, the colonial legislature; of the remainder three were to be officials holding office under the Crown and two unofficial members nomi-

> nated by the Governor from amongst the members of the legislature.[38]

This arrangement can be described as representing an embryonic ministerial system capable of expansion by stages.[39] 'In the new constitution the legislature was remodelled. The lower house became an entirely elected body on the basis of universal adult suffrage, with an upper house consisting of three *ex officio*, not more than two official and not less than ten unofficial members appointed by the Crown ... The upper house had no final power of veto, but only delaying powers.'[40]

In the structure of the legislature, no less than in its ministerial system in embryo, the Jamaica Constitution of 1944 represented a substantial instalment of responsible government.[41] Further changes were to follow in 1953

> when the Executive Committee was reconstituted so as to consist of eight ministers from among the members of the lower house of the legislature; *viz.*: a Chief Minister appointed by the Governor with the approval of the lower house and seven other ministers appointed on the recommendation of the Chief Minister, ... and entrusted with the management of all public departments except for the reservation of official authority of responsibility for defence, external affairs, and the public service.[42]

Similar constitutional changes on the model of the Jamaica Constitution of 1944 subsequently followed in British Guiana, Trinidad and Tobago, Barbados, and in the Windward and Leeward Islands. It bears emphasis, however, that current opinion in the late 1940s and 1950s held that political independence for the British West Indian colonies was only feasible through federation. It was therefore with the breakup of the 1958

Federation in 1962 that the idea of self-government for the islands on an individual basis became a genuine possibility.

Lawful Devolution

Jamaica

The two decades following the Second World War witnessed the progressive liquidation of the European colonial empires - in Asia, Africa, and the Caribbean - in some cases voluntarily, and with perhaps a certain sense of relief of being able to shed a military or economic burden, and in other cases reluctantly and most tardily. The process of decolonisation usually involved, in stages, the progressive devolution of qualified home rule, then self-government, and finally independence.[43] This, in essence, describes the process of 'lawful devolution of sovereignty' by which Britain granted independence to countries like India, Pakistan and Ceylon between 1947 to 1948, and ultimately to its colonies in the West Indies, starting with Jamaica and Trinidad and Tobago in 1962, and ending with St. Kitts and Nevis in 1983. This process, in its totality, often involved the constitutional transition of a colony through stages of semi-representative and representative government, and eventually semi-responsible government, culminating in full independence with the formal enactment of the independence constitution by Her Britannic Majesty in Council.

This process, it bears repeating, was established or adopted by Britain for treating with its colonies. Therefore, it is notorious, as Edward McWhinney observes, that

> the new post-colonial constitutions were invariably highly derivative, and tended to borrow very heavily from the constitutional institutions and developed practices of the

> "parent" European colonial power involved. Since the approach to self-government and independence on the part of the colonial territory concerned was usually conditioned upon the development, within that territory, of a democratic system of government as evidence of its capacity finally to govern itself, free from the benevolent paternalism of the erstwhile colonial power, it is perhaps not surprising that the emerging new, post-colonial, indigenous local political élite should find it good practical politics to copy the constitutional models of the colonial power, and that the influence of the old colonial office legal draftsmen should often be pervasive.[44]

He further states that

> In instances of decolonization, where a parent, imperial government finally resolves to devolve political-legal authority to an indigenous, local, colonial community, the imperial government – normally in control of the constitutional rules of the game from the beginning – may prefer an orderly, 'arranged' state succession from its own government to a new local government created, ad hoc, for the purpose. The transfer of constitutional power thus becomes an elitist, oligarchic exercise, with the constitutional charter of the newly created state often being one prepared in advance by the imperial government's own colonial office functionaries.[45]

McWhinney notes that 'when there has been adequate time, the British Empire practice was, as far as possible, to try to co-ordinate the imperial initiative in favour of constitutional devolution with some form of local constituent activity in the colonial territory concerned and on the part of the local people on some more or less genuinely representative basis.'[46] This was indeed the case

in respect of that older and narrower European segment of the empire – Canada, Australia, and even the Union of South Africa – and the process was also successfully applied in the case of decolonisation and devolution of constitutional self-government and independence on the Indian subcontinent, where a local representative constituent assembly functioned from the beginning to work out the general principles as well as the detailed institutions of the new constitutional system or systems.[47]

This measured process of constitutional devolution was not, however, affordable to the rest of the empire – to Africa and to the Caribbean. By the late 1950s, decolonisation had become a 'new' international law imperative which the United Nations and the emerging Third World sought to impose on often unwilling or uncooperative parent imperial states or governments.[48] In the circumstances, the actual transfer of power was often ungracious and hurried, 'with the consequence that the post-independence constitutional systems ... were often improvised or makeshift arrangements, with a predominantly European "colonial office" personality reflected in [the] constitutional institutions ...'[49] In other words, the post-decolonisation 'succession states' of the late 1950s, 1960s and 1970s did not really have the time to develop, in comparative leisure and on their own proper constitutional initiative, their own genuinely local source of sovereignty in place of the 'received', imperial *Grundnorm* at the time of independence; in a word, their own 'locally developed constitutional institutions and practices more nearly reflecting the local, indigenous society and its aspirations.'[50] In sum, then, in the era of rapid decolonisation, British Empire constitutional systems were, with the notable exception of the Indian subcontinent, normally devolved from above from the parent authority. They thus tended to have an elitist, and certainly non-popular, root of political and legal sovereignty.[51]

Certainly, in the Commonwealth Caribbean, there was no

active popular participation in constitutional drafting through a representative, elected constituent assembly and later ratification by a referendum. Rather, the process of constitutional founding, allowing for differences in matters of detail in respect of each particular island, was one in which local political leaders journeyed to London to enter into negotiations with colonial office functionaries over the terms of our constitutional arrangements. Thus, it is fair to say, notwithstanding the risk of over generalisation, that the process of establishing the *West Indian Independence Constitution*, to mark the founding of a 'new' independent sovereignty, was, as described by McWhinney, an 'elitist, oligarchic exercise.' Constitutional founding in Jamaica, for example, the largest of the (British) West Indian islands, and the first to gain political independence, was quite representative of the process which obtained in the rest of the Commonwealth Caribbean, and did not involve the mass of the people as such, but was essentially an elitist policy of negotiating with the Colonial Office.

This last point however should not be overstated, for, as Professor Woodville Marshall advises, the '*uprisings*' throughout the West Indies in the late 1930s, coupled with the rise of mass political parties in the 1940s, would have allowed for some measure of popular participation in the constitutional development of the West Indies. In other words, constitutional reform would have resulted in large measure from popular pressure. As a general premise, therefore, it must be conceded that the West Indian 'uprisings' in the late 1930s, in response to the abuses of colonialism, would have sparked the quest in earnest for constitutional reform, for a more democratic constitutional order through which all sections of society would allegedly benefit, and for the development of the appropriate instruments of self-government.[52] In Jamaica, for example, the new Constitution in 1944 was largely the result of specific Jamaican agitation begun in 1938 and of a consequent change in colonial policy. This

change in colonial policy witnessed the need for rationalisation of the administration of the West Indies. 'In the post-war Colonial Office, Jamaica and the other British Caribbean territories were seen as viable autonomous constitutional entities only in Federal formation. Official thought held that a colony had to be able to attain a certain level of economic development, probably beyond the capacity of any single territory, in order to qualify for self-government.'[53] Federation thus became a policy of the Colonial Office.

The years following the inauguration of the 1944 Constitution saw much agitation for further constitutional change, largely due to the perceived inadequacies of the new Constitution. As Professor Trevor Munroe puts it, 'within two years of its inauguration disillusionment with the Constitution had begun to set in. Dissatisfaction over the constitutional arrangement propelled the need for further constitutional reform, specifically for self-government.'[54]

This agitation for constitutional reform culminated in the inauguration of a new Constitution in 1953. The new Constitution was welcomed but it fell well short of guaranteeing self-government to the colony. The changes that it provided for were largely administrative, with the Crown still retaining some measure of control. Full internal self-government was to come in August 1959 with the inauguration of yet a new Constitution.[55]

But as noted earlier, constitutional advancement toward self-government was linked to the idea of a Federation of the British Caribbean territories – at least as far as imperial policy was concerned. There was a clear Imperial determination to bring about a union between Jamaica and several units of the British Caribbean territories. The Jamaican Legislature, as did the Legislatures of the various territories, acquiesced in this Imperial policy and in 1958, the Federation of the West Indies was established.[56]

It bears emphasis, however, that, following the struggles of the late 1930s, political agitation for constitutional advancement was largely an 'affair' of the political leaders or élite and the Imperial Government. The mass of the people were virtually excluded from the details of constitution-making; notwithstanding that it was their eruption on the political scene that would have set the stage for the political leaders to pursue changes in constitutional form. As Ann Spackman has written, 'although the post-war period saw important constitutional changes taking place, including the formation and dissolution of the Federation, and the achievement of formal independence or associated statehood, there was no real involvement of the mass of the people in this process, despite the fact that it was their eruption in the 1930's which, if it did not start this movement, certainly speeded it along its way.'[57] And Professor Trevor Munroe adds:

> With regard to local constitutional advance, its discrete tutelage served as an additional guarantee of the strict observance of Westminster constitutional practice. With regard to Federation, the immediate impact of the Imperial determination to bring about the union had the consequence of making unnecessary the cultivation of popular awareness on the issue ... It was therefore no accident that the Jamaican Legislature committed the colony to West Indian Federation without any attention to the formation of popular opinion on the question ... In no election before 1958 was Federation an issue; hence it remained outside the main medium of mass opinion – formation — the political meeting. But the fact that there was considerable agreement among the legislative groups was sufficient to commit the island to a Federal union, even before the legislators had persuaded themselves, much

> less the population, of the desirability of self-government.[58]

The Federal Constitution was, therefore, largely the work of the Imperial Power. The Federation package came direct from Whitehall. Even the West Indian political elite, to say nothing of the West Indian electorate, were subjugated to a secondary role in the Federalizing process. Thus, when in Jamaica serious discontent emerged over the Federation, thereby resulting in a referendum, it is instructive that this referendum was largely caused by conflict among political leaders, and was not the expression of popular dissatisfaction.[59]

The point to be made here is that even in the case of Jamaica which held a referendum immediately prior to political independence, there is no compelling evidence that the referendum was indeed a reflection of wide citizen-engagement in the process of constitutional founding. For although mass participation ensued as a result of the disagreement among Jamaican political leaders over the Federation, it is not evident that the electorate did much more than decide on September 19, 1961 that Jamaica should withdraw from the Federation, with the possibility that they would be seeking political independence from Britain on their own.[60] As J.B. Kelly puts it, 'until 19th September, 1961, Jamaica had given no thought to the outline of an independence constitution.'[61]

Again, it can hardly be gainsaid that constitutional founding in Jamaica – like the rest of the Commonwealth Caribbean – was virtually the exclusive province of the political leaders and the Parliament of Jamaica. As Professor Trevor Munroe observes, within two weeks of the referendum, a Jamaica mission was in London and an official release declared that 'Her Majesty's Government will receive a delegation from the Parliament of Jamaica in January or February 1962 to consider proposals' for a

Jamaican Independence Constitution.[62] Professor Munroe further notes that by the third week in October, both of the Jamaican Houses of Parliament had appointed Committees 'to prepare proposals for a Constitution for Jamaica to take effect on Independence.'[63]

The first of the Joint Meetings of these two Committees was held at Gordon House in Kingston on October 31, 1961. The idea was to have a draft constitution ready by early January 1962 in order to use it as a basis for discussions with the Colonial Office regarding independence. Therefore, at this first meeting, this Drafting Committee, (representing both main political parties and both branches of the legislature), began in earnest to consider the outline of an independence constitution. With virtually no input from the public, the first draft of the Constitution was produced on January 18, 1962, approximately four months after the referendum.[64]

The absolute priority on completing a constitutional document in short order resulted in the fundamental law being drafted by a few men in secret conclave, which was eventually presented to Parliament and passed as the basic law of the land. Basic decisions regarding whether Jamaica should be a 'Constitutional Monarchy', whether it should retain an appointed Upper House, and whether the Privy Council should remain the final appellate court for Jamaica were taken by the Drafting Committee to the exclusion of any public debate whatsoever.[65]

To put it more bluntly, the 'Jamaican Constitution was almost entirely the creation of the leading legislators and the influences to which they were most susceptible.'[66] As J.B. Kelly puts it, 'the Jamaican Constitution was drafted by representatives (either elected or nominated) from a legislature which was two and a half years old at the time drafting began. Drafting was done by a group which included five (i.e. approximately 30%) non-elected members from the Legislative Council.'[67] It is therefore not sur-

prising that in all essentials of form and substance, the Jamaican Constitution reflected the dominant influence of the Westminster tradition. Indeed, as then Premier Manley was to remark, 'We did not attempt to embark upon any original or novel exercise for constitution building.'[68] The method of acquiring the new Constitution and the substance of its provisions would bear this out.

In summary, Jamaica's need to draft a new constitution for independence was one of haste following the September 19, 1961 referendum on the question of Jamaica's continued participation in the West Indies Federation. On that date a majority of the Jamaican electorate had voted to take their island out of the West Indies Federation of which it had been a member since 1958. Following the referendum, Jamaica's two main political parties – (the People's National Party of then Premier N.W. Manley and the Jamaica Labour Party Opposition) – had closed ranks in remarkable unanimity on the question of independence from Britain at the earliest feasible opportunity. The idea was to have a draft constitution by early January 1962 in order to use it as a basis for discussions with the Colonial Office regarding independence. This inevitably led to a rather hasty drafting procedure in which a Drafting Committee (representing both main political parties and both branches of the legislature) produced a Draft Constitution by January 18, 1962, just barely four months after the referendum of September 19, 1961, when, for the first time, Jamaicans would have had to give serious thought to the outline of an independence constitution. Needless to say, four months would hardly have been sufficient time for the people to have formed an intelligent opinion as to the form and content of an independence constitution. In consequence, a Draft Constitution was produced without meaningful consultation of the people. In the final analysis, a Draft Constitution was precipitately produced in Committee, was hardly debated in public, was taken to London where important alter-

ations were agreed on, and ultimately ratified by a legislature not elected with a specific mandate to draft and ratify an Independence Constitution. From the standpoint of democratic legitimacy, this procedure as described hardly measures up to the standard of constitutional legitimation required for a democratic constitution.[68a]

Thus, the Jamaican Independence Constitution, like its sister Constitutions throughout the region, reflected 'the normal tendency of the successor political class to copy the political culture of the Imperial Power.'[69] This is in the very nature of the colonial experience where the colonial society is penetrated at all levels of decision making, even in areas beyond its economic and political life.[70] And it bears out the truth of Edward McWhinney's observation that the new post-colonial constitutions were invariably highly derivative, and tended to borrow very heavily from the constitutional institutions and developed practices of the 'parent' European colonial power involved.[71] This was a basic feature of the development of post-colonial constitutionalism, which was a natural sequel to the progressive liquidation of the European colonial empires in Asia, Africa, and the Caribbean.[72] Given that the approach to self-government and independence on the part of the colonial territory concerned was usually conditional upon the development, within that territory, of a democratic system of government as evidence of its capacity finally to govern itself, free from the benevolent paternalism of the erstwhile colonial power, it is perhaps not surprising that the emerging new, postcolonial, indigenous local political élite should find it good practical politics to copy the constitutional models of the colonial power, and that the influence of the old colonial office legal draftsmen should often be pervasive.[73]

Trinidad and Tobago

This process of constitution-making, sketched above, was common to the entire Commonwealth Caribbean. The draft of the Jamaican Constitution, which was produced in January 1962, was taken to London, where significant alterations were made, and subsequently ratified by the Jamaica Parliament on February 27, 1962. The Constitution, however, came into force, 'in strict law,' by Imperial legislation - the Jamaica Independence Act 1962. This process, allowing for minor differences in details, was replicated throughout the region in the 1960s,1970s, and 1980s.

Trinidad and Tobago, however, might well prove to have been the exception. In the twin-island colony, the populace would have been engaged in the process of constitution-making to a degree quite unlike the rest of the Caribbean, including Jamaica. This might well have been due in large measure to the entry of Dr Eric Williams into active politics of the country in the mid 1950s. It is hardly contestable that, upon his return to Trinidad, following his studies at Oxford University and a brief stint as a professor at Howard University in the United States, Dr Williams had established himself as arguably the most dominant figure in the politics of Trinidad and Tobago and the leading advocate for constitutional change, leading ultimately to political independence. Williams' public lectures on politics and constitutional reform at the 'University of Woodford Square' in Port-of-Spain and throughout the country, in the mid-to-latter 1950s, had introduced a level of civic education to Trinidad and Tobago quite unmatched in any of the islands, including Jamaica. In addition, he was primarily responsible for establishing the first really organized political party with a coherent programme in Trinidad and Tobago, which he led to victory in the general elections of 1956.[74] In essence, then, with the establishment of the People's National Movement (PNM), Williams had successfully

introduced party politics to Trinidad and Tobago. As Dr Ann Spackman puts it:

> The germ of the P.N.M. is to be found in the lectures given by Dr. Williams throughout the colony in 1955, and the real beginnings of the P.N.M. can be seen in July of that year, when Dr. Williams lectured on constitutional reform and presented a Memorial embodying these reforms to his audience, to be signed by them. The Memorial was eventually signed by about 15,000 people and an *ad hoc* committee was formed in order to direct activities. This led to the Inaugural Conference of the People's National Movement on Sunday, January 15, 1956, at which a statement of fundamental principles was adopted called the People's Charter.[75]

Quite interestingly, Ann Spackman, in her essay on constitutional development in Trinidad and Tobago, takes the year 1956 to be the watershed year in the constitutional development of Trinidad and Tobago since, prior to that date, the constitutional changes which took place were largely concerned with increasing the representative nature of the Legislative Council.[76] However, in and after 1956, Trinidad and Tobago moved rapidly towards fully responsible government until, in 1962, the country became independent.

Following its success in the 1956 elections, the PNM pressed for constitutional change based largely on the Memorial for constitutional change it had drafted. From then on, the Constitution was amended quite considerably until the Colony was granted full internal self-government in 1961.[77] These amendments generally followed the pattern of additional grants towards full responsible Cabinet government. For example, in 1957, the Government had advocated amendments to the Constitution 'which would recognise the conventions of Cabinet Government', in that the

Governor would call upon the leader of the majority party in the Legislative Council to form the government, or the man most likely to command a majority, and that the Governor should select and remove Ministers from office and distribute portfolios on the advice of the Chief Minister. The Government also recommended that the Chief Minister be styled the Premier; the Executive Council, the Cabinet; the Colonial Secretary, the Chief Secretary; that the Premier should preside at Cabinet meetings and not the Governor; and that the Chief Secretary and Attorney-General should remain in the Cabinet but with no vote.[78] Further suggestions for reform were to come in June 1958, which were primarily concerned with the executive power. It was suggested, among other things, that the number of Cabinet Ministers be increased to nine, including a Minister of Home Affairs who would be responsible for police, security and immigration, and limitations were put on the Governor's powers of reservation and Her Majesty's powers of disallowance.[79]

These suggested reforms were however joined together with further recommendations and together they were brought into force in June 1959 by Order-in-Council. These reforms of 1959 constituted the last stage of constitutional development before the formal adoption of internal self-government in 1961.[80] This was to come with the Trinidad and Tobago (Constitution) Order-in-Council, 1961. According to Dr Spackman, this Order did little more than recognise the full conventions of Cabinet government which had been effectively in force since the PNM gained power in 1956. She writes: 'Theoretically, prior to 1961, the Governor could have rejected the advice given to him by the Premier and other Ministers. In practice he had acted far more like a constitutional monarch than a colonial governor.'[81] This was institutionalised, however, with the 1961 Order-in-Council which stated that the Governor, in performing most of his functions, could only act on the advice of the Cabinet or of any

Minister acting with full Cabinet authority.[82] Of course, the Governor retained, among others, the critical powers of appointment of the Premier; the revocation of this appointment; and the dissolution of Parliament.

Towards the end of 1961, following the collapse of the West Indies Federation upon Jamaica's decision to withdraw therefrom in September of that year, the PNM Government under Dr Eric Williams decided to concentrate its efforts on attaining full independence. By April 1962, in reply to a despatch from the Governor, the Secretary of State for the Colonies agreed that Trinidad and Tobago should become independent as early as practicable in 1962. He proposed that an independence conference be held in London towards the end of May to agree on a constitution and the date for independence.[83]

In the meantime, however, in February 1962, the Government published a Draft Independence Constitution for public comment. Individual citizens and public and private organizations were invited to submit memoranda. Those responding to the invitation were invited to a three-day conference at Queen's Hall, April 25 to April 27, to discuss the Draft Constitution.[84] The press was excluded from this conference, popularly known as the Queen's Hall Conference, but the proceedings were later broadcast and published uncensored.[85] Following the Conference, the Government made certain amendments to its draft which was then presented to a Joint Select Committee of Parliament. On May 11, 1962, the Report of the Joint Select Committee to consider Proposals for an Independence Constitution for Trinidad and Tobago was laid before the House of Representatives and adopted.[86] It was this draft that the Trinidad and Tobago delegation took to London for the Independence Conference on May 28, 1962. Trinidad and Tobago became independent on August 31, 1962.

But the Government's handling of the independence issue and

its method of consulting the people on the Independence Constitution had provoked severe criticisms. 'Organizations and individuals vociferously condemned the Government's "indecent haste" in putting the Independence Constitution on the political agenda with only six weeks allotted for comment, especially since nothing had yet been done to consult the people on the unitary-state proposition.'[87] Moreover, the original draft constitution which was presented for debate by delegates at the Queen's Hall Conference was not a bipartisan document.[88] Further criticisms of the draft concerned the sections on civil liberties, the provisions for entrenchment, the composition of the Senate, the appointive power of the prime minister, and the machinery for the conduct of elections.[89]

But the Government responded that the original draft embodied the elected government's thoughts on the desirable form of constitution for Trinidad and Tobago, and was intended to be the basis for discussion in the Queen's Hall Conference, to which all individuals and organizations, including the political parties, were invited. Therefore, since it was the amended draft resulting from the Queen's Hall Conference, and not the Government's original draft which went to the Joint Select Committee, of which the Parliamentary Opposition was a part, it therefore could not be claimed that they were excluded from any vital stage in the national debate on the constitution.[90]

Still, it was felt by some delegates and the main opposition parties that, by limiting discussion at the Queen's Hall Conference to the government's draft, no really fundamental questions with regard to the constitution could be put: whether, for example, Trinidad and Tobago should be a Republic as opposed to a constitutional monarchy within the Commonwealth.[91] Ironically, there was probably greater consensus of opinion about remaining a monarchy within the Commonwealth, with a responsible form of parliamentary government, than on any

other issue.[92] Only a minority at the Conference openly expressed any preference for a republican constitution.[93] Be that as it may, in the round, very few changes were made in 1962 except those which could be anticipated in the change-over from a colonial to an independent regime. The basic structure of the Constitution remained that which had been laid down by the 1961 Order-in-Council. The more substantive areas of change, as was earlier intimated, concerned the sections on civil liberties, the provisions for entrenchment, the composition of the Senate, citizenship, and the authority of the political executive, particularly the Prime Minister.[94] On this last issue, according to Professor Selwyn Ryan, the question about the relationship between the Governor-General and the Prime Minister posed a fundamental question about the basic ideological foundations of the constitution.[95]

But notwithstanding the criticisms levelled at the Government, it is quite remarkable that a process of constitutional founding of that sort had been undertaken in the Commonwealth Caribbean on the eve of political independence. The Premier had boasted that the process was an honest and sincere attempt to achieve a democratic consensus on a matter of national concern. No other country (in the West Indies), he thought, had adopted the course that Trinidad and Tobago had decided upon in soliciting public reaction to constitutional proposals. As Professor Selwyn Ryan puts it, 'the constitutional conference held at Queen's Hall on April 25 to 27 1962 was perhaps one of the finest democratic exercises that Trinidad had yet witnessed. Quite accidentally, the government had hit upon a method of obtaining popular participation in the constitution-making process.'[96] And, as Dr Williams himself has stated:

> The presence of some 200 citizens from all walks of life, including representatives of religious, economic, labour, civic, professional and political organizations as well as

> governmental agencies, constitutes a landmark in the history of our Territory. Today's meeting represents the closest approximation we have yet achieved towards the national community ... All of you added together, with your collective views however divergent or contradictory, constitute a citizens' assembly the like of which has seldom been seen in the world ... You are all here this morning ... the nation in conference, an educated democracy in deliberations, a Government seeking advice from its citizens.[97]

Still, all was not well. On the question of the exclusion of the press, among other things, the Opposition had walked out of the Queen's Hall Conference, never to return. So although they would have participated in the work of the Joint Select Committee and in the debate in Parliament on the Draft Independence Constitution, the Government and Opposition forces did not go to the London Conference with a united front. To repeat, this lack of agreement between the Government PNM and the Opposition Democratic Labour Party, prior to their departure to London, was in large measure ascribed to the procedure the PNM had chosen to adopt in framing the constitution. As Dr Capildeo, leader of the DLP had argued:

> Wider measure of agreement would have been achieved if an attempt had been made to secure our co-operation from the outset. ... The Government, however, chose to ignore us and proceeded to prepare a draft on its own, so that when the joint select committee was belatedly appointed, the Government members of the committee had already closed their minds, and in committee they were not disposed to discuss issues but were determined to defend a draft to which they appeared to be irrevocably

committed. The joint select committee was, therefore, prejudiced from the beginning.[98]

At the Marlborough House Conference on May 29, 1962, Dr Capildeo stated the DLP claims for an independent judiciary; for provisions effectively guaranteeing the rights and freedoms which ought to exist in a democratic society; a democratically constituted Parliament; a procedure for the amendment of the Constitution which effectively protects the citizenry from the arbitrary exercise of the power to amend; and the various service commissions so constituted as to ensure that they function effectively and impartially.[99]

But proceedings at the Conference were hardly harmonious; Dr Williams and Dr Capildeo had locked horns. On the question of entrenchment the DLP demanded a three-quarter majority in both Houses, and an entrenched right of appeal to the Privy Council on all issues relating to the interpretation of the Constitution.[100] Dr Capildeo declared himself as having no faith in the integrity of Dr Williams, and accused him of 'tearing up' the federal constitution and the old Trinidad Constitution and there would be nothing to stop him from 'tearing up' the new constitution and making Trinidad and Tobago a republic, as Nkrumah had done in Ghana.[101] He also complained that at present, 'one section of the community was armed against the other'; therefore, for him, it was critical that the police force and the national guard be more representative of the ethnic make-up of the country.[102]

In due course, however, in an effort to avoid the collapse of the Conference, Dr Williams and the PNM delegation made certain concessions which he hoped would meet some of the objections of the DLP.[103] In the event, the Conference was saved, and the British officials, for their part, were quite pleased about the outcome of the deliberations. Trinidadians were equally pleased

that the Conference had been brought to a happy conclusion.[104] It was decided that Trinidad and Tobago should become independent on August 31, 1962; and, further, that an independent Trinidad and Tobago would continue in allegiance to Her Majesty the Queen as Queen of Trinidad and Tobago.

Barbados

Perhaps no country in the Commonwealth Caribbean more strongly bears out the truth of Sir Hugh Springer's words than Barbados. It was an 'ancient British colony' of over 300 years old at the time of independence.[105] From 1625, when it was claimed for, and subsequently settled in 1627, in the name of King James 1 of England, to 1966, when it became an independent sovereign State, Barbados, unlike the neighbouring islands, had never known another imperial master. According to Dr Richard Cheltenham, this unbroken attachment to a single metropolitan power has bequeathed to Barbados a set of values and a political style essentially British.[106] In this regard, Barbados provides a rather interesting case study of the process of decolonisation. It is not that Barbados' case is radically different from that of the other British West Indian colonies; rather, it is to emphasize the point that Barbados presents a classic example of the incremental, evolutionary process toward constitutional self-government that was reminiscent of the Canadian experience, say, a century earlier.[107]

Today, Barbados is the most stable parliamentary democracy in the Commonwealth Caribbean. It boasts the longest tradition of parliamentary government of the Westminster model. Unlike neighbouring dependencies, Barbados has never experienced Crown Colony government, the colonial constitution originating in the early days of British overseas settlement in the seventeenth century having survived through the centuries. Under this constitution Barbados has enjoyed a considerable measure of self-

government through the existence of a legislative body dating back as far as 1639.[108] As Dr Cheltenham states,

> In the history of the Commonwealth, no former British territory has moved into independence with a longer tradition of Parliamentary Government than Barbados. No country had endured a longer period of tutelage. In recent years, of all the British colonies to achieve independence, Jamaica alone possessed a representative assembly going back, though not without interruption, to 1664. Important countries like Ceylon, Ghana, Nigeria, Cyprus and Malta, and even Trinidad and Tobago, enjoyed responsible Government only a few years immediately preceding their attainment of independence.[109]

But in spite of Barbados' celebrated tutelage in British parliamentarism – or maybe because of it – the 'founding' of the Barbados Independence Constitution remained very much an *affair* of the local political élite and the officials of the Colonial Office in the United Kingdom. That is to say, the process of *constitutional founding* was not one in which it can truthfully be said that the people were engaged in a discursive, deliberative, collective *conversation* as to the foundational terms of their political order. In this regard, as was common to the entire Commonwealth Caribbean, the Independence Constitution was not the product of collective, democratic *authorship*; so that even though there were general elections in November 1966, prior to independence, this could hardly be said to have been adequate public expression on the terms of the Constitution, given that by then these would already have been settled at the London Conference earlier in the year.[110]

It bears reminding that the idea of political independence for a country the small size of Barbados was never on the cards –

except of course in federation with the other British West Indian territories. And even then, in 1962, following the break-up of the West Indian Federation, the idea of political independence for Barbados was considered only to be feasible in federation with the rest of the Eastern Caribbean islands (the Windwards and the Leewards). So it was not until 1965, when negotiations towards that federation broke down, that the idea of political independence was seriously considered.[111]

By that time, small states like Cyprus, Malta, Jamaica and Trinidad and Tobago had already achieved political independence. What is more, Barbados had by then 'matured as an outstanding legacy of British colonial rule. Its economy was growing both in strength and diversity. There was no longer a total reliance on sugar. This state of affairs would certainly have boosted the confidence of the local political élite.'[112] What is more, there had been constitutional changes in 1964, which represented the most advanced state short of independence a colony could possibly have achieved. It was therefore natural that the country would have proceeded to independence on the tacit assumption that the constitutional arrangements then in operation, and to which she had become accustomed, would be retained on independence.[113]

Following the break-down of negotiations in 1965 on the question of federation with the Eastern Caribbean islands, the Barbados Government issued a White Paper announcing Barbados' intention to seek political independence on its own.[114] The procedure adopted in formulating the Independence Constitution was as follows:

> In or around March 1966, the Government published a Draft Constitution and invited public comments thereon. The plan was to follow this up with a debate in the House of Assembly to approve the Draft Constitution, following which the Constitutional Talks in London were to be

held. This procedure, however, met with fierce resistance from the Opposition Parties, who, in the end, boycotted the debate. They are said to have objected to the procedure adopted because, they claimed, the constitution had not been drafted in consultation with them. They also feared that, in a debate, the Government would use its majority to defeat all the opposition's proposals for amendments. The result, they insisted, would be to stamp the constitution with a "spurious authority" and limit their impact at the London Talks. And, finally, they were opposed to the arrangements with respect to the size of the delegations allowed them at the London Conference.[115]

Comments on the Draft Constitution were submitted by certain organisations, most notably the Chamber of Commerce, the Bar Association and the Junior Chamber of Commerce. Among other things, the Chamber of Commerce recommended that elections be held before independence, that arrangements for a common court of appeal be made with other Caribbean countries, that a referendum procedure be inserted for amending entrenched clauses, and for deciding on proposals for a union with some other territory.[116]

At the London Conference there was bitter wrangling between the Government party and the Opposition delegation. The disagreements centered, among other things, on the composition of the Senate. It was felt that the composition of the Senate should be such that a Government, regardless of the size of its majority in the House, should not be able to secure an amendment to an entrenched provision of the Constitution without at least some support from the Opposition. The Government, however, rejected such proposals on the premise that to accommodate them would mean giving the Opposition Senators an influence

on important issues out of proportion to the strength of the Opposition in the House of Assembly.[117]

These few details would suffice to underscore the salient point that the Independence Constitution that came out of the London Conference was hardly a *consensus document*, but was moreso the Government's *document*.[118] But in any event, as earlier noted, it was hardly to be expected that the constitutional arrangements at the time would have been deviated from. As was the case with other British territories adopting a written constitution at independence, a Bill of Rights was appended to the Barbados Constitution. Another very significant addition was the 'Supremacy Clause', declaring the Constitution to be the supreme law of Barbados, and that any law inconsistent with the Constitution is void to the extent of the inconsistency.[119] This provision, according to Dr Cheltenham, makes the Constitution a body of fundamental law; a provision which no Barbadian constitutional instrument in the past could claim.[120] In all other respects, however, the Barbados Independence Constitution remains very much a legacy of British constitutionalism: a parliamentary, constitutional democracy with the British Monarch as the head of state, thus assuming its 'monarchical status.'[121]

If the story of the founding of the Jamaican, the Trinidad and Tobago, and the Barbados Independence Constitutions is indeed representative of the process that obtained throughout the region, then at least two essential points are underscored: that political independence in the Commonwealth Caribbean was not a revolutionary repudiation of our colonial past and, equally important, that the people were not the 'authors' of that which they have *accepted* as their 'Fundamental Law'. The virtual absence of the people from the political independence process meant that Commonwealth Caribbean constitutional founding fell far short of the democratic ideal – which, to paraphrase Professor Frank Michelman, is the idea that a country's people

see themselves, 'in some nonfictively attributable sense', as the authors of the laws that constitute their polity; 'the laws, that is, that fix the country's "constitutional essentials" – charter its popular-governmental and representative-governmental institutions and offices, define and limit their respective powers and jurisdictions, and thereby express a certain political conception [of themselves].'[122] Such authorship, according to Professor Seyla Benhabib, requires that a country's processes for fundamental lawmaking be so designed and conducted that outcomes will be continually apprehensible as products of 'collective deliberation conducted rationally and fairly among free and equal individuals.'[123]

Commonwealth Caribbeans are heirs to a constitutional tradition that derived in large part from English constitutional theory and practice. Until independence, Commonwealth Caribbeans were British subjects living under a constitutional monarchy. With independence, however, and unlike the Americans, Commonwealth Caribbeans did not reject the British constitution and affirm their own constitutional tradition. Rather, in the fundamental design of their political institutions, their 'retention' of the Privy Council and their continuing allegiance to the Crown, West Indians implicitly attest to a 'constitutional faith' in that English constitutional tradition. The words of the Wooding Constitution Commission are instructive

> The Constitution under which Trinidad and Tobago achieved independence in 1962 was in all its essentials a written version of the constitutional arrangements evolved in the United Kingdom over many centuries.[124]

But could the process of constitutional founding in the Commonwealth Caribbean have been fundamentally different? Could it have taken a more 'revolutionary' path, say, resulting in a repudiation of the Westminster-style constitution and much of its

attendant practices? And could it have engaged the populace in a more open communal conversation as to the kind of constitution they should wish for?

Stephen Vasciannie suggests hardly not; strong political and intellectual forces – the education and social formation of West Indian nationalists and political élite – would have militated in favour of the Westminster system and against any 'revolutionary' change.[125] Moreover, the decision of the British Government, at a constitutional conference in London in June 1961, to grant political independence to some of its Caribbean territories comprising the Federation, would certainly have meant independence within the constitutional framework established by Britain over the years for granting independence to its colonies. But particularly in the case of the British West Indies, the rapid pace at which independence came, following the break-up of the Federation, meant there was hardly much time for any careful rethinking of the received constitutional forms and institutional arrangements. For, unlike the case of that older and narrower European segment of the empire, Canada, Australia, and even the Union of South Africa and, subsequently, in the case of decolonisation and devolution of constitutional self-government and independence on the Indian subcontinent (when there was adequate time, and where the imperial initiative in favour of constitutional devolution was co-ordinated with some form of local constituent activity in the colonial territory, such as a representative constituent assembly able to work out the general principles as well as the detailed institutions of the new constitutional system), in the case of the West Indies, the imperial initiative might well have been occasioned by an urgent need to be rid of the burdensome West Indian territories.[126] Time was therefore of the essence.

In any event, as Stephen Vasciannie observes, in the case of Jamaica, following the results of the Federal Referendum in 1961, the constitutional process became a matter of identifying

the shortest, and least controversial, route to independence. In addition, the British tradition of imperial tutelage would have required a colonial allegiance to the institutional requirements of constitutional government, which meant adopting the Westminster-style constitution and its Australian-Canadian-Indian export versions.[127] Certainly, political leaders like Norman Manley would have been well aware that one sure way to prove to the British that the West Indian colonies were indeed ready for independence was to express a desire for the unbroken continuity of the Westminster-style constitution and its attendant practices – in particular, our continuing allegiance to the Crown. In the circumstances, therefore, political leaders would not have encouraged any debate but that which showed a clear preference for the Westminster-style constitution. An early comment from Manley in 1952 would seem to bear this out:

> One thing we have learned from history in all this colonial development, is the greatest desirability of complete unity on the part of those in the colony who are making the demand.
>
> It is the natural tendency of colonial powers to doubt the ability of the governed to rule themselves. That must be so, otherwise they would not dare to continue to rule. If a man did not believe in his superiority to govern, he could not do so. Colonial powers must find reasons to justify slow progress. And they are not to be quarrelled with for that because it is based on the historical process.[128]

So notwithstanding that constitutional change and development in the Commonwealth Caribbean would have resulted in part from the political uprisings of the late 1930s, say, it still remains the case that the colonial imperial process – the experience of being colonized – would have planted in the West Indian

consciousness a negative perception of *self* and would have encouraged a longing to be like the colonial master. As our eminent *man of letters*, Mr. George Lamming, puts it,

> [Colonialism] was not a physical cruelty. Indeed, the colonial experience of my generation was almost wholly without violence. No torture, no concentration camp, no mysterious disappearance of hostile natives, no army encamped with orders to kill. The Caribbean endured a different kind of subjugation. It was the terror of the mind, a daily exercise in self-mutilation ... This was the breeding ground for every uncertainty of self.[129]

There is no question, then, that our political imagination has been shaped by the historical experience of British colonialism. Therefore, the kind of constitutional discourse that would have attended the quest for political independence would have limited itself to reinforcing the belief that we were indeed ready for independence and, above all, that independence did not mean any radical departure from the 'pre-existing colonial constitution'; that is to say, it did not mean the founding of a new constitution. In essence, then, the desire for political independence would not have indulged any serious reflection on an alternative constitutional frame, such as the US presidential model, say, which, in any event, would have required a 'critical mass of intellectual exchange and awareness among non-governmental sectors of the society.'[130]

A constitution is a document of political founding or refounding.[131] It is an architectonic plan for the founding and ordering of a political society, commonly understood in modern terms as the 'State'. It defines the arrangement of those essential powers, *viz.*, the executive, the legislative, and the judicial, that mark the sovereignty of the State and its authority over the countless other institutions of social life – familial, economic, cultural, and the

like. In a broader, more fundamental sense, the term 'constitution' comprehends virtually the whole of what is sometimes called the 'form of life' of a human community, describing what that life should be like, and ordering the institutional design for achieving that life in a given society. In a word, the constitution is a plan for a way of life.[132] And this entails an enunciation of those values that would support a certain conception of the good life, and also a certain conception of justice, and an elaboration of those institutions by means of which this way of life is to be achieved;[133] the range of activities on which these institutions will bear and who, as full citizens, those holding full political rights, will share in the operation of those institutions.[134]

Constitutional founding, the giving of form to collective life or the organisation of a political community in which all its members are, in theory at least, implicated in a common life, is certainly one of the most fundamental of human endeavours. Indeed, it is reckoned to be the most notable action of which political man is capable. It is deemed to be superior to other types of political acts because it aims to shape the lives of citizens by designing the structure or 'dwelling' which they and their posterity will inhabit.[135] It is an act addressed to a fundamental and universal human problem: the problem of defining some of the most fundamental relationships in which members of society are to stand to one another and to their State.[136] A constitution affects to define how human beings are to live with one another in society; more specifically, the 'political' ways in which people may live together; politics here taken as being fundamentally concerned with the proper life of man in the polity. Constitutional law is, therefore, very much the study of human collective life. It addresses the problem of the way in which certain fundamental claims and needs of human beings are treated in the society in which they live; indeed, it addresses the very fundamental questions of who are to be included as

members of the political community, and the kinds of rights, liberties, and responsibilities that are thereby entailed.[137] Thus, the constitution's reach, in a conceptual and practical sense, into the lives of the citizens can be extraordinary. As Professor Peter J. Steinberger puts it

> Wherever humans live together there is likely to be some ultimate practice, in terms of which particular forms of social life are, according to the fashion, either actively regulated or generously allowed to operate without overt interference, and where the decision actively to regulate or not is itself subject to review and revision. This practice – however formulated and instituted – is the practice of politics conceived in the broadest possible terms and, as such, is the defining characteristic of political society. It follows, then, that all our ways of living together are, at least in theory, subject to the claims and judgments of politics – [to which the constitution is central].[138]

So if it is indeed the case that the constitution, in the broader sense, speaks to the conditions of the common life, then, in theory at least, all our ways of living together are subject to constitutional injunctions. In other words, the constitution speaks to our moral and political life, since it concerns not only the structure of power and, therefore, the ways in which the government may treat the citizens, but also the ways in which individuals may treat each other in society. Thus, the constitution must be conceived as defining both a moral and a political community, since it can be, at one and the same time, both an instrument of political order and an expression of a people's moral aspirations for political life. It is, ideally, a collective, public expression of the essential political commitments of a people; of the kind of people they are and wish enduringly to be. This expresses two critical senses of the word 'constitution'. As Professor Hanna Pitkin reminds us, the

use of the word 'constitution' may refer to 'a characteristic way of life, the national character of a people, a product of their particular history and social conditions.'[139] This is the sense of Aristotle's *politeia*, which refers not to fundamental law or locus of sovereignty but to the distinctive shared way of life of a *polis*, its mode of social and political articulation as a community.[140]

The second use of the word 'constitution' points to the act of constituting, that is, of founding, framing, shaping something anew. In this sense, *our constitution* is 'an aspect of the human capacity to act, to innovate, to break the causal chain of process and launch something unprecedented.'[141] This underscores an elemental truth: that 'constitutions are *made*, not found; ... that they are human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and some lose.'[142]

These two senses of constitution – as fundamental character or way of life and as the activity of constituting – conjoin in the political and legal sense of 'constitution'. On this view, the political constitution of a people is an act of collective self-definition and self-interpretation; an act by which a people constitute themselves *as a people*. As Professor Donald Lutz puts it, 'At some point, if a political system is to endure, a people must constitute themselves *as a people* by achieving a shared psychological state in which they recognize themselves as engaged in a common enterprise and as bound together by widely held values, interests, and goals.'[143] Constitutional founding is therefore a process of collective self-definition; and constitutional reform, as an essential aspect of the continuation of that process – of rethinking and reshaping our constitution through our collective activity – is equally an act of self-definition and self-interpretation. From this perspective, and in view of the foregoing story of our constitutional *origin*, the project of constitutional reform in the Commonwealth Caribbean assumes a very urgent and profound

mission: above all else, the task of constitutional reform must engage our human capacity for collective and deliberate creative action in rethinking and reshaping the polity; in a word, to make our constitutions *our* own.

The distinctive challenge for constitutional reform today is therefore the redefinition of Commonwealth Caribbean political identity. For whether or not we are mindful of the fact, *West Indian Independence Constitutions* provide us with images of ourselves and representations of our political identity. They demonstrate the importance of authorship in the construction of political identity,[144] as evidenced by our willingness to surrender to their inscriptions of the *West Indian constitutional self*. The question, then, for us, is whether, on a critical and comprehensive understanding of the *origin* and nature of our constitutional texts, of the constitutional *world* they have brought into being and of the images they provide us of ourselves, we would wish to reaffirm, rather than *remake*, as it is within our human capacity to do, the foundational terms of our political order and the inscriptions of the collective *constitutional self* provided in our Fundamental Laws.[145]

To repeat, then, constitutional reform becomes an act of critical self-understanding because, in this enterprise, we recur to our *plan* for public life in the hope of grasping who we authentically are, or aspire to be, even beyond the current state of our constitutional realization and the imaginings of our founders.[146] Constitutional reform therefore becomes an interpretive enterprise that seeks to understand and explain the connections between the written texts and the political order they have signalled into existence; our collective identity and the form of our politics. In a word, it becomes a project of active, affirmative theorising, radical in the sense of getting at the root of things; beginning at the starting point of critical consciousness of what we really are, and of knowing 'ourselves' as a product of the historical process to date.[147]

The central claim of this Introduction has been that our post-colonial constitutions were drafted from above as part of an oligarchic, elitist exercise, and this helps to explain precisely why we still do not yet perceive our Independence Constitutions as 'our own'; why we do not yet fully recognize the collective *self* as the *author* of the political community; why we do not yet have a sense of having constituted ourselves a sovereign people in some positive act of communal self-constitution.[148] A possible corrective to this situation is given in the terms of reference regarding the 'patriation' of the *Independence Constitution* and a re-examination of our continuing relationship with the British Crown and, possibly, the establishment of a Caribbean court of final appeal and the abolition of appeals to the British Privy Council.[149]

Patriation of the *Constitution* is taken here to imply some local event (or series of events) that may be taken as a measure of constitutional autochthony; meaning that the *Constitution* may now be seen to derive its validity and authority from the local events, rather than from an Act of the British Imperial Parliament.[150] The patriation term of reference is therefore all important because it is the starting point in any possible replication of the *ideal* of constitutional founding: the idea of a people grounding their political community and establishing their own political identity in some positive act of fundamental law-making. The issue of patriation must therefore be fully addressed in the first chapter on constitutional reform.

But patriation is closely linked to the terms of reference regarding the continuing presence of the British Crown in the Commonwealth Caribbean constitutional order, and the abolition of appeals to the Privy Council and the establishment of a Caribbean court of final appeal. It can hardly be gainsaid the defining impact of the British Monarchy and its Judicial Committee on conceptions of the West Indian constitutional *self*. On the assumption that we have retained the monarchy, we continue to define

ourselves as 'subjects' of the British Crown. Hence our continuing pledge of fealty. And the Judicial Committee's continuing location at the top of the Commonwealth Caribbean judicial hierarchy virtually ensures that our constitutional practices and judicial habits of mind would carry a distinctly British cast.[151]

Our colonial tutelage has no doubt resulted in the historical entrenchment of certain constitutional forms and practices. The institutions of constitutional democracy that emerged from that tutelage have, for the most part, remained remarkably stable, paradoxically producing a powerful impetus to preserve and to be faithful to that which we have 'inherited'. Still, the very strong opposition, in some quarters, to either the 'removal' of the British Crown or the abolition of appeals to the Privy Council suggests a blindedness to the fact that the continuing presence of the Crown and its Judicial Committee represents a vestigial incongruity, a contradiction in the constitutional symbolism of a politically independent sovereign people.[152] This incongruity is further underscored when one considers that the *West Indian Independence Constitution* is a written constitution with an entrenched Bill of Rights; very much in contrast to the largely unwritten British constitution and the absence of constitutionally entrenched rights. This means that the domiciling of ultimate judicial power over Commonwealth Caribbean Constitutions in London would leave them too much under the dominance of British constitutionalism and their interpretation less open to cosmopolitan intellectual influences.[153] Thus, in a separate chapter offering a philosophical justification for the proposed Caribbean Court of Justice, it is shown that the establishment of our own court of final appeal constitutes an essential part of the process of *West Indian decolonisation* and could have tremendous implications for the redefining of our political identity, through a hermeneutical reading of the *West Indian constitutional text* and of the *polity* it recommends, in the more appropriate *language* of modern republican constitutionalism.

In summary, this entire work presents itself as a hermeneutical enterprise in constitutional theory – a *re*-conception of the *West Indian polity*, and a *re*-definition of *West Indian political identity*. Our political independence from Britain was only the beginning of this mission: the *starting point* in our struggle to make ourselves a free people. Achieving this goal must mean, among other things, refusing to 'inhabit', without question, an identity constructed for us by a colonial past and scripted by the texts (and institutions) that emerged from that tutelage. We can only be *free* by giving to ourselves, texts, bequests, and commitments by which we propose to live our lives over time;[154] in a word, by a re-definition of the political *Grundnorm* inherited from Britain.

This, according to Professor Jed Rubenfeld, is the *ideal* of democratic, constitutional self-government; an understanding of constitutional law initiated by American written constitutionalism.[155] That is to say, 'breaking from a two-thousand-year-old tradition, in which a democratic constitution meant a constitution establishing a democratic politics, America understood a democratic constitution to mean, in addition, a constitution *democratically* made. America made democratic *constitution-writing* part of democracy.'[156] Thus, the authority, the legitimacy, and the value of American constitutional law, in large measure depend on its claim to being law that embodies the nation's *self-given* fundamental political and legal commitments.[157] The task of constitutional reform, therefore, is to afford us the opportunity of realizing this idea of a nation living out commitments of its own authorship over time.[158]

Our written constitutions are certainly democratic in content, but as long as they continue to be perceived as the received constitutional instruments from our former colonial master, they would forever bear the taint of fundamental illegitimacy, of subjection to imposition from without.[159] As Professor Rubenfeld puts it, 'a nation that lives under a constitution imposed from

without – imposed, say, by an occupying army or a colonial power now departed – might come to accept the document, to embrace its authority, perhaps even to revere it.'[160] Still, such a situation would constitute a betrayal of an ideal conception of self-government – of a people living out, over time, commitments of its own authorship.[161] In the current enterprise of constitutional reform, we invoke this ideal of democratic constitution-making, which must include the possibility of the people's *re*-authorship of their fundamental law.

But, then, even a founding moment of perfect popular will will not suffice to secure the legitimacy of the constitution once and for all. Constitutions are lived under over time and, in due course, they would come to suffer temporal dysfunction: aspects of a constitution may become unsuitable or the people may no longer recognize some of the constitutional commitments as their own.[162] Happily, democratic constitutionalism rests on the very supposition that the process of framing a constitution – *la politique politisante* – continues long after the founding moment,[163] in the judicial, political and cultural discourse through which a political community continuously reassesses and reshapes itself. Democratic constitutionalism therefore entails the continuing possibility of a democratic *re*-writing of the fundamental law.[164] Our current constitutional reform project should at least achieve that much, so that our Constitutional Charters can be said to have acquired, though only *ex post facto*, an unimpeachable popular root of sovereignty.[165]

Endnotes

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93 Ryan, *supra* note 84, at 319.
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95 *Ibid.* 318.
96 *Ibid.* 316.
97 Quoted in *ibid.* 317.
98 Quoted in *ibid.* 329.
99 *Ibid.* 330.
100 *Ibid.* 332.
101 *Ibid.*
102 *Ibid.*
103 *Ibid.* The concessions were:
1. Special entrenchment of an increased number of provisions by a three-fourths majority of the members of the lower house and a two-thirds majority of the members of the upper house.
2. An independent boundaries commission which would delineate new constituencies which would vary by no more than a margin of 20 per cent.
3. An elections commission which would be responsible for the conduct of elections and the registration of voters. The commission was also to be responsible for ensuring the accuracy and competence of voting machines and for seeing that these were fully tested and sealed in the presence of representatives of political parties. The commission was to be completed free of any direction or control from the executive or any other authority.
4. The widening of the right of appeal to the Privy Council in matters other than constitutional rights.
5. Limitation to six months of the period during which a proclamation of a state of emergency could remain in force without being extended by Parliament.
6. Strengthening of the provisions for the independence of the auditor general.
7. Entrenching of the provision that Trinidad remain a constitutional monarchy.
8. Entrenching of provisions relating to the independence of the judiciary from partisan political pressure.
9. Consultation with the Leader of the Opposition on important appointments including the chairmanship of the elections and boundaries commissions, and on all the important national issues. *Ibid.* 333.

104 *Ibid.* 336.
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110 Again, I wish to acknowledge my indebtedness to Professor Woodville Marshall for this point.
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Chapter 1

Constitutional Reform and Caribbean Political Identity

The Question of Origin

The story of *origin* of *West Indian Independence Constitutions*, briefly sketched in the Introduction, is very much a critical aspect of the story of Commonwealth Caribbean political identity. Not only did our constitutions come from Britain, as is evident in the fundamental design of our political institutions, but we have, we believe, for the most part, remained 'constitutional monarchies', with the British monarch serving as our head of state. On the understanding that she remains our queen, we continue to pledge allegiance to her. This, in essence, is the story we continue to tell about ourselves. In other words, the story of origin of our Independence Constitutions, plus the British monarch's continuing *presence* in the Commonwealth Caribbean political order, continues to foster our central notions of collective identity. In a most critical sense, therefore, *West Indian Independence Constitutions* remain our most prominent attempt at self-definition. They are our principal political texts. And, by 'accepting' or 'adopting' them as our own, we purport to share their conceptions of the world and human nature; to adopt their categories of speech, thought and action; to accept their definition of us as to the kind of people we are and wish to be.[1]