



## MINISTRY OF LEGAL & CONSTITUTIONAL AFFAIRS

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### MINUTES

#### 4<sup>th</sup> Meeting of the Constitutional Reform Committee (CRC)

Venue: Jamaica House Banquet Hall

Date: Wednesday, April 12, 2023

Time: 10:00 am

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### AGENDA

1. Call to Order
2. Prayer
3. National Pledge
4. Welcome and Opening Remarks – Chairman
5. Apologies for Absence
6. Confirmation of the Agenda
  - a. Statement by Dr Lloyd Barnett\* (added item)
7. Confirmation of Minutes of Meeting held on April 5, 2023
8. Matters Arising from the Minutes (April 5, 2023)
9. Action Items:
  - a. Public Education Report \*(added item)
10. Matters for Deliberation & Decision:
  - a. Review of Summary of Recommendations of the JSCCER
    - i. Chapter II – Citizenship
    - ii. Chapter V –
      - A. Qualifications to sit in Parliament

B. Extension of life of Parliament

C. Constitutional Amendment Procedure - Section 49

**CONVERSATIONS OVER LUNCH**

b. Work Plan

c. Proposed Drafting Strategy\* (added item)

11. Additional Matters:

- Formation of other Sub-Committees

12. Any Other Business

13. Closing Comments

14. Date and Time of Next Meeting

15. Adjournment

## **1. CALL TO ORDER**

**1.1.** The meeting was called to order by Ambassador Rocky Meade, Co-Chairman, at 10:10 am.

### **ATTENDEES:**

#### **Constitutional Reform Committee**

- Honourable Marlene Malahoo Forte, KC, JP, MP (Chairman)
- Ambassador Rocky Meade, CD, JP, PhD (Co-Chairman – Office of the Prime Minister)
- Dr Derrick McKoy, CD, KC (Attorney General of Jamaica)
- Senator Ransford Braham, CD, KC (Government Senator)
- Senator Donna Scott-Mottley (Parliamentary Opposition – Senate)
- Mr Anthony Hylton, CD, MP (Parliamentary Opposition – House of Representatives)
- Dr the Hon. Lloyd Barnett, OJ (National Constitutional Law Expert)
- Mr Hugh Small, KC (Consultant Counsel and Nominee of the Leader of the Parliamentary Opposition)
- Dr David Henry (Wider Society – Faith-Based)
- Dr Nadeen Spence (Civil Society – Social and Political Commentator)
- Mrs Laleta Davis Mattis CD, JP (National Council on Reparation)
- Mr Sujae Boswell (Youth Advisor)
- Dr Elaine McCarthy (Chairman – Jamaica Umbrella Groups of Churches)
- Professor Richard Albert (International Constitutional Law Expert – University of Texas at Austin)

#### **Secretariat**

##### ***Ministry of Legal and Constitutional Affairs***

- Mr Wayne O. Robertson, JP, Permanent Secretary
- Mr Christopher Harper, Senior Constitutional Reform Officer (Actg.)
- Mrs Chrystine Bernard-Wedderburn, Legislative Editor

- Ms Christal Parris-Campbell, Assistant Parliamentary Counsel
- Mr Makene Brown, Legal Officer
- Ms Nastacia McFarlane, Director, Corporate Communication & Public Relations (Actg.)
- Ms Roxene Nickle, Advisor/Consultant
- Mrs Janelle Miller-Williams, Senior Director, Legal Education (Actg.)
- Ms Julia Wedderburn, Senior Legal Education Officer (Actg.)

*Ministry of Foreign Affairs and Foreign Trade*

- Ambassador Sheila Sealy Monteith, CD, JP, Permanent Secretary

*Ministry of Justice*

- Ms Samantha Blair, Deputy Director, Legal Services

**2. PRAYER**

- 2.1. Prayer was said by Dr David Henry.

**3. NATIONAL PLEDGE**

- 3.1. The National Pledge was said.

**4. WELCOME AND OPENING REMARKS**

- 4.1. Ambassador Meade welcomed everyone and thanked members of the Committee for volunteering to be a part of the process to serve the nation. He also expressed his hope that the outcome would be the best for Jamaica.
- 4.2. Dr Elaine McCarthy, Chairperson of the Jamaica Umbrella Groups of Churches (JUGC), attended her first meeting as a new member of the Committee.

**5. APOLOGIES FOR ABSENCE**

- 5.1. An apology was tendered for lateness on behalf of the Chairman, who had a delayed flight on her return from official duties abroad.

## **6. CONFIRMATION OF THE AGENDA**

- 6.1.** The Agenda was confirmed with the addition of three new items: “Personal Statement by Dr Lloyd Barnett” inserted as Item 6(a); “Public Education Report” inserted as Item 9(a); and “Proposed Drafting Strategy” inserted as Item 10(c).

*(Senator Ransford Braham and Dr Nadeen Spence joined the meeting at this point).*

- 6.2** Dr Barnett expressed deep concern about paragraph 15.1 of the Terms of Reference (TOR) of the Constitutional Reform Committee (CRC), which required compliance with government policies and procedures. He informed members of the moral and professional difficulty he was experiencing with the requirement and indicated his disagreement and unwillingness to comply with all policies of the Government of Jamaica, as he may not agree with them nor was willing to compromise his professional standards. He noted that the relationship between the CRC and Secretariat stated in paragraphs 8.1 and 9.1 of the TOR did not equate to the relationship between the CRC and Cabinet. He stated that his views on constitutional reform should therefore not be subject to government policy.

- 6.3** Some members supported the views of Dr Barnett and asked that the clause be removed. One member stressed that the CRC operated with independence of thought as its members sat in their expert capacity, and therefore requested further clarification on paragraph 15.1.

- 6.4** The Co-Chairman advised that paragraph 15.1 was intended for administrative purposes, such as, for example, procedures related to procurement. He further shared that if at any point a government policy issue arose which did not relate to administrative matters, Committee members could express their dissent.

*(The Chairman joined the meeting at 10:29 am.)*

- 6.5** The Chairman reiterated that the provision for adherence to policy related to administrative matters between the Committee and the Secretariat.

## **7. CONFIRMATION OF THE MINUTES OF THE MEETING HELD ON APRIL 5, 2023**

**7.1.** The Chairman acknowledged concerns raised with her about the accuracy of some parts of the Minutes and acceded to a request from Mr Small that they not be confirmed, but revised. She advised that there would be two sets of records for the work of the Committee. Verbatim records of the meetings would be provided. The stenographers had indicated that they required at least two weeks after each meeting to review and verify the transcripts. Given the frequency of meetings, Mrs. Chrystine Wedderburn-Bernard, one of the Ministry's Legislative Editors was designated to prepare separate Minutes of each meeting, which could be checked for accuracy against the transcripts. As an example of inaccuracy, Senator Braham pointed out that his name appeared on the List of Attendees in the Minutes of the 3<sup>rd</sup> Meeting though he was not present and an apology was tendered for him.

**7.2.** The Chairman paused discussion on the Minutes to formally welcome Dr Elaine McCarthy, Chairman of the JUGC, to the CRC and informed everyone that at an appropriate time Dr McCarthy would address the Committee.

**7.3.** The Chairman then instructed the Secretariat that:

- a) the record should reflect the discussion/reasons that informed any recommendation made;
- b) Minutes should be taken separately from the verbatim report done by the stenographers; and
- c) Draft minutes should be circulated to the Committee members before they are presented as finalised.

## **7.4 MAKING THE MINUTES AVAILABLE TO THE PUBLIC**

**7.4.1** In response to a query as to whether the Minutes would be made publicly available or exempt from an Access to Information (ATI) request, the Chairman expressed her desire to have the Minutes accurately recorded and made available to the public, subject to the consensus of the Committee, without any need for any ATI request.

**7.5** The Chairman pointed out that the Committee would be tested on many fronts based on the issues which were emerging in the public and emphasized that the Committee was operating in a low trust environment. She highlighted that there were already many inaccuracies publicised in the media and that the CRC would have to counter the misinformation through a press release at the end of each meeting. The Chairman reminded members that a decision was previously taken for a press release to be done after each meeting and that such should be actioned by the Public Engagement Committee (PEC). She noted that the sub-Committee would not have to do the actual drafts but should provide the mechanism for same.

**7.6** Dr Spence suggested that someone be identified to prepare press releases and the matter be treated in the same way as a Post Cabinet Press Briefing, which would allow for the dissemination of the information from each meeting and for greater efficiency. Mr Hylton agreed with the suggestion and underscored the inaccuracies in the media. Senator Scott-Mottley advised that although she appreciated the necessity for real time reporting, having two press conferences each week would be challenging and it may be more practicable to schedule press conferences fortnightly.

**7.7** Dr Spence agreed that a press conference every week would be challenging. She recommended that the Committee schedule a press release after the meeting and noted that in the previous week a decision was taken to not do the press release. She underscored the importance of putting out information and expressed concern with the speed of the implementation process. It was therefore generally agreed that the Committee should do press releases after each meeting.

**7.8** Ambassador Rocky Meade reminded members that the public would have access to the summary dispatched by the Committee and the entire record of the Committee's deliberations. He also recommended that someone be identified to draft the press releases.

**7.9** The Committee was then invited to address the issue of the role and views of Professor Albert which were being questioned throughout the public sphere. While it began with a particular group, more persons were asking questions about his involvement. Professor Albert expressed regret that his role on the Committee had become a distraction from the important

work of the Committee. He indicated that as a member of the Committee, he was invited to provide advice based on his experience and expertise, to illuminate various practices throughout the world so that the Committee could consider them and make recommendations on what may be best for the country.

**7.10** Dr Barnett queried whether a budget had been finalised. Mrs. Davis-Mattis responded by noting that the Government of Jamaica (GOJ) had adequate resources across its agencies from which expertise could be garnered to support the work of the Committee. The Committee should not be hampered by budgetary issues. She queried whether members of the Committee would be allowed to speak directly to the media as there were two international media houses which had raised queries with her on the Committee's work. In response, Dr Barnett noted that the members of the Committee were free, unencumbered citizens who could contribute to the public discourse.

**7.11** Ambassador Meade advised that the main points of each meeting were summarised at the end of the meeting to enable Committee members to speak on the issues. Mr Small suggested that a summary of the last three meetings be prepared.

**7.12** Mr. Boswell noted that the report from previous Commissions had included several engagements on television and radio as it relates to community programmes, which could guide the Committee's approach to media. Dr Barnett also queried whether anyone had been identified to activate these programme.

**7.13** In responding to the issues raised, the Chairman reassured that the work was in progress. She then summarised the actions to be taken going forward. She stated that:

- The Minutes should reflect the discussions leading up to the recommendations.
- The Minutes would be drafted by Mrs Chrystine Wedderburn-Bernard.
- The draft Minutes would be distributed to the Committee for their input by Ms Roxene Nickle, guided by PS Wayne Robertson.
- Ms Nastacia McFarlane would prepare a summary of the issues discussed as a matter of priority.
- Committee members may speak publicly and in accordance with their respective subject area.



**7.14** In further responding to the concerns raised about Professor Albert’s membership on the Committee, the Chairman expressed embarrassment that the learned professor was subjected to such treatment. She asked that her apology be placed on record. She advised the Committee that he accepted the invitation to serve on the Committee in his personal professional capacity as an expert and not as a representative of the Canadian government nor with any intent to impose the LGBTQ agenda or any other perspective on the Committee.

**7.15** She further agreed that there was a need to address the vacuum by revisiting the information in the public sphere. She noted that while Canada was a valued international partner, Professor Albert’s nationality was purely incidental in relation to him serving on the Committee. She advised that she had spoken to a member of the faith-based groups on the need to ensure that the information that they raised in the public sphere was accurate and truthful.

**7.16** Dr Henry noted the issues, expressions of concern dominating the public space and the cynicism of Jamaicans. He noted that the media engagement needed to happen sooner than later otherwise the expressions of concern would prevail. He cautioned that the timeline for the development of the Bill was not feasible as consultation with the public was critical and if the Bill was put to the public without proper consultation it may be rejected.

**7.17** The Chairman then told the Committee that candid discussions had revealed lessons to be heeded. She then invited the members of the meeting to take a coffee break.

### ***COFFEE BREAK***

## **8. MATTERS FOR DELIBERATION AND DECISION**

### **8.1. QUALIFICATIONS FOR MEMBERSHIP IN THE PARLIAMENT**

**8.1.1.** The Chairman invited the Committee members to discuss the Agenda item 10(a)(i). She noted that questions had been raised on:

- i. whether the entitlement of Commonwealth citizens as broadly defined should remain;
- ii. whether Jamaicans living in the United States with US citizenship should be barred from being members of Parliament because of their pledge of allegiance to a foreign power; and
- iii. the type of citizenship qualification that would be required to serve in the Jamaican Parliament.

**8.1.2.** Dr Barnett advised that it was not a citizenship question but rather the appropriate qualification for membership in Parliament and the Committee should therefore decide whether or not a substantial period was required to acquire such qualification or whether there should be no qualification at all.

**8.1.3.** Dr McKoy suggested that the question should be framed to ask whether someone should be allowed to represent the people if they are not citizens of Jamaica and if they are not citizens then whether they should be able to serve once they have demonstrated that they have lived in Jamaica for a certain number of years.

**8.1.4.** Mr Small expressed his reservation on retaining Sections 9–12 of the Constitution which dealt with Commonwealth citizens. He cited the example of Rwanda which has an awkward relationship with Britain at present and noted that he would not wish for that country to have a stake in the governance of Jamaica. He recommended that the sections be removed.

**8.1.5.** Mr Hylton stated that he shared the reservations voiced by Mr Small. He suggested that in speaking of ‘Jamaicanizing’ the Constitution, it is necessary to decolonise it by removing the whole Commonwealth construct. He further noted that although Jamaica enjoyed some economic and foreign relation benefits there was no concrete reason for keeping these requirements especially in light of the fact that certain relationships with the United Kingdom have not been maintained.

- 8.1.6.** Senator Scott-Mottley added that based on the reasons stated by other members, the answer to the question of whether a Commonwealth citizen should be allowed to sit in the lower or upper house is ‘no’. She then stated that the Committee would need to deliberate further on whether someone with citizenship in another country should be allowed to sit in the Jamaican Parliament.
- 8.1.7.** Senator Braham stated that there were some cases in recent history on the issue of citizenship in other countries as there were persons who had several citizenships. Some were citizens by virtue of birth. For example, some had a parent who was Venezuelan, another who was American and they were Jamaican. The state of their citizenship may not impact their daily lives in some instances. However, for some persons, citizenship was pursued for educational or other benefits. Moreover, some persons were born in the USA but had not lived there, however had US passports and may be able to secure college/university benefits as a result.
- 8.1.8.** He emphasized that Commonwealth citizens for all intents and purposes were foreigners. He noted that it was ubiquitous that Mugabe, for example, could be appointed to the Senate in Jamaica but a US/Jamaican citizen could not be so appointed. He indicated that from his perspective if one wished to sit in the Jamaican Parliament then that person:
- i. should be born in Jamaica; or
  - ii. can be a citizen of another country; but
  - iii. must spend at least 3-5 years as a resident of Jamaica before being eligible to serve.
- 8.1.9.** Dr McKoy advised that the first question, as raised by Senator Scott-Mottley, would be the construct of a Commonwealth citizen. He stated that if someone were a Commonwealth citizen, then they would be a foreigner.

- 8.1.10.** Dr McKoy noted that the matters discussed above made sense at the time the Dominion prevailed when the Monarch was the Head of the Commonwealth. However, at present, that was not the case. As an Empire, it was expressed that those in the Empire were not regarded as foreigners, but that has since changed and it was now time to move on.
- 8.1.11.** He noted that the second point on dual citizenship would have to be resolved with further discussion.
- 8.1.12.** Dr Barnett advised that persons with multiple citizenships needed to be considered. He stated that the law made provision for someone to receive Jamaican citizenship by way of parentage. The State was responsible for protecting citizens and they should not be deprived of protection if they were born in another country but had parents who were Jamaican. It was his opinion that a conflict of allegiance would arise when someone with multiple citizenships indicated their desire to serve in the Houses of Parliament. He articulated that once the person had a conflict of allegiance they should not serve. The issue of whether Commonwealth citizens could serve in the Parliament would therefore require further discussion.
- 8.1.13.** Mr Hylton suggested that regard should be given to the expansion of the possible conditions for the granting of citizenship, taking into account the fact that some requirements were not limited by blood. He further noted that one attribute of citizenship would be an obligation imposed on the State to offer protection to citizens worldwide and consideration should be given to the kind of protection which would be afforded to the citizen.
- 8.1.14.** Senator Braham reiterated the point that a Commonwealth citizen would be qualified to sit in Parliament, whereas a Jamaican of another nationality would be ruled out if they pledged allegiance to another country. He noted that the matter had been considered by the courts and that barriers did not arise until one applied for a passport.

**8.1.15.** The Chairman invited Ambassador Sealey Monteith to speak on this issue. Ambassador Monteith advised that Ministry of Foreign Affairs and Foreign Trade (MFAFT) had treated citizenship as a technical issue. She said that questions of citizenship were handled by the Ministry of National Security and citizenship was granted in perpetuity and/or could be granted, so long as the person could prove successive connection. Persons have used this opportunity to stay in Jamaica for several years. The act of fraudulently acquiring citizenship also highlighted issues within our system especially since there are persons without family or cultural ties who could become citizens.

**8.1.16.** The Chairman advised that section 3 of the Constitution spoke to this matter. She noted that she had served as the chair of the Diaspora Committee while at MFAFT and Jamaicans in the diaspora were surprised at how wide the law was with regard to citizenship by descent.

**8.1.17.** Another issue that arose was whether citizenship should continue where a marriage had ended and the spouse no longer had ties to Jamaica. The other context was the duty of the State to protect and provide for its citizens considering the limited resources at its disposal. It was regarded as a vexed issue.

**8.1.18.** Mr. Hylton noted that he had also considered the matter of citizenship by investment, as Minister of Investment and Commerce. He noted that other countries such as Antigua and Barbuda used it as a pathway to citizenship by investment. The matter had not found favour at that time.

**8.1.19.** Dr Barnett then reminded the Committee that there was a serious humanitarian problem for those persons who moved to England. The issues in Rhodesia influenced a change in the UK law which made Jamaicans born in the UK ineligible for UK citizenship. He advised that the Committee needed to be careful as removing certain protections could leave some citizens stateless.

**8.1.20.** Mr Small noted that persons in the UK born of Jamaican parentage could apply for citizenship by descent. Dr Barnett stated that the Committee had to be careful due the colonial history of citizenship, especially with the UK.

**8.1.21.** Professor Albert advised that there were three points for consideration:

- i. local citizenship being a requirement to serve in Parliament;
- ii. the balancing act in dealing with multiple citizenship; and
- iii. comparative analysis.

**8.1.22.** He suggested that the first point was an issue of national pride and that there was a need to be perceived as being free from foreign influence. There must be a balance between the desire to maximise participation in the electoral process and doing what was necessary to protect and preserve the national interest.

**8.1.23.** He said that an analogous comparison of this issue could be made with Australia where section 44 of their Constitution provided that:

*“any person who is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power ...shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.”*

**8.1.24.** He advised that their Constitution took a definitive position on the issue of citizenship. He noted that the case of *Sue v Hill* (1991) had arisen in relation to a senate nominee who had dual citizenship in Australia and the United Kingdom. The Australian courts held that the United Kingdom was a foreign power and therefore the Senate nominee would not be eligible to run. Professor Albert noted that this case was analogous to the present discussions and that the UK would be deemed a foreign state.

- 8.1.25.** The Chairman thanked Professor Albert for that information. She expressed her desire for the public to better understand the depth and insight which Professor Albert brought to the deliberations.
- 8.1.26.** The Chairman then guided the meeting to deliberate on section 12 of the Jamaican Constitution.
- 8.1.27.** Dr McKoy suggested that a distinction should be made between persons who were foreigners and persons who were not citizens. Dr Barnett suggested that the Commonwealth countries had been specified to allow for further additions to the provision.
- 8.1.28.** The Chairman read section 8(3) of the Constitution, which she had advised Parliament was one of the provisions to be reviewed.
- 8.1.29.** Senator Braham sought confirmation on whether there was consensus on the removal of references to “Commonwealth” in the Constitution. He noted that if there was agreement then that would be a momentous achievement.
- 8.1.30.** The Chairman indicated that the Committee needed to consider the practical lived reality of our *Jamaican-ness* especially as Jamaicans were generally migratory and sought jobs outside of Jamaica. She asked the Committee to address the matter of statelessness based on the United Kingdom’s decision to exclude Jamaicans from citizenship, as pointed out by Dr Barnett.
- 8.1.31.** Dr McKoy reminded the meeting that Senator Scott-Mottley raised two issues. The first issue was how to characterise privileges for certain groups who were not foreigners (foreigners being persons outside the Commonwealth). He suggested that such be raised with the Chief Parliamentary Counsel, Ms. Grant. He confirmed that the Committee was not in favour of giving privileges to Commonwealth citizens. However, the larger issue was how to deal with multiple citizenships.

**8.1.32.** Mr Hylton agreed with the approach suggested by Dr McKoy. He suggested that the definition of foreigners as persons outside of the Commonwealth was a constitutional relic of a past age and it was the emerging consensus that the new Constitution should not be encumbered with the Commonwealth notion. It should be removed from the Constitution and if necessary, placed in ordinary legislation. The next issue would be how benefits were accorded to Jamaican citizens who had multiple citizenships.

**8.1.33.** In responding to Mr. Hylton, Dr Barnett proposed that:

- i. Jamaican citizenship was an essential qualification for parliamentary membership. No other citizenship should apply.
- ii. A person with Jamaican citizenship who had allegiance to another state was to be disqualified from membership in Parliament; and
- iii. The new Constitution could provide the means by which only CARICOM citizens who became permanently resident in Jamaica were entitled to vote in general elections.

**8.1.34.** Mr Small endorsed Dr Barnett's proposal. Mr Hylton queried whether Dr Barnett's proposal meant that members with multiple citizenship could serve in Parliament once the question of their allegiance was resolved. Dr Barnett advised that he was not ruling out anyone.

**8.1.35.** Senator Scott-Mottley queried whether Jamaicans holding US citizenship would therefore not be eligible.

**8.1.36.** The Chairman pointed out that Jamaicans who sought US citizenship had to renounce their Jamaican citizenship. Senator Scott-Mottley then queried whether the individual seeking to serve in Parliament could become a Jamaican citizen if s/he renounced his/her US citizenship.

**8.1.37.** The Chairman advised the Committee that a child born in the US to a Jamaican took no part in the decision of where s/he was born, but when the child became



an adult and wished to renew his/her passport that was a deliberate act. The child could also activate Jamaican citizenship by descent. However, although entitlement was automatic, the individual would still have to go through a process. Dr Barnett indicated that based on the Chairman's explanation, the Jamaica Information Service (JIS) had incorrect information on the entitlement to citizenship on its website.

**8.1.38.** Mr. Hylton queried whether membership in the United States armed forces was evidence of allegiance.

**8.1.39.** Ambassador Meade advised that a person who joined the US army would not be entitled to citizenship automatically. However, it could be argued that fighting for a country indicated allegiance. He further advised that after a certain number of years, the soldier could apply for citizenship. Clarification was necessary on whether such action indicated an act of allegiance.

**8.1.40.** Senator Braham indicated that the Committee may be unable to come up with an answer which was 100% satisfactory on the issue. He suggested that provision be made for someone who was a US citizen but had not served in the army nor sought a US passport in the past three years. Such persons could be eligible for membership in the Jamaican Parliament. He also suggested a higher tier for qualification of persons who have sought citizenship outside of Jamaica for benefits.

**8.1.41.** Dr Nadeen Spence indicated her agreement with the removal of the reference to the Commonwealth in the Constitution, but felt that Jamaicans who travelled abroad for better opportunities should retain their citizenship. In response, Mrs Davis-Mattis asked members to consider the kind of people they would want to see representing the people. Dr Barnett reiterated that the person must be a citizen of Jamaica and should have no allegiance to another country.

- 8.1.42.** Senator Scott-Mottley queried whether the Committee had agreed on the eligibility of a Jamaican with dual citizenship who was resident in Jamaica for a certain number of years to serve as a member of Parliament.
- 8.1.43.** Mr. Hylton noted that Dr Barnett's proposal did not exclude dual citizenship but the question of allegiance arose. He expressed the view that the mere possession of an overseas passport should not disqualify an individual from running for office.
- 8.1.44.** Dr McKoy cautioned that in considering the question of foreign allegiance the Committee should be careful that persons who joined the US army were not seen as renouncing their allegiance to Jamaica.
- 8.1.45.** Dr Barnett questioned what would happen if the President of the foreign country where the individual also had citizenship attacked Jamaica, which country would the individual support?
- 8.1.46.** The Chairman indicated that when tweaking section 39 of the Constitution the intention might not be to outlaw dual citizenship, but rather to look at the issue of allegiance. She noted that the present formulation spoke to the Commonwealth. She suggested that in light of the earlier discussion the Committee could recommend removal of references to the Commonwealth and examine the wording used by Australia.
- 8.1.47.** The Chair then read section 41(1)(d) of the Constitution for consideration by the Committee. Dr Barnett suggested that section 39 should also be reviewed. It was agreed that references to the Commonwealth would be removed from sections 39 – 41. Dr Barnett pointed out that once section 39 was amended then section 41(d) could be removed. The Chairman pointed out that the second limb of section 41 spoke directly to allegiance, in order to remove the concerns about capturing the meaning.

- 8.1.48.** Senator Scott-Mottley queried whether a sitting minister who took citizenship while sitting in Parliament would be required to renounce their membership. Dr Barnett advised that transitional arrangements would have to be enacted so the person would not be invalidated while sitting in Parliament. Mr Hylton hoped that the present exercise would simplify and address the issues directly as certain matters were unavoidable.
- 8.1.49.** In response to a query by Mr Small, Senator Scott-Mottley noted that where possible, all scenarios should be addressed by the Committee. Mr Small noted that the process would take place as set out in the Constitution, however, the possibility exists that there may be Members of Parliament who may be compromised during the process. Dr Barnett advised that this could be addressed in the transitional provisions.
- 8.1.50.** Mr Small expressed his discomfort with enacting transitional provisions in the Constitution. Dr Barnett pointed out that Trinidad and other jurisdictions had included transitional provisions in their Constitutions.
- 8.1.51.** The Chairman advised that the provisions, when changed, would not be retroactive. However, the *grandfather clause* Dr Barnett suggested would guide the transition when the new provision of the Constitution took effect. Those persons who were not compliant with the new provisions would not be disqualified until the next parliamentary period, when they were due to be re-elected.
- 8.1.52.** Senator Braham then indicated that the sections 40 and 41 requirements of allegiance did not address the Jamaican/American dilemma. He queried whether such persons should be disqualified because they had a US passport. In noting that such would not fit the Jamaican reality, Senator Braham suggested that the Committee either allow such persons to serve or consider alternative approaches to the issue of allegiance.

**8.1.53.** The issue of conflicted allegiance should be considered in the context of migratory nature of the Jamaican reality. Mr. Boswell noted Germany's requirement for eight years of residency prior to eligibility to sit in Parliament and this could be considered for comparative purposes.

**8.1.54.** Mr. Hylton advised that since Parliament comprised two houses - one elected and one appointed - a role for the diaspora could be provided in the Senate through a formulation that addressed election in the lower house and appointment in the upper house. He concurred with the concerns of Senator Braham and suggested that, in *Jamaicanising* the Constitution, the Jamaican reality should be addressed in a way that found favour with the Government and the Opposition.

**8.1.55.** Dr McKoy surmised that Mr Hylton's suggestion would create more issues than it aimed to solve. He further queried how such persons would participate in or attend the parliamentary sessions. Mr Hylton noted that meetings could be held in the virtual space as was done during the COVID-19 pandemic.

**8.1.56.** Professor Albert indicated that the language used in section 41(d) was the boilerplate for Commonwealth Constitutions. He suggested that the discussion should focus on establishing allegiance and not on multi-citizenship. He noted that the input of the courts may be necessary. He also noted that the evaluation for allegiance could be against the foreign law standard or local law. He said that the Australian law had come up with their own test and where someone had renounced in accordance with foreign law that was sufficient, but that may not be the approach for Jamaica.

**8.1.57.** The Chairman referenced Professor Albert's input and reminded the Committee that he was not being paid by the Jamaican Government. He was a Committee Member like others. Mr. Hylton said that point should be made in the public sphere. Professor Albert confirmed that he was not paid and he had agreed to serve on the Committee due to family connections with Jamaica and for reasons of scholarship.

**8.1.58.** Mrs. Davis-Mattis recommended that the language used in the Constitution should be simplified in order to make it more accessible to Jamaicans.

*The meeting broke for lunch at 2:25 pm and resumed its deliberations at 3:25 pm*

**8.1.59.** On resumption of the meeting, the Chairman advised that the next meeting of the Committee would be held at King's House for consultations with the Governor-General.

## **8.2. EXTENSION OF THE LIFE OF PARLIAMENT**

**8.2.1.** Dr Barnett advised that the only way to extend the parliamentary period currently was if Jamaica were at war, as pestilences and plagues were not covered in the Constitution. In determining the question of whether the reasons for an extension should apply to instances other than war, he suggested that the provisions related to the circumstances that would necessitate the use of emergency powers be adopted to address this issue. He noted that war allowed for an extension past one year, however such a long period may not be needed. The Committee would therefore have to determine what timeframe would be necessary.

**8.2.2.** Mr. Hylton queried whether the Committee might not be assisted in this discussion by technical input from persons involved in disaster preparedness as it may impact the ability and capacity of the GOJ to hold an election. It was also noted that such could impact campaigns and the functioning of Parliament.

**8.2.3.** The Chairman noted that the first matter for deliberation was the extension of the life of Parliament. Dr Barnett stated that the relevant issue was the time limit and therefore flexibility was important. He advised that the extension could be for a limited period and could be extended further, as necessary, as a time frame could not be fixed for calamities.

**8.2.4.** Mr Small advised that section 64 and section 20(2)(c) provided a flexible time table for emergencies other than war. He proposed that the language in section 20 (2)(c) be adopted for section 64.

**8.2.5.** Mr. Hylton suggested that a time frame of two years be applied. Dr Barnett indicated that the time should not go beyond what is necessary for the preservation of human rights when dealing with a natural disaster. He proposed using four to six-month periods for extensions.

**8.2.6.** Professor Albert raised three points for consideration:

- i. Specificity vs Generality;
- ii. Inflexibility; and
- iii. Definition.

**8.2.7.** He advised that if it were specific, it spoke only of one way, and it would be under-inclusive. That would also raise the problem of how to describe the text of the Constitution to allow for the suspension of elections. He noted that the Belizean Constitution had specific wording on the state of emergency but if a country sought to be as specific as Belize, then everything would not be captured, as Belize did not capture financial emergencies. Therefore, if the event were specified it would create a closed list.

**8.2.8.** The second problem of flexibility was a temporal one and the issues could arise included:

- i. How long can the Constitution manage?
- ii. How inflexible is the Constitution?
- iii. What if the emergency existed beyond two years?

**8.2.9.** The Constitution of South Africa allowed for a State of Emergency (SOE) with a majority vote and indefinite subsequent renewals which must be supported by

super majorities in the Parliament. This cured the extension of Parliament by the government as a political tool and required support from the Opposition.

**8.2.10.** The third point addressing definition meant that there may inevitably be disagreement on what constituted an emergency, if the emergency were not specifically defined. It was possible that the threshold of approval could be increased in such a situation.

**8.2.11.** Mr Hylton commended Professor Albert on his informed response and noted that his scholastic interpretation had proved valuable to the Committee. He noted that the framework outlined was valuable due to Jamaica's experience with the use of emergency powers.

**8.2.12.** The following points were then raised in the Committee's deliberations:

- i. Was it conceivable that an emergency could only affect a part of the country and if so, could the unaffected areas still participate in the election?
- ii. What was the nature of the emergency that would prevent an election? Could the emergency affect movement of the public?
- iii. Could a period of one or two years be allotted to the Government with three-month extensions? That would avoid a constitutional lacuna. What would happen if the Parliament were decimated?
- iv. Would provision could be made for an extended war?

**8.2.13.** It was agreed that a public emergency should be defined. A definition of a public emergency vs. public disaster was important in considering parliamentary guard rails.

**8.2.14.** The Committee agreed that it would be helpful to look at different constitutional provisions in contemplating emergency powers for Executive and Parliamentary

bodies and it was recommended that the Executive must be allowed some latitude (bearing in mind the norms of democracy) to take certain actions in emergency situations outside of the Parliamentary term. However it was important to identify who would initiate the period of emergency in order to guard against executive overreach.

**8.2.15.** It was then debated whether the power to initiate an emergency should rest with the Executive and the President or whether the Executive should have the sole authority to do so for a set period and thereafter be determined by Parliament.

**8.2.16.** The meeting noted that there was agreement on step one – that the life of Parliament should continue, where a period of public emergency existed. The period of extension should be limited to a defined period with any extension beyond that defined period being supported by a special majority to provide the ability to account for unforeseen events as well as avoid an abuse of power. Further queries were raised on how the process would be initiated if Parliament itself were not able to meet or the mechanism that would be used to trigger the emergency. If it were agreed that the period should be shorter rather than longer, how would it be extended?

**8.2.17.** It was noted that there was a constitutional mechanism to declare a period of public emergency and public disaster. The meeting was further advised that under the Office of the Disaster Preparedness and Emergency Measures (ODPEM) Act, the Prime Minister could declare Jamaica a Disaster Area so there was a trigger.

**8.2.18.** The Committee's discussion was then summarised by Dr Barnett:

- i. The life of parliament could be extended when a public emergency arose.
- ii. The period of extension should be limited.
- iii. The question of who should initiate needed further discussion.
- iv. The assessment of the political and economic considerations were not matters for the 'titular' Head of State but should be done by the Prime Minister in consultation with the Leader of the Opposition.



- v. The preliminary executive decision should only last for a limited time. Any extension of that time would reduce the democratic value of the citizen and should only be done in the utmost compelling situations with parliamentary approval.
- vi. The extension beyond that period should be submitted to Parliament.

**8.2.19.** He then suggested that an effective method of dealing with the emergency laid in the democratic principles of government.

**8.2.20.** Professor Albert responded on the question of who should initiate the emergency. He referred to Carl Schmitt's: "Sovereign is he who decides on the exception". Professor Albert then pointed out that if the President made the exception he/she would have a certain authority and agreed with the provision 'for consultation or on the advice of', as new institutions evolved in due course. He said it would be useful to think about an alternative body declaring the emergency because it was believed that if the President were to declare an emergency, such declaration would give him/her more power than a ceremonial President. He cautioned the Committee to be careful about the powers being given to a ceremonial President especially when it converged with moments of national significance.

*(At 5:02 pm, the Chairman proposed a ten-minute coffee break.)*

**[COFFEE BREAK]**

*(The meeting resumed at 5:20 pm)*

**8.2.21.** During the break a recommendation was agreed for the extension of Parliament for period of six months at a time, with a suggestion that Parliament not go beyond two years of the initial declaration by the President, after consultation with the Prime Minister and the Leader of the Opposition. That provision would only begin once the constitutional life of the Parliament was about to expire and there was a state of public emergency and disaster.

**8.2.22.** The Committee agreed to the following recommendation:

*“Where it is not practical to hold general elections due to circumstances created by or as a result of the occurrence of a calamity [such as set out in section 20(2)(c) hurricane, i.e pestilence...or other calamity] the life of the parliament should continue beyond its normal term for a period not exceeding two years in total.*

*The period of extension should be limited to one not exceeding 6 months in the first instance and other periods not exceeding 6 months up to a maximum of two years. The initial proclamation will be done by the President acting on the advice of the Prime Minister and the Leader of the Opposition. Subsequent extensions should be done by Parliament for a period not exceeding 6 months on the vote of a majority of the House of Representatives. If the circumstances persist requiring a further extension, such a vote will be held with a majority of 2/3 of the House of Representatives.”*

**8.2.23.** In response to comments made during deliberations, Dr Barnett remarked that he had tried unsuccessfully to change the reference to the Senate as the Upper House to the Second House to remove the implication of supremacy. He recommended that the amendment proposed would be in the new instrument and the Constitution would be put to the people in the new referendum. The amendment Bill passed in Parliament had to be approved by the people and the question was: “Do they approve of the Bill or not?”

**8.2.24.** He further advised that the process would require a robust public education campaign. The Memorandum of Reasons outlining the proposals in the Bill should be disseminated to the public and public meetings would be critical. He noted that the Republican Constitution will be passed by the Parliament of Jamaica.

### **8.3. JAMAICANISING THE CONSTITUTION**

- 8.3.1.** The meeting then considered the expression ‘Jamaicanisation of the Constitution’. The Chairman indicated that ‘Jamaicanising the Constitution’ meant an instrument passed by the Parliament of Jamaica (instead of England) and approved by people of Jamaica. References to colonial relics such as the Commonwealth would be removed and the Constitution would then redefine the meaning of foreign power. Jamaicanisation would also include the removal of the British Monarch from as Head of State. She noted that it should be clarified that the present Constitution was framed in Jamaica save and except for one provision. However, it was not passed in Jamaica and it was a Schedule of a British Order in Council.
- 8.3.2.** Mr Hylton said that in considering the process of the decolonisation of the Constitution, the Committee cannot say it was decolonising and then keep the Privy Council in London. Mr Hylton suggested that the notion of court independence should be assessed, and should ask the question ‘Independent of what and whom?’ He noted that it should occur to us as a people that, after 60 years of independence, whatever self-doubt remained should be scrutinised. To say that pure justice resided in the Privy Council was unacceptable. Mr Hylton also noted that CARICOM was our construct, and advised that it would be fair to question whether our final court would be national or regional, and whether that issue could be resolved practically. However, the comfort of the people with the Privy Council could not be the basis of constitutional reform.
- 8.3.3.** The Chairman agreed that the substance of the Constitution should represent the aspirations of the people and having the Judicial Committee of Privy Council as Jamaica’s final court would be contrary to our understanding of ‘Jamaicanising’, as all three branches of government were creatures of a British instrument.

**8.3.4.** Professor Albert advised the Committee that there were two different objectives being considered. One was in relation to process and the other related to content. Both were integral to the discussion. Instead of ‘repatriation’ he suggested the use of ‘patriation’ or ‘sovereignisation’ to create a homegrown Constitution for Jamaica by Jamaicans to bring the Constitution home. The word ‘Jamaicanising’ or ‘decolonising’ related to content even though there was overlap. Therefore, when referring to content, the words ‘Jamaicanisation’ or ‘decolonisation’ could be used to discuss the replacement of the King with a President and to specifically refer to Jamaican institutions and removing the painful reminders of colonisation.

**8.3.5.** The Chairman advised that the question of a final court would have to be considered and that was the reason why it was agreed that the constitutional reform agenda was to proceed in phases.

## **9. ANY OTHER BUSINESS**

**9.1.** The Chairman then invited the Committee to consider the issues arising in relation to Professor Albert’s membership on the Committee. She informed the Committee that Professor Albert was entitled to Jamaican nationality and his role on the Committee was not due to Canadian courtesy or tax payers money. She advised that they treated Professor Albert on the same terms as everyone else and expressed her discomfort with the fact that he was footing his own bill. She suggested that at the least his hotel costs should be absorbed locally.

**9.2.** Professor Albert expressed his embarrassment that his participation in the Committee was an issue. He advised that he would be willing to step aside from the Committee and observe it from afar as he did not want to be a distraction and a press release in relation to his role would be contrary to his wishes. He noted however that politics was a lively sport and it was good that persons were responding to the Committee’s composition as that was an opportunity to inform the Committee. He expressed his deep rooted desire to work with the Committee and if accepted it would be his honour to continue to contribute to the discussion.

*(Professor Albert then left the room.)*

**9.3.** Professor Albert's contribution to the Committee so far was discussed, as well as his role, against the backdrop of concerns raised in the public domain. The Committee noted that its local constitutional expert, Dr Barnett, also served other countries regionally and internationally.

*(Professor Albert was then invited to re-join the meeting.)*

**9.4.** Professor Albert was advised that the Committee found his contributions most valuable and his participation was welcomed by the Members.

## **10. DATE AND TIME OF THE NEXT MEETING**

**10.1.** The Committee was advised that the next meeting would be held on April 14, 2023 and would commence at 9:30 am. Matters not reached were rolled over.

## **11. ADJOURNMENT**

**11.1.** There being no further business, the meeting was terminated at 7:00 pm.