

# Bahamian-ness as an Exclusive Good: Attempting to Change the Constitution, 2002

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## ABSTRACT

In 2014, Bahamian Prime Minister Perry Christie announced a constitutional referendum on gender equality. In 2002, his predecessor, Hubert Ingraham, had already put a similar referendum before the electorate. Back then, the proposed amendments failed.

The Bahamas' Independence Constitution imagines citizenship as limited and exclusionary. The amendments currently proposed would indeed remove some levels of discrimination contained in the citizenship provisions, but others would be retained, and some new ones may even be added. However, the discussion of these amendments is dominated by a proxy debate appealing to populist emotions.

This paper seeks to analyse the amendments proposed in 2002, which marked the first attempt at constitutional reform since Bahamian Independence, as well as the process that ultimately led to defeat at the polls. The focus will be on the amendments addressing gender inequality. Questions include: how would the 2002 proposal have changed the levels of unequal access to citizenship compared to the 1973 Constitution, and how do they compare to the 2014 proposals? And, to what extent were there procedural flaws present in 2002, and to what extent did a distractionary discourse sabotage the declared goal of gender equality?

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## INTRODUCTION

Since Independence in 1973, the Constitution of The Bahamas has seen only minor changes—cosmetic in nature, addressing non-entrenched provisions (Constitutional Commission, 2013, p. 61) These have been disregarded; they certainly did not change the way Bahamians think and feel about this document, their nation, their democracy, or even themselves. However, attempts have been undertaken or at least processes begun,

to make more fundamental changes to the Constitution. So far, none have succeeded.

In 2002, towards the end of his second consecutive term in office, then Prime Minister Hubert Ingraham put five constitutional amendment bills to the electorate in the country's first ever, and thus far only, constitutional referendum. All five were rejected at the polls on February 27, 2002, gaining only between 29.1% and 37.2% of voter support (Dames, 2012).

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Following the failed referendum, Ingraham's Free National Movement (FNM) also lost the May 2002 general election, and later that same year, the new Prime Minister Perry Christie, during his first term in office, appointed a constitutional commission co-chaired by Paul Adderley and Harvey Tynes. This commission published two documents: *The Bahamas Constitution: Options for Change* (2003) and a *Preliminary Report and Provisional Recommendations* (2006). A second round of consultations was supposed to result in a final report, but the process got stalled and the Adderley-Tynes Commission never completed its work (Constitutional Commission, 2013, p. 60). In 2012, upon embarking on his second, non-consecutive term in office, Christie appointed a new constitutional commission chaired by Sean McWeeney,<sup>2</sup> which submitted its report, *Report of the Constitutional Commission into a Review of The Bahamas Constitution*, on the eve of the 40th anniversary of Bahamian Independence in July 2013. One year later, partly based on the recommendations of the McWeeney Commission, Christie announced a constitutional referendum originally scheduled for November 6, 2014. However, the announced referendum has since been postponed indefinitely<sup>3</sup> with its four proposed constitutional amendment bills stuck in committee in the House of Assembly (Turnquest, 2015).

The 2002 constitutional referendum consisted of five bills addressing a variety of unrelated subjects: gender equality, a Teaching Service Commission, the office of a Parliamentary Commissioner, the establishment of an independent Boundaries Commission, as well as the retirement age of judges. In contrast to

this, the latest proposal, though consisting of four separate bills, is presented to the electorate under a single common theme: gender equality. The Christie administration thus revisits one of the subjects of the 2002 exercise. Despite being presented in a markedly different format, the general thrust behind the bills is indeed similar to what it was then. This is important to note, because in 2002 Christie, then Leader of the Opposition, campaigned for the defeat of the bills at the polls.

While I will briefly describe the various constitutional amendment bills of 2002 in this paper, I will focus mainly on those that aimed to address the discrimination based on sex contained within the Constitution, particularly in its citizenship provisions. I will describe the various levels of inequality that currently exist, explain the changes a successful referendum in 2002 would have brought about, as well as the changes currently proposed in those instances where there are important differences between the 2002 and 2014 proposals. I will also demonstrate that other levels of inequality and discrimination will continue to be enshrined in these constitutional provisions, even if the currently proposed amendments were successful, meaning they would have to pass both Houses of Parliament with the required qualified majority as well as being approved by a simple majority of voters in a constitutional referendum.

Out of this comparison arise several questions. Why does Christie now attempt to realise the kind of constitutional reform that he was instrumental in defeating while in opposition? What lessons can be learnt from the failed attempt at constitutional reform in 2002, in order to increase the chances of success in a future referendum aimed at decreasing the levels of discrimination enshrined in the Bahamian Constitution? What other developments since 2002 might

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<sup>2</sup> The 2013 Constitutional Commission will be referred to as the McWeeney Commission.

<sup>3</sup> The Gender Equality Referendum was held June 7, 2016, after this paper was accepted for publication. – Ed.

impact the outcome of a constitutional referendum, especially one on women's rights, in today's Bahamas?

### **Proposed Constitutional Amendments, 2002: An Analysis**

While the constitutional referendum in 2002 saw only five questions put to the electorate, there were 10 bills seeking to amend the Constitution. One bill was withdrawn shortly before the referendum, and four bills were not put before the voters in the referendum. The argument, which has since been repeated by the McWeeney Commission, was that, technically, they did not need referendum approval (Constitutional Commission, 2013, p. 240). I posit that this, in some instances at least, is a loose interpretation of the spirit of both article 54 of the Constitution, as well as of the Constitutional Referendum Act, which requires that for any bill which "seeks to alter an Article of the Constitution specified in Article 54(2) or (3) of the Constitution ... a vote shall be taken by way of a referendum ..." (Constitutional Referendum Act, 1977, sec. 2(1)).

The bills for which no referendum approval was sought were Bills 2, 3, 4 and 5. At least Bills 2 and 5 addressed areas that were already entrenched in the Constitution. However, instead of altering existing articles, they proposed to create new articles without referendum approval, only to then have these entrenched via referendum, meaning that any future changes to these new articles created without a referendum would then require one. With Bill 10, which would have introduced a five-year waiting period before being eligible to apply for spousal citizenship but granting foreign spouses of Bahamians a residency and work permit in the interim, withdrawn, this left Bills 1, 6, 7, 8 and 9 going to referendum.

Bill 2 sought to establish the office of Parliamentary Commissioner "to keep the register of voters and to carry out duties

relating to registration of voters and the holding of elections" (Bahamas Constitution (Amend.) (No. 2) Act, 2002, p. 4). This was to be done in articles 70A, 70B and 70C of the Constitution, which were defined as new articles, rather than as amendments to the existing article 70, thus circumventing the constitutional provision in article 54 that would have made a referendum on this Bill a requirement. However, Bill 7, which did go to referendum, then sought to entrench these new articles into the Constitution by amending article 54 accordingly. Therefore, this part of the 2002 referendum was not about the creation of the office of Parliamentary Commissioner, but merely about its entrenchment after the fact.

Bills 3 and 4 sought to establish the office of Director of Public Prosecutions, and define its role, by adding new articles 92A, 92B and 92C (Bahamas Constitution (Amend.) (No. 4) Act, 2002), and consequently to redefine the functions of the Attorney-General by changing article 78 (Bahamas Constitution (Amend.) (No. 3) Act, 2002). As neither article 78 nor article 92 is entrenched in article 54, and as no entrenchment of the new articles was sought, neither of these two bills went to referendum. However, due to the overall failure of the constitutional reform effort, none of these new articles has yet become part of the Constitution, as "no day was appointed for these acts to come into operation" (Constitutional Commission, 2013, p. 240).

Bill 5 sought to establish a Teaching Service Commission by adding new articles 121A, 121B and 121C to the Constitution. The Commission's purpose would have been to advise the Governor-General "to appoint persons to hold or act in public offices in the Teaching Service and to remove and to exercise disciplinary control over persons holding or acting in such offices..." (Bahamas Constitution (Amend.) (No. 5) Act, 2002).

Bill 6 then sought to entrench these new articles into article 54 of the Constitution; the current article 121 is already entrenched. As in the case of the office of Parliamentary Commissioner, this then would not have been a consultation of the electorate about the establishment of the Commission, but merely about its entrenchment after the fact. In addition, Bill 6 would have added a mention of this new Commission in the entrenched article 107:

A former member of the Public Service Commission or Teaching Service Commission shall not, within a period of five years commencing with the date on which he last held or acted in that office, be eligible for appointment to any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the recommendation or in accordance with the advice of the Public Service Commission. (Bahamas Independence Order, 1973, art. 107; Bahamas Constitution (Amend.) (No. 6) Act, 2002)

This would have excluded Teaching Service Commission members from appointments made by the Public Service Commission, but not from appointments made by the Teaching Service Commission itself—a noteworthy construct.

Bill 8 sought to establish a new Boundaries Commission to replace the existing Constituencies Commission, by changing the entrenched article 69 of the Constitution. The referendum ballot question characterised this new commission as independent; however, all of its members would have continued to be political appointees:

The Chairman and one other member of the Commission shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the

Opposition, ... and the Deputy Chairman and one other member shall be appointed by the Governor-General, acting on the recommendation of the Leader of the Opposition after consultation with the Prime Minister... (Bahamas Constitution (Amend.) (No. 8) Act, 2002).

The fifth member would have been the Parliamentary Commissioner, also “appointed by the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition” (Bahamas Constitution (Amend.) (No. 2) Act, 2002). However, as the Parliamentary Commissioner was to be tenured for a period of eight years (Bahamas Constitution (Amend.) (No. 2) Act, 2002), it is conceivable that the government of the day would not necessarily have appointed the majority of the Commission’s members—an important difference in comparison to the composition of the current Constituencies Commission.

Finally, Bill 9 sought to increase the retirement age of Supreme Court Justices from 65 years to 68 years of age, and possible extensions from 67 to 72 years by changing the entrenched articles 96 and 102 of the Constitution by way of referendum (Bahamas Constitution (Amend.) (No. 9) Act, 2002).

This completes the brief overview of what might be considered the “simpler” bills, each changing no more than a few constitutional provisions, and all addressing topics that have not seriously resurfaced in public discourse. It must be noted that in the above instances, many of the bills were constructed, by definition, as adding new articles to the Constitution rather than changing its existing articles to circumvent the need for a referendum on them. Namely, these were articles 70A, 70B, 70C, 92A, 92B, 92C, 121A, 121B, and 121C. As we shall see below, Bill 1, on the other hand, was

inconsistent with this dialectic.

Whereas none of the above bills were very complex, Bill 1 proposed to change no fewer than nine articles in the Constitution, namely articles 3, 5, 8, 9, 10, 13, 14, 26, and finally 54, which entrenches the previous eight articles. These articles of the Constitution not only govern citizenship but also spell out the fundamental rights and freedoms of the individual. In the still operational Independence Constitution of 1973, these provisions are unequal for men and women.

In the Constitution, article 3 defines those persons who became citizens upon Independence on July 10, 1973. In its current form, paragraph 2 grants citizenship to those overseas-born children whose fathers became “or would but for his death have become” (Bahamas Independence Order, 1973, art. 3)<sup>4</sup> citizens of The Bahamas. Article 3(2) thus clearly discriminates against Bahamian mothers—or the children of these Bahamian mothers. In combination with article 14, however, the nature of this discrimination is no longer as unidirectional, for article 14 invokes the common law principle of *filius nullius*, declaring the biological father irrelevant when determining the status of children born out of wedlock (Constitutional Commission, 2013, p. 104). This then means that article 3(2) denies citizenship to children born overseas prior to Independence to either a married woman, who became a Bahamian citizen upon Independence, and her foreign husband, or an unmarried man, who became a Bahamian citizen upon Independence, and a foreign mother. The 2002 proposal would have removed this bias, by changing the language from “father” to “father or mother” (Bahamas Constitution (Amend.) Act, 2002). The bill was proposed to be retroactive, thus

granting citizenship to a group of children who up to this point have no constitutional entitlement to Bahamian citizenship. As the bill also proposed to remove the marriage-bias by revoking *filius nullius* in article 14, it would have addressed both instances of inequality.

Article 8 is similar to article 3(2) in that it addresses the access to citizenship of overseas-born children, but post-independence. Again, the 1973 Constitution grants it to the children of Bahamian fathers; again, because of the *filius nullius* rule in article 14, this then means the overseas-born children of married Bahamian men or unmarried Bahamian mothers. Again, the proposed change was to remove the gender bias—and in connection with the proposed changes to article 14, marriage bias—and grant the same constitutional entitlement to citizenship to the overseas-born children of most Bahamian parents. This change, too, would have been retroactive, allowing children to become citizens upon the commencement of the change, even if they were born prior to the change. It is, however, important to note that there still remains a group of Bahamian parents—men or women, married or unmarried—excluded from passing on their citizenship to their overseas-born children, and that is those who obtained their citizenship either through article 3(2) or 8 themselves, that is, they were themselves overseas-born.

The proposed 2002 amendments to articles 3 and 8 also emphasised that they would not have affected the entitlement of anybody to citizenship under any earlier provisions of the Constitution that have been changed. This is important, as the change to article 9 would have been a drastic one: it was proposed that it be deleted.

Article 9 currently entitles the overseas-born children of Bahamian mothers married to

<sup>4</sup> This phrase is common throughout this Chapter of the Constitution, but for simplicity’s sake I shall omit it henceforth.

foreign husbands to be registered as citizens upon reaching the age of 18 years, and while the new article 8 would have been retroactive, there remains one group of children currently entitled to future citizenship, but still waiting to claim it under article 9, who would not be entitled to it under the new article 8. Currently the overseas-born children of married Bahamian fathers and unmarried Bahamian mothers who were themselves born overseas are excluded from citizenship, but article 9 does not define the same exclusions for married Bahamian women. However, these children have to wait until they turn 18 before they can apply, and they must do so before turning 21. Without saving this constitutional entitlement under article 9 for those born before the change, some children would have been, figuratively speaking, deleted from the waitlist.

Article 5 speaks to spousal citizenship upon Independence. It entitles not only foreign wives, but also foreign ex-wives and widows of husbands who became Bahamian citizens upon Independence, to also become Bahamian citizens upon Independence. Here, too, the 2002 proposal sought to remove the gender bias by allowing the foreign husbands—and ex-husbands and widowers—of wives who became Bahamian citizens upon Independence these same rights. It is important to note that this article applies only to marriages entered into prior to Independence, so that this, too, would have been a retroactive change (Bahamas Constitution (Amend.) Act, 2002).

Similarly, article 10 speaks to spousal citizenship post-independence. It currently entitles the foreign wives of Bahamian husbands to be registered as citizens. The main difference to article 5 is that in this case, the marriage must persist; ex-wives and widows are not so entitled. Here, too, the gender bias would have been removed for the current foreign husbands who got married to

their Bahamian wives on or after July 10, 1973.

Apart from the various clauses defining how Bahamian citizenship is obtained, this chapter of the Constitution also addresses the possible deprivation of such citizenship. Currently Parliament may make laws to revoke the citizenship of Bahamian citizens, except that of those who are citizens by virtue of articles 6 or 8 of the Constitution, that is citizens born after Independence and entitled to citizenship at birth (Bahamas Independence Order, 1973, art. 13(b.)). This group's citizenship cannot be revoked, except in very limited cases where the Governor-General has the discretionary right to deprive some Bahamians who are dual nationals of their citizenship (Bahamas Independence Order, 1973, art. 11). It was proposed to add citizens by virtue of the newly amended article 3A to this protected list (Bahamas Constitution (Amend.) Act, 2002), that is, citizens born overseas prior to Independence to parents who were entitled to Bahamian citizenship at Independence. Yet citizens born in The Bahamas prior to Independence would not have been amongst the beneficiaries of this constitutional change. In essence, this starkly contrasts with the post-independence preference for *ius soli*, putting those born prior to Independence within The Bahamas in a less privileged position than those born abroad.

The proposed change to article 13 was the only provision in this complex bill that did not aim to address some form of gender disparity in the current Constitution. It did not address any other form of discrimination either; rather it further expanded the Constitution's catalogue of differences. However, the article's highly discriminatory nature—it effectively creates “two legal classes of citizens” (Johnson, 2008, p. 60)—so far has not been a topic in any discussion about constitutional reform.

Thus far, Bill 1 addressed the chapter on citizenship, but its last provision proposed a change to article 26, which defines discrimination in the chapter on fundamental rights and freedoms of the individual as follows:

In this Article, the expression ‘discriminatory’ means affording different treatment to different person [*sic*] attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby person [*sic*] of one such description are subjected to disabilities or restrictions to which person [*sic*] of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description (Bahamas Independence Order, 1973, art. 26(3)).

The proposed change was to add the word “gender” to the above list of attributes (Bahamas Constitution (Amend.) Act, 2002).

### **Proposed Constitutional Amendments, 2002 and 2014: A Comparison**

While all of the above proposals failed to find the approval of voters in the 2002 referendum, 12 years later, in the summer of 2014, Christie tabled a set of four constitutional amendment bills in the House of Assembly, which in their combination had a similar thrust to Bill 1 of 2002. This time, it was declared, the referendum would address only one aspect of constitutional reform: the removal of gender discrimination (“PM Opens,” 2014). Only, the first victim of this renewed attempt was the term “gender”, which is not included in the actual bills. Instead, it has been replaced by the narrower concept and the strictly biologically understood word, “sex” (Bahamas Constitution (Amend.) Bill (No. 4), 2014). This was a recommendation of the McWeeney Commission’s report, but the

reasons for this choice of word were not discussed within its pages. Even though the report’s discussion revolved wholly around the term “gender”, it is the word “sex” that then appears in the specific recommendation for amending article 26 (Constitutional Commission, 2013, p. 23).

The McWeeney Commission further recommended adding a provision to article 26 explicitly stating that despite the broadened anti-discrimination criteria, laws prohibiting same-sex marriage shall not be inconsistent with the Constitution (Constitutional Commission, 2013, p. 25). This recommendation was not included in the proposed bills. Both the administration and the same Commission, which is now tasked with educating the Bahamian electorate about the four bills, can argue that the Constitution already exempts marriage laws from having to comply with the anti-discrimination provisions (Bahamas Independence Order, 1973, art. 26(4)(e)). As it stands, the 19th century Matrimonial Causes Act prohibits same-sex marriage: “A marriage shall be void on any of the following grounds: ... that the parties are not respectively male and female...” (Matrimonial Causes Act (1879), sec. 21(1)(c)). The proposed constitutional change would therefore not void this law. Furthermore, the Constitution exempts laws “enacted or made before” Independence from having to comply with the Constitution’s non-discrimination clauses (Bahamas Independence Order, 1973, art. 30(1)(a)). While many opponents of the current constitutional reform effort have tried to derail the process by proclaiming that the Christie administration’s ulterior motive was to sneak in same-sex marriage under the guise of equality between men and women, this argument neglects not only the constitutional reality outlined above, but also ignores the fact that Parliament could legalise such today without the need for a controversial, costly

and politically perilous referendum.

The proxy discussion over same-sex marriage to defeat the constitutional guarantee of gender equality is probably owed, at least in part, to developments abroad as well as to the influence that international media covering them have in The Bahamas (Aranha, 2014). However, the attempts at mitigating these fears among many Bahamians did little to achieve that aim. Rather, through the McWeeney Commission's patient entertaining of the issue at town hall meetings, as well as through Christie's reference to it when first presenting the four bills in July 2014 ("PM Opens," 2014), an impression is created that those fears are perhaps justified, even though Christie presumably made the reference to preemptively alleviate such concerns.

Another major difference between the 2002 proposals and the current proposals is the retroactivity of the new citizenship provisions. It is no longer a part of the plan. During town hall meetings, retired Justice Rubie Nottage (personal communication, August 5, 2014) has argued on behalf of the Commission's education campaign that this is due to the fact that the government simply does not know how many people would suddenly be entitled to citizenship—a move deemed too risky. However, it stands to reason that statisticians should be able to extrapolate a fairly accurate estimate of that number based on data available to the government, such as overseas passport applications, demographic data for the countries from which they were made, historical figures of applications for citizenship registration under article 9, etc.

Overall, the 2002 Bill 1 would have been more comprehensive and less exclusionary than the four 2014 bills combined (Aranha, 2015). The McWeeney Commission recorded observers opining that this complexity of the 2002 bills as well as the government's failure to adequately educate the electorate about

them had contributed to the failed referendum (Constitutional Commission, 2013, p. 63). If that is one reason for the different approach of dividing the gender equality issue into several bills, Nottage, at town hall meetings, gave another reason: the McWeeney Commission and the Christie administration are of the opinion that one constitutional amendment bill may not change more than one article of the Constitution (personal communication, August 5, 2014). This is an interpretation of the Constitution that is implicit, not explicit (Bahamas Independence Order, 1973, art. 54). However, as a consequence this amounts to an indirect accusation that the 2002 process was unconstitutional; if upheld, it would also cast doubt upon the constitutionality of one of the current proposals, for the first Constitutional Amendment Bill (2014) affects both articles 8 and 9 of the Constitution. While the 2002 process was indeed criticised by the opposition, this criticism did not claim unconstitutionality of the bills themselves. The opposition did try to claim unconstitutionality of the process, arguing that the referendum date of February 27, 2002 was too close to that of the upcoming general election, ultimately held on May 2, 2002. However, their argument in this regard failed to gain traction (Smith, R. M., 2002, p. 1). Christie's main criticism of the 2002 process can be described as what he deemed a lack of appropriate consultations with those he considered legitimate stakeholders—predominantly, the churches (Thompson, 2012).

Despite, or perhaps because of, the complexity of the 2002 bills, their ballot questions, which are a required element of each bill (Constitutional Referendum Act, 1977, sec. 3), were more accurate than the current proposals, where especially the first bill's ballot question would be misleading if it were to remain unchanged, as it does not acknowledge the existence of disqualifiers



that exclude parents from passing on their citizenship and instead leads the audience to believe that there exists a positive list of qualifiers that would enable them to do so; the language suggests that this right would be the privilege of those parents who are citizens by birth (Rolle-Brown, 2014). Yet while some of the excluded categories, i.e. articles 3(2) and 8 of the Constitution, do in fact describe citizens by birth, others who are not citizens by birth but by registration or naturalisation are not excluded.

Three other differences highlight the more exclusionary nature of the current proposals: while 2002 simply removed the gender bias from the entitlement of overseas-born children of Bahamian parents, spousal citizenship and *filiius nullius*, Christie now introduced new supposed safeguards to ensure that Bahamian citizenship remains an exclusive good—in the first instance by expanding the list of disqualifiers contained in article 8 (Bahamas Constitution (Amend.) Bill, 2014), in the second instance by erecting perceived protections against so-called marriages of convenience, and in the third instance by making DNA testing of unmarried fathers mandatory thereby continuing a degree of discrimination based on marital status, for while the married man is automatically assumed to be his wife’s child’s father, the unmarried couple’s word is not trustworthy enough to establish paternity (Bahamas Constitution (Amend.) Bill (No. 2), 2014). However, it must be remembered that the withdrawn Bill 10 of 2002 also would have put somewhat stricter requirements on spousal citizenship, which could be interpreted as an early attempt to protect against so-called marriages of convenience without saying so in the actual text.

Those are the obvious differences. There are obvious commonalities, too. Bill 1 (2002) and Bills 1 through 4 (2014) appear to share the theme of gender equality. However, most

obvious are some shortcomings of both proposals.

Firstly, because of the exclusionary nature of the citizenship provisions in articles 3(2) and 8 of the Constitution, the reality is now, would have remained in 2002, and will remain even if the current exercise were to succeed, that the overseas-born children even of two Bahamian parents could be rendered stateless if they are born in a country that does not have *ius soli*. Due to their more exclusionary character, the current proposals increase this risk, despite the McWeeney Commission’s recommendation to remove all disqualifiers from article 8 in order to ensure that the children of all Bahamian citizens, not only regardless of their parents’ sex but regardless of their parents’ place of birth, enjoy the same rights (Constitutional Commission, 2013, p. 104).

Secondly, both in 2002 and now, the government avoids the proverbial elephant in the room—the need to revisit article 7 of the Constitution, which speaks to children born in The Bahamas after independence to two non-Bahamian parents, or an unmarried non-Bahamian mother and Bahamian father. Currently, they are “entitled, upon making application on his [*sic*] attaining the age of eighteen years or within twelve months thereafter in such manner as may be prescribed, to be registered as a citizen of The Bahamas...” (Bahamas Independence Order, 1973, art. 7) or, in short, “entitled... to be registered as a citizen.” This is frequently obfuscated by reducing it to being merely a “right to apply,” even by the Minister of Foreign Affairs and Immigration Fred Mitchell (2015), especially in the public debate around the government’s so-called New Immigration Policy. The reality is that many of these children are here to stay, and that our Constitution’s rendering them stateless, whether *de jure* or *de facto*, as minors, and due to the slow processing of

applications by the Department of Immigration and cabinet as young adults, too, disadvantages them as individuals and as members of our society. This then can create parallel societies, ultimately harming the very society this exclusivity was designed to protect. After reviewing the Constitution in its entirety and making countless recommendations on virtually all aspects of the document, the McWeeney Commission decided to exclude article 7 from its review, and instead recommended the appointment of another commission to further study this subject (Constitutional Commission, 2013, pp. 103-104). While Christie announced in 2014 that “preliminary preparations are already underway” (“PM Opens,” 2014) to this end, no such commission has been appointed as yet.

The riskiest difference contained in the current proposals, however, is the presentation of separate bills in what will be a binding referendum. In a worst-case scenario, this could result in increasing rather than decreasing the inequality between fathers and mothers. Namely, if Bill 1 (2014) were to fail but Bill 3 (2014) were to succeed, *filius nullius* would be abolished, and unmarried Bahamian fathers would gain the right to pass on Bahamian citizenship to their children while unmarried Bahamian mothers would consequently lose the right to pass on Bahamian citizenship to their children born overseas.

### **Resistance to Reform: Recommendations to Avoid a Repeat Performance**

While voters in 2002 were asked to decide on an array of issues, Bill 1 and its promise of gender equality, as well as its resounding rejection in the referendum is the one Bahamians seem to remember most vividly today. It certainly generated the most debate then (Bethel, 2003, p. 72). Given Bahamian voters’ demographics, it stands to reason that

the referendum was not, or at least not only, a vote on the issues at hand. Both the 2000 as well as the 2010 census show that Bahamian women outnumber Bahamian men by approximately 52% to 48% in the overall population of the country (Bahamas Dept. of Statistics, 2002, 2012). Among the adult population, i.e. those eligible to vote, this imbalance is slightly greater still. Before the last general election, Ingraham announced that there were approximately 20,000 more women registered to vote than men (Hall, 2012). Given the total registration numbers for 2012, that translates into a split of roughly 56% women to 44% men amongst registered voters.<sup>5</sup>

If the majority of voters are women, why then is a vote for equal rights controversial? The McWeeney Commission mentioned several factors as contributing to the failed referendum in 2002: “contamination of the referendum by other political controversies; the imminence of a general election; decidedly mixed feelings among the electorate as to the citizenship-related aspects of the gender-equality issue; the complexity of the bills; and the lack of public education” (Constitutional Commission, 2013, p. 63). However, these are in many ways connected, rather than separate reasons.

When the People’s Liberal Party (PLP), after having voted for all of the constitutional amendment bills in the House of Assembly, turned around, withdrew its support, and campaigned against the amendments, it became a political issue. This in turn affected everything down to the public’s education about the bills.

Arguably, Ingraham and the FNM

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<sup>5</sup> Calculation based of Ingraham’s statement and voter registration numbers published by the International Institute for Democracy and Electoral Assistance, <http://www.idea.int/vt/countryview.cfm?id=31>

underestimated the need for an educational campaign, too, only announcing it less than four weeks before the referendum (Smith, February 1, 2002, p. 11). A few days later, the divided political climate on the issue led him to decide that no funds from the public treasury would be spent on such a campaign, but that, because the PLP was using its party funds for a No campaign, the FNM would use its party funds for a Yes campaign; government funds were to be “limited to reproducing the bills, printing posters, and costs associated with sponsoring the referendum” (Smith, February 11, 2002, p. 1).

The unfortunate result of this decision was that the education on the constitutional amendment process then took place at party rallies (Smith, February 26, 2002, p. 1). However, political rallies in The Bahamas are neither informational nor educational, but largely emotional, and they each tend to reach only one side of the political divide. Thus, at a rally less than a week before the referendum, Ingraham made the ultimate plea: “Whoever wins Wednesday’s referendum will no doubt become the next government of The Bahamas. If you give us the referendum I will give you the next government of The Bahamas” (Maycock, 2002).

An analysis of the media coverage of the 2002 referendum suggests that the highly politicised nature of the referendum, and the unpopularity of the sitting government early in 2002 when The Bahamas’ tourism sector was suffering badly as a result of the 9/11 terror attacks in the United States, were the main reasons for the No vote. I furthermore posit that the opposition PLP exploited this climate, and the referendum, for the ultimate prize, i.e. the May 2nd general election.

When Christie introduced his bills in 2014, much of the process had already been markedly different from the 2002 process, e.g. the McWeeney Commission had met with

more than a dozen clergy from different denominations, and their opinions had been noted in the Constitutional Commission report (2013, App. VI). Also, a public education campaign was launched and announced with their tabling in Parliament (“PM Opens,” 2014). It could be argued that this was premature, as the bills are, to this date, stuck in committee in the House of Assembly. This means that they are subject to further changes that could have potential implications for any informational or educational campaign.

However, an educational campaign alone may not be sufficient to ensure that the bills pass in another referendum. The process faces several serious challenges. Parallel to what happened in 2002, the current process is in danger of being politicised. Not only does the FNM expect Christie to apologise for campaigning against the 2002 referendum (Thompson, 2014), but Christie categorically refuses to do so (Virgil, 2014). In the current political climate, with the sitting PLP government’s unpopularity arguably rivalling that of the 2002 FNM administration, but the FNM opposition being perceived as “the weakest the country has seen in decades” (Cartwright-Carroll, 2016), any effort the electorate perceives to be part of Christie’s effort to construct his own legacy, and thus a popularity contest, runs the risk of being rejected. On the other hand, the opposition may jump at any opportunity to sharpen its profile.

Prominent members affiliated with both major political parties are spearheading the educational campaign but it nonetheless faces some challenges. By relying heavily on the town hall format, it has, at least thus far, embraced a decidedly 20th-century approach to public campaigning. Also, it has largely been on the defensive. Christie himself brought up same-sex marriage in connection with the constitutional amendment bills, as if in an attempt to alleviate concerns before they

could be voiced (“PM Opens,” 2014). Since then, the McWeeney Commission has been patiently entertaining many questions on the subject at repeated town hall meetings. Arguably, it could have taken a stronger stance in categorically dismissing the matter. As a result, homophobia appears to have been, to some extent, validated in the debate, if only serving as a proxy for misogyny.

In their analysis of the public debate of the proposed marital rape law in 2009, Lisa Benjamin and Cathleen LeGrand demonstrated that “unfounded beliefs, unchallenged assumptions and illogical arguments” (2012, p. 31) can effectively derail legislative reform. This debate also showed a continued strong element of misogyny among shapers of Bahamian public opinion, which does not bode well for a referendum on gender equality, even if, for the time being, the disguises of choice are homophobia and chauvinism.

Another obstacle to a successful constitutional referendum is the tainted legacy of the so-called referendum on web-shop gaming and a national lottery, which was held in January 2013. Voter turnout was well below 50% (Hainey, 2013) and the government could thus argue that no quorum had been reached and that the gaming referendum in reality was but a non-binding opinion poll in which the majority of the electorate, by abstaining, declared they had no preference either way. Christie prepared for such a scenario before the vote and declared “that a minority turnout would make the result ‘inconsequential’ and the government would have to make its own judgement on the way forward” (Smith, 2013). Nonetheless, after the vote he promised that he would abide by the outcome (Thompson, 2013). However, his administration has since turned around, and passed legislation to legalise and regulate web-shop gaming regardless (Gaming Act, 2014). His administration has since failed to

make the Bahamian public understand and trust that, in contrast to the so-called referendum in 2013, a constitutional referendum will be binding, that his administration not only would not, but could not, act contrary to its outcome.

If, because of the history of the past 14 years, the process, the actors as well as the bills are contaminated, then what measures might increase the chances of gender equality becoming entrenched in the Bahamian Constitution? One possible approach would be to broaden the conversation about the current proposals. As most of the constitutional provisions requiring change affect the Constitution’s chapter on citizenship, especially the status of children born to Bahamian parents abroad, the public debate would gain an element of honesty if the proponents of change admitted more directly that, yes, the changes would have immigration implications. Also, framing the entire conversation around the very worthy concept of gender equality neglects to acknowledge one fundamental fact: the citizenship provisions only indirectly discriminate against Bahamian women—and some Bahamian men—in their roles as parents. The real victims of this unequal entitlement to Bahamian citizenship, however, are their children, regardless of their sex. The key provision in the Constitution, where the debate is framed around gender, but could also be framed around children’s rights, is article 8, which says, “A persons [*sic*] born outside of The Bahamas ... shall become a citizen ... if ... his father is a citizen...” (Bahamas Independence Order, 1973, art. 8). Clearly, the constitutional entitlement speaks to the newborn, the Bahamian parent’s sex—and marital status—and the conditions under which the child gains this entitlement, or is denied it. The debate about the bills should therefore also include children’s rights.

Another approach would be to broaden the

proposals themselves, and heed the advice given by the McWeeney Commission to remove all the disqualifiers contained in article 8 of the Constitution, thus making all Bahamian citizens and their children equally Bahamian. Nottage has stated that it was necessary to exclude some citizens from passing on citizenship to their children to ensure “attachment to the territory and allegiance to the state” (R. Nottage, personal communication, September 25, 2014). However, using a person’s place of birth, a singular moment in life, as the sole criterion to determine this concept is arbitrary and ineffective. Furthermore, demanding citizens’ “attachment to the territory and allegiance to the state” could be viewed as a colonial legacy which continues to define the persons who inhabit the territory as subjects. If, as has been stated, the aim of the constitutional reform exercise is to deepen our democracy (Gilbert, 2013), then it could be argued instead that the state owes allegiance to the citizens, who are the true sovereigns. If a degree of loyalty or attachment is to be expected of a citizen, perhaps it ought to be to the society of fellow citizens around them, but such surely is not miraculously instilled in the newborn at the time—and by the place—of birth, that singular moment in life.

## CONCLUSION

After scrutinizing both the 2002 and 2014 proposals for constitutional reform, we see that, despite the removal of some barriers, Bahamian-ness continues to be treated as an exclusive good. These exclusionary qualities of Bahamian citizenship fail to foster democratic maturity, and encourage the disengagement and retreat into parallel societies of would-be citizens. As Bertin Louis has shown for Haitian-Bahamians, the state thus “produces subjects that are ... unpatriotic and potentially disloyal to The Bahamas...” (2011, p. 20). However, as I have demonstrated, individuals that are

potentially being excluded and alienated are more diverse and can include the progeny of families without any recent immigration background.

Therefore, we must ask: Why is Christie, why are we, The Bahamas, attempting to change our Constitution to enshrine gender equality? And, why is this seemingly such a difficult task, with failure a distinct possibility?

Some observers have opined that Christie’s second term in office will be about constructing his personal legacy (Dames, 2014). He himself has used this term on occasion (“Crime Solving,” 2014; Christie, 2015). However, legacy aside, other factors necessitate the appearance of movement towards constitutional reform for gender equality.

In 1993, The Bahamas ratified the United Nations’ Convention on the Elimination of all forms of Discrimination against Women (CEDAW). Since then, The Bahamas has been unable to fully comply with the document because of its constitutionally enshrined gender inequality, and the Committee on the Elimination of Discrimination against Women has repeatedly demanded constitutional and legislative improvements to fully implement the Convention in The Bahamas, e.g. in 2012 it recommended that the government:

take steps to repeal article 26(1) of the Constitution and ensure that an explicit definition of discrimination in line with article 1 of the Convention, as well as provisions on the equal rights of women in line with article 2(a) of the Convention, be included in the Constitution or in other appropriate legislation (p. 3).

or that The Bahamas “amend its Constitution and relevant domestic laws to grant Bahamian women equal rights with men regarding the

transmission of their nationality to their children or to their spouses of foreign nationality” (p. 7).

Not only as a party to CEDAW, but as a nation heavily dependent on tourism—and tourism targeting a predominantly Western, North American customer base—The Bahamas is caught between legal spaces on this issue. At least the appearance of movement towards equal rights is important to avoid potential negative consequences. Compliance issues with CEDAW can also explain the narrow focus on gender in the proposals to change the citizenship provisions, rather than an overall reform of the system to create a more inclusive Bahamas in general.

On the other hand, as we have seen, there seems to be only a limited commitment of government resources towards educating the electorate on, and convincing them of the benefits of such a constitutional change. While on the one hand The Bahamas needs to comply with international treaties and domestic laws, on the other hand there are socially widely accepted rules and conventions that may not necessarily accept women as equal to men. As has been shown in the marital rape debate, certain religious interpretations can negatively influence public attitudes in this arena (Benjamin & LeGrand, 2012, p. 29). Furthermore, many Bahamians interpret the call in the Constitution’s preamble for “an abiding respect for Christian values” (Bahamas Independence Order, 1973, Preamble) “as a declaration that The Bahamas is a Christian nation” (Benjamin & LeGrand, 2012, p. 29).

The issue of legal spaces can be spun as a threat to Bahamian sovereignty, and the issue of multi-normativity makes constitutional reform towards gender equality a political minefield domestically. Many callers on talk radio vocally oppose the proposals, and hosts

allow them considerable air-time. As Nicolette Bethel noted about the influence and power of talk radio, The Bahamas is “a country where radio talk show hosts determine the decisions taken by government officials and analytical texts are relegated to college classrooms or embattled conclaves of academics...” (Bethel, 2000, pp. 257-258). It is then not surprising that an administration beset by controversy, especially one that in hindsight is able to look at the political consequences of an earlier failed constitutional referendum, does not appear to see this referendum as a priority at present.

Regardless of one’s stance on the subject of gender equality, observers have also noted amongst Bahamians a general reluctance to make any changes to the Constitution. This has been linked to the false belief amongst many Bahamians that our founding fathers crafted the Constitution as “an original work of Bahamian authorship” (Johnson, 2008, p. 17) when in fact the document is merely the 1973 vintage of “the Westminster Export Model Constitution,” (Johnson, 2008, p. 18) handed to us by the British at Independence.

Perpetuating the exclusionary qualities of Bahamian citizenship encourages the disengagement and retreat into parallel societies of would-be citizens. This refusal of our society to be more inclusive is what Alfred Sears predicted could become “a threat to the domestic stability of The Bahamas” (1994, p. 10).

Constitutional reform is a vital ingredient in shaping a more progressive future; however, in The Bahamas, as in the Commonwealth Caribbean in general, “the discourse on constitutional reform is fundamentally sterile and technocratic and not tied to any philosophical direction” (Barrow-Giles, 2010, pp. 7-8). The challenge is to shift this paradigm and to challenge these inherited notions. Failure to do so means accepting the

shackles of coloniality.

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