

Our Constitution, Unfinished Business

AN ANALYSIS OF CONSTITUTIONAL REFORM IN JAMAICA



APRIL 27
2017

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Caribbean
Vulnerable
Communities
Coalition

“Our Constitution Unfinished Business” is the

product of the work of the Jamaica Civil Society Coalition (JCSC) and the Caribbean Vulnerable Communities Coalition (CVC).

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COLLABORATORS

This publication is made possible by the support of the European Union. The contents are the sole responsibility of the Jamaica Civil Society Coalition. The findings, interpretations and conclusions expressed do not necessarily reflect the views of the European Union.

2017



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Who We Are

The Jamaica Civil Society Coalition

Is a six year old non-partisan, non-discriminatory coalition of civil society groups and individuals. The Coalition was established to contribute to and foster dialogue across social sectors. It aims to build trust throughout the society, as well as a more open, transparent and broadly based political culture in Jamaica. We seek to encourage civil society participation in governance and the national decision-making process, to monitor government performance and encourage effective, accountable leadership in government and civil society.

We hold core principles of gender equality, democracy, transparency, respect for diversity and commitment to protection of the natural environment.

The Caribbean Vulnerable Communities Coalition

Caribbean Vulnerable Communities Coalition (CVC) was established in 2004 and is headquartered in Jamaica. CVC is the Caribbean's largest indigenous regional coalition of civil society organizations and community leaders responding to HIV in key populations. Its work is distinguished by its human rights-based approach. CVC has grown since 2011 into a technical organization that provides programmatic and advocacy leadership for over 40 civil society organizations.

It is a coalition of community leaders and non-governmental agencies providing services directly to and on behalf of Caribbean populations who are especially vulnerable to HIV infection or who are often forgotten in access to treatment and healthcare programmes.

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LIST OF ACRONYMS

CA	Constitutional Assembly
CAFFE	Citizens Action for Free and Fair Elections
CARICOM	Caribbean Community
CBO	Community Based Organisation
CCJ	Caribbean Court of Justice
CODESA	Convention for Democratic South Africa
CoE	Committee of Experts
CSO	Civil Society Organisation
CVC	Caribbean Vulnerable Communities Coalition
EAC	Electoral Advisory Committee
ECJ	Electoral Commission of Jamaica
IFP	Inkatha Freedom Party
IJCHR	Independent Jamaica Council of Human Rights
JCSC	Jamaica Civil Society Coalition
JET	Jamaica Environment Trust
JFLAG	Jamaica Forum for Lesbians All-Sexuals and Gays
JLP	Jamaica Labour Party
JLU	Jamaica Language Unit
KZN	KwaZulu-Natal

LIST OF ACRONYMS (cont'd)

LGBT	Lesbian, Gay, Bisexual and Transgender
MPNP	Multi Party Negotiating Process
MSM	Men who have sex with men
NGO	Non-Governmental Organisation
NIA	National Integrity Action
PM	Prime Minister
PNP	People's National Party
RM	Resident Magistrate
ROPA	Representation of the People Act
UK	United Kingdom
UKPC	United Kingdom Privy Council
UN	United Nations
UWI	University of the West Indies

PREFACE

The work of the Jamaica Civil Society Coalition and the Caribbean Vulnerable Communities Coalition has shown that many civil society organisations (CSOs) in Jamaica have limited ability to conduct the research required for policy critique and the articulation of policy positions. This observation resulted in a joint JCSC/CVC project funded by the European Union entitled the Improved Civil Society Capacity for Research-Based Advocacy Project which began in January 2016.

The focus of the project is on building civil society capacity to research, monitor and advocate on a range of issues relevant to good governance, democracy and respect for human rights.

A key undertaking of the project is research of which this report on Jamaica's Constitutional reform journey is the second output. The aim is to provide an analysis of our framework for democratic governance, to identify outstanding issues of concern, and foster informed public discussion and civil society advocacy for continuation of the constitutional reform process.

Research Method

The research examined a significant body of work previously done around Jamaican constitutional reform. This included two (2) reports of the Constitutional Commission (1993 and 1994) and three (3) reports of Joint Select Committees of Parliament (1995, 2001, 2006) established to lead the constitutional reform process. Newspaper articles written since 1970 and publications on constitutional reform in Jamaica, the Caribbean and other countries were reviewed. Interviews were conducted with twelve (12) civil society groups and stakeholders to explore the extent to which they are knowledgeable about the constitution, and its reforms and to establish their concerns with the current constitution. The experiences of constitutional reform in other countries were also considered.

EXECUTIVE SUMMARY

A central foundation in the journey of nation building is a Constitution. The Constitution is the declaration of what the society values most and how it intends for its members to live by those values. It is both a guide and an aspiration. As the Nation's ultimate and all-embracing Law, to which even Parliament and Prime Ministers must submit, the process towards its creation and the provisions enshrined are indispensable considerations.

- How has the Jamaican constitutional journey been in this regard?
- What aspirations of citizens are reflected and what is missing?

These are some of the questions that motivated this research on constitutional reform in Jamaica.

Jamaica's Constitution - For but not of the People

This analysis of the development and reform of Jamaica's Constitution shows a long, sporadic process that has had important moments of consultation and participation but with limited impact on the outcomes. Despite over four decades of reform the Constitution has remained biased towards the colonial model of governance arrangements with rights and freedoms proscribed by a 'Savings Clause' that prevents challenge to specific Laws existing up to 2011.



The Independence Constitution ~ A Missed Opportunity

On January 18, 1962, the Jamaican Houses of Parliament aided by a Drafting Committee, representing political parties and branches of the legislature produced the first draft of the Independence Constitution. The entire process of drafting, including consultations and committee deliberations lasted a short four months, from the time Jamaica voted against Federation on September 19, 1961 until the following January.

Only the tenth of twelve sittings of the Joint Committee that drafted the Constitution, heard presentations from the public.

The Jamaican people had only four weeks in which to make submissions on what they wanted in their constitution. “[L]ess than three hours after the Joint Committee commenced the opening session [on October 31] the decision was effectively taken that independent Jamaica should be a constitutional monarchy with a bicameral legislature”¹. Only the tenth of twelve sittings of the Joint Committee that drafted the constitution heard presentations from the public.

On February 1, 1962 the proposed Constitution was taken by a bipartisan delegation to London where, after substantial amendments, it was unanimously agreed to and had the signature of the British Secretary of State. The Jamaican Parliament gave its blessing near the end of February 1962.

The end product was a constitution without meaningful public consultation and debate, and which was biased toward the British Westminster model of parliamentary government.

It was a missed opportunity in the early shaping of the Nation.

**The Jamaican people had only FOUR WEEKS
in which to make submissions on what they
wanted in their Constitution.**

¹ Trevor Munroe, *The Politics of Constitutional Decolonization: Jamaica 1944-62* (Institute of Social & Economic Research, University of the West Indies, Jamaica 1972).P. 140

A LONG HAUL TOWARDS REFORM: Changing Agendas and Disjointed Approaches

In the more than four decades since the Independence Constitution of 1962 there have been two main reform periods - **the 1970s and in the 1990s up to 2015.**

The process has spanned several changes in government resulting in changing agendas and a disjointed approach to reform. Multiple Joint Select Committees of Parliament were formed during the period 1978 to 2006. The reform agenda has shifted over the years from an extensive overhaul of constitutional provisions ranging from electoral reform to a change of Head of State, to a piecemeal approach to amendment.

Important issues which were considered during the various periods include:

- ✓ The British Monarch as the Head of State;
- ✓ The Powers of the Executive;
- ✓ Bill of rights;
- ✓ Entrenchment of the system of local government;
- ✓ Oversight of elections;
- ✓ Final Appellate Court

Of the approximately 49 proposals presented by the Constitutional Commission only 17 were adopted and resulted in amendments.

Given the importance of these issues it is noteworthy that, to a large extent, there has been bipartisan support and involvement through equal representation on the Joint Select Committees and the Constitutional Commission (established in 1991).

Even in instances where there has been extensive public consultation, as was the case with the Constitutional Commission, the majority of proposals from the public were not reflected in the ultimate decisions on amendments.

Even recommendations of official bodies, such as the Constitutional Commission, seemed to have little impact on the decisions of the Parliament.

Of the approximately 49 proposals presented by the Constitutional Commission only 17 were adopted and resulted in amendments. Most but not all of the amendments that were accepted were in relation to introducing new rights and virtually none dealt with the structure of government and political process.

The Charter of Rights passed in 2011, adds other ‘socio-economic’ rights to the ‘civic’ rights of the Independence Constitution and ensures greater protection to individuals against abuse by the State. The additional rights were:

1. The right to vote and participate in free and fair elections
2. The right to a healthy and productive environment
3. The right of every child to the protection required by the status of a minor
4. The right of every child to free education from infant through primary level
5. The right to fair, humane and equal treatment from public authorities
6. The right of every citizen to be granted a passport and not to be denied or deprived thereof, except by due process of law.

However, the new Charter of Rights deviated from the recommendations of the Constitutional Commission by including a narrow savings clause. This clause prevents legal challenge to laws existing up to 2011 which deal with obscene publications, sexual offences and offences relating to the life of the unborn.²



2 The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 13(12)

Participatory Reform Processes - Experiences of other countries

We examined typical constitutional reform phases and guiding principles, as well as the constitutional reform processes adopted by other countries including such as Kenya, South Africa as well as Bolivia.

The results indicate that participatory processes with mechanisms to ensure effective public input have been undertaken with success in other jurisdictions.

The research indicates that successful, participatory reform processes require comprehensive efforts at awareness-raising and consensus-building throughout all phases - agenda setting, consultation and deliberation, adoption and implementation. However, a lengthy, drawn-out and relatively open public consultative rather than deliberative process, also has serious drawbacks. This is particularly so, if these consultations are not properly focused or integrated, or if they fail to produce a manageable, politically salient and popular series of agenda items.

Participatory Strategies

Modern constitutional reform requires the use of innovative tools to ensure more appropriate and far reaching public engagement in the process. The literature shows that these may include constituent assemblies, citizen policy forums, workshops, and other similar structures promoting citizen deliberation and involvement in parallel with official intergovernmental agenda-setting structures such as Parliamentary Committees.

Recommendations for Constitutional Reform

The recommendations that arise from the research, both from the literature review and stakeholder consultations, fall under the following two headings:

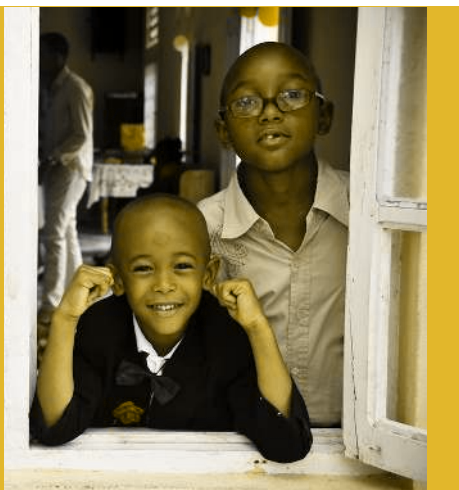
1. Future amendments to the Constitution; and
2. Procedures for future Constitutional reform.

PROPOSALS FOR FUTURE AMENDMENTS TO THE CONSTITUTION

Citizens including minority and marginalized groups must be allowed to have a meaningful and substantive role in the deliberation and shaping of the constitutional reform agenda and process. This is a fundamental prerequisite for broad-based ownership of the constitutional reform process and the new Constitution.

This protracted process of constitutional reform should finally come to a head with the thorough deliberation of proposals that have been recommended in the past. The following recommended amendments were either raised by the public during previous constitutional reform procedures or considered by the Constitutional Commission and previous Joint Select Committees:

- Repeal of the Jamaica (Constitution) Order in Council of Jamaica 1962 and enactment of The Constitution by the Jamaican Parliament.
- Re-framing the Constitution in easily understandable language.
- Expansion of the anti-discrimination rights to include among other things mental illnesses, disability, sexual orientation and/ or gender identity, language, health status.
- Other fundamental rights and freedoms (the right to health / health care, right to education up to the tertiary level).
- Executive powers (impeachment of Parliamentarians and public sector officials, party/ campaign financing provisions, , term limits for the Prime Minister).
- Entrenchment of the Electoral Commission of Jamaica and the Office of The Public Defender in the Constitution



With the passage of time and the rapid societal and intergenerational changes brought about by evolving norms and technologies, other issues should properly be identified and brought to the table. This could be achieved through a modern public survey of current concerns and issues that could form the basis for future proposals for constitutional reform.

Procedures for Future Constitutional Reform

The following recommendations relate to procedures to be adopted for future constitutional reform, to achieve adequate public consultation and input into the constitutional reform process. The recommendations are intended to ensure that the amended or new Constitution in the future captures and reflects the needs and aspirations of the populace.

1. A comprehensive constitutional reform process and programme with adequate funding including a unit or personnel assigned with specific administrative responsibility for developing educational materials, organising Commission meetings, public consultations and forums and responding to queries and concerns from the public.
2. Simple and understandable educational materials for the constitutional reform process should be prepared in English and the Jamaican language (patois) and widely disseminated.
3. Multimedia approach to constitutional education and consultation inclusive of the use of multiple forms of media e.g. television, radio, newspaper and social media. Both English and the Jamaican language should be used to reach a wide range of audiences, with provisions made for those who may not be literate and for persons with visual and hearing impairments.
4. Multiple and varied forums which facilitate wide public participation island-wide including government sponsored and non-government consultations such as public meetings, community workshops, citizen policy forums, focus groups, surveys, interactive websites and social media pages.



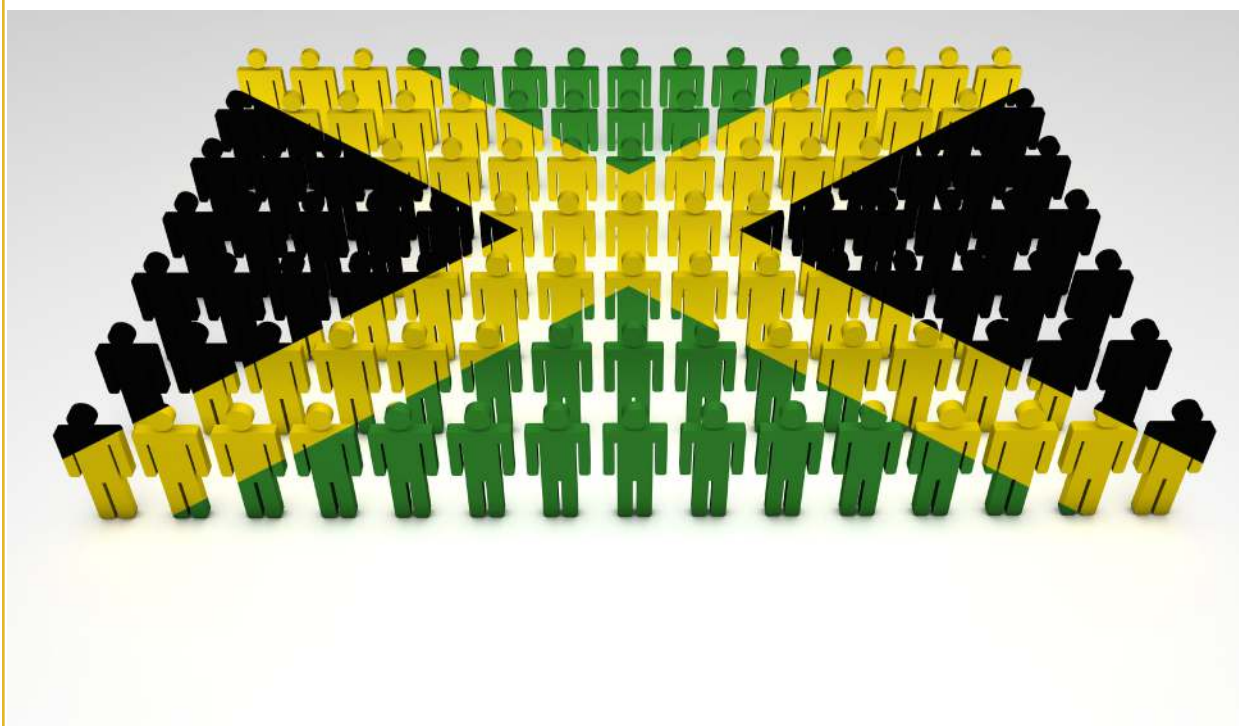
5. A modern public survey of current concerns and issues to gather input for future proposals for constitutional amendments.
6. Agreement or memorandum of understanding between the political representatives and the Constitutional Commission on the outcomes of the consultative phases to ensure public inclusivity and accountability.
7. Loosen the political party rules in legislative debates and votes on constitutional amendments to permit free conscience debate and vote by parliamentarians on the proposed constitutional reform provisions.



*Come,
Let's Finish This*

PART ONE

INDEPENDENCE CONSTITUTION AND MAJOR AMENDMENTS



CHAPTER 1

THE INDEPENDENCE CONSTITUTION, 1962 – AN EXCLUSIONARY BEGINNING

On August 6, 1962, Jamaica became its own nation, with its own Constitution. Soon thereafter would come calls for reform of that Constitution and from time to time there would be amendments.

How this Constitution was framed is where this story begins. Who were its architects, and what was the actual process in which the makers of the Constitution engaged?

Colour/Class Hierarchy

The Jamaican people were born in the cauldron of slavery. As a consequence, a large majority came to be of African descent, and very much smaller percentages of Caucasian, other ethnic or mixed origin. Given the nature of slavery, these differences were carried in the class structure of society and expressed as well in its socio-economic and political life: whites and browns held the top places in an oppressive hierarchy. Although resistance brought slavery to an end, the previous, racialized, class structures remained deeply entrenched.

Nonetheless, challenges to these structures continued. While the Morant Bay rebellion of 1865 was brutally suppressed, the black consciousness let loose in the next century through the teaching and efforts of Marcus Garvey and other black nationalists and taken up by Rastafarians, was another matter. It was very much alive in the 1930s in the thinking and energies of influential individuals and groups. In a few years it would combine with the socialist ideas originating from Karl Marx and find its way into the membership of the People's National Party (PNP).

The PNP, later joined by the Jamaica Labour Party (JLP), from the late 1930s to early 40s explicitly set Jamaica on the road to nationhood. These parties were formed in response to the rebellion of black plantation and port workers of 1938 who were seeking better wages and conditions of work. But the party leaders to whom workers pledged allegiance were professionals of the brown middle class whose thinking and practice were dominated by a deep respect for British cultural and political ways.

PNP and JLP party organizing combined with the impact of World War II to force on Britain the task of “preparing” (its word) Jamaica, along with other colonies, for independence. From the general elections of 1944, the first in which every adult could vote, the JLP and PNP emerged with control of the country’s internal affairs. The period between 1944 and 1958 saw, among other things, preparation for the creation of a West Indies Federation, formed in January 1958.

Then in 1960 Opposition leader Alexander Bustamante, suddenly declared withdrawal of his party’s support for Jamaica to be part of the West Indies Federation, which declaration was backed by the JLP in due course. Premier Norman Manley’s instant individual response, which Cabinet afterwards endorsed, was to call a referendum to settle whether Federation or no. The loss suffered by the PNP in that referendum of September 19, 1961 meant Jamaica would become an independent state and put an Independence Constitution squarely on the drawing board.



The Making of the Independence Constitution - A Four-Month, Exclusive Procedure

The outcome of the September referendum led to a series of rapidly taken steps. First, the approval of the British Government was sought and, to obtain it, Manley and a delegation travelled immediately to London. Approval was given and by mid-October 1961, on a resolution in the House of Representatives tabled by Manley, a Joint Committee was appointed from both Houses of the Legislature to prepare the draft Constitution. By January 11, 1962, this work was completed and by January 18 1962, a short four months after the referendum, the draft Constitution was approved by both Houses. On February 1, 1962 the proposed Constitution was taken by a bipartisan delegation back to London where, after substantial amendments, it was unanimously agreed to and had the signature of the British Secretary of State. The Jamaican Parliament gave its blessing near the end of February 1962.

As the process described above indicates, the steps that led to the Independence Constitution for Jamaica were taken without sufficient time for meaningful public consultation and debate. In the explicitly stated interest of concluding the process speedily, the press and the public were excluded from Committee deliberations. The public was given only thirty days to submit written comments on the draft Constitution. Manley, who chaired the proceedings, had to be persuaded (by members of his own party as well as of the Opposition) to extend the time for such submissions from two weeks.

The 79 memoranda submitted by individuals and organizations were given very little attention. Audience was given to the public in only the tenth of the Committee's 12 sessions. By that time, the Attorney General had already been instructed to prepare the draft of the Constitution that would be taken to London .

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Recommendations from public submissions

Several submissions that were rejected favoured extending the time to be spent to frame the Constitution. One of these put forward the precedent set by India which was to have Britain permit a Constituent Assembly to take the framing of the Constitution to the Jamaican people over a longer period after first electing a Parliament. This in effect would have had Jamaica's own Parliament authorising its Constitution and Independence rather than having it granted by the British Parliament as an Imperial Order under the legislation of the United Kingdom.

Other submissions objected to having a British monarch as Jamaica's head of state. Others would have limited the power granted to the Prime Minister - described by the PNP's then first vice-president, Wills O. Isaacs, during the Joint Committee's

3 T. Robinson, A. Bulkan, A. Saunders, *Fundamentals of Caribbean Constitutional Law*, (Sweet & Maxwell, London, 2015), p. 60

4 Trevor Munroe, *The Politics of Constitutional Decolonization: Jamaica 1944-62* (Institute of Social & Economic Research, University of the West Indies, Jamaica 1972).P. 140

deliberations as the “dictator for five years”.

Some submissions were, of course, accepted. One such proposed the entrenchment of a Bill of Rights. It was urged especially by Henry Fowler on behalf of the Jamaica Union of Teachers. Another submission which was accepted after initial rebuff, came from the Law Society, represented by L. E. Ashenheim, called for the entrenchment of property rights, on the ground that foreign investors would otherwise be turned away.

The Colonial Product

“[L]ess than three hours after the Joint Committee commenced the opening session [on October 31] the decision was effectively taken that independent Jamaica should be a constitutional monarchy with a bicameral legislature”.⁵ It was Manley who insisted on this set of “fundamentals” before proceeding further.

The Constitution that was finally approved carried forward the country’s existing political structure and practice (See Appendix 1) which, while ensuring stability, was biased toward the British Westminster model of parliamentary government. Norman Manley, who guided the constitution building process, made no secret of his admiration for the Westminster model. The British monarchy as the head of state and the UK-based Judicial Committee of the Privy Council as the final appellate court⁶ were retained and deeply entrenched. (For degrees of entrenchment and procedure for amending, see *Appendix 2*.)

Hansard (1961-62, p 719) has Manley saying in the debate on the Independence Constitution Report on January 23rd, 1962: “We...are familiar with this... system of parliamentary government which, over the centuries, has been evolved by the British people, who certainly have displayed the most unique genius of any people in history for devising a form of government acceptable to people. And I make no apology for the fact that we did not attempt to embark upon any original or any novel exercise for constitution building.

5 Trevor Munroe, *The Politics of Constitutional Decolonization: Jamaica 1944-62* (Institute of Social & Economic Research, University of the West Indies, Jamaica 1972), p. 140

6 Simeon C.R. McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity*, The Caribbean Law Publishing Company, (Kingston) 2002, p. 18-19.

We had a system, which we understood; we had been operating it for many years - with sense... It is a system which is consistent with the sort of ideals we have in this country, and it was not difficult to decide that we would follow that familiar system with those modifications we thought the circumstances of independence deserved.”

Thus the Jamaican Independence Constitution “*bore the imprint of the Colonial office*”.⁷

Absent from the Constitution making was any recognition in practice that the brown middle class conversation was not the only one in Jamaica. Absent was an appreciation that the excluded mass of the population must have had something worthwhile to say, reflective of their values and views, on how the Jamaican government should run and society should live.

7 Robinson et al, p. 61

CHAPTER 2

THE NEXT 38 YEARS 1977 – 2016: A SPORADIC, BUT MORE PARTICIPATORY ERA OF REFORM

CONSTITUTIONAL REFORM IN JAMAICA

.....
1978 - 2016

TIMELINE

1978

November 21, 1978, the House of Representatives passed a Resolution recommending the establishment of a Joint Select Committee Constitutional and Electoral Reform

1979

Enactment of Representation of the People (Interim Electoral Reform) Act of 1979 establishing the Electoral Advisory Committee

1991 - 1993

1991 Joint Select Committee on Constitutional Reform formed

1992 Constitutional Commission
14 town hall meetings
129 public submissions

1993 Constitutional Commission Report

1993 General election
New Joint Select Committee formed
Constitutional Commission reconstituted

1994 - 1999

1994 Final Report Constitutional Commission

32 written submissions
19 oral presentations to Parliament
1995 Report of Joint Select Committee of Parliament

1995 Local Government Reform Committee

1997 General election
1999 Bill on Charter of Rights

2001 - 2009

Written and oral submissions received 1999 - 2001

2001 Report of Joint Select Committee of Parliament

2003 General election

2006 Report of Joint Select Committee of Parliament

2009 Bill on Charter of Rights redrafted

2011 - 2016

2011 General elections

2011 Joint Select Committee of Parliament reconstituted

2011 new Charter of Rights enacted

2015- 2016 local government reform legislation passed system enshrined in Constitution



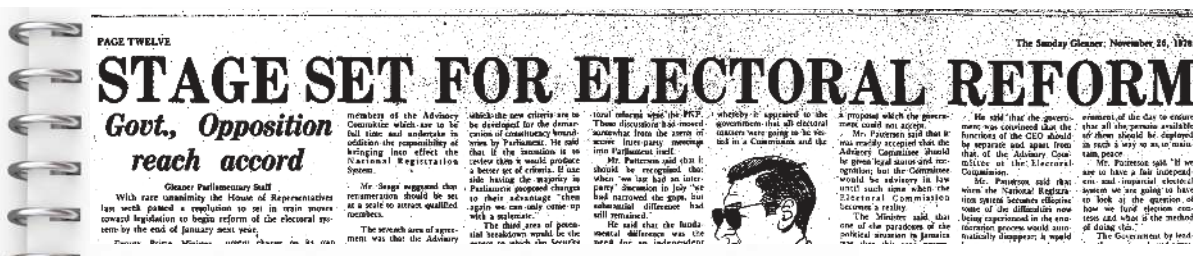
The first calls for reform of the Jamaican Constitution came in 1977, only 15 years after Independence. The focus was on political reform. The calls were for the Constitution to include some mechanism or method for the non-partisan handling of

elections. Subsequent Parliamentary discussions led to the creation of an Electoral Advisory Committee, and later the Electoral Commission of Jamaica. Although both mechanisms have had an extremely important function over the years, no constitutional amendment has to date been made to ensure Constitutional protection for the electoral mechanism.

The story begins after the Jamaica Labour Party (JLP) lost the 1976 General Election to the People's National Party (PNP). The JLP documented allegations of electoral malpractice and tabled a report in Parliament. Both parties recognized the need for electoral reform. One of the main concerns was the impartiality of the Electoral Office of Jamaica, which was then a department under the control of a ministry of government.

The intention at the time was to establish the Electoral Commission as an independent oversight body that would eventually be enshrined in the Constitution. To this end a Constitution reform plan was drafted:

- to carry out widespread and objective educational programmes on the Constitution and constitutional matters, and
- to provide the opportunity for island-wide democratic, systematic national expression of views on the content of the Constitution by the organisation of discussions and meetings at community and other levels.



What actually happened, however, was that, after spending approximately \$369,600 from January 1977 to June 1978, the plan was abandoned - due, it was stated, to financial constraints and a burdened economy. There was, however, one enduring achievement: legislation was enacted that would have huge impact on elections and electoral reform.

Acting on the recommendation of a Joint Select Parliamentary Committee, the House passed the Representation of the People (Interim Electoral Reform) Act of 1979, which established an Electoral Advisory Committee (EAC) to oversee the election process⁸. The Act expressly provides that it shall “continue in force until provision is made in the Constitution of Jamaica for the establishment of an Electoral Commission”.⁹

The issue of enshrining the EAC in the Constitution was again raised in 2003 after the Local Government Election. The EAC held consultations over the course of three days with civil society organisations including Citizens Actions for Free and Fair Elections (CAFFE) and with the political parties, on ways to improve the electoral system. The recommendations following the consultations included, inter alia, amending the constitution to allow for the establishment of an Electoral Commission and its inclusion in the Constitution.

The Electoral Commission of Jamaica (ECJ) was finally established not by Constitutional amendment but by the Electoral Commission (Interim Act) of 2006. The Act provided that this would be an interim measure pending the incorporation of the ECJ in the Constitution. Up to the present, this has not occurred.

Education and Consultation - Important Features of the 1970s Reform Period

Although aborted, the process toward reform of the Jamaican Constitution was initially characterised by public education about the Constitution and widespread consultation with citizens and their organizations. At considerable cost, a raft of educational materials was developed (see below) and thousands of copies of the Constitution distributed.

8 The Representation of the People (Interim Electoral Reform) Act of 1979, s. 4

9 Ibid, s. 3

Table 1: Educational Materials developed in 1970s

Educational Materials
Electoral Systems, April 1977
Paper on Constitutional Implications of Reconciliation paper, April 1977
Basic Facts (original), April/May/June. '77
What is a Constitution? What it should contain? What is the significance of a Constitution? How constitutions have developed
Paper on Field-Services, June '77
Introduction to Constitutions. June/July '77
History of Constitutional Development June/July '77
What is a Republic July/August '77
How does the Constitution affect our Daily Lives (original); July/August '77

CHAPTER 3

1992 – 2011:

THE CONSTITUTIONAL COMMISSION & THE BILL OF RIGHTS

Following the efforts of the 1970s it was more than a decade later in 1991 that a more substantive effort for reform began with the formation of a Joint Select Committee on Constitutional Reform. On the recommendation of this Committee, Parliament established, in February 1992, a Constitutional Commission to examine proposals and recommendations from the public.

As happened in the 1970s, the Commission was required to:

- ☑ widen public knowledge and appreciation of the Constitution;
- ☑ mobilize public interest and
- ☑ submit recommendations to the Joint Select Committee, which in turn would report to Parliament.

The Commission had a large composition of 39 members - 16 from the two main parties and another 23 from a wide array of civil society (women, youth), private sector, trade union, professional (law, teaching, academic, farming, press) and church organizations.¹⁰ (The appointed members from these organizations are listed in Appendix 3.)

This second period for constitutional reform culminated two decades later, in 2011, with the inclusion in the Constitution of a Charter of Fundamental Rights and Freedoms. Although the process was a considerable improvement on the previous period, the process suffered for reasons to do with the electoral cycle and the absence of a determined will to achieve a constitutional amendment within that four-to-five-year time frame.

10 Report of The Constitutional Commission, September 1993 p. 6

Deeper Public Consultation

In keeping with its terms of reference, the Constitutional Commission conducted a public education campaign to increase awareness of the Constitution and of the process for constitutional reform, and to ensure public involvement in a dialogue. During the first period of the Commission's work, the following were achieved:

- ☑ Thirty-six (36) member meetings were held
- ☑ There were 14 public education forums across all parish capitals
- ☑ One thousand booklets on the Jamaican Constitution, "Some Basic Facts and Questions" authored by Commission member Dr. Lloyd Barnett, were distributed at the public forums.
- ☑ Through the High Commissioner in London invitations for submissions were sent to the diaspora, for whom, however, the lack of funding prevented holding public forums.¹¹

Attendance at the public meetings was not overwhelming, the Commission noted in its 1993 Report, but it was useful for the reasons that most of those who attended were community leaders and others vocal in their communities. Half of the forums had radio coverage by mainstream media-houses, which brought increased public awareness and proposals.¹²

The Commission did not, however, report specific numbers of persons who attended the public forums, or information on the oral submissions received at them. Its Report does not clearly indicate which of its recommendation emanated from or received public support. To what extent they reflect the views of the public is therefore uncertain.

Written Submissions

The public outreach efforts of the Commission garnered written submissions from 129 individuals and organisations as well as two proposals - from Professor Edward

11 Ibid., p 10

12 Report of The Constitutional Commission, September 1993 p. 10- 11

Baugh and the Hon. Sir Phillip Sherlock - for the Preamble to the Constitution. These latter had been invited from the public in an effort to address criticism of the too technical, legal language being used.

The 129 submissions from the public were far greater than those that came in response to newspaper invitations later. Additional public submissions and appearances before the Joint Select Committee were invited in 1994. 32 written submissions were received and over the course of seven meetings 19 oral presentations were heard from individuals and organizations.

The momentum stalled after 1994 and it was not until March 31, 1999, the middle of the third electoral cycle, that a Bill entitled “An Act to Amend the Constitution of Jamaica to provide for a Charter of Rights and for connected matters” was tabled in Parliament. This was followed by another call for submissions, made by advertisement in the daily newspaper. Written submissions and, in several cases, oral presentations were received between 1999 to 2001 from, among others, the following organisations and individuals:

- Coalition for Community Participation in Governance
- Professor H. Devonish, University of the West Indies
- Jamaica Forum for Lesbians All-Sexuals and Gays
- Senator Floyd Morris
- Westmoreland Parish Council
- Ethiopia Africa Black International Congress Church of Salvation
- Jamaicans for Justice.¹³

The slow march forward continued. The Joint Select Committee reviewed the Bill and tabled a report in Parliament on December 11, 2001. But the Parliamentary debate on this report was not concluded before the 2003 election. Similarly in 2003, a Joint Select Committee of Parliament was appointed but it was not until July 25, 2006 that it presented its Report and the process was stalled again in 2007 by general

13 Report of The Joint Select Committee on its Deliberations on The Bill Entitled An Act To Amend The Constitution of Jamaica to provide for a Charter of Rights and for Connected Matters (2001), p. 2-3

elections. Finally in 2009, the new Bill on the Charter of Rights was opened to public comments and passed in 2011 without extensive island-wide public meetings or a public education campaign.

The nature of the process accounted for its length. The Constitutional Commission made recommendations to a Joint Select Committee, which in turn reported its analysis of them to Parliament. However, no Commission, Joint Committee or Parliament completed their tasks within the time frame of an electoral cycle. This was due to factors such as:

- the slow pace of Parliament, meeting only once a week
- requests from Commissions for additional time, which could not be denied
- national elections (1993, 1997, 2003 and 2007) bringing new members to Parliament, to Joint Select Committees and to the Commission
- delays in appointments to the latter bodies: although the first Commission was confirmed to be the same after the 1993 election, its appointment was delayed till eight months after the election.
- new rounds of newspaper advertisements and public forums but delays in education activities because of insufficiency of funding
- Parliament's disagreements with the reports of the Joint Committee or with the recommendations made by the Commission, which had to be ironed out.

The Rights

This brings us to the outcome of these efforts. The rights and freedoms in the bill of rights of the 1962 Independence Constitution were consistent with those in the Universal Declaration of Human Rights of the United Nations and the European Convention on Human Rights. They were the basic rights of freedom of conscience, expression, movement, association and assembly, religion, freedom from arbitrary detention and inhumane treatment and from discrimination on the ground of race; the rights to life, privacy, property and due process of law.

The criticism of that bill was its narrow range of rights and that the protection of rights and freedoms granted by the Constitution were “greatly weakened by the provision that a pre-Independence, and therefore colonial law, which infringes the fundamental rights and freedoms, must nevertheless be upheld by the Courts because it existed before the Constitution came into effect” (Barnett, p 7).

The recommendations of the Constitutional Commission and Joint Select Committees finally approved by Parliament began by setting out:

- the obligation of the state to promote respect for and observance of human rights and freedoms,
- citizens’ entitlement to rights by virtue of their inherent dignity and
- citizens’ responsibility to respect and uphold the rights of others.

The Charter adds to the ‘civic’ rights of the Independence Constitution other ‘socio-economic’ rights and ensures greater protection to individuals against abuse by the State:

1. The right to vote and participate in free and fair elections
2. The right to a healthy and productive environment
3. The right of every child to the protection required by the status of a minor
4. The right of every child to free education from infant through primary level
5. The right to fair, humane and equal treatment from public authorities
6. The right of every citizen to be granted a passport and not to be denied or deprived thereof, except by due process of law.

Other changes implemented included:

- providing protection of these rights against abuse by private persons and organizations; and
- making it easier for persons to access the court to protect and preserve their rights and freedoms.

However, the new Charter of Rights deviated from the recommendations of the Constitutional Commission by including a narrow savings clause. This clause prevents legal challenge to laws existing up to 2011 which deal with obscene publications, sexual

offences and offences relating to the life of the unborn. The new Charter also explicitly prevents the passage of legislation that would recognize same sex relationships in the context of marriage.¹⁴

Of those not implemented, several issues which were considered by the Commission and which deserve to be considered in future constitutional amendments include:

- freedom from discrimination on grounds of sexual orientation,
- the status of the Maroons
- the rights of the Rastafari, and
- discrimination based on language (Appendix 5).

14. The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 13(12) and (18)

CHAPTER 4

1995 – 2015:

LOCAL GOVERNMENT IN CONSTITUTIONAL REFORM

The Independence Constitution had entirely left out Local Government and its processes. This was a huge omission, which may have been the result of the speed with which Norman Manley led the drafting of the Constitution. In 1995 Cabinet approved the setting up of a Local Government Reform Committee under the Ministry of Local Government. It was charged with reviewing the Ministry's policy paper on local government reform with a view to coming up with recommendations.

Like the Constitutional Commission but operating separately, the 1995 Local Government Reform Committee also held island-wide consultations. These were with Parish Development Committees. This was to help obtain the buy-in of communities into the reform proposals as well as, for the longer term and more profoundly, to get community input into the local government process.

Through a National Advisory Council, the Local Government Reform Committee made submissions in 1996 to the Constitutional Commission. There was an on-going engagement after 1996 looking at the issue of local government reform and the necessary corresponding legislation. It was two decades before any legislation was passed. In 2015/2016 Parliament passed the following:

- The Constitution (Amendment) (Local Government) Act 2015 - this Act enshrined the system of Local Government in the Constitution
- Local Governance Act - This Act defined the scope of the local government framework and its mandate.
- Local Government (Finance and Management) Act - This Act dealt with the management of finances of local government.
- Local Government (Unified Services and Employment) Act - This Act provided the terms of employment for people who did not fall under the remit of the Public Service Commission.

It is noteworthy that there were 20 recommendations of the Constitutional Commission dealing with government and the political process. To date, only those dealing with Local Government have had the recommended amendment to the Constitution.

Table 2: Recommendations of the Constitutional Commission on provisions relating to the government and political process

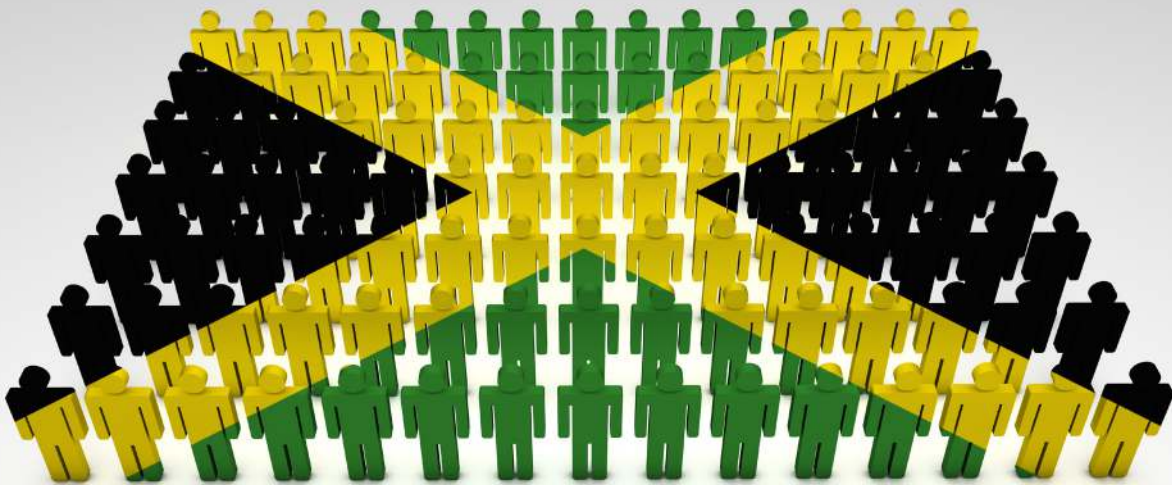
SUBJECT MATTER	RECOMMENDATIONS OF THE CONSTITUTIONAL COMMISSION
Chapter IV - Head of State and incidental matters	Rescission of the UK's Jamaica (Constitution) Order in Council, 1962 and enactment of the Constitution by Jamaican Parliament
Change from monarchial to republican government	Replacing the Queen as Head of State with a President appointed by the Prime Minister in consultation with the Leader of the Opposition and confirmed by 2/3rd majority of both Houses of Parliament Term of office of 6 years and limited to two terms
	Insertion of a general preamble at the beginning of the Constitution.
Chapter V - Parliament	The number of Parliamentarians in both Houses who hold executive office should not exceed 33 1/3 % of the total number of Parliamentarians.
General elections	The Prime Minister should not be able to exercise his power to call for an election unless there is a list of registered voters which has not been completed for more than 6 months prior to the calling of elections.
Impeachment proceedings	Include provisions for the institution, conduct and sanctions in impeachment proceedings which should be subject to judicial review.
Right to vote	There should be a right to vote entrenched in the Constitution
	There should not be a residential requirement for eligibility to be elected as a member of either House of Parliament.
Electoral Commission	An Electoral Commission should be entrenched in the Constitution with provisions on appointment of members, tenure of office and powers as an independent and impartial body including those exercised by the Boundaries Commission under section 67 of the Constitution

<p>Chapter VI - The Attorney General</p>	<p>Legislative provisions be enacted to confer on public-spirited bodies a locus standi to bring representative action to seek declaratory judgement and other remedies in certain public wrong cases.</p> <p>The post of Advocate-General be established in the Constitution to institute and undertake proceedings on behalf of the public for public wrongs.</p>
<p>Director of Public Prosecutions</p>	<p>There should be an express provision that the decisions of the Director of Prosecutions should be subject to judicial review.</p>
<p>Leader of the Opposition</p>	<p>There should be provisions for the appointment or re-appointment of the Leader of the Opposition similar to the Prime Minister with prescribed appropriate Oaths.</p>
<p>Privy Council</p>	<p>The name “Privy Council” should be changed to “President’s Council” and consist of 8 members appointed by the President in consultation with the Prime Minister. Six of the members should be from professional, philanthropic, economic and other social organizations.</p>
<p>Chapter VII - The Judicature</p>	<p>The Bar Council of the Jamaican Bar Association should be consulted by the Governor General in the appointment of the Chief Justice and the President of the Court of Appeal.</p>
<p>Judicial Services Commission</p>	<p>The members of the Judicial Service Commission should be increased by two members appointed by the President after consultation with the Prime Minister and Leader of the Opposition.</p>
<p>Public Service Commission</p>	<p>The list of members of the Public Service Commission should include persons from professional, philanthropic, economic and social groups.</p>
<p>Police Service Commission</p>	<p>The members of the Police Service Commission should be appointed by the President after consultation with the Prime Minister and Leader of the Opposition from a panel of persons named by the President from professional, philanthropic, religious and other organizations. The number of members be increased from five to seven and should include one nominee from a panel of three submitted by the Police Federation who should not be a serving member in any of the Security Forces.</p>
<p>Local Government</p>	<p>The system of local government should be established in the Constitution but its powers and duties should be defined by statute.</p>

The Contractor General	The post of Contractor General should be established by the Constitution with provisions to ensure independence and impartiality.
The Ombudsman	The post of Ombudsman should be entrenched in the Constitution and he should be given his own budget
Treaties	Ratification of treaties should be mandatory.
Amendment procedure	Where a referendum is required, if both Houses agree, a simple majority of electors will be sufficient unless there is rejection by the Senate in which case a 2/3rd majority of electors voting is necessary.

PART TWO

OUTSTANDING CONSTITUTIONAL ISSUES IN A GLOBAL CONTEXT OF DEMOCRATIC CITIZENSHIP



CHAPTER 5

OUTSTANDING CONSTITUTIONAL ISSUES

The constitutional reform processes from 1978 to 2015 saw various stakeholders making submissions and recommendations which were either not accepted in part or in whole. This Chapter examines outstanding issues for constitutional reform identified by stakeholders. These issues should be viewed in the modern, global context of democratic citizenship, progressive constitutional reform, and the cross-cutting norms of human rights (rule of law, equality, participation, etc.).

Major reform themes have related to

7. The Charter of Rights
8. The Local Government System
9. The British monarch as the Head of State
10. The Powers of the Executive
11. Entrenchment of the Electoral Commission
12. The Final Appellate Court

RIGHTS REFORMS

Over the course of the constitutional journey the scope of rights accorded have expanded. A criticism of the Bill of Rights of the 1962 Independence Constitution was that the rights and freedoms were limited and qualified with exceptions to protect the interests of the State. The Constitutional Commission and 1995 Joint Select Committee recommended adding additional rights. They also recommended including a new Chapter III where, consistent with the modern Bill of Rights form, the rights are stated positively without specific exceptions. This was to ensure greater protection to individuals against abuse by the State.

They recommended the following additional rights:

1. The right to vote and participate in free and fair elections
2. The right to a healthy and productive environment
3. The right of every child to the protection required by the status of a minor
4. The right of every child to free education throughout the primary level
5. The right to fair, humane and equal treatment from public authorities
6. The right of every citizen to be granted a passport and not to be denied or deprived thereof, except by due process of law

Other recommended changes included providing protection of these rights against abuse by private persons and organisations and making it easier for persons to access the court to protect and preserve their rights and freedoms.

Tension over the extent of rights to be accorded to the citizens of Jamaica have persisted. Critics of the Bill and the process noted that the Bill eventually tabled in 2011 included provisions far from the contemplation of the Constitutional Commission including “new draconian devices limiting the scope of judicial review for breaches of fundamental rights”.¹⁵ It should also be borne in mind that the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 utilized a savings clause in certain instances to restrict the application of new constitutional interpretations which would challenge pre-constitutional reform provisions.

These include savings clauses in relation to

- the torture, cruel and inhuman or degrading treatment (s. 13(7));
- the death penalty (s. 13(8));
- freedom of movement in times of public emergency or disaster (s. 13(9));
- right to liberty/freedom of the person (s. 14).

15 T. Robinson, A. Bulkan, A. Saunders, *Fundamentals of Caribbean Constitutional Law*, (Sweet & Maxwell, London, 2015), para 10-004

Outstanding Rights

Several stakeholders proposed including additional anti-discrimination rights in the Constitution such as the right not to be discriminated against based on:

- Disability including the mental illness;
- Sexual orientation and gender identity;
- Health status (e.g. HIV /AIDs status affecting work); and
- Language

Jamaica is not unique or isolated in contemplating such rights for they are the subject of global conversation and in some cases have been codified in UN Conventions to which Jamaica is a signatory.

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Disabled persons including the mentally ill

The issue of discrimination against the disabled and mentally ill was not addressed in the new Charter of rights although such rights are internationally recognized. The 2007 Convention on the Rights of Persons with Disabilities promotes respect for difference and acceptance of persons with disabilities. Persons with disabilities are guaranteed equal and effective legal protection against discrimination on all grounds by States, which are required to adopt all appropriate legislative, administrative and other measures for the implementation of the Convention rights. These include legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. In that regard, it is noteworthy that in 2014 Jamaica enacted the *Disabilities Act*.

Sexual orientation and gender identity

Discrimination based on sexual orientation and gender identity was not included among those rights incorporated in the new Charter of Rights. These too are internationally recognised rights. Anti-discrimination based on 'male or female' was the language included in the Charter of Rights, instead of anti-discrimination based on 'sex'. This was a deliberate strategy of the Parliament to exclude any possibility of constitutional

challenge on the to the provisions of the Offences Against the Persons Act (or other Acts) on the grounds of discrimination based on ‘sex’.... The International Covenant on Civil and Political Rights (1966) (art. 2 and 26) promotes non-discrimination based on sex which has been interpreted to include sexual orientation.¹⁶ The Committee on Economic, Social and Cultural Rights declared that discrimination based on “status” under The International Covenant on Economic, Social and Cultural Rights (art. 2 (2)) may include sexual orientation.

Health status (e.g. HIV /AIDs status affecting work)

The right to health and not to be discriminated against based on health status, although recognized in international law as a human right and as part of the right to an adequate standard of living¹⁷, was not incorporated in the Charter of Rights. ‘Status’, which is interpreted to include health status (e.g. HIV/AIDS) is a ground for discrimination under The International Covenant on Economic, Social and Cultural Rights (art. 2 (2)).¹⁸ The United Nations General Assembly’s Declaration of Commitment on HIV/AIDS calls on States to address the global HIV/AIDS pandemic by setting deadlines for the introduction of national legislation and other measures to ensure that the rights of those affected are respected in relation to their education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection.

Language

The right not to be discriminated against based on language although extensively proposed was not incorporated in the Charter of Rights. Discrimination based on language is also recognized in international law under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights to which Jamaica is a party. The Committee on Economic, Cultural and Social Rights declared that “Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment

16 Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

17 The 1948 Universal Declaration of Human Right, art. 25; 1966 International Covenant on Economic, Social and Cultural Rights, art. 2(2), 12

18 ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’, Report of the United Nations High Commissioner for Human Rights, UN GA A/HRC/19/41

of many of the Convention rights, including the right to participate in cultural life as guaranteed by Article 15 of the Convention. Therefore, information about public services and goods, for example, should be available, as far as possible, also in languages spoken by minorities and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria”.¹⁹

In 2005, the JLU conducted a nationwide survey and found that 75% of the population supported Jamaican Patwa being an official language and 80% felt that it is a language.²⁰ The JLU sent an Interim Report to the Joint Select Committee in February 2006 along with other organisations including the Jamaican Bar Association, the Brethren Christian Fellowship, Mr. Gordon Robinson - Attorney-at-Law and the National Aids Committee. Perhaps due in part to the limited number of submissions received during this round of consultations, the 2006 Report of the Joint Select Committee referenced and considered extensively the concerns of those who had made submissions at length with responses provided for each submission. Despite all this work, the Charter was passed without allowing the JLU to make its final oral submission.

Right to life in terms of death penalty

Jamaica is a party to several human rights treaties and instruments including the International Covenant on Civil and Political Rights (Article 6) in which they commit to respect the right to life. Notwithstanding this, The Charter of Rights not only retains the death penalty but further it provides that circumstances such as delays and conditions of imprisonment have no bearing on the right to protection from being subjected to torture or inhuman or degrading punishment or other treatment.²¹ Several stakeholders including the Independent Jamaica Council for Human Rights and Jamaicans for Justice expressed great concern about the inclusion of this provision.

19 Committee on Economic, Social and Cultural Rights Forty-second session Geneva, 4-22 May 2009, E/C.12/GC/20 10 June 2009

20 The Language Attitude Survey of Jamaica: Data Analysis (November 2005), The Jamaican Language Unit Department of Language, Linguistics & Philosophy, Faculty of Humanities & Education, University of the West Indies, Mona Available at <https://www.mona.uwi.edu/dllp/jlu/projects/Report%20for%20Language%20Attitude%20Survey%20of%20Jamaica.pdf>

21 The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 s 13(8)

Rights of Maroons and Rastafari

Several issues which were considered by the Commission and deserve to be considered in future proposals for constitutional amendments include the status of the Maroons and the rights of Rastafari. When raised previously (in the 1960s and early 2000s in relation to the Maroons and in the 1970s and 1990s in relation to Rastafari) those issues were considered as novel, but over the length of time international law (notably the 2007 United Nations Declaration on the Rights of Indigenous Peoples) and national law have evolved. For example, the Maroons of Suriname have been recognised by the Inter-American Commission and the Inter-American Court of Human Rights as being entitled to the rights of Indigenous Peoples, and recent amendments to the Dangerous Drugs Act recognise the rights of Rastafari individuals and collectives under the Dangerous Drugs (Amendment) Act 2015.

Recent Inter-American human rights jurisprudence and related Commonwealth Caribbean jurisprudence from Belize (per the appellate jurisdiction of the CCJ) regarding the Maya in Belize have also contributed to contemporary juridical recognition of the rights of the Indigenous Peoples and Minorities of the Caribbean.²² These developments recognise the right of such communities to protection of their traditional lands, territories and resources, including sacred spaces and traditional knowledge.

Certainly, in fulfilling the objective of fashioning the Constitution of Jamaica to meet the needs and aspirations of the Jamaican public, the recognition and protection of the special status and rights of both communities in Jamaica is eminently justified and long overdue.

22 The Constitution of Belize, as amended in 2008, provides for the recognition and protection of the Indigenous Peoples of Belize. The Revised Treaty of Chaguaramas and the CARICOM Charter of Civil Society oblige CARICOM member states to protect the historical culture and way of life of Indigenous Peoples.

POLITICAL REFORMS

Local Government Reform

Concerns over the management of Local Government were raised by the public during consultations held by the Constitutional Commission. These concerns stemmed from instances where Government had suspended Parish Councils elected by popular vote, and entrusted the running of the parish to Commissioners selected by the Government. The Report of the Constitutional Commission recommended entrenching the system of local government in the Constitution.

Both the Commission and the 1995 Joint Select Committee recommended that while the system should be entrenched, its powers and duties should be spelt out in legislation. Legislation to enshrine the system of local government in the Constitution, and to regulate the management of finances within local government, was eventually passed.

The complete vision of financial independence was not achieved by the legislation. Instead of giving Local Government complete financial independence, the legislation provided that it would be Parliament which would make provision for local authorities to generate and spend their own revenue. The view at the time was that Parliament could not do more since this would necessitate changing some specially entrenched provisions and consequently require a referendum. It was anticipated that more comprehensive reforms would be implemented in future constitutional reform. Outstanding matters in relation to Local Government reform are outlined below.

Democratic decentralization

A devolution of tasks from Central Government to Local Government is increasingly being promoted in the Commonwealth Caribbean and worldwide.²³ Local government institutions are the closest to the needs of the people and a direct provider for many essential services including public health, sanitation and waste management, and infrastructure (building approval, maintenance of drains, parochial roads and street

23 D Schoburgh, E. and B. Ragoonath (2013), "Democratic Decentralisation in the Commonwealth Caribbean", in *New Century Local Government: Commonwealth Perspectives*, Commonwealth Secretariat, London, p. 18

lights). Decentralization is said to promote a higher level of responsiveness to citizens' needs, improved efficiency and effectiveness in service delivery.²⁴

A fixed date for Local Government elections

Stakeholders proposed a fixed date for Local Government elections. In Jamaica local government elections can be called at any time. The date does not have to coincide with the date for general elections.

The Commonwealth Local Government Forum in a 2016 declaration stated: “democracy and free election of local representatives is fundamental to democracy and a powerful force for promoting understanding, social cohesion and community-driven development”.²⁵

A fixed date for local government elections would allow for a smoother election process and increase the likelihood of greater voter turnout. This would advance the principle of community participation and local democracy.

The British Monarch as the Head of State

Notwithstanding public support and proposals from the Constitutional Commission to replace the British Monarch as the Head of State with a local representative, this has yet to be done.

The drafters of the Independence Constitution chose to retain the British monarchy as the head of government. The monarchy is entrenched in sections 34 and 68 of the Constitution. These sections provide that Her Majesty is part of the Parliament of Jamaica and vest the executive authority of Jamaica in Her Majesty, which authority is exercised through her representative, the Governor General. These provisions can only be changed by referendum and a two-thirds majority vote in Senate and by the electorate.

24 Ibid., p. 19

25 Commonwealth Local Government Forum, London Affirmation On Global Cooperation And Local Democracy, 11-12 July 2016

In the 1961 Report of the Committees of the Legislature to Prepare Proposals for a Constitution to take Effect on Independence, the Committee noted that they received many proposals from the public that Jamaica should become a Republic. The Committee dismissed this view stating their preference for a monarchy and said “Nationhood as a reality is not affected in any way by the choice” and “in substance there does not appear to be any fundamental difference”.²⁶

Nonetheless the aspiration of many for Jamaica to become a republic persisted. In 1977 the Ministry of Justice under its Constitutional Reform Division conducted a survey of the adult population to test public awareness of the Constitution. The majority, 59% wanted the Monarchy to be replaced and 61% showed clear support for Republican status.



The Constitutional Commission noted in its 1993 Report that the question of whether to retain the Queen as the Head of State or replace Her Majesty with a President chosen from the citizenry of Jamaica was “the leading topic at the forums and in nearly every written submission from organizations and citizens”²⁷. Heeding the calls of the need for identity and nationhood from the majority, the Commission recommended

26 The Report of the Committees of the Legislature to Prepare Proposals for a Constitution to take Effect on Independence, 1961, p. 18

27 The Report of The Constitutional Commission, September 1993 p. 36

that the time had come for Jamaica as an independent nation to have a Jamaican Head of State. This recommendation was accepted by the Joint Select Committee of Parliament in its 1995 report in which it stated that “we are satisfied that the time has come for Jamaica to have a Head of State who is selected by a national process and symbolizes the unity and identity of the Jamaican nation”²⁸.

Again in 2001 The Joint Select Committee recommended that Jamaica should be a Republic with the Governor General being replaced by a non-Executive President as the Head of State “who would be purely above partisan politics” and that the Parliamentary System should be retained.

They recommended, however, that the President not be elected but be appointed by the Prime Minister after consultation with the Leader of the Opposition subject to Parliamentary confirmation by a two-thirds majority on a secret ballot.²⁹

Notwithstanding the recommendations of the Constitutional Commission, the Joint Select Committee of Parliament and the views of the public, this proposed amendment has yet to be effected.

Powers of the Executive



The Constitution gives the Prime Minister significant powers in governing the country. He has the sole power to appoint the Ministers to serve in the Cabinet, to choose the majority of Senators and to call elections. There are no provisions for recall or

28 Final Report of the Joint Select Committee of The Houses of Parliament on Constitutional and Electoral Reform, May 1995, p. 5

29 Ibid., p. 23

impeachment of the Prime Minister, Members of Parliament or Senators while there are constitutional procedures for the removal of judges, civil servants, the Director of Public Prosecutions and the Auditor General. If Parliament has lost confidence in the Prime Minister the only option is for the Governor General to dissolve Parliament at the request of the said Prime Minister.³⁰

REFORM PROPOSALS

Recall

Early suggestions to limit the powers of the Executive included the introduction of a system of “recalling” Members of Parliament who are not performing adequately. This suggestion was contained in the Stone Report on the Performance, Accountability and Responsibilities of Elected Parliamentarians (1990). It received the support of 72% of people polled. The possibility of “Recall” was considered, but not recommended, by the Constitutional Commission. Elsewhere in the Caribbean, Belize amended its Constitution in 2008 to introduce the power to recall a member of the House of Representatives and Trinidad and Tobago has drafted a 2014 Constitution (Amendment) Bill to allow for recalling members of the lower House of Representatives. In the case of Belize appropriate safeguards were put in place to prevent this power of the people from being overtaken by political mischief including political lobbying to oust members based on political affiliations. There, at least 65% of the registered voters must participate in a vote to recall.³¹

Term Limits

There have been calls for fixed term limits. The recommendations were for a two term limit and a fixed election date.

The benefits of having a fixed election date have been questioned on the basis that a fixed date lacks flexibility.³²

30 Jamaica (Constitution) Order in Council of Jamaica 1962, s 71(3)

31 Recall of Elected Representatives Act 2010 (Belize)

32 agenda’, A.J. Nicholson, The Sunday Gleaner, November 9, 2008cted Representatives Act 2010 (Belize)

Relationship between Executive and Legislature

Another issue raised has been the relationship between the executive and legislature and the fact that the Senate is controlled, de facto, by the Prime Minister who is able to appoint the majority of its members. This does little to ensure the appropriate checks and balance in the governance systems.

Here in Jamaica, in 1993 the Constitutional Commission declined to recommend amending the Constitution to significantly reduce the powers of the Prime Minister. They felt that it was necessary to retain the power of the Prime Minister to advise a dissolution of Parliament. They argued that if there was a vote of no confidence in the Prime Minister, this could result in political upheaval and the formation of a government that was never the choice of the electorate in the absence of the power to call an election. They also felt that the discretion to call the time of the general election provided flexibility that may be needed to meet any new situation or if the government's credibility needed to be affirmed.³³

By 1995 however there was some shift and the Joint Select Committee of Parliament in its 1995 report agreed with the Constitutional Commission and recommended specific changes to the Constitution that would impact the powers of the Prime Minister:

The Senate be increased to 36 members with less than two-thirds (2/3) of the total membership being appointed by the Prime Minister. Two of these Senators to be appointed to represent interests other than those of the two political parties.

There be a section in the Constitution on impeachment procedures for all high level public officials, in particular: The Head of State, Parliamentarians, Ministers of Government, Contractor General, the Chief Electoral Officer, Chairmen, Chief Executive Officers and Heads of Departments of public bodies, Chairmen of Regulatory and Disciplinary bodies established by the Constitution or Acts of Parliament, Ambassadors, High Commissioners, and Principal Diplomatic Representatives of Jamaica.

33 The Report of The Constitutional Commission, September 1993 p. 46 - 47

That the Prime Minister should not have the power to call a general election unless there exists a list of registered voters which has been completed for not more than six (6) months prior to the calling of the general election.

Notwithstanding the recommendations of the Constitutional Commission, the Joint Select Committee of Parliament and the views of the public, these proposals have yet to be effected.

Oversight of elections and entrenchment of the Electoral Commission

Jamaica has developed an enviable system of electoral oversight taking the country a far way from the early history of electoral malpractices including impersonation, double voting, false voting, bribery, threatening of voters, missing ballots, the use of chemicals to remove voting ink and gerrymandering.³⁴ The Electoral Commission of Jamaica was established with the intention that it would eventually be enshrined in the Constitution. This remains to be done.

Jamaica has also made strides in passing legislation on campaign financing³⁵. This law stipulates how individuals and organizations can contribute to political parties and candidates, requires the disclosure of such contributions and prescribes penalties for false and non-disclosures. It is significant that the Electoral Commission is tasked with oversight of campaign financing under those laws and any move to entrench the Electoral Commission in the Constitution should also consider referencing this role.

Other public offices and officials which were established with the intention of being eventually entrenched in the Constitution include the Office of the Public Defender and the Office of the Political Ombudsman.³⁶

In addition, the Constitutional Commission had recommended that the positions of the Contractor General and the Ombudsman be entrenched in the Constitution.

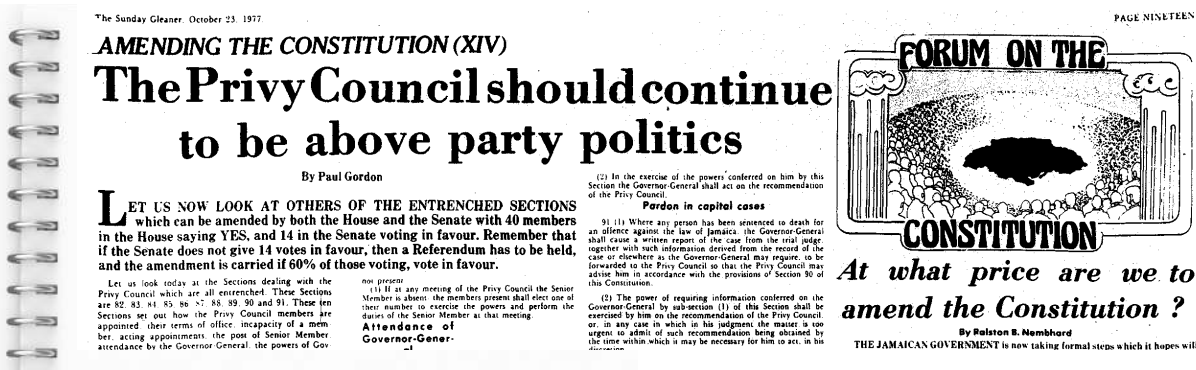
34 History of the Electoral Commission of Jamaica, the Electoral Commission of Jamaica (September 2014)

35 Representation of the People (Amendment) Act 2016

36 Section 3, Public Defender (Interim) Act 2000; section 3, Political Ombudsman (Interim) Act 2002

Final Appellate Court

The UK Privy Council has been the final appellate court for Commonwealth Caribbean colonies at least from as far back as 1792. Replacing the UK Privy Council with a Caribbean court has been one of the main proposals for constitutional reform across the English-speaking Caribbean from before independence. The regional court established under the West Indies Federation provided a few years of experience and experimentation with a regional court. However upon the dissolution of the Federation, the court was also dissolved and the Privy Council was retained.



After decades of debate and negotiation, the Caribbean Community (CARICOM) member states were able to adopt the Agreement establishing the Caribbean Court of Justice (CCJ) in 2001. The Agreement provides for an original exclusive jurisdiction court to interpret the Revised Treaty of Chaguaramas and for a final appellate jurisdiction court to hear appeals from the Courts of Appeal of CARICOM member states. The CCJ has therefore been thrust into national constitutional reform agendas, as the implementation of the appellate jurisdiction of the CCJ requires amendment of Constitutions to replace the final appellate jurisdiction of the Privy Council.³⁷

Jamaica eventually attempted to amend its Constitution to replace the UK Privy Council (UKPC) with the CCJ. The Jamaican legislature passed three Acts in 2004 to that effect. However the legality of the Acts was challenged by the Jamaica Council for Human Rights in *Jamaica Council for Human Rights v Marshall-Burnett* (2005) 65 WIR 268, on the basis that the correct procedure was not followed and that the CCJ was not entrenched and therefore less secure than the UKPC.

37 Robinson et al, ch. 10, para. 10-003

The issue was whether the Acts required a referendum to be valid. The Jamaican Supreme Court and Court of Appeal ruled that a referendum was not required by the Constitution and therefore the Acts were valid. However, the UKPC ruled that while a referendum is not required to abolish appeals to the UKPC, the power to review the decisions of the Supreme Court and Court of Appeal of Jamaica may not be entrusted to a new court, such as the CCJ, which did not enjoy the same Constitutional protections as the courts it was reviewing.³⁸

SUMMARY OF OUTSTANDING REFORMS

The following summarises the recommended amendments which were either raised by the public during previous constitutional reform procedures or considered by The Constitutional Commission and previous Joint Select Committees.

1. Repeal of the Jamaica (Constitution) Order in Council of Jamaica 1962 and enactment of The Constitution by the Jamaican Parliament

The Jamaican Constitutions should reflect the ideals of nationhood of a sovereign independent nation. The Jamaica (Constitution) Order in Council of Jamaica 1962 should be repealed and The Constitution should be enacted by the Jamaican Parliament. This would symbolise ownership of the Constitution among the Jamaican people.

2. Re-framing the Constitution in easily understandable language

Modern constitutions should be written in language that is understandable by the average citizen. As it is currently written the Constitution of Jamaica is written in an overly formal and legal style which is understandable only by legal professionals and academics.

38 2005) 65 WIR 280

3. Expansion of the anti-discrimination rights

Chapter III of the Constitution should be amended to include the rights not to be discriminated against based on:

- Mental illnesses
- Disability
- Sexual preference and/ or gender identity.
- Language
- Health status (e.g. AIDs status affecting work)

4. Other fundamental rights and freedoms

The following additional rights were supported by stakeholders and should be considered for inclusion:

- Right to health / health care.
- The right to education should include up to the tertiary level

5. Executive powers

- Impeachment of Parliamentarians and public sector officials
- Party/ campaign financing provisions
- Term limits for the Prime Minister

6. Entrenchment of public offices and officials relating to accountability

- The Office of The Public Defender
- The Electoral Commission of Jamaica
- The Office of the Political Ombudsman
- The Contractor General
- The Ombudsman.

7. Replacing the Privy Council with the Caribbean Court of Justice

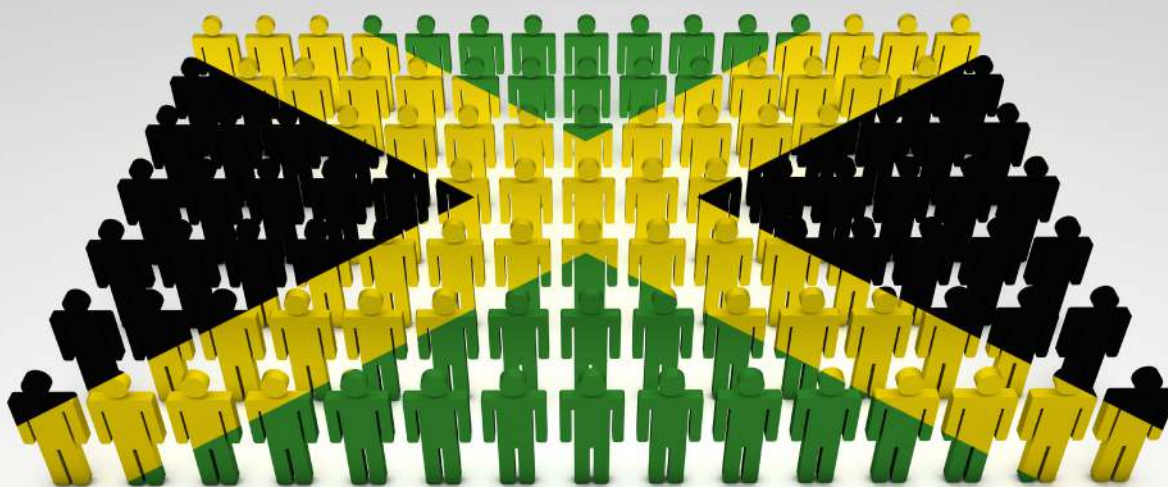
8. Matters requiring referendum

The following matters have been raised in the past and would require a referendum:

- Fixed election dates
- Replacing the monarchy with a President (executive or non-executive) as the Head of State

PART THREE

EXPERIENCES AND LESSONS IN CONSTITUTIONAL REFORM PROCESSES IN OTHER JURISDICTIONS



CHAPTER 6

EXPERIENCES AND LESSONS

A review of constitutional reform processes in other countries shows that in addition to the more traditional, government-led, top-down, 'elitist' approach, which generally only involves parliamentarians, politicians and political representatives in the constitutional reform process, there are examples of broad-based, participatory approaches, involving public consultations, constitutional commissions, constitutional assemblies and thematic committees among other structures.

Several contemporary constitutional reform processes in Africa have gone further and used Committees of Experts and referenda, in addition to constitutional assemblies and extensive public consultations. In its own unique, remarkable constitutional reform process in post-apartheid South Africa, a multi-party negotiating process, national submissions process, constituent assembly, agreed constitutional principles and certification by the constitutional court, were all used to ensure maximum participation and definition of the new Constitution.

It is generally recognized that limiting participation to the executive and bureaucratic structures of government, on such important matters as constitutional reform, is unsatisfactory. Inevitably such an approach overlooks or discounts some issue or item considered of central importance to interest groups, social movements or concerned citizens³⁹. The recommended approach is to engage a genuine process of deliberation and public participation in policy development.

It is important to note however, that a lengthy, and relatively open-ended public consultative process, also has serious drawbacks. This is particularly so if the consultations are not properly focused or integrated, or if they fail to produce a manageable, politically salient and popular series of agenda items. There is a need to enable citizens to have a meaningful substantive role in the deliberation and shaping of the agenda. Constituent assemblies, citizen policy forums, workshops, and other

39 Stein, 312

similar structures promoting citizen deliberation and involvement in political matters, may be established in parallel to official intergovernmental agenda-setting structures, in which experts and nonpartisan, politically influential and respected citizens can generate frameworks and items for constitutional negotiation⁴⁰.

Jamaica’s Guidelines for Consultation

Jamaica already has a useful framework for stakeholder consultation in policy and decision-making. In 2005 the Government of Jamaica issued a Consultation Code of Practice for the Jamaican Public Sector containing minimum rules for consultation in an effort to become more open, transparent and accountable to the people of Jamaica.

MINIMUM RULES

Develop clearly structured proposals

- State all possible options to be considered in respect of the proposal
- Be specific about issue/s to be addressed
- Provide supporting information
- List persons/groups consulted
- Provide contact details and relevant information

Make consultation material concise, easily understandable, and widely accessible

- Use plain language
- Make proposals concise and to the point
- Use all available and relevant media for dissemination and distribution

Facilitate the ability of stakeholders to participate in consultations

- Conduct stakeholders analyses
- Provide adequate time for responses to proposals
- Hold informal consultations

Give feedback on response and the consultation process

- Acknowledge all feedback

40 Stein, 331

- Carefully analyse responses
 - Provide a summary of all feedback
 - Advise on how feedback information will be used
- Monitor the effectiveness of consultations within your Ministry

- Reproduce minimum rules in all consultation documents
- Identity a consultation liaison officer within the Ministry
- Evaluate all consultation exercise
- Record all consultation activities

Follow policy-making best practice guidelines in the development of proposals

- Reduce red-tape and bureaucracy
- Assess proposals for cost, benefits and risks

The Code acknowledges that consultation is “an exchange of information and ideas between affected and interested people and decision-makers before a decision has been reached”. This exchange “needs to begin at the earliest possible time when policies, plans, programmes or services are being developed.”⁴¹

Importantly, the Code states as a general principle, that “access to consultation processes and ability to participate is ensured despite race, ethnicity, religion, political affiliation, sex, disability status, sexual orientation or any other possible basis for discrimination”.⁴²

The Code also affirms “wide consultation” especially at the identification and conceptualising stage of policy development, to improve the quality of policy outcomes and enhance the involvement of interested parties and the public at large.

Although not specifically referring to constitutional consultations, the Consultation Code of Practice for the Jamaican Public Sector (2005) represents national standards set by the Cabinet Office which are applicable to “all consultations carried out by Government Ministries, their departments and agencies, as well as Executive Agencies,

41 Consultation Code of Practice for the Jamaican Public Sector (2005), p. 2

42 Consultation Code of Practice for the Jamaican Public Sector (2005), p. 2

Statutory Bodies, Government companies and local authorities in their development or revision of major polices, programmes, plans and services”.⁴³

Consultations on the reform of the Constitution should be held at least to the same minimum standards and comply with the rules laid out in the Code.

CONSTITUTIONAL REFORM IN PRACTICE IN OTHER JURISDICTIONS: CASE STUDIES

South America - Bolivia

In response to growing demands from social movements and street demonstrations for constitutional reform, the Bolivian Congress in 2005 acceded to demands for a constitutional assembly. Elections to the 255-member Constitutional Assembly (CA) were held in 2006, concurrently with a referendum on state unity.

The CA approved its rules of procedure on 14 February 2007, when 81% of the members agreed to the overall text and two-thirds voted in favour of considering individual articles. A proposal could only be reconsidered if more than a third of the assembly proposed an alternative text. Failure to achieve a two-third majority would result in an inter-party dialogue to seek a new text and any irreconcilable differences would be settled by popular referendum.

The CA, through its thematic committees, conducted a number of public consultations and site visits. The mobilisation of citizens in interest groups and social movements facilitated considerable gains being made by indigenous citizens and the poor in the provisions in the new Constitution.

On 24 November 2007, the CA approved a preliminary draft of the Constitution. The final draft Constitution was approved article by article in a marathon all-night voting session, and approval of the draft was announced on December 9, 2007. On 14 December 2007, the President of the CA presented the complete text to the Bolivian National Congress in order to legislate a referendum.

43 Ibid, Introduction

The constitutional text was further modified after dialogue between the President and opposition parties in September 2008 and in Congress during negotiations for a referendum in October 2008. On 23 October 2008, the Bolivian Congress approved holding a referendum on the new Constitution, which took place on January 25, 2009. The new Constitution came into effect on 7 February 2009, approved by a majority of 61.7% of Bolivians.

Commonwealth Africa- Kenya

In 1990 civil society organisations in Kenya formed an alliance and began to press for a new constitution. However, it was not until 1997 that the ruling party agreed to implement constitutional reform. Opposition parties and civil society began lobbying for a people's assembly to frame the new constitution. The ruling party enacted a law to allow a 'review' of the existing Constitution through parliamentary supervision and established the organs for constitutional review, including a commission appointed by the President, constituency deliberation forums and a national dialogue conference.

The Constitution Review Commission published a new draft constitution along with its report, in 2002. This draft became the basis of a national multi-stakeholder dialogue convened in 2002, which was presented to the Attorney General for publication and tabling in Parliament. The Attorney General however made alterations and presented a revised draft to a national referendum in November 2005. It was rejected by 58% of the electorate.

The Constitution of Kenya Review Act 2008 identified four main institutions that would be involved in the reform process: a Committee of Experts (CoE), the Parliamentary Select Committee, the National Assembly and a popular referendum. The CoE's mandate was solely to reconcile the contentious issues in the two previous constitutional drafts. Public consultation was mandatory. The presence of a number of foreign experts helped to raise the CoE's profile and reinforce its credibility as a technical, not political, committee.

The new Constitution was passed in Parliament with the required two-thirds majority and by referendum with over two-thirds of voters supporting it, and a turnout of over 70%.⁴⁴ The new Constitution was adopted on August 4, 2010.

44 Martin van Vliet, Winluck Wahiu and Augustine Magolowondo, *Constitutional Reform Processes and Political Parties Principles for Practice* (Netherlands Institute for Multiparty Democracy, International Institute for Democracy and Electoral Assistance and African Studies Centre, 2000) p. 30

South Africa

In 1992, after South Africa's President de Klerk lifted the 44-year ban on the ANC and other political parties, a multi-party dialogue forum known as the Convention for Democratic South Africa (CODESA) was established and was able to agree on a key set of constitutional principles.

In 1993 a new platform was launched, known as the Multi Party Negotiating Process (MPNP), which focused on negotiations on a constitutional framework for democratic transition. The MPNP's Negotiating Council represented 26 political parties, and oversaw seven technical committees, including the Technical Committee on Constitutional Matters, which prepared the 1994 Interim Constitution.

In 1994 South Africans elected Nelson Mandela as President in the first democratically held elections and also elected a Constituent Assembly (CA) to negotiate and draft a permanent constitution within two years. The Assembly led a series of consultations that resulted in over two million submissions from the public. The key decisions on constitutional controversies however were largely made in closed bilateral talks between the ANC and the National Party, under the principle of 'sufficient consensus'.

The Interim Constitution of 1994 stipulated that the new Constitution could not come into force until three conditions had been met: (1) the Constitutional Assembly had to adopt the new constitutional text with a two-thirds majority vote; (2) the text had to comply with the constitutional principles agreed to in the pre-constitutional phase; and (3) the Constitutional Court, by unanimous decision of all eleven judges or by a clear majority, had to certify that those principles had been respected and reflected in the final draft of the constitutional text.

The certification hearings began on 1 July 1996. The 29 political parties represented in the CA, together with interest groups, were allowed to submit briefs and arguments in what became the largest hearing in South Africa's legal history.

On 6 September, the court unanimously ruled that the text adopted in May 1996 could not be certified because it did not fully satisfy the principles and conditions agreed in the multi-party talks. The court also rejected eight of its clauses. This forced the CA to reconvene and address the issues in the ruling. On 7 October, the CA compromised and voted for a new text, with one party (the Inkatha Freedom Party - IFP) voting against it.

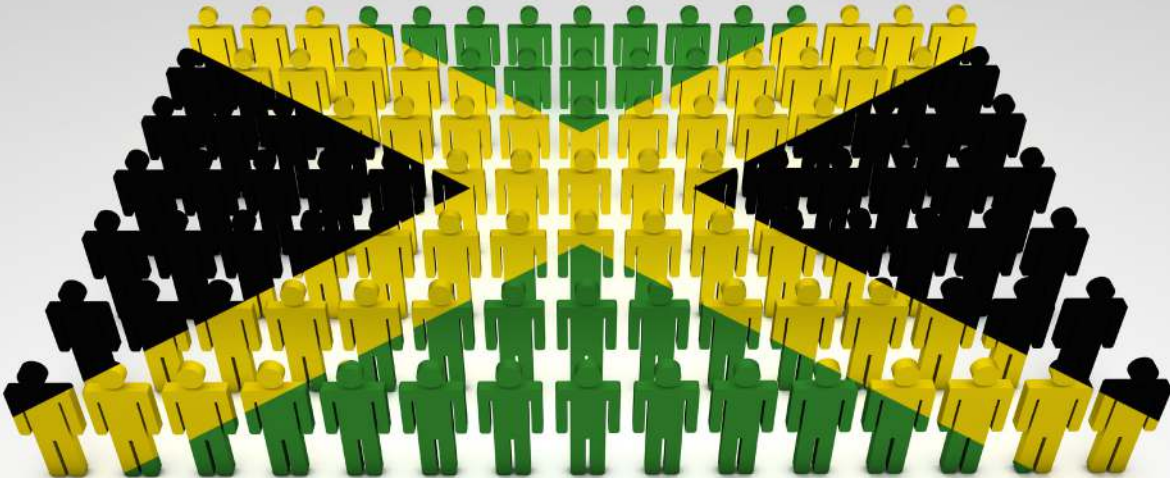
On 11 October the new text was presented to the Constitutional Court. Political parties, the general public and the Constitutional Assembly were again invited to make written representations to the Court. Objectors were free to raise issues not raised before, or to submit that the Court had erred in some or other finding in the previous judgment. Objections to certification were received from the Democratic Party, the IFP, the government of KwaZulu-Natal (KZN) and eighteen private individuals or interest groups. Oral argument on behalf of the two political parties, the government of KZN and the Constitutional Assembly was heard on 18 to 20 November 1996.

The Court held that most of the grounds for non-certification of the earlier constitutional text had been eliminated and granted its unanimous approval on December 4, 1996.⁴⁵ This text became the Constitution of South Africa, which President Mandela signed into law on 10 December 1996.

45 See The First Hearing On Certification of the Constitution of the Republic of South Africa, 6 September 1996. available at <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02257/05lv02258/06lv02261.htm>

PART FOUR

RECOMMENDATIONS



CHAPTER 7

RECOMMENDATIONS

Citizens must be allowed to have a meaningful and substantive role in the deliberation and shaping of the constitutional reform agenda and process in Jamaica going forward. The recommended approach is to engage a genuine process of awareness-raising, deliberation and policy participation, to ensure that citizens are familiar with the content of a constitutional package and the issues under consideration. Fundamentally, inclusive governance is the objective.

The following are therefore specific recommendations for facilitating full and effective participation of the public in future constitutional reform processes in Jamaica:

- **A comprehensive constitutional reform process and programme**

A comprehensive Constitutional Reform Programme with adequate funding should be planned. This should include a unit or personnel assigned with specific administrative responsibility for the preparatory phase including developing educational materials, organising Commission meetings, public consultations and forums and responding to queries and concerns from the public. This is particularly important to tackle serious constitutional amendments that will require a referendum. The constitutional reform process should be led by a broad-based and inclusive Constitutional Commission and must be clearly thought out to ensure public participation and consultation even in the agenda setting phase. It should be time-bound and not be indefinite, tied into a clearly articulated time-line and road map to constitutional amendment. The programme should be housed in the Ministry of Justice and be convened as and when constitutional reform is required. In light of financial constraints, officials in relevant Ministries and agencies should be seconded to facilitate the work during the period as determined by the Minister is appropriate for the work to be undertaken.

- **Simple and understandable material**

Educational materials for the constitutional reform process should be prepared in simple understandable language in English and the Jamaican language and disseminated to all levels of society including secondary and tertiary schools, churches and civil society.

- **Multimedia approach to constitutional education and consultation**

The use of multiple forms of media including e.g. television, radio, newspaper and in particular social media should be employed in English and the Jamaican language to reach a wide range of audiences including those who may not be literate and persons with visual and hearing disabilities.

- **Multiple and varied forums which facilitate wide public participation**

Multiple and varied forums should be employed island-wide including government sponsored and non-government consultations such as public meetings, community workshops, citizen policy forums, focus groups, surveys, interactive websites and social media pages etc. Such structures promoting citizen deliberation and involvement in the constitutional reform process should be established in parallel to official governmental structures, in which experts and nonpartisan, politically influential and respected citizens can be engaged based on upon agreed terms and topics identified for constitutional reform.

- **Identification of and special focus on special interest and stakeholders**

The Government should identify and target special interest groups in addition to public authorities responsible for implementation of key reforms. These would include non-governmental organisations (NGOs), community-based organisations (CBOs), Indigenous cultural communities, academia, Parish Development Committees, trade unions, professional and service organisations, associations for persons with special needs such as persons with disabilities, children and the elderly. Parish Development Committees should be specifically charged to meet with and canvas the views of the community councils that they represent.

- **A modern public survey of current concerns and issues**

Several issues not mentioned in detail in this Report should be considered in future proposals for constitutional amendments including the status of the Maroons and the rights of the Rastafari. Other issues should properly be brought to the table and identified through a modern public survey of current concerns and issues that could form the basis for future proposals for constitutional reform.

- **Agreement or memorandum of understanding between the political representatives and the Constitutional Commission**

After the agenda-setting phase and the awareness raising and consultative phase, there should be an agreement or memorandum of understanding between the political representatives and the Constitutional Commission, setting out an agreed approach to treating with the outcomes of the consultative phases. That will ensure that the wider public concerns and recommendations are not whittled away by the political elite and will ensure that the subsequent content deliberation and drafting phase and adoption and implementation phase meet the criteria for public inclusivity and accountability.

- **Loosen the political party rules in legislative debates and votes on constitutional amendments**

This will permit the free conscience debate and vote by parliamentarians on the proposed constitutional reform provisions, thereby enabling a more open, transparent and enriched debate and reform process that benefits from the insight and expertise of politicians who are not muzzled by party expectations.

PART FIVE

APPENDICES



APPENDIX 1 – THE EXECUTIVE, LEGISLATURE AND JUDICIARY

The Executive

The Prime Minister (PM) is the head of government. The Queen of England is the head of state and represented by the Governor General of Jamaica who is appointed by the Queen on the advice of the PM. The Parliament of Jamaica also consists of The House of Representatives whose members are elected on general election by registered voters and 21 members of The Senate who are appointed by the Governor General, 13 on the recommendation of the PM and 8 on the recommendation of the Leader of the Opposition. The term of office is five years. . The PM presides over the Cabinet which is comprised of at least 11 members being Ministers and Ministers of State selected by him and serving in either of the House of Representatives. The Cabinet is the principal instrument of policy and is charged with the general direction and control of the government.

The Legislature

The Constitution sets out the power of Parliament to make laws including amendment to the Constitution. A Bill for an Act of Parliament, other than a Money Bill, can be introduced in either The House of Representatives or the Senate. A Money Bill is a public Bill which only contains provisions dealing with taxation, debt, the Consolidated Fund or public monies provided by Parliament. Once approved by both Houses, the Bill requires the formal assent of the Governor-General to become law.

The Judiciary

There are five tiers of courts: the lower courts - the Petty Sessions court and Resident Magistrates (RM) Court and the higher courts - the Supreme Court, the Court of Appeal and the Judicial Committee of the Privy Council of the United Kingdom. The RM Court is an inferior court of record and its jurisdiction includes criminal cases, the Coroner's Court, Traffic Court, Drug Court, Tax Court, Family Court, Juvenile Court and the Civil Court limited to claims not exceeding \$250,000.00. The Supreme Court is a High Court and has jurisdiction in Civil, Criminal, Family, Commercial, Succession and Admiralty cases and specialised courts: High and Circuit Court Divisions of the Gun Court and the Revenue Court. All appeals from the Petty Sessions Court, RM Court and Supreme Court are heard by the Court of Appeal. Appeals of decisions of the Court of Appeal are heard by the Judicial Committee of the Privy Council of the United Kingdom.

APPENDIX 2 – ENTRENCHED AND SPECIALLY ENTRENCHED PROVISIONS

Entrenched Provisions	Specially Entrenched Provisions
Charter of fundamental rights and freedoms (s.13 - 26)	Establishment and constitution Parliament (s. 34, 35 and 36)
Establishment of Supreme Court and Court of Appeal and security of tenure and remuneration of judges(s.97-99,100(3)(4)(5)(6)(7)(8)(9), 101,103, 104, 105, 106 (3), (4), (3, (6), (7), (8) and(9))	Dissolution of Parliament after 5 years except during war and power of Governor General to dissolve Parliament with majority vote of no confidence vote by House of Representatives (s. 64 (2),(3) (5))
Establishment, functions and security of tenure of Auditor General (s. 120, 121(2),(3),(4),(5),(6) ,(7) and 122)	The executive authority of Jamaica is vested in the Queen (s. 68 (1))
Establishment, functions and security of tenure of the Director of Public Prosecutions (s 94 and 96(2), (3), (4), (5), (6), (7))	The executive authority of Jamaica is vested in the Queen (s. 68 (1))
Establishment, functions and security of tenure of the Director of Public Prosecutions (s 94 and 96(2), (3), (4), (5), (6), (7))	The effect of the Constitution as the supreme law over all other laws (s. 2)
Establishment of the Consolidated Fund for arrangements for control of public funds (s. 114, 116, 117, 118 and 119)	Qualification for membership in the Senate and House of Representatives (s. 39)
Immunity of members of House of Representatives from civil or criminal actions in relation to Parliamentary proceedings. (s. 48(3))	Duration between the sessions of Parliament to be no more than 6 months (s. 63 (2))
Number of constituencies should be between 45 and 65 (s. 66 and 67)	Holding of general elections three months after dissolution of Parliament (s. 65)
Proceedings of the Privy Council (s 82-89)	

Power of Governor General to grant pardons or limit sentences (s. 90 and 91)	
Establishment and composition of the Judicial Service Commission, Public Service Commission and Police Service Commission and appointment of judicial, public and police officers and Permanent Secretaries (s.111(1), (2), (4), (5), (6), (7), (8), (9), (10), 112, 113(s. 124, 125, 126 (1), 127, 129, 130, 131, 135 and 136)	
Number and boundaries of constituencies (Second Schedule)	
Applicability of the Commissions of Enquiry Act to Tribunals appointed under the Constitution (Third Schedule)	

PROCEDURE FOR AMENDMENT FIXED BY CLASSIFICATION

Classification of Provisions	Procedure for Amendment
1. Ordinary, e.g. requirements for citizenship, qualifications for voting in national election, office of the Leader of the Opposition	Votes of simple majority of members of both Houses of Parliament
2. Entrenched, e.g. Charter of Rights, Director of Public Prosecutions (establishment, function & tenure)	Votes of two-thirds of all members of each of both Houses of Parliament, and period of three months must elapse between the introduction of the Bill in the House of Representatives and the commencement of the first debate on the Bill in that House and a further period of three months between the end of that debate and the passing of the Bill by that House.
3. Specially Entrenched , e.g. final Court of Appeal, British Monarch as head of state	Same as for Entrenched, plus a majority in a national Referendum
An entrenched or specially entrenched provision can be amended without the necessary majority in the Senate if the amendment is approved in the House of Representatives twice in one session and is approved by two thirds (entrenched) or three-fifths (specially entrenched) of voters in a national referendum held between two to six months after rejection by the Senate.	

APPENDIX 3

LIST OF MEMBERS OF THE CONSTITUTIONAL COMMISSION 1992-1995

Chairman	Hon. Mr. Justice James Kerr, Q.C., O. J. (Ombudsman)
People's National Party (8)	Hon. Carl Rattray, Q.C. / Hon. David Coore Q.C. Senator Dr. the Hon. Peter Phillips Hon. Donald Buchanan, M. P. His Worship the Mayor Charles Learmond Ms. Shirley-Ann Eaton Mr. James Walsh Mr. Frederick Hamaty, Q.C. Professor Edwin Jones
Jamaica Labour Party (8)	Rt. Hon. Edward Seaga, P.C., M.P. Senator Oswald Harding, Q.C. Hon. Hector Wynter, O.J. Mr. Harold Brady Senator Dorothy Lightbourne Mr. Jeremy Palmer Dr. Horace Chang Mrs. Ruby Walcott
Jamaican Bar Association (2)	Dr. Lloyd Barnett Ms. Norma Linton
Press Assoc. of Jamaica (2)	Mr. Wenty Bowen Lady Elean Gifford
University of Jamaica (2)	Mr. Delroy Chuck Mr. Rupert Lewis

Trade Unions (3) (Union of Technical, Advisory and Supervisory Personnel) (Nurses Asscn of Ja.) (Trade Union Development Research Council)	Mr. Reg Ennis Senator Marshall-Burnett, C.D. Mr. David Gordon-Rowe
Church Organizations (3) (Ja. Council of Churches) (Ja. Evangelistic Asscn.)	Rev. Raymond Coke Rev. Dr. Roy Henry Mr. David Grant
Teachers' Organization (2)	Mr. Dorothy Raymond Mr. Vivian Whyte
Women's Organizations (2) (Bureau of Women's Affairs) (Asscn of Women's Organisation in Jamaica)	Dr. Dorith Grant-Wisdom Ms. Antoinette Haughton
Private Sector Interests (2) (Private Sector Organization of Ja.)	Mr. Emil George, Q.C. Mr. Charles Rose
Farmers' Organization (2) (Jamaica Agricultural Society)	Mr. Alfred King Mr. Lucius Patterson
Youth Organizations (2) (Jamaica National Youth Council)	Ms. Janet Robinson / Ms. Amsale Maryam Mr. Troy Foster / Mr. Horace Summers

APPENDIX 4 – MINOR AMENDMENTS OF THE CONSTITUTION

Subject Matter	Recommendations of the Constitution Commission	Amendments to the Constitution
Chapter II Citizenship	Entitlement to citizenship by registration through marriage should refer to “man and woman” and not “any woman” - s. 4(1)	Amended by Act 4 of 1994
	Amend proviso to the right of child born in Jamaica to apply for citizenship - s. 5(a)	Repealed by Act 18 of 1999
	Deprivation of citizenship can only occur in limited grounds and circumstances defined in legislation - s. 8(2), 11(b)	Amended by Act 18 of 1999
	Remove entitlement of Commonwealth citizen to be a member of Legislature or appointed to a ministerial office	
	The minimum period for the Minister to abridge the period for residential qualification for citizenship should be 12 months	
	The deprivation of citizenship should be subject to judicial review	

APPENDIX 5

RECOMMENDATIONS OF THE CONSTITUTIONAL COMMISSION ON RIGHTS

This table highlights the main recommendations of the Constitutional Commission in the area of rights and liberties of citizens and the extent to which amendments to the Constitution were made to give effect to these recommendations.

SUBJECT MATTER	RECOMMENDATIONS OF THE CONSTITUTIONAL COMMISSION	AMENDMENTS TO THE CONSTITUTION
Chapter II Citizenship	Entitlement to citizenship by registration through marriage should refer to “man and woman” and not “any woman” - s. 4(1)	The Citizenship (Constitutional Amendment) Act 1994
	Amend proviso to the right of child born in Jamaica to apply for citizenship - s. 5(a)	The Citizenship (Constitutional Amendment) Act 1999
	Deprivation of citizenship can only occur in limited grounds and circumstances defined in legislation - s. 8(2), 11(b)	The Citizenship (Constitutional Amendment) Act 1999
	Remove entitlement of Commonwealth citizen to be a member of Legislature or appointed to a ministerial office	None
	The minimum period for the Minister to abridge the period for residential qualification for citizenship should be 12 months	None
	The deprivation of citizenship should be subject to judicial review	The Citizenship (Constitutional Amendment) Act 1999
Chapter III Fundamental Rights & Freedoms	The declaratory provisions of the Fundamental Rights and Freedoms should be expressed in positive terms and in the modern Bill of Rights form	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
The Environment	Provisions relating to the protection of the environment should be included in the Constitution	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

Freedom of movement	There should be the right to freedom to leave Jamaica	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
Bail	Persons in custody should not be unduly denied bail and should be treated humanely during those periods.	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
Education	Children should have the right to free primary education	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
Protection from child abuse and exploitation	Children should have a right to measures of protection	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
	Rescission of the section 50 that allows Special Acts of Parliament to prevail over the provisions of the Fundamental Rights and Freedoms	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
State of Emergency	The Executive should be compelled to conform to the recommendations of the Review Tribunal with regards to persons detained during periods of public emergency	None
	A Review Tribunal must be established immediately after a state of emergency declared and any person detained can request that his case be reviewed.	None
	The duration of the state of emergency should be limited to fourteen (14) days without specific Parliamentary approval instead of twelve months and extensions are subject approval by 2/3rd majority of both Houses of Parliament.	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

State of Emergency (con'td)	The grounds for a state of emergency should be definite and confined to circumstances specifically listed. The phrase “or other calamity whether similar to the foregoing or not” in s. 26(5)(a) should be deleted.	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
	The question of whether a state of emergency is justified on the grounds set out in the Constitution should be subject to judicial review.	The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
	It should be clearly stated that a state of emergency can be declared in respect of any part or parts of Jamaica.	None
Special groups and institutions	Special groups or institutions, such as the Press, the Maroons, the Rastafarians, political parties and trade unions should not be singled out in the Bill of Rights.	None
Discrimination	Discrimination on the grounds of sex should be included in the constitutional prohibition.	None
Right of redress	The right to apply for redress should be extended to include any member of the public likely to be affected.	None
	In the proviso to s. 25(2) “shall” should be deleted and “may” substituted, giving the Court the discretion to entertain an application notwithstanding that there are other adequate means of redress.	
	S. 26(8) which preserves pre-independence laws despite their inconsistency with the fundamental rights and freedoms should be repealed.	
	The right to redress should apply against private persons and entities	
Interpretation	In the interpretation of the judicial rights and freedoms, the Courts must have regard to international human rights jurisprudence	None

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2017**