

CONSTITUTIONAL REPATRIATION AND A NEW CITIZENS' CHARTER OF RIGHTS

LLOYD BARNETT

A. NEO-COLONIALISM AND ABORTED AUTOCHTHONY

1. "Autochthony" was the word applied by Dr. Kenneth Wheare to describe the aspirations of new Commonwealth states that they should 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 authorised by the parliament of the United Kingdom; that is to say, "home grown", "sprung from their own soil, and not imported from the United Kingdom."¹ The achievement of autochthony is most convincingly demonstrated where there is a break in legal continuity between the colonial past and the new independent status. This is clearly effected by revolutionary rather than evolutionary changes. The Irish Free State, India and Pakistan are examples of the former within the Commonwealth. The United States of America is an example of the former occurring outside the Commonwealth. New Zealand, Canada and Jamaica are examples of the latter within the Commonwealth.

2. On the break-up of the West Indies Federation, on the basis of Dr. Eric Williams' political formula that one from ten leaves "0", Jamaica having decided "to go it alone" hastily embarked on the negotiations for Independence and the exercise of constitution-making. Orthodox constitutional theory postulated that sovereignty and Constitution creativity had to be bequeathed by the Imperial authority, since the existing legal sources were then the statutory provisions of the United Kingdom Act of 1866 which had abolished the local Assembly and the West Indies Act of 1962 which gave

¹ K.C. Wheare, The Constitutional Structure of the Commonwealth, p. 89.

the Queen the right to make such provisions as appears to Her to be expedient for the government of the erstwhile colonial members of the Federation and the residuary prerogative powers of the Crown. When preparations were being made for the drafting of the Independence Constitution many of us believed the proper course to take was to ask for a declaration of Independence by the U.K. Parliament which should also confer constitution-making powers on a constituent assembly in Jamaica.

3. This proposal if adopted would have maintained respect for legal orthodoxy and at the same time emphasized in a dramatic way that Independence constituted a real break with the colonial past and that the Constitution was home-grown or autochthonous. The rationale for the rejection of this proposal by the Jamaican Government and the Legislature is not clear. The Premier, Mr. Norman Manley merely stated² that he was “not in a position to accept such a suggestion; it could never have been accepted by the British Government”. It had been accepted in India and Pakistan but the Premier clearly felt himself shackled by an inconsistent colonial tradition. Why in Jamaica’s case it would be unacceptable to the British Government was not explained and is not obvious, since there was little evidence to support any apprehensions on the part of the Mother Country that the interests of minority groups had to be protected by the vetting in Westminster of our Independence Constitution. Thus was the attempt to demonstrate the autochthony of the Independence Constitution aborted by neo-colonialist sentiments and constraints.

4. The resultant format of the Independence Constitution is hardly consistent with sovereignty and nationalistic aspirations. It is merely a Schedule to an Order-in-Council made at the Court at

² Proceedings of the House of Representatives 1961-62, Vol. 4, p. 773 (Mr. Manley, 22 February, 1962)

Buckingham Palace and is signed by some little known British operative "W. G. Agnew".³

B. PROSPECTS FOR CONSTITUTIONAL REPATRIATION

5. Despite the formal and legal sources of the Independence Constitution and its imperialist format, it was in all material respects drafted by Jamaicans in Jamaica. In the book *The Constitutional Law of Jamaica* I described⁴ the process in the following terms:

"The Jamaican Constitution was perceptibly made locally in circumstances in which the people and their elected representatives participated in the production process. 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 Chairman 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. Both Committees agreed to sit together under the Chairmanship of the Premier and to present a joint report. 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. 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

³ The Jamaica (Constitution) Order in Council, 1962 No. 1550.

⁴ Barnett, *The Constitutional Law of Jamaica*, pp. 30-31.

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. Public discussion groups were organised 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 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'. 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. Nevertheless, the almost complete absence of

external participation in the preparation of the Constitution is an important autochthonous feature of the Jamaican Constitution.”.....

6. Although the Constitution was taken to London for final approval and formal enactment it was moulded and shaped by Jamaicans in Jamaica”⁵ In fact, the Constitution drafted in Jamaica and approved by the unanimous vote of both Houses of the Legislature before being taken to the London Conference was only slightly varied in the final Order in Council. 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.

7. It must be recognized 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.’⁶ As Professor Trevor Munroe emphasized many of the important questions were settled before the public views were received by the Parliamentary Committees.⁷

8. Sovereignty has provided the opportunity for the Nation to repatriate its Constitution. The power to change the most important provisions of the Constitution vests in the Jamaican people through its Parliament and its people in referenda. Even more symbolically, the Constitution made

⁵ Proceedings of the House of Representatives 1961-62, p. 757 (Mr. C. Tavares, 25 January, 1962).

⁶ Barnett, *op. cit.*, p. 31.

⁷ “Origins of the Jamaica Independence Constitution”, 1972 J.L.J.68.
in England can be “brought home”, entombed and resurrected in Jamaica. The Constitutional

Commission which was appointed in 1992 and presented its First Report in September 1993 recommended⁸ that the Constitution should be re-enacted in Jamaica by the Jamaican Parliament and People. The Commission stated that "this requires the revocation of the Jamaica (Constitution) Order in Council, 1962, to which the present Constitution is a Schedule. This will emphasize that a new Constitution is the product of the Jamaican People and rid our basic law of its present colonial form."

9. The monarchical form is another feature of the Independence Constitution which reflects our colonial heritage. The Constitutional Commission also recommended that "the monarchical form should be replaced by a republican form "so as to enhance our sense of national identity and consciousness and to foster our self-esteem".⁹ These two changes will have to undergo the most stringent amendment procedure. I do not regard this as a disadvantage however as it compels a wide political consensus and the participation of the people. What is regrettable is that eight years have passed since those recommendations were made and still no significant steps have been taken for their implementation.

10. Under the present Constitution¹⁰ the words of enactment of Acts of Parliament must declare that they are enacted "by the Queen's Most Excellent Majesty". The Governor-General, the Prime Minister and other Ministers of Government, Members of both Houses of Parliament as well as the

⁸ Report of the Constitutional Commission, Jamaica, August 1993, para. 8.

⁹ *Ibid*, para. 8

¹⁰ s. 61.

Judges must make and subscribe an oath of allegiance to the Queen¹¹. These provisions are only

subject to the ordinary amendment procedure of the Constitution and so it is surprising that the politicians who voice such emotional concerns about sovereignty and view the Judicial Committee of the Privy Council as anachronistic have taken no steps to remove the incongruity of the words of enactment and the oath of allegiance. Can we expect that those who have not been faithful in that which is least will be faithful also in much?

C. PEOPLE'S CHARTER OF RIGHTS

11. The Constitution-makers in 1962 were not enthusiastic about the incorporation of fundamental rights provisions in the Independence Constitution. Some were definitely opposed to this 'novelty' which was not a feature of the British Constitution and accordingly was seen to be an aberration typical of unstable States. While there was a rational argument in support of the view that the basic constitutional system to which Jamaica was accustomed and had operated with relative success should be retained, the argument that a Bill of Rights was undesirable was a manifestation of the neo-colonial proclivities of some prominent politicians. A high percentage of the views expressed by the public and of the submissions to the Constitution Committee favoured the incorporation of human rights guarantees. The Constitution-makers eventually succumbed to the pressure of public opinion, although the argument which seemed to have been most persuasive was the least commendable, namely, that it was necessary to make such provisions to convince foreign investors that democracy and property rights would continue to be respected after Independence.¹²

¹¹ ss. 28, 29(2), 42(2), 43(2), 62, 74, 78(4), 102, 108.

¹² See Barnett, *op. cit.*, pp. 376-7.

12. Thus it was that the Chapter on Fundamental Rights and Freedoms appeared in the Final Draft presented to Parliament. However, when it emerged, it was discovered that the Committee had succeeded in whittling down the effectiveness of the fundamental rights provisions. The textual limitations and restrictive judicial interpretation have combined to make the Fundamental Rights Chapter inadequate as a safeguard of citizens' rights and antithetical to the creation of public respect for the Constitution as a credible bastion against State abuse of human rights.

13. The resultant chapter contained the following six main weaknesses:

- 1) The Preamble declared the basis of the provisions as follows:
"Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual" thus sowing the seeds for the erroneous view that the guarantees were limited to existing common law rights and creating one of the bases for future restrictive judicial interpretation (s. 13);
- 2) the procedural handicap resulting from the provision that any other available remedy must be sought before the constitutional protection is invoked (s. 25(2), proviso)
- 3) the nullification of the constitutional protection in the face of colonial or pre-Independence law (s. 26(8));
- 4) the presumption of constitutionality which was available for safeguarding offending legislative and executive measures and actions;
- 5) the provisions for the suspension of the fundamental rights provisions by a Special Act procedure; and
- 6) the relative facility with which periods of public emergency could be prescribed and perpetuated, so as to dispense with the protection afforded by the constitutional

guarantees (s. 26).

14. The Commission's draft contains an all-important declaratory section which is not a mere preamble but a substantive and, by itself, eminently enforceable enactment. The Commission decided that this declaratory section should be expressed in simple but comprehensive language. It took the view that the clarity of the provisions does not depend on whether they are expressed in positive or negative terms but on the general manner of their formulation. On the other hand, the explicit prohibition of any derogation or abridgement of the rights and freedoms is an effective way to emphasize the fundamental and sacrosanct nature of the rights and freedoms. Accordingly, the Commission combined both an affirmative commitment to the preservation of the rights and freedoms with a clear prohibition against legislative or executive infringements.

15. The proposed Preamble reads as follows:

WE RESOLVE as a people to preserve for ourselves and future generations the fundamental rights and freedoms to which we are entitled by virtue of our inherent dignity as individuals and as citizens of a free and democratic society:

WE AFFIRM that, save only for laws that are required for the governance of the State in periods of peril and emergency or as may be demonstrably justified in a free and democratic society, Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes:

- 1) the right to life, liberty and the security of the person;
- 2) the right to freedom of conscience, belief and observance of religious and political doctrines;
- 3) the right to freedom of expression;

- 4) the right to seek, distribute or disseminate to other persons and members of the public, information, opinions and ideas through any media;
- 5) the right to freedom of association and assembly;
- 6) the right to freedom of movement;
- 7) the right to due process of law;
- 8) the right to equality before the law;
- 9) the right to fair, humane and equal treatment from any public authority in the exercise of any function;
- 10) the right to freedom from discrimination by reason of race, social class, colour, religion, gender or political preference;
- 11) the right to enjoyment and beneficial ownership of property;
- 12) the right to respect for private and family life, privacy of the home and of communication;
- 13) the right of every child to such measures of protection as are required by the status of a minor or as part of the family, society and the State;
- 14) the right of every child who is a citizen to free education, at least throughout the primary level;
- 15) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;
- 16) the right of every citizen to participate and vote in free and fair elections;

- 17) the right of every citizen to be granted a passport and not to be denied or deprived thereof, except by due process of law:

AND WE FURTHER DECLARE that any person whose right, freedom or entitlement here stated has been abrogated, abridged, infringed or denied whether by action of the State or by the act of any other person or body may seek redress before a court of law.¹³

16. The Commission's draft has sought:

- 1) to make it clear that the genesis of the fundamental rights and freedoms is not confined to English common law but also encompasses universally accepted human rights norms;
- 2) to preserve and strengthen in all aspects the power and jurisdiction of the Courts to determine the constitutionality of any measure or action which has an impact on the rights and freedoms;
- 3) to ensure that any abridgement or infringement of the rights and freedoms will be struck down unless it satisfies a stringent test of demonstrable justifiability;
- 4) to facilitate the individual's access to the Courts for constitutional redress as well as to ensure that the Court's power to grant adequate remedies will not be hindered or curtailed by technicality; and
- 5) to remove the facility by which through Special Acts or easily imposed emergency provisions the rights and freedoms can be suspended or abrogated.

¹³ *Op. Cit.*, paras. 2, 7, 11-14.

17. After considerable delay following on the acceptance of the Commission's Report by the Joint Parliamentary Committee, there inexplicably appeared a Bill tabled by the Prime Minister which departed significantly from the Commission's draft.

18. Some of the differences between the Government Bill and the Commission's draft demand special emphasis:

- 1) The Government Bill unlike the Commission's Draft does not prohibit action by public authorities which deprive us of the right to equality of treatment but leaves open the prospect that the phrase "equality before the law", which it adopts, may be interpreted as limited to strictly legal proceedings and would not rule out executive or administrative inequality of treatment which is not justifiable in a free and democratic society.
- 2) The Government's Bill omits the right to privacy in communications, which was guaranteed by the Commission's Draft, and therefore leaves government free to pry into the citizen's private conversations and correspondence.
- 3) The Government's Bill unlike the Commission's draft does not specifically guarantee the protection of the ecological heritage of our Nation.
- 4) The Government's Bill does not guarantee the provision of early childhood education or care for our infant children although expert opinion is strong and united that those years constitute the most vital part of the development of the child. The Commission's Draft placed the duty on the State for both the preparatory and primary levels.

- 5) The Government's Bill unlike the Commission's Draft does not guarantee that every citizen who is entitled to be registered and who goes through all the enumeration processes is guaranteed the right to vote.
- 6) The Government's Bill unlike the Commission's Draft does not permit the citizen to seek the protection of the Courts where his fundamental rights are being violated by private corporations or individuals.
- 7) The Commission's Draft left the determination of whether or not any form of punishment, including hanging or flogging would eventually be regarded as inhuman or degrading to the wisdom or experience of future years and so did not as the present Constitution does freeze our moral judgment in time. The Government's Bill goes further than the present Constitution and the Commission's draft and authorises the Government through its control of Parliament to make laws providing for all types of capital punishment however novel, degrading, cruel or inhumane. Thus it would be possible under the proposed provision to provide for capital punishment for a whole range of offences known or unknown. Thus an Act of Parliament could be passed by virtue of the Government's Bill for the execution of a person for insulting the Prime Minister by hanging, the firing squad or to use the most recently devised technology by dumping in a red mud lake.
- 8) The most important indication of the Government's failure to capture the spirit of the Commission's Draft is that in respect of the great freedoms of movement, of conscience, association and assembly it has repeated the old catalogue of restrictions and limitations of the present Constitution with its weaker test of "reasonably

required” rather than “may be demonstrably justified”. The Government’s Bill adopts two diametrically opposed techniques of constitutional drafting and is therefore inconsistent, confused and confusing.

- 9) The Government’s Bill defeats one of the main objectives of the Commission’s Draft, which was to express the rights in simple, straightforward language and to prohibit encroachment on them excepting on clear and convincing grounds.

19. The differences are considerable and significant. This is not by accident. It is deliberate. The Government’s Bill omits such important provisions of the Commission’s Draft as the requirement that the Court should take into account the provisions of the international human rights conventions to which Jamaica is a party and that where there is an infringement of our rights and freedoms it is for the State to justify the infringement.

20. The most disturbing feature of the Government’s draft is that it rejects the recommendations of the Constitution Commission which comprised three Cabinet Ministers, other Government and Opposition Parliamentarians and nominees, and representatives of the leading civic and professional organisations in Jamaica, it rejects the recommendations of the Joint Select Committees of Parliament on Constitutional Reform, and it rejects the unanimous vote of Parliament in support of the Commission’s Draft.

21. It seemed that history was about to repeat itself and that the political leaders would once again undermine the People’s Charter. However on this occasion time provided the opportunity to protest. The Government sensed that the protests against its Bill would have been widespread and determined. As a result, the Joint Parliamentary Committee was reconvened to reconsider and reconcile the different approaches and rescue the Government from its inconsistency. That

Committee referred the matter to the then Solicitor-General, Dr., the Honourable K.O. Rattray, Q.C. and myself in some sort of Parliamentary alternative dispute resolution mechanism and we have since provided a Report which essentially affirms the approach of the Constitutional Commission and supports its recommendations.

22. In particular we recommended that:

- 1) the approach of the Commission's draft should be followed and but for the special treatment of the protection from inhuman treatment, freedom of the person, the right to due process and the protection of property rights, the guarantee of rights and freedoms should be in general and simple language free of detailed limitations and subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free, peaceful, orderly and democratic society;
- 2) all the rights included in the protected provisions of the Commission's draft should be retained in the constitutional guarantees;
- 3) in all cases (a) where a determination of a person's civil rights and obligations or (b) of any legal proceedings which may result in an important decision adverse to his interests, that person should be entitled to a fair hearing;
- 4) the right to legal aid where the interests of justice require should be constitutionally protected;
- 5) the existence of an adequate alternative remedy should not defeat a person's action for redress but the case should be remitted to the court which is able to give that remedy;
- 6) the right to jury trial in criminal trials in the superior courts should be guaranteed;

- 7) the courts should be required to have regard to international human rights conventions in interpreting the fundamental rights provisions; and
- 8) constitutional redress should be available where a person's fundamental rights have been violated by a private person or body as well as the State.

23. The Parliamentary Committee has now completed its work and we await with bated breath the reformed Bill which should now emerge.

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