



**GREEN PAPER NO. 1 /2007**

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**GREEN PAPER  
ON  
CONSTITUTIONAL REFORM ISSUES**

When the Parliamentary Committee consisting of representatives of both political parties met in 1961 to draft the Independence Constitution for Jamaica, they brought to the discussion a number of shared assumptions which profoundly affected both the structure and the content of our present Constitution.

The most important of these were:

- That Her Majesty the Queen would remain as the official Head of State and be represented locally by a Governor General appointed by Her.
- That we should adopt the system of parliamentary government that had been evolved over the centuries by the United Kingdom and which has become known as the "Westminster model" - export version.
- That the written constitution would contain a Chapter on fundamental rights and freedoms which ordinary legislation could not transgress. The technical supremacy of Parliament would, however, be preserved by a provision exempting from this control, legislation passed by a two-thirds majority in each House of Parliament.

• That the Judicial system would continue, at least initially, to have at its apex the Judicial Committee of the Privy Council which had been created in 1833 as an instrument for ensuring the uniformity of jurisprudential systems and principles throughout the British Empire.

With the experience gained by the operation of this Constitution in the years since Independence, the influence exerted by the development internationally of new ideas and concerns in respect of human rights and principles of good governance, together with a heightened sense of our identity as a nation that is part of a particular region, these assumptions no longer command the unquestioned acceptance that they once enjoyed.

This has led to a growing recognition for the need to revisit and reconstruct our constitutional arrangements. This recognition led to the initiation, in 1991, of a process designed to achieve amendment of our Constitution.

In that year, a Joint Select Committee of Parliament began deliberations designed to recommend to the full Parliament proposals for constitutional and electoral reform. That Select Committee, after a series of meetings, recognized that it was necessary to establish a process that would facilitate a wider degree of public input by involving other sections of the society, apart from the two political parties represented in the Select Committee itself.

To this end, a Constitutional Commission was established with membership drawn from a wide range of national institutions that included, but was not dominated by, Members of Parliament. This Commission was established under the Chairmanship of the late Mr. Justice James Kerr and commenced its work in February 1992.

As members will recall, this Commission presented a Report to Parliament in September of 1993 which indicated wide areas of agreement among the participants. This meant, of course, that there was agreement on these matters between representatives of the political parties forming the Government and the Opposition.

The first decision taken by the Joint Select Committee was that, before the Report as a whole could be dealt with, further work was required to be done in respect of that Chapter of the Constitution dealing with Fundamental Rights and Freedoms. The life of the Commission was accordingly extended for this purpose under the Chairmanship of Dr. Lloyd Barnett. A Final Report of the Commission was eventually submitted in February 1994.

A reconstituted Joint Select Committee considered the totality of the Commission's recommendations and presented its own Report and recommendations to Parliament on May 31, 1995.

Since that time, there have been subsequent discussions by successive Joint Select Committees but these have primarily focused on additions to, and refinements of, the proposed Charter of Rights and Freedoms. In fact, these discussions have reached the stage of a Bill currently before Parliament that, when amended to incorporate the decisions taken by the last Select Committee, would repeal and replace the existing Chapter III of our present Constitution.

It is apparent, moreover, that the Report presented in 1995 and subsequent deliberations have indicated a wide area of agreement that the assumptions which underlie the present Constitution no longer reflect the prevailing sentiments either in the political parties or in the nation as a whole.

It can now be stated with confidence that:

- It is no longer considered appropriate for our Head of State to be the hereditary monarch of a foreign country which our citizens require a visa to enter – a requirement that applies even to the Governor General who is the local representative of Her Majesty the Queen. It is accepted that our Head of State should now be chosen by a process that will enable the holder to symbolize the sovereignty and unity of the nation and to be vested with certain specific responsibilities *ex-officio* that need to be exercised without any suspicion of partisan political considerations.

- While there is continued acceptance of the desirability of retaining the parliamentary system of government within the broad structure of the “Westminster Model”, it is recognized that there must be a limit fixed by the Constitution on the ability of the legislature to trespass on the specific responsibilities of the Head of State above mentioned, as well as on the protections afforded by the Charter of Rights.
- That the said Charter of Rights should be so structured as to emphasize the supremacy of those rights and freedoms by insisting that derogations from them must be justified by the norms of a democratic society and that specific qualifications on those rights and freedoms should be minimal.
- The phenomenon of globalization has mandated, for us in the Caribbean, the recognition of a need for regional economic and trade co-operation. This in turn requires that our judicial system contain an institution that will resolve intra-regional disputes between the sovereign countries involved and which will be recognized and accepted as a replacement for the Judicial Committee of the Privy Council, the vestigial remnant of an empire that no longer exists.

The modifications, indeed to some extent rejections, of the original assumptions on which our present Constitution is based have created a new context that now requires not merely piecemeal amendments, but a new creation that will reflect

current realities and draw its authority from a formal act done in the name of the Jamaican people and not from legislation passed by the United Kingdom Parliament.

**It is therefore proposed that, immediately following the next general election, there should be brought to Parliament a legislative instrument establishing a new Constitution which will reflect the consensus that exists in respect of the matters stated above. Since some of the provisions of the existing Constitution that are going to be replaced are either entrenched or deeply entrenched and in as much as the instrument establishing the new Constitution has to be passed as a whole, the procedural requirements are that the proposed Act be passed by a two-thirds majority of the membership in each House and then submitted to the electorate for approval.**

This legislative instrument will contain recommendations to the electorate in respect of the following matters:

- *Preamble*
- *Citizenship*
- *Charter of Fundamental Rights and Freedoms*
- *The President*
- *The Legislature*
- *The Executive*
- *The Judicature*

- *Local Government*
- *The Public Service*
- *Public Finance*
- *Impeachment of Public Officials*
- *Declarations of National Emergency or National Disaster*
- *Procedures for Amending the Constitution*

Members are urged to familiarize themselves with the Final Report of the Joint Select Committee dated 31<sup>st</sup> May, 1995.

In addition, there is attached to this Paper, two appendices. The first deals with the provisions relating to the proposed Charter of Fundamental Rights and Freedoms and reflects the changes that have been made by subsequent Select Committees to the original proposals emanating from the Constitutional Commission and the original Joint Select Committee. The second appendix deals with the Caribbean Court of Justice as a replacement for the Judicial Committee of the Privy Council since this topic did not form a part of the deliberations of any of the Joint Select Committees.

These two appendices, together with the final Report of the Joint Select Committee dated May 31, 1995, contain the matters on which agreement has been reached between members on both sides of the House and those relatively few matters on which some areas of disagreement still exist.

It is proposed, at some convenient time, to debate a Resolution that will seek the approval of the House for the process of Constitutional Reform and will enable Parliament to resolve any matters that still require a final decision.

**Portia Simpson Miller**  
**Prime Minister**

## Appendix 1

### **Proposed Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act**

The proposed Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act has had a prolonged period of gestation.

A Charter of Rights and Freedoms (Constitutional Amendment) Bill to implement recommendations for legislation to replace the existing Chapter of the Constitution with a new Charter, made by a Constitutional Commission in its February 1994 Final Report and approved by a Joint Select Committee on Constitutional and Electoral Reform in its Report of May 1995, was tabled in Parliament on March 31, 1999.

The Bill tabled in March 1999 was itself submitted to a Joint Select Committee for consideration and report. In December 2001, that Committee tabled a Report in which it made recommendations for amendment of the March 1999 Bill to achieve more fully, in so far as was appropriate, the underlying intent and objectives of the recommendations made by the Constitutional Commission and approved by the earlier Joint Select Committee.

During a debate in June 2002 on a resolution to improve the 2001 Joint Select Committee Report, however, the then Leader of the Opposition indicated that he would have concerns with the Bill even if the recommended amendments were to be incorporated in it. The Government was unable to ascertain precisely what those concerns were. A new Bill incorporating the recommended amendments was therefore tabled in Parliament on April 29, 2003 and was referred to a new Joint Select Committee, appointed in 2003, for consideration and report.

The Joint Select Committee, appointed in 2003 and chaired by the Minister of Justice, saw various changes in its membership over the period 2003 to 2006, held seventeen meetings, and received submissions from a number of persons and bodies. That Committee tabled its Report on September 12, 2006.

In its September 2006 Report, the Joint Select Committee made forty three recommendations and decisions. Thirty nine of those recommendations and decisions relate to matters on which the Committee reached full agreement while four recommendations and decisions relate to matters on which the members of the Committee were unable fully to agree.

Of the thirty nine recommendations and decisions on which the Committee reached full agreement, seven relate to provisions in the Bill which were discussed by the Committee in relation to proposals made to it, but which the Committee agreed, after discussion, to retain unchanged, while thirty two were recommendations for amendments to be made to the Bill.

Two of the four recommendations and decisions on which the members of the Joint Select Committee were unable to reach full agreement relate to the question whether the provisions on the death sentence exceptions to the protection of the right to life and to the protection against torture or inhuman or degrading punishment or other treatment should be retained in, or deleted from, the Charter; another relates to the question whether the Constitution should be amended to guarantee a right to trial by jury, and, if so, as to the manner in which that right should be formulated; and the fourth relates to the question whether a constitutional guarantee of the right to vote should be formulated as set out in the Bill or as proposed by certain Opposition members of the Joint Select Committee.

As regards the death penalty issues, the Committee's recommendation was that, as those issues depend on the fundamental question whether capital punishment should be retained or abolished, the death penalty exceptions to the protection of the right to life and to the protection

against torture or inhuman or degrading punishment or other treatment should be retained in the Constitution pending a determination by Parliament, on a free conscience vote, of that fundamental issue as to the abolition or retention of capital punishment.

The Joint Select Committee also left it to Parliament to determine whether there should be a constitutional guarantee of the right to trial by jury and, if so, how that right should be formulated. It did so as, notwithstanding its awareness of the importance of jury trials in the judicial system, it was unable, for reasons set out in its Report, to identify a method which would enable it to recommend a provision which would guarantee the right to jury trial and, at the same time, to address the two issues -

- of cases which, for national security or similar fundamental reasons, may, at some time in the future, justify trial by judge alone; and
- of the inundation of the Circuit Courts with cases for jury trial which would result from a constitutional right to trial by jury of offences now tried in the High Court Division of the Gun Court by judge alone.

The proposed Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, incorporating the amendments recommended in the

September 2006 Report of the Joint Select Committee, will therefore reflect the result of work carried out over a number of years by the Constitutional Commission, various Joint Select Committees and the persons and bodies and Advisory Groups which made representations to the Commission and the Joint Select Committees and assisted in their deliberations.

Members of Parliament are invited to refer to the September 2006 Report of the Joint Select Committee appointed in 2003 and the December 2001 Report of the earlier Joint Select Committee to gain a full understanding of the various issues raised before those Committees and of the bases on which each of those Committees came to its conclusions in relation to those issues. A Summary of Recommendations and Decisions is appended to each of those Reports.

The major areas to be dealt with by the proposed Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act relate to:

- a change from the approach now adopted in Chapter 111 of the Constitution, which involves the guarantee of each of the rights and freedoms immediately followed by provisions qualifying the right or freedom, to a new format involving a listing of all the rights and freedoms which, save as regards



five rights and freedoms which are dealt with separately and are each subject to separately listed derogations, are made subject to a single broad derogation;

- a change from what is known as the vertical approach, whereby constitutional remedies are provided for infringements by the State of the constitutional rights and freedoms, to a combination of that approach with what is termed the horizontal approach whereby a constitutional right or freedom binds the legislature, the executive and all public authorities, and, also, natural and juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right;
- significant additions to the existing constitutional rights and freedoms, including a more broad based right to privacy than now exists; a right to the protection of the environment; rights of the child; the right to vote; the right to a passport; and an increase in the discrimination grounds against which constitutional protection is guaranteed;
- various changes in relation to a number of rights and freedoms, including the right to freedom of movement; the right to the protection of freedom of the person; the protection of the right to due process; and the protection of property rights;

- the inclusion in Chapter 111 of the Constitution of provisions to make it clear that, under Jamaican law, any restriction of marriage or any similar relationship to one man and one woman is not to be regarded as being inconsistent with or in contravention of the provisions of Chapter 111, and that no form of marriage or other similar relationship other than the voluntary union of one man and one woman, may be contracted or legally recognized in Jamaica;
- provisions to permit anyone authorized by law, or, with the leave of the Supreme Court, a public or civic organization, to initiate an application to the Supreme Court, on behalf of anyone entitled to apply for constitutional redress, for a declaration that any legislative or executive act contravenes any of the provisions of Chapter 111 of the Constitution;
- the addition of a number of new safeguards in relation to what are now termed periods of public emergency, some of which will become periods of public disaster, while the other such situations will continue to be termed periods of public emergency;
- the repeal of the provision which now saves pre-Constitution laws and anything done under the authority of any such law from inconsistency with or contravention of any of the

provisions of Chapter 111 and its replacement by a narrower provision relating only to pre-Constitution laws relating to sexual offences, obscene publications or offences relating to the life of the unborn; and

- the repeal of section 50 of the Constitution which now provides a special procedure for the enactment of legislation which, notwithstanding its inconsistency with any of the fundamental rights and freedoms provisions, is not thereby void, but prevails over those provisions.

## **APPENDIX II**

### **Replacement of the Judicial Committee of the Privy Council with the Caribbean Court of Justice as Jamaica's Final Court of Appeal**

On June 9, 2003, the Government of Jamaica ratified a treaty made between the Member States of CARICOM establishing a regional court to be known as the Caribbean Court of Justice. In order for this Treaty to be effective, it is necessary for legislation to be passed incorporating its terms into the law of Jamaica.

This court is vested with an original and an appellate jurisdiction. The former confers jurisdiction on the court to resolve issues between the Member Countries that may arise as a result of the establishment of the Caribbean Single Market and Economy (CSME). The latter would confer jurisdiction on the court to be the final appellate court for Member Countries that wish to adopt it in place of the Judicial Committee of the Privy Council of the United Kingdom.

Members are also aware that, while legislation has been passed by Parliament enabling the original jurisdiction of the court to be part of Jamaican law, the legislation in respect of the appellate jurisdiction which was passed by Parliament and affirmed by our Supreme Court and our Court of Appeal has been nullified by a decision of the Judicial Committee itself.

The basis of that decision is that such legislation can only be constitutionally enacted if it is passed in accordance with the procedure for amending an entrenched provision of the Constitution as provided by section 49 (2) thereof. This means, in practice, that the legislation has to have the support in Parliament of at least some of the members of the Opposition in the House of Representatives and in the Senate.

This support has not been forthcoming because the Opposition has contended that such a change in our judicial system should not take place unless the electorate as a whole, not just their Parliamentary representatives, is given the opportunity to vote for its acceptance or rejection.

Both the Government and the Opposition are in agreement that the appellate functions of the court, if and when it becomes a part of Jamaican law, should be entrenched in the Constitution. Since such entrenchment will require an affirmative decision by the electorate in a special referendum, the Attorney General has discussed with the official representatives of the Opposition a proposal that will satisfy the technical requirements mandated by the Privy Council decision and provide the opportunity for the consultation with the electorate as a whole.

#### **The proposal is that:**

- **There will be two Bills brought to Parliament simultaneously.**
- **One will provide for the replacement of the Privy Council by the Caribbean Court of Justice as Jamaica's final court of appeal.**
- **The other will amend section 49 of the Constitution by making the provision relating to the final court of appeal one of the entrenched provisions of the Constitution.**
- **Each Bill will contain a clause that it will only come into effect, after being passed by both Houses of Parliament and with the necessary majorities, on the order of the Minister and that such order can only be made after the Bill amending section 49 has been approved by the electorate.**

This procedure will satisfy the requirements of the ruling made by the Judicial Committee of the Privy Council, and the insistence of the Opposition that the Caribbean Court of Justice should not become part of the law of Jamaica unless and until it has been specifically approved by the vote of a majority of the electorate.

Once the Government receives the formal agreement of the Parliamentary Opposition this process can be set in motion without any further delay.

**NOTES**