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MINUTES

50th Meeting of the Constitutional Reform Committee (CRC)

Venue: Ministry of Legal and Constitutional Affairs

Date: October 16, 2024

Time: 10:00am

AGENDA

1. Call to Order
2. Prayer
3. National Pledge
4. Apologies for Absence/Lateness
5. Confirmation of Agenda
6. Confirmation of the Minutes of the 49th Meeting of the CRC
7. Matters Arising
8. Review of the Revised Recommendations of the Constitutional Reform Committee
    a. Office of President – Process of Appointment;
    b. Office of President – Process of Removal;
    c. Amendment of Alteration Provision (Section 49);
    d. Impeachment Process
    e. Qualification for Membership in Parliament (Dual Citizenship and Test of Allegiance)
9. Recommendation from Preamble Committee
10. Preparation and Review of the Draft Bill

11. Preparation of Public to discuss the Issue of the Final Appellate Court
12. Any Other Business
    a. By-Elections
13. Date and Time of Next Meeting
14. Adjournment

*Amendments to Agenda

ATTENDEES:

- Honourable Marlene Malahoo Forte, KC, JP, MP (Chairman)
- Ambassador Rocky Meade, CD, JP, PhD (Co-Chairman – Office of the Prime Minister)
- Dr Derrick McKoy, CD, KC (Attorney General of Jamaica)
- Senator Ransford Braham, CD, KC (Government Senator)
- Dr the Hon. Lloyd Barnett, OJ (National Constitutional Law Expert)
- Mr Hugh Small, KC (Consultant Counsel and Nominee of the Leader of the Parliamentary Opposition)
- Dr Elaine McCarthy (Former Chairman – Jamaica Umbrella Groups of Churches)
- Dr Nadeen Spence (Civil Society – Social and Political Commentator)
- Mr Sujae Boswell (Youth Advisor)
- Professor Richard Albert (International Constitutional Law Expert – University of Texas at Austin)

Secretariat

Ministry of Legal and Constitutional Affairs

- Mr Wayne O Robertson, JP – Permanent Secretary
- Ms Nadine Wilkins – Director of Legal Reform
- Mr Christopher Harper – Senior Director, Constitutional Reform
- Ms Nastacia McFarlane – Director, Corporate Communication and Public Relations
- Ms Cheryl Bonnick Forrest – Senior Director, Strategic Planning
- Ms Yanique Douglas – Legal Education Officer
- Mr Makene Brown – Legal Officer
- Ms Shereika Mills – Constitutional Reform Officer (Actg.)

1. CALL TO ORDER

1.1. The meeting was called to order at 10:45am by the Chairman, the Hon. Marlene Malahoo Forte when quorum was achieved.

2. PRAYER

2.1. Prayer was led by Senator Ransford Braham.

3. NATIONAL PLEDGE

3.1. The National Pledge was recited.

4. APOLOGIES FOR ABSENCE/LATENESS

4.1. Apologies for absence were received from Dr David Henry, Senator Donna Scott-Mottley, Mr Anthony Hylton and Mrs Laleta Davis Mattis.

5. CONFIRMATION OF AGENDA

6. The Chairman suggested that the Agenda be amended to include a new agenda item titled "Preparation and Review of Draft Bill" after the item entitled "Recommendation from Preamble Committee".
7. Dr Barnett suggested that the process of impeachment be included in the matters to be revisited under the list of revised recommendations of the Constitutional Reform Committee and that "by-election" be listed under "Any Other Business"
8. The Amended Agenda was confirmed on a motion by the Chairman, the Hon. Marlene Malahoo Forte and seconded by the co-chairman, Ambassador Rocky Meade.

9. CONFIRMATION OF MINUTES OF THE 49th MEETING OF THE CRC

9.1. The Minutes of the 49th Meeting of the Constitutional Reform Committee held on October 2, 2024 were corrected and confirmed on a motion by the Hon. Marlene Malahoo Forte and seconded by Ambassador Rocky Meade.

10. MATTERS ARISING

10.1. The Chairman noted that since the publication of the Report of the Committee, Members have been taking note of the feedback from the public to the recommendations contained therein. She stated that having considered the feedback, the Committee had since revisited its recommendation on the process of appointing the President. She noted that there remained

consensus among Members for a two-tier process involving a nomination stage and a confirmation stage.

10.2. The Chairman reminded Members that in response to the feedback from the public and the criticisms of former Prime Ministers PJ Patterson and Bruce Golding, Members agreed to revise the recommendation so that the Prime Minister would be empowered to nominate a candidate after consultation with the Leader of the Opposition. Although the revised recommendation would not require agreement between the Prime Minister and the Leader of the Opposition, the process of consultation should be meaningfully done, to allow for consensus to be reached between them. Where there was no consensus, or initial agreement on a nominee, the recommendation would go back for further consultation and due consideration. She then indicated that the draft Bill, dated **September 16, 2024** contained a provision (appended hereto as **Annex I)** which sought to reflect the revised recommendation in respect of the process of selecting the President.

10.3. Dr Barnett stated that the provision in the draft Bill did not accord with subsequent discussions of the Committee. He said that the nomination process, as indicated by the Minutes, involved one reference back to the Leader of the Opposition, if there was no agreement between the Prime Minister and the Leader of the Opposition. After that, the Prime Minister's recommendation could be put to the Parliament, if the Prime Minister chose to. However, if the Prime Minister nominated a second person (after a first consultation where there was disagreement) and there was still no agreement, a decision must be made whether to empower the Prime Minister to put forward either of the two nominations for confirmation by the Parliament.

10.4. In an effort to assist the deliberations of what the process of consultation could look like, the Chairman directed the Committee to consider the process of consultation provided for at section 32(5) of the Constitution, where the Prime Minister made a recommendation after consultation with the Leader of the Opposition.

10.5. The Chairman pointed out that the Prime Minister's power to nominate a candidate for the office of President was to be exercised after meaningful consultation. She invited the Committee to propose the way forward, bearing in mind that consensus could not be forced.

10.6. Ms Wilkins stated that the provision in the Bill empowered the Leader of the Opposition to propose someone else in the absence of agreement. The Chairman, in response, stated that a

decision must be made as to whether the Prime Minister should be able move forward with his nominee in the absence of agreement. Dr Barnett expressed the view that if there was disagreement between the Prime Minister and the Leader of the Opposition on a second nomination, the Prime Minister should be able to proceed with his nomination to the Parliament for confirmation.

10.7. The Chairman summarised the views shared in response to the feedback on and criticisms of the initial recommendation for the process of appointing the President. Taking into account the fact that agreement could not be forced between a Prime Minister and a Leader of Opposition, there was consensus among Members of the Committee for a revised recommendation that would empower the Prime Minister to nominate a candidate after a process of meaningful consultation which would include a reference back. Where there was agreement between the Prime Minister and the Leader of the Opposition, the nomination would proceed and where was no agreement, the Prime Minister would be empowered to proceed with his nomination. The recommendation regarding the vote for confirmation by Parliament would be revised to an absolute majority, instead of a two-thirds majority. It was not the intention of the CRC to recommend an effective veto by the Opposition where there was disagreement. Instead, the focus was on providing for a process of meaningful consultation between a Prime Minister and a Leader of Opposition.

10.8. Dr Spence enquired whether provision could be made for a caveat outlining what meaningful consultation entailed. Dr McKoy responded that it would be difficult to do so, as there were no rules on how the actual consultation should take place. Dr Barnett stated that a lot would depend on the personalities and that the process should allow for flexibility.

10.9. Dr McCarthy suggested that where the Leader of the Opposition was not in agreement, he could propose another candidate. Dr Barnett, in response, stated that that could take place during the process of consultation itself.

10.10. Senator Braham stated that in one instance, three (3) or four (4) nominees may end up on the table for consideration where the Leader of the Opposition disagrees and proposes someone else. Alternatively, a letter may be written resulting in the end of the matter. Nevertheless, he stated that at the end of the period set for consultation, the Prime Minister had the option and the authority to put forward anyone considered during the consultation process.

10.11. The Chairman then enquired of Members whether the process of nomination should specify that the Leader of the Opposition be empowered to make a nomination or whether it should be implicit in the consultation process.

10.12. Dr Spence stated that she preferred to work with principles and invited Members to think about the process on which the revised recommendation turned. She said that since the process required consensus, Members of the Committee ought determine whether they agreed with the proposal.

10.13. The Chairman invited Members to recall that the Prime Minister came into office at the end of a democratic process of a vote and commanded the confidence of the majority of Member of the House of (elected) Representatives.

10.14. Dr Barnett repeated that this type of matter was heavily dictated by personal attitudes. While some may say they disagree with a nominee, others would quarrel and create conflict. He opined that while history has demonstrated a process of selection that worked, one was unable to say whether it would work in the future.

10.15. Dr McCarthy said that she recalled a suggestion for an electoral college that would be responsible for filtering the nominee into the Parliament. Dr McKoy cautioned the use of the words "electoral college" loosely. In an effort to achieve efficiency in the discussion, the Chairman invited Members to settle the process of nomination. She enquired whether the Leader of the Opposition should be empowered to nominate a rival candidate.

10.16. Dr McKoy enquired whether both candidates would be put forward to be decided by simple majority rule and what measure of success would be used within the electoral body.

10.17. Dr Barnett, in response, stated 51%. Dr Spence enquired whether both names would be submitted to the Parliament where a second candidate was nominated.

10.18. The Chairman invited Members to recall that the process would be initiated by the Prime Minister. She noted that the discussion between the Prime Minister and the Leader of the Opposition could take many forms. Depending on the personalities in the room, one may disagree but step back whereas another may disagree and obstruct the process. She again enquired whether the Leader of the Opposition should be formally given the power to nominate a candidate.

10.19. Senator Braham opined that there was no need to make provision for such a power formally. If there was disagreement between the Prime Minister and the Leader of the

Opposition, both parties could propose a number of candidates from which the Prime Minister would ultimately choose.

10.20. Members agreed that the power to nominate the President should be given to the Prime Minister, exercised after meaningful consultation with the Leader of the Opposition.

10.21. The Chairman then went on to refer to a submission made by Dr Barnett, received by her *via* email dated **October 7, 2024,** appended hereto as **Annex II.**

10.22. Senator Braham stated that if the proposal in Dr Barnett's submission that local government representatives be included in the confirmation process was the decision of the Committee, he would strongly oppose it. He pointed out that there were approximately 228 local government representatives and 63 Members of Parliament. He opined that it was highly conceivable that the Opposition could control 170 or 180 of them therefore limiting the selection of the President to local government. Mr Boswell stated that he understood the perspective of Senator Braham, noting that their inclusion made the process of selecting the President more susceptible to partisan politics.

10.23. The Chairman indicated that while the novelty of the proposal was attractive, processes needed to be administered. She stated that her experience in government has led her to favour processes that were designed for ease of practical administration and implementation. The proposal for the inclusion of local government representatives, as she understood it, involved councillors of the Municipal Corporations, sitting in their parishes, voting to confirm the presidential candidate simultaneously with the Parliament.

10.24. Dr Barnett said that having worked in elections for nearly all his life he believed that it was possible, both legally and physically, to cast a vote simultaneously in different places, as has been practised in many organisations.

10.25. Dr McKoy said that while the proposal was complex, it was democratic. He noted that the electoral college in India was an example of such an approach where it comprised the Senate, the Parliament and Union territories. He stated that his concern was with the size of the vote as a strong opposition party could reject the candidate. Nevertheless, he conceded that that was a feature of democracy.

10.26. Dr McCarthy stated that the incorporation of the parish councillors could create imbalance.

10.27. Dr Barnett stated that the person selected by whatever method should be able to achieve substantial acceptability in the nation. If the candidate could not obtain a majority support, such a person did not deserve to be Head of State.

10.28. Dr Spence was of the view that a larger pool of people to select/confirm the President may be more persuasive to wider Jamaicans, particularly those who were distrusting of the current recommendation. She also recalled that having regard to the deliberations and recommendations of the Committee, there were many who would prefer a directly elected President.

10.29. The Chairman stated that she was sensitive to the call for greater participation of the people. She said that there were many new and novel ways in which the people could participate in a Republic that would achieve the legitimacy being asked for. She further stated that the jury was still out for her on whether to load everything in the process of selecting the President. She opined that the Committee was caught in the crosshairs of an Executive Presidential Model and that Members were inadvertently trying to accommodate the process for an Executive President in a Parliamentary Cabinet System with a Non-Executive President. She stated that once Members were settled on a Non-Executive President who was not responsible for the day-to-day running of Government the decision on the selection process should be easier.

10.30. The Chairman then stated that she did not believe that local government should be run from central government or that the way in which local government was practised in Jamaica had served the people well. She stated that the amendments to the Constitution on local government were broad enough for the implementation of a different kind of local government that would better serve the people.

10.31. Dr Barnett stated that the weakness of local government was not to be attributed to the Councillors but to the government which had not reorganised in a way to accommodate how local government should be operated. If one believed in democracy, one would accept that local government Councillors were chosen by the electorate.

10.32. Dr McKoy cautioned Members about expanding the scope of the conversation beyond the immediate focus of the process of selecting the President. He then stated that although there was a symbolic statement to the inclusion of a broader pool of elected participants, if that proposal went forward, it would raise a number of questions.

10.33. Dr Spence opined that the model of consensus and democracy meant that people did not always get all of what they desired. She stated that the Committee ought think about how it could build a model that most people would buy into. Dr McKoy suggested that the candidate could get a majority vote in two of the three parts: House of Representatives, Senate and Local Government.

10.34. Senator Braham, in response, stated that Parliament or Senate would always succeed on the majority vote. As such, he queried the value in including local government. He then opined that when persons vote for local government representatives, they voted on political party lines having taken instructions from the Leader of the Opposition or the Prime Minister to vote in a particular way. Where the government puts forward a candidate and such a candidate was defeated, it would cast the government in a lame duck position thereby diminishing its credibility.

Lunch Break at 1:17pm

Meeting resumed at 2:03pm

10.35. Senator Braham noted that there seemed to be consensus on the procedure to nominate the President. In relation to the confirmation stage, he observed that there were contending views as to whether confirmation of the President would be confined to the Parliament or a body of elected representatives dubbed by Dr Barnett as the "People's Congress."

10.36. The Chairman reiterated that there was consensus that the nomination of a presidential candidate would be made by the Prime Minister after consultation with the Leader of the Opposition and that the process of consultation would be designed to be a meaningful one. Where others were proposed, they would be considered, but the power to nominate would ultimately be the Prime Minister's.

10.37. Dr Barnett stated that there was agreement that the nomination be subject to a confirmation process, but he noted that there were divergent views around the confirmation process.

10.38. The Chairman stated that having arrived at consensus that the nomination should be subject to confirmation and that the confirmation vote should be an absolute majority, the remaining question to be answered was whether the body confirming the nomination should be expanded beyond the two Houses of Parliament. She also stated that Members

appeared to have forgotten what was agreed within the Committee about the high symbolism of having a constitutional provision for both Houses of Parliament to sit together.

10.39. Dr Barnett stated that Members needed to be more precise in their formulation. He enquired whether Members of the two Houses of Parliament sitting jointly would vote separately. The Chairman, in response, reminded that it was agreed that they would sit jointly but the votes of Members of the two House would be counted separately and an absolute majority was required in each House.

10.40. The Chairman then summarised that while there was no consensus on whether the body confirming the nomination should be expanded, there was a proposal to include local government councillors who would sit in their respective parishes and vote simultaneously with the Parliament.

11. REVIEW OF REVISED RECOMMENDATIONS OF THE CONSTITUTIONAL REFORM COMMITTEE

11.1. OFFICE OF PRESIDENT – PROCESS OF APPOINTMENT

11.1.1. The Chairman noted that this matter was discussed at length during matters arising.

11.2. OFFICE OF PRESIDENT – PROCESS OF REMOVAL

11.2.1. The Chairman stated that this matter was included as a formality. She noted that there was consensus among Members to revise the recommendation to include a quasi-judicial body to investigate the complaint, report on whether the specified or any other grounds for removal have been sufficiently established and whether the President should be removed from office.

11.3. AMENDMENT OF ALTERATION PROVISION (SECTION 49)

11.3.1. The Chairman invited Members to consider the proposal to amend section 49 of the Constitution dated **October 16, 2024** appended hereto as **Annex III.**

11.3.2. The Chairman noted that the revision of the alteration provision may alleviate some of the concerns raised such as whether additional referenda would be held in respect

of other reforms to come, including the consideration of the final appellate court amongst others.

11.3.3. Dr Barnett stated that the proposal would also help to clarify that where new provisions were be entrenched, the relevant provision to alter would be required to do so i.e. if one sought to make a provision deeply entrenched, the procedure to alter deeply entrenched provisions would be required.

11.4. IMPEACHMENT PROCESS

11.4.1. Dr Barnett invited Members to review his draft submission **dated October 10, 2024** entitled ***"Impeachment: Yes or No"*** appended hereto as **Annex IV.**

11.4.2. The Chairman expressed her gratitude to Dr Barnett for providing an expanded memorandum on the issue of impeachment to help demonstrate why the Committee was persuaded to make its recommendation in the manner it did.

11.4.3. Dr Spence stated that she liked the thoughtfulness of the submission. She then suggested that the substance of the document be used to infiltrate public dialogue around the issue of impeachment so that members of the public could understand what led the Committee to its conclusion. She further suggested that the document be published.

11.4.4. The Chairman stated that the paper would be appended to the Minutes of the meeting. She also stated that she would use its content to inform a Ministerial Statement as the Committee moved to close any existing gaps on the issue, particularly those identified by the Parliamentary Opposition.

11.5. QUALIFICATION FOR MEMBERSHIP IN PARLIAMENT (DUAL CITIZESHIP AND TEST OF ALLEGIANCE)

11.5.1. Matter deferred until the next meeting.

12. RECOMMENDATION FROM PREAMBLE COMMITTEE

12.1. Dr Spence advised that the Preamble Committee was established on July 26, 2024 and has had five meetings since then. She informed Members that the Committee comprised herself as Chairwoman, Professor Kwame Dawes - the 2024 Poet Laureate of Jamaica, Dr Joseph

Farquharson - Senior Lecturer in the Department of Language, Linguistics and Philosophy at the University of the West Indies, Mona Campus and Mr Frankie Campbell - Bassist and Manager of the Award-winning Show Band Fab 5.

12.2. Dr Spence advised that the Committee's process was to examine the draft Preambles submitted and to identify aspects of them that could be adopted. She also stated that members of that committee were of the view that the language, in some instances, needed to be updated to reflect a modern Jamaica. She then invited Members to consider the draft Preamble dated **October 7, 2024** appended hereto as **Annex V.**

12.3. Ms Wilkins enquired into the use of the word "bot" in the third paragraph. Dr Spence explained that its use was consistent with the standardisation of patois as proposed by the Jamaican Language Unit at the University of the West Indies. Mr Boswell stated that the draft Preamble, in the form proposed, captured the sentiment of the young people. Senator Braham stated that the only difficulty he had with the draft Preamble was that it did not make any reference to God.

12.4. Dr Barnett suggested that in the second proclamation of the draft Preamble, the sentence beginning with the words "We enjoy" be removed and be stated next in the sequence as a separate proclamation so as to maintain the style and pattern of the draft.

12.5. Dr Spence explained that Members of the Preamble Committee were of the view that the Preamble should be non-sectarian. Some Members of the CRC were of the view that reference should be made to God and proposed that the words "to the Almighty" be inserted after the word "gratitude" in the fourth paragraph. It was then agreed that proposal to include "to the Almighty" should be put forward.

13. PREPARARTION AND REVIEW OF DRAFT BILL

13.1. Matter deferred until next meeting.

14. PREPARATION OF PUBLIC TO DISCUSS THE ISSUE OF THE FINAL APPELLATE COURT

14.1. Matter deferred.

15. ANY OTHER BUSINESS

15.1. BY ELECTIONS

15.1.1. Matter deferred.

15.2. PUBLIC EDUCATION UPDATES

15.2.1. Ms Douglas, Legal Education Officer in the Legal Education Division of the Ministry of Legal and Constitutional Affairs, informed Members that the Division recognized the need for the Ministry to engage with the general public by meeting people where they were. She stated that after an assessment of what was needed to achieve that outcome, the "Town Hopping" Plan was created. She reported that the inaugural Town Hop was executed on October 15, 2024 in downtown Kingston, in the Parade and surrounding streets, such as King Street, Orange Street and Church Street.

15.2.2. Ms Douglas stated that the Town Hop was attended by the officers of the Legal Education Division, including herself, Mrs. Janelle Miller Williams, Ms. Julia Wedderburn, Mr. Ivan Godfrey and Mr. Kevin Williams. The Senior Public Relations Officer from the Corporate Communication and Public Relations Division- Mrs. Jennese White, was also in attendance. She advised that the base of operations for the event was St. William Grant Park, where a booth was erected for persons to interact with the officers from the Ministry as well as receive brochures with information on the constitutional reform process and other related matters. Ms Douglas stated that officers, in teams of two, walked the surrounding areas and interacted with persons who were waiting on buses, selling goods or walking along the street. Through this type of engagement, the Division was able to interact with two hundred and fifty-one (251) persons. She advised that the next Town Hop would take place on November 6, 2024, in Half-Way-Tree.

16. DATE AND TIME OF NEXT MEETING

16.1. The Chairman advised Members that the date and time of the next meeting of the Committee was to be notified.

17. ADJOURNMENT

17.1. There being no other business, the meeting was terminated at 3:01pm on a motion by Senator Ransford Braham and seconded by the Chairman, Marlene Malahoo Forte.

ANNEX I

Procedure for Appointment of President

25. - (1) A vacancy in the office of the President shall be filled by an appointment made in accordance with this section.

(2) The Prime Minister shall consult with the Leader of the Opposition on the nomination of a person qualified as mentioned in section 24(2) for appointment as President.

(3) On a consultation under subsection (2), all reasonable steps shall be taken by the Prime Minister and the Leader of the Opposition to agree on the nomination.

(4) For the purposes of subsection (3) –

(a) the Prime Minister shall inform the Leader of the Opposition of the Prime Minister's recommended nominee;

(b) if the Leader of the Opposition concurs with a recommendation under paragraph (a) or (c)(i) or (ii) for a nominee –

(i) the Leader of the Opposition shall so inform the Prime Minister;

(ii) the Prime Minister shall in writing inform the Speaker and the Senate President as to the nominee; and

(iii) the Speaker and the Senate President shall refer the nomination to Parliament for a confirmation vote; and

(c) if the Leader of the Opposition does not agree with the recommendation, the Leader of the Opposition shall so inform the Prime Minister and the Prime Minister may –

(i) refer the recommendation back to the Leader of the Opposition for reconsideration; or

(ii) recommend a different nominee and inform the Leader of the Opposition of the recommendation;

(d) in any case where a recommendation is referred back to the Leader of the Opposition for reconsideration, the Leader of the Opposition may propose a different nominee, and if the Prime Minister –

(i) agrees with the proposal for a different nominee, the Prime Minister shall in writing inform the Speaker and the Senate President as to the nominee, and the Speaker and the Senate President shall refer the nomination to Parliament for a confirmation vote; or

(ii) does not agree with the proposal and not less than three months has elapsed since the Prime Minister first made a recommendation to the Leader of the Opposition in respect of a nominee to fill the vacancy, the Prime Minister shall determine the nominee and in writing inform the Speaker and the Senate President as to the nominee, and the Speaker and the Senate President shall refer the nomination to Parliament for a confirmation vote.

(5) The nomination referred to Parliament under subsection (4) shall be put to a confirmation vote conducted by secret ballot at a joint sitting of the Houses of Parliament.

ANNEX II

REFORMING THE CONSTITUTION OF JAMAICA

THE METHOD OF APPOINTING THE PRESIDENT

1. The Constitutional Reform Committee ("the CRC") has recommended the retention of the Cabinet parliamentary system of government in the new Constitution, the removal of the British Monarch as Jamaica's Head of State and that a Jamaican Head of State be established. (Report 4.1.4-5).

2. The CRC further recommended that the President in the new Constitution would perform similar formal and ceremonial functions as are now performed by the Governor-General. (Report 4.2.4). The consensus was that this President should be the embodiment of Jamaica's national identity, unity and a neutral arbiter for the nation. (Report 4.3.1).

3. As the Report states:

> "Guided by these values and ideals, and after considering provisions of the constitutions of other Commonwealth countries, **the CRC recommends that the selection of the prospective president be done through a two (2) stage process of nomination and confirmation.** Nomination is to be done by the Prime Minister, after consultation with the Leader of the Opposition with a view to arriving at consensus. Confirmation is to be done by the Parliament, in a joint sitting of both Houses, where each House votes separately by secret ballot. The vote required to confirm the nominee is an affirmative vote of two-thirds (⅔) majority of each House."

4. As a last resort, in case the special two-third majority was not achieved, the CRC recommended that both the Prime Minister and Leader of the Opposition would be empowered to make a nomination and the decision would be made by an absolute majority of both Houses.

5. These decisions were arrived at after intense debate in an effort to ensure that there was no protracted stalemate and controversy which would undermine the prestige and unifying functions of the office. The CRC was firmly of the view that it was undesirable to have a general election of the

President having regard to his or her limited functions and the objective of the office-holder being seen to be non-partisan and a unifying national figure. The CRC's proposed solution in case of a deadlock has been the subject of criticism but no viable or practical alternative has been proposed.

6. Jamaicans for Justice has made a proposal which involves widening the poll, which confirms the nomination, to include all the Parish Councillors.

7. There are advantages in the JFJ's proposal in that it widens the poll of voters in the confirmation process but limits the temptation for a national and contentious campaign to be conducted.

8. Doubts have been expressed as to the competence and/or appropriateness of employing the Parish Councillors in this way. It is submitted that local government is at the foundation of the democratic process. The Councillors are selected by electors exercising the franchise and are therefore authentic representatives of the people. Apart from parliamentarians, there is no other group of persons who have the democratic representative status of Councillors.

9. Secondly, the engagement of the local government representatives provides novel and attractive way of involving a group of persons who present a picture of island-wide involvement.

10. Thirdly, in keeping with democratic ideals in 2015, the Constitution was amended to include provisions for a democratic system of local government so that the involvement of local government in this highly symbolic exercise enhances local government and therefore popular democracy.

11. The CRC is unable to identify any other group of persons who can legitimately claim such island-wide representative status and who provide a ready means of verification and official facilities for a vote of national significance to be conducted.

LLOYD BARNETT

October 7, 2024

ANNEX III

AMENDMENT OF SECTION 49 OF THE CONSTITUTION

This proposal seeks to recreate the current format of section 49 of the Constitution to provide for the procedure to amend each type of provision in the Constitution according to its level of entrenchment. Section 49 of the reformed Constitution should, in the following order, make provision for:

1. Parliament's power to amend the Constitution or the Jamaican Independence Act, 1962 should be made subject to this provision. This initial portion of section 49 should include a *proviso* requiring any Bill for an Act of Parliament that amends either the Constitution or the Jamaica Independence Act to be introduced in the House of Representatives.

2. Any Bill for an Act of Parliament amending the ordinary provisions of the Constitution shall not come into effect unless it satisfies two minimum requirements of:
    a) a time period of one (1) month should pass between the introduction of the Bill in the House of Representatives and the commencement of the debate on the whole text of the Bill in that House and a further period of one (1) month should pass between the conclusion of that debate and the passage of the Bill by that House; and
    b) the vote of an absolute majority is required for passage in each House.

3. Any Bill for an Act of Parliament amending the ordinarily entrenched provisions of the Constitution should not come into effect unless it satisfies the following three (3) requirements:
    a) a time period of three (3) months should pass between the introduction of the Bill in the House of Representatives and the commencement of the debate on the whole text of the Bill, and a further period of three (3) months should pass between the conclusion of that debate and the passage of the Bill by that House;

b) the vote of two-thirds majority of all the members of each House of Parliament should be required for passage in each House; and
c) has the support of at least one (1) Senator who was appointed by the President, acting on the advice of the Leader of the Opposition.

4. Any Bill for an Act of Parliament amending the deeply entrenched provisions of the Constitution should not come into effect unless it satisfies four (4) requirements
    a) a time period of three months should pass between the introduction of the Bill in the House of Representatives and the commencement of the debate on the whole text of the Bill and a further period of three months should pass between the conclusion of that debate and the passage of the Bill by that House;
    b) the vote of two-thirds majority of all the members of each House of Parliament should be required for passage in each House;
    c) the support of at least one (1) Senator who was appointed by the President on the advice of the Leader of the Opposition; and
    d) referred to the electors qualified to vote for the election of members of the House of Representatives not less than two nor more than six months after the Bill passes in both Houses of Parliament for a vote taken in such manner as Parliament may prescribe with a majority of the electors voting having approved the Bill.

5. Provisions should be made for the proposed section 2A of the Constitution and the Interpretation Act, as amended by this Bill, to receive the same level of protection through entrenchment as the provisions to which they apply. For example, where a section of the Interpretation Act applies to an ordinarily entrenched provision of the Constitution, the process to amend such a provision would require the procedure set out at paragraph 10.2.3 above. Any section of the Interpretation Act which applies to a deeply entrenched provision of the Constitution would require the prescribed time period between introduction and debate and conclusion of debate and passage to elapse

and thereafter receiving the support of the majority of the electorate for the Bill to come into effect.

6. Reproduce the scheme of subsections (5), (6), (7), (8) and (9) of section 49 of the Constitution in so far as they relate to a Bill for an Act of Parliament which amends the Constitution being brought into operation.

ANNEX IV

IMPEACHMENT: YES OR NO

Lloyd Barnett

INTRODUCTION

1. The decision[1] of the Constitutional Reform Committee (CRC) against recommending the inclusion of a system of impeachment in the proposed reformed Jamaican Constitution has been the subject of some criticism. The criticisms have essentially proceeded on the assumption that impeachment is a progressive step towards holding public officials accountable and there is no good ground for not adopting it. These criticisms have largely ignored the historical record of impeachment proceedings and the rational grounds given by the CRC for declining to recommend its adoption. I consider that it is prudent that before adopting such a far-reaching constitutional process we should examine its historical record and the evidence of its fairness and efficiency or lack thereof.

THE HISTORICAL BACKGROUND

2. Impeachment proceedings were adopted from Germany by England in the 14th century[2] but fell out of use and was not re-introduced until the 17th century for a short time after which it was permanently discontinued. At the independence of the United States, impeachment was adopted at both the Federal and State levels. Accordingly, it is the US example that has usually

[1] Report of the Constitutional Reform Committee, May 2024, 6.3.

[2] Blackstone's *Commentaries on the Laws of England*, Vol. IV, 254-263 edited by Wayne Morrison.

been followed by other countries. However, since it was an adoption of the English example it is prudent to examine its source.

3. In England, the High Court of Parliament was the supreme and highest court in the middle ages, which not only made laws but enforced the laws "by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment". Blackstone, Commentaries, Vol. IV, 259. It involved a prosecution for well-established criminal offences, namely treasons, felonies and high misdemeanours. Blackstone describes the rationale for this system as follows:[3]

> "The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords; who are in cases of misdemeanours considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Germans; who in their great councils sometimes tried capital accusations relating to the public: '*licet apud consilium accusare quoque, et discrimen capitis intendere*.' [The Council is permitted to lay the charges as well as to determine the verdict]. And it has a peculiar propriety in the English constitution; which has much improved upon the ancient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be more carefully avoided, yet it may happen that a subject, entrusted

[3] Blackstone, *Op. Cit*., 260.

> with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish. Of these, the representatives of the people, or house of commons, cannot properly *judge*; because their constituents are the parties injured: and can therefore only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests, nor the same passions as popular assemblies."

4. Impeachment was used by the English Parliamentarians to control the agents of the Crown and the powerful nobles whom the ordinary criminal process was unable to discipline or punish. Impeachment was therefore a parliamentary mechanism for controlling the agents and favourites of the corrupt and dictatorial monarchy.[4]

5. There were three essential features of the English system, namely,

   (1) it was specifically limited to criminal offences,

   (2) the prosecuting body was essentially different from the trial body; and

   (3) the trial body had a significant component of judicial officers and experienced lawyers.

[4] Blackstone, Op. cit., 262-3.

Great care was taken in the effort to ensure that the trial body was independent so that there was an intense debate as to whether the bishops who were members of the House of Lords should be permitted to sit in the impeachment trials.[5]

6. With the expansion of the franchise in the 1830s and the growth of the principles of ministerial responsibility to Parliament, impeachment was replaced by political accountability.[6] Thus, votes of censure became the accepted method of calling Ministers to account. So after the Lord Melville's impeachment and his acquittal in 1805 there was no further resort to this practice.[7]

THE AMERICAN MODEL

7. When the American Constitution-makers discussed the adoption of the impeachment process there was intense debate as to whether impeachment should be extended beyond serious criminal offences. Secondly, the disparity and conflicting views of the States at that time did not settle the question of the undesirability of the presiding house being similar in composition and "passions" to the adjudicating house.[8]

8. In the making of the Federal Constitution, the Founding Fathers provided that the House of Representatives should formulate and present the charges to the Senate as they did not then envisage that both bodies would become

[5] Blackstone, Op. Cit., 264

[6] S.A. deSmith, *Constitutional and Administrative Law* (2nd ed.), 119-120.

[7] Ibid, 169.

[8] Levitsky & Ziblatt, *Tyranny of the Minority*, 53-55.

subject to similar political biases. As it has been demonstrated the Senate has failed to satisfy any test of judicial competence or political independence. Although it is provided that the Chief Justice should preside, he has no actual role in the debate or decision-making.[9]

9. The result is that the American model has failed to achieve the objectives of judicial independence or competence. It should be noted however that the Federal Constitution retained the strict limitation of impeachment offences to criminal offences. Thus Article 4(2) of the US Constitution limits impeachable offences to "treason, bribery, or other high crimes or misdemeanors".[10]

10. Most importantly, institutional parallel with England did not exist and has not been achieved. There has been political partisanship rather than judicial independence.

11. With the development and domination of political parties in modern States, it is no longer possible to maintain the separation and independence of the legislators even where they sit in different houses. Thus an essential safeguard of the original system has been compromised. It is obvious that impeachment proceedings in the United States and elsewhere have been dominated by political partisanship and controversy.

12. In two and a half centuries, four U.S. Presidents have been impeached. The first, Andrew Johnson, in the 1860s violated several important legal principles and abused his powers. However, political factors predominated

[9] Akhill Reed Amar, *America's Constitution – A Biography*, 198-204.

[10] There are variations in different State constitutions.

and he was found not guilty.[11] The second case of impeachment of a US President was Richard Nixon in the 1970s as he was involved in criminal conspiracies. Nixon resigned when it became obvious that the case against him was overwhelming.[12] Thus the impeachment process was not tested. The third case of Bill Clinton in the 1990s commenced with allegations of sexual harassment of a staff member. Clinton aggravated the problem by falsely denying the accusations. However, the entire episode was coloured by political controversy which was intensified by the growth in the coverage of the cable news networks. Intervening elections favoured the Democrats and were taken as a public rejection of Clinton's impeachment so that the two-thirds majority for conviction in the Senate could not be obtained.[13] Thus, as the framers had feared, impeachment will tend to be a political rather than a legal process. The most recent cases of impeachment concerned Donald Trump's alleged attempts to corrupt the electoral process, overturn the presidential elections and instigate a violent attack on the Capitol building. Once again political factions prevailed. Although many prominent Republicans condemned Trump's complicity in and condoning of the attack on the Capitol, the necessary two-thirds majority could not be obtained in the Senate and he was acquitted.[14]

[11] *Impeachment – An American History by Meacham*, Naftali, Baker, Engel, 55-96.

[12] Op. cit., 97-182.

[13] Op. cit., 183-242; See also, Gregory (Tardi), *The Law of Democratic Governing Jurisprudence*, 10.7.4.

[14] *Impeachment – An American History*, 245-266.

13. As Jeffrey Engel wrote in the Conclusion of the book published in 2018 and entitled "Impeachment-An American History":[15]

> "So long as there are doubts, there is always another election. And with the important caveat that so long as there remains no doubt that the next election will occur (and its results trusted), we would all be less frustrated if we focussed on winning the next rather than litigating the last. This is truly what the study of history teaches that the past cannot be changed, merely employed to bring a better future."

14. In *The Politics of Impeachment*, edited by Margaret Tseng and written before the President Trump impeachment, the editor described the book as addressing the increased political nature of impeachment at both the national and State levels, highlighting the politics of initiating impeachment charges, the political nature of how the proceedings are conducted and the political fallout afterwards. From this account there can be no doubt that the American experience is a strong warning as to the low political levels to which impeachment proceedings are likely to descend in a politically partisan environment.

IMPEACHMENT IN COMMONWEALTH COUNTRIES

15. Some Commonwealth countries in Eastern and Southern Africa have adopted an impeachment process which is specifically related to elected Presidents who are granted immunity from criminal prosecution during their term in office. In general, this process is used specifically in relation to the

[15] Op. cit. 265.

abuse of presidential powers. This is essentially the approach taken in Kenya, Zimbabwe, Zambia, Malawi and Namibia. The experience of these countries is that the process involves national and international adverse publicity and heightened political tensions. It has also been a weapon in partisan political rivalry. The risks would be greatly increased if the impeachment process is extended to all ministers and parliamentarians.[16]

THE JAMAICAN PROPOSALS

16. There have been several proposals for the adoption of an impeachment process in Jamaica. The most notable is what may conveniently be called the Golding Model. A Bill for the introduction of impeachment in the Jamaican Constitution was first tabled in Parliament by former Prime Minister Bruce Golding. A similar Bill has more recently been tabled by Leader of the Opposition, Mark Golding. It is therefore only necessary to examine this second Bill.

17. The second Golding Bill has included in its definition of impeachable offences a wide range of vaguely described conduct which is to be treated as unbecoming of the holdesr of high public offices. The offices specifically targeted by the Bill are Senators and Members of Parliament. The penalty which it has proposed to prescribe is removal from the House of which the impeached person is a member. It provides for the disqualification of that Member for specified periods or indefinitely, but gives not right to challenge this decision if the punishment is excessive.

[16] See See Hatchard, Ndulo, Slynn*, Comparative Constitutionalism and Good Governance in the Commonwealth* (Cambridge), 81-92.

18. The Bill raises several questions relating to due process and the administration of justice. The Bill lists five categories of misconduct as falling within the impeachment jurisdiction. The first is "corruption or misappropriation of public funds or property". These are essentially criminal offences. The finding of guilt or the imposition of penalties for the commission of these offences if not conducted by the established courts is an infringement of the principle of the separation of the judicial function and the fundamental right of the accused person to due process. Secondly, such matters are subject to investigation by the police or established authorities and the control of the Director of Public Prosecutions. Thirdly, the impeachment process is not to be treated as a court proceeding so that the impeached member will remain subject to a criminal trial for the same breach if it amounts to a criminal offence. Fourthly, just as in proceedings in criminal courts, it would be necessary to have available, admissible and credible evidence. This would require the employment of investigative staff and legal counsel to prepare and present the case. Fourthly, there is no solution provided for the problem of whether the criminal process or the impeachment process should have priority or be capable of being conducted at the same time. Faced with these problems former Prime Minister Bruce Golding had suggested removing criminal offences from the definition of impeachable causes. This would mean that the process could no longer be accurately described as "impeachment".

19. The second category is described by the Bill as "refusal to exercise, or persistent neglect in the exercise of the duties or responsibilities of the office held by the Senator or the Member of Parliament impeached". This category

is manifestly vague or imprecise. The duties of parliamentarians are not precisely "defined". The Stone Report made proposals for describing those duties. Recent attempts to revive that initiative have not produced any specific definitions. It will require a political and not a legal assessment. A member could be impeached for irregular attendance at meetings of Committees of the House or at his or her constituency office or for failure to ask questions or table any private members' motion or for continuously abstaining from voting on important issues.

20. The third category is described as "abuse of official authority". Its vagueness is palpable. First, there is no definition of "official authority". It is not clear what is the nature of the "official authority" referred to nor what qualifies as abuse. The basic duty of a Member of the House of Representatives is to speak on behalf of his or her constituents in Parliament and to vote for or against bills and resolutions. Would repetitive and boring speech-making or repeatedly abstaining from voting be impeachable? On a more serious note, would the making of defamatory statements be impeachable although one of the most established principles of the parliamentary system, is the freedom of speech of members, which is only controlled by the application of the Standing Orders?

21. The fourth category of "deliberately misleading or intentionally abusing the privileges of Parliament". This appears essentially to be a duplication of the second category. The only relevant privilege a member of either House has is freedom of speech which in democratic constitutions has always been given substantial protection against any civil or criminal proceedings. The famous English constitutional provision of the 1688 Bill of Rights declared

that “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament”. Our present Constitution adopts this principle and prohibits civil or criminal proceedings against any member of either House for statements made in Parliament. It is recognised that in the cut and thrust of Parliamentary Debate a member may make a statement which on proper research is shown to be inaccurate. His or her political opponents could thus use this opportunity to institute impeachment proceedings in a scheme designed to secure that Member’s removal from the House.

22. The fifth and final category mentioned in the Bill is “egregious conduct or other misbehaviour unbefitting of the holder of the office of Senator or Member of Parliament which is so serious as to:

(i) render the holder of the office unfit to continue to hold that office; or

(2) bring the office held by the person into disrepute.

23. The vagueness of this description is disturbing. It is highly subjective. Different opinions may be genuinely arrived at. For instance, conduct which amounts to reckless driving, unlawful littering of a public place, or failure to file the statutory declaration of assets by the prescribed time may be included in this group. Politicians would find many situations in which it is feasible and politically strategic to lay this charge so as to subject their political rivals to adverse publicity and the disadvantage of having to arrange for the presentation of a defence to a charge which is indefinite and imprecise.

24. The procedure proposed for the initiation and conduct of the impeachment process also raises troubling questions. The Bill provides that the impeachment process can be initiated by an Impeachment Committee comprising any three Senators or Members of the House of Representatives acting in furtherance of a petition signed by one thousand registered electors. This provides no clear protection because members of any leading political party would have no difficulty obtaining the signatures of party activists and supporters who are not required to give any true consideration to the merits of the allegations. In addition, the verification of the signatures would present administrative challenges. The other persons named in the Bill as being granted the power to initiate an impeachment inquiry are the Director of Public Prosecutions and the Director of Elections, each of whom should not be involved in what is essentially a political process and be at risk of compromising their essential non-partisan characteristics.

25. The Bill provides that the Impeachment Committee should be responsible for conducting what is essentially a preliminary inquiry, the preparation of the Articles of Impeachment and the initiation of the trial before an Impeachment Tribunal. Accordingly, this important stage would be controlled by politicians and subject to partisan manipulation.

26. The Impeachment Tribunal itself is proposed to be appointed by a system in which the Prime Minister and Leader of the Opposition play a crucial role. It will consist of both Members of Parliament as well as non-members. The Members of Parliament appointed need not have any legal qualifications. The non-members although they must have the qualifications needed for judicial appointment may be members or sympathizers of the Government

or Opposition Party. Accordingly, the entire process is open to domination by political adversaries.

27. The third stage of sentencing as provided by the Bill is to be conducted by the House of which the indicted person is a Member, so that the ultimate penalty of censure, removal from the House and/or disqualification is to be determined by a political partisan body.

28. It is not difficult to visualise the negative impact impeachment proceedings would have on the parliamentary process and the conduct of the business of government. It would divert time and resources from the normal business of Parliament and intensify political tensions.

29. The impeachment process proposed for adoption in the Bill has not avoided the defect of being susceptible to political partisan manipulation. It is clear that the process proposed will facilitate politicians taking malicious action against their rivals. There is no doubt that it provides a mechanism for the exercise of partisan vindictiveness and harassment. The process as has been demonstrated in other countrie,s will be extremely contentious, time consuming, disruptive and inimical to good governance and the rule of law.

October 10, 2024

ANNEX V

DRAFT PREAMBLE

WE, THE PEOPLE OF JAMAICA, affirm our place as a free and self-respecting people in the global community.

WE PROUDLY ACKNOWLEDGE that our history of struggle, sacrifice, endurance, and triumph led us to become an independent democratic nation. We enjoy this heritage and hold it in trust to pass on to future generations.

WE JOYFULLY CELEBRATE our resilient spirit in the face of adversity, our outstanding achievements in different fields, and our contribution to the advancement of humanity. Wi likl bot wi talawa.

WE HUMBLY PROCLAIM OUR GRATITUDE for the beauty of our island, the abundance of our natural resources, our talents, and the strong institutions we have built.

WE WHOLEHEARTEDLY COMMIT to the protection and preservation of our culture and environment; to the principles of justice, equity, and truth; to the upholding of the rights of all, and to the enhancement of our moral, material, and spiritual well-being.

TO WHICH END WE SOLEMNLY DECLARE THIS CONSTITUTION to be the sovereign will of the people of the Republic of Jamaica.

October 7, 2024