

CONSTITUTIONAL REFORM – THE PROPOSED CHARTER OF RIGHTS

A. INTRODUCTION

1. When the Independence Constitution was being drafted in 1961-62, the Constitution-makers had no initial intention to include protection for the fundamental rights and freedoms of Jamaican citizens. It was only after public protests and strong representation from civil society that a Chapter was inserted in the draft. As this was done in the final phases of the preparation, the public had no real opportunity to examine and make representations on its contents. In the result what was eventually revealed contained many defects and has led to widespread dissatisfaction.

2. The major defects which emerged are as follows:

(1) the Preamble “Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual,.....” commenced with the legalistic expression “whereas” which is characteristic of the technical language in which the entire chapter was formulated;

(2) the Preamble itself was misleading and led to judicial misconception that pre-Independence legal entitlement to the protection of these rights was the ultimate limit of post-Independence rights;

- (3) its formulation enabled the courts to adopt the erroneous position that there is a general and pervasive presumption of constitutionality in favour of measures which abridge fundamental rights and freedoms;
- (4) it omitted protection of important civil rights such as the right to vote and made no reference to any social or economic right;
- (5) it severely curtailed the right of access to the court by prescribing a strict test of *locus standi*;
- (6) it compelled the court to dismiss an application for constitutional redress where some other remedy is available.
- (7) it contained a general as well as a special savings clause which gave primacy to colonial law over the constitutional guarantees;
- (8) it contained wide and non-justiciable scope for executive abrogation of fundamental rights and freedoms during periods of public emergency; and
- (9) the guarantees could be suspended by a special Act, requiring no special prior notification and only a two-thirds majority in each House.

B. REMOVING DEFECTS AND EFFECTING IMPROVEMENTS

3. As a result primarily of the work of the Constitutional Commission a new set of provisions have been drafted. The title "Charter of Rights" first advocated by the Most Honourable Edward Seaga was adopted. The draft seeks to correct many of the defects of the present Fundamental Rights Chapter and to implement significant extensions and improvements.

SIMPLIFICATION OF EXPRESSION

4. The Commission had recommended that the declaratory provisions of the Fundamental Rights and Freedoms should be expressed in positive terms and in the modern Bill of Rights form obtaining in the Constitutions of certain other Commonwealth Countries, such as Canada and Trinidad and Tobago.

5. Thus, the draft Bill for the introduction of the new Charter of Rights proposes the following Preamble:

"CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

13(1) Whereas –

- (a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;

(b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society;

(c) all persons are under a responsibility to respect the rights of others and to strive for the promotion and observance of the rights recognized in this Chapter,

the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others..”

6. The endeavour to make the new Charter more reader friendly is also achieved by the provision of a simple enumeration of the rights protected by the constitutional guarantees. Generally, there will be no detailed provisions in relation to each fundamental right or freedom with accompanying exceptions and limitations as exists in the present Chapter III.

7. In the draft only four rights/freedoms were originally dealt with separately and in detail. These are:

- (i) the protection from inhuman or degrading treatment, in the proposed section 13(6) and (7) of the Constitution;
- (ii) the protection of freedom of the person, in the proposed section 14 of the Constitution;
- (iii) the protection of property rights, in the proposed section 15 of the Constitution; and
- (iv) the right to due process, in the proposed section 16 of the Constitution.

8. More recently the draft was amended as a result of representations made by religious groups to deal separately with the right to freedom of religion and this we will discuss further on in this presentation. The following rights and freedoms are included in the enumeration and will now be granted constitutional protection:

- (a) the right to life, liberty and security of the person and the right not to be deprived thereof except –
in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;
- (b) the right to freedom of thought, conscience, belief and observance of religious and political doctrines;
- (c) the right to freedom of expression;

- (d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;
- (e) the right to freedom of peaceful assembly and association;
- (f) the right to freedom of movement, that is to say, the right –
 - (i) of every citizen to enter Jamaica; and
 - (ii) of every person lawfully in Jamaica, to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica;
- (g) the right to equality before the law;
- (h) the right to equitable and humane treatment by any public authority in the exercise of any function;
- (i) the right to freedom from discrimination on the ground of –
 - (i) being male or female;
 - (ii) race, place of origin, social class, colour, religion or political opinions;
- (j) the right of everyone to –
 - (i) protection from search of the person and property;

- (ii) respect for and protection of private and family life, privacy of the home; and
- (iii) protection of other property and communication;
- (k) the right of every child –
 - (i) to such measures of protection as are required by the status of a minor or as part of the family, society and the State;
 - (ii) who is a citizen to free tuition in a public educational institution at the pre-primary and primary levels;
- (l) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;
- (m) the right of every citizen –
 - (i) who is qualified to be registered as an elector for elections to the House of Representatives to be so registered; and
 - (ii) who is so registered to vote in free and fair elections;

- (n) the right of every citizen to be granted a passport and not to be denied or deprived thereof except by due process of law.
- (o) the right to protection from torture, inhuman or degrading punishment or other treatment, as provided in subsections (6) and (7);
- (p) the right to protection of freedom of the person, as provided in section 14;
- (q) the right to protection of property rights, as provided in section 15;
- (r) the right to due process, as provided in section 16.

REMOVAL OF COLONIAL CONTROL AND DECLARATION OF A PROPER RATIONALE

9. The new Preamble avoids the implication of the existing provisions that the fundamental rights are co-terminus with common law rights or pre-Independence legal protection but instead asserts as its foundation the responsibility of the State and the inherent rights of each individual which is more consonant with the international human rights conventions.

10. The greatest devaluation of the fundamental rights and freedoms in the present Chapter is the general savings clause in section 26(8) to the effect that –

“Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.”

Since “law” includes the common law, this provision preserved and elevated pre-Independence statutory as well as common law principles to the detriment of the fundamental rights and freedoms.

A PROPER BURDEN AND STANDARD OF PROOF

11. Section 13(2) is another new introductory provision which is of considerable importance, which will now read:

“Subject to section 49 and to subsection (8) of this section, and save only as may be demonstrably justified in a free and democratic society -

- (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and
- (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.”

12. These provisions effectively remove the pernicious presumption of constitutionality and provide an objective standard of a free and

democratic society. They thus eliminate the onerous burden previously imposed on the individual to establish a negative, namely that a particular abrogation of his fundamental freedom was not reasonably justified.

13. In Canada, where the Canadian Charter of Rights has a similar formulation, the Supreme Court in the leading case of *The Queen v. Oakes* [1987] L.R.C. (Const.) 477 held that the onus of proving that an alleged limit was reasonable and demonstrably justified rested on the person seeking to uphold it. The standard of proof was the civil standard of proof by a preponderance of probability, but, given that the object was to justify a violation of constitutional guarantees, a very high degree of probability was required. Two central criteria had to be satisfied: (a) the objective of the limitation must be of sufficient importance to justify overriding the constitutional guarantee; (b) the means chosen must be reasonable and demonstrably justified, i.e., a “form of proportionality” test.

HORIZONTAL AS WELL AS VERTICAL APPLICATION

14. A most significant strengthening of the constitutional guarantees is that it will now provide that they will operate both vertically and horizontally. If a culture of human rights is to be created, government as well as citizens must respect these rights. There are individuals and entities, possessing vast resources, influence and power, who may initiate action which greatly impair

the fundamental rights and freedoms of fellow citizens. Thus, it will be provided that all persons are under a responsibility to respect the rights of others. The new Charter will thus state that:

“This Chapter applies to all law and binds the legislature, the executive and all public authorities.

A provision of this Chapter binds natural or 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”

LOCUS STANDI MODIFIED

15. The existing constitutional provision limits access to the Court to challenge a contravention of the fundamental rights provided to persons who allege that any of these rights have been contravened or is being or is likely to be contravened in relation to him. Under the new provisions, additionally any person authorized by law, such as the Public Defender, or with leave of the Court, a public or civic organisation way, initiate an application on behalf of persons who would on the strict test of *locus standi* be able to apply. Accordingly, where the fundamental rights of persons such as the mentally ill or detained persons are threatened a human rights organisation may initiate an action for redress on their behalf.

ALTERNATIVE REMEDY RESTRICTION REMOVED

16. A major impediment to applications for constitutional redress which is now posed by the existing provision is that which prohibits the Court from granting constitutional relief if it is satisfied that adequate means of redress have been or available to the applicant under any other law. Even to experienced counsel it has often been unclear whether other means of redress existed and even more significantly whether such means would be regarded as adequate. Under the proposed provisions, the Court is not compelled to decline to exercise its jurisdiction but has a discretion whether to decline or not and if not to remit the matter to the appropriate court, tribunal or authority.

PUBLIC EMERGENCY MEASURES MADE JUSTICIABLE

17. Abrogation of the protection from arbitrary arrest or detention under the present provisions is immune from challenge if the action is taken in accordance with a law that authorise the taking, during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation. Although a detained person is entitled to appeal to a Tribunal, the recommendations of the Tribunal are not binding on the authorities. The new provision will make a distinction between periods of public emergency and periods of public disaster. The former relates to threats to public order from war, insurrection and the

like, while period of public disaster results from a natural disaster. A person detained or whose freedom of movement has been restricted during a period of public emergency will be entitled under the new provisions to apply to the Special Tribunal for a review of his case at any time after the detention and then at intervals of 6 weeks and the Tribunal must immediately review his case. Most importantly, the detaining authority must implement the recommendations of the Tribunal.

18. It will also be provided by the Charter that the Court shall be competent to enquire into and determine whether a proclamation or resolution creating a state of public emergency or public disaster was made or passed for the permitted purpose and whether any measures taken pursuant thereto are reasonably justified for that purpose.

SPECIAL ACT PROCEDURE DISPENSED WITH

19. The new Charter will not permit the abrogation of the fundamental rights and freedoms by the Special Act procedure now provided in section 49 of the Constitution. Any change in the scope or effectiveness of the guarantees will have to be made by the appropriate constitutional amendment procedure. There is a point of view that these provisions if truly fundamental should be deeply entrenched but it appears that no decision on this question has yet been taken.

BETTER SECURING OF PROTECTION LAW AND DUE PROCESS

20. The Charter will give additional legal protection to an arrested or detained person in that he will have the constitutionally protected right:

- (a) to communicate with and be visited by his spouse, partner or family member, religious counsellor and a medical practitioner of his choice;
- (b) to be treated humanely and with respect for the dignity of the person; and
- (c) if charged with a criminal offence and has not sufficient means to pay for legal representation to be given such assistance as is required in the interest of justice.

NEW GUARANTEES

21. The addition of new civil and political rights such as the right to vote, the right to equality before the law and the right to equitable and humane treatment will greatly strengthen democracy and individual freedoms. Even more significant is the inclusion of such socio-economic rights as the rights of the child, the right to a free primary education and the right to a healthy environment. These new provisions are consistent with international conventions to which Jamaica has adhered, including the International Covenant on Civil and Political Rights, the International

Covenant on Economic and Social Rights and the Convention on the Rights of the Child. However, the Parliamentary Committee did not accept the recommendation of the Constitutional Commission that the following provision should be included:

“In determining the meaning and effect of the provisions of this chapter judicial notice should be taken of the international human rights instruments to which Jamaica is a party and where a legislative or executive act has a direct impact on the fundamental rights and freedoms protected by this chapter the onus shall rest on the State or other responsible party to justify the derogation.”

C. ISSUES NOT PROPERLY DEALT WITH OR UNRESOLVED

PROPERTY RIGHTS

22. Essentially the Charter would retain the existing formulation of the right to protection of property rights. The Constitutional Commission had recommended that the protection of property should be expressed in the following terms:

“No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, transferred, diminished or extinguished except

23. This recommendation was on the basis that a person's proprietary right may be effectively taken away although it cannot be said that the Government had "acquired" or "taken possession" of that property or right which is all the current provision safeguards against. It was arguable that the declaration in the existing Preamble of the right to the enjoyment of property could be employed as an independent and enforceable source of protection. However, even this argument will not be possible under the Charter provisions and so there is need for express protection where property is sterilised although not acquired.

HEALTH AND DISABILITY

24. The National Aids Committee made submissions to the Parliamentary Committee in support of the inclusion of a provision to secure the right to health care and protection against discrimination on the grounds of health. The provision recommended is in the following terms:

"Everyone has the right to enjoy the highest attainable standard of physical and mental health and to have access to the highest standard of healthcare services. The State must take reasonable legislative, administrative, judicial and other measures within its available resources to achieve the progressive realization of this right to health."

25. The anti-discrimination provision would also include mental or physical disability or health status as impermissible grounds for

discrimination. The Committee took the view that it would be impracticable at this stage of Jamaica's development, to include in the Constitution provisions guaranteeing protection from discrimination on the ground of disability or health status. The Committee thus demonstrated a low evaluation of Jamaica's capacity to achieve moral consciousness and lost the opportunity to provide constitutional condemnation of the cruelty and inhumanness frequently directed at the mentally ill and persons living with HIV/AIDS.

SEXUAL ORIENTATION

26. Late and impassioned submissions were made to the Parliamentary Committee by the Lawyers Christian Fellowship on the subjects of marriage, homosexuality and freedom of religion. It appears from the submissions that the major concern is that the liberal language of the draft Charter would have permitted Courts to hold that restrictions on same sex marriage or the criminalisation of homosexual activity in private would contravene the Charter.

27. Unfortunately, the Submissions sought to forestall the apprehended developments by amendments to the Charter which would re-introduce the methodology of reciting numerous exceptions and would abandon the standard of justifiability in a democratic society for a standard of what is in "keeping with the aspirations and norms of the Jamaican people". This would not only be a dangerous relegation of the fundamental rights to

what could be temporary, irrational or unprincipled insular standards but it was inconsistent with the principle of the universality of human rights and the objectives of the LCF itself to maintain traditional Christian standards. Fortunately, a powerful argument was advanced against this retrograde step by Senator, Dr. Trevor Munroe and the Most Reverend Lawrence Burke, Roman Catholic Archbishop of Kingston, who referred to the level of promiscuity in the Jamaican society, the number of children born out of wedlock, and the homophobic views of many members of the society, which now appeared to constitute norms of the Jamaican society. They wisely warned against the possible danger of opening up a Pandora's Box by the insertion of the words proposed.

28. The Parliamentary Committee did not accept the LCF's recommendation but has recommended changes which will prevent the Charter provisions from being relied on for the recognition of same sex marriages or the striking down of legislation which makes homosexual activity between consenting adults in private a criminal offence. Thus provisions will be inserted in Chapter III to make it clear that:

- (i) any restriction of marriage, or of any other union in respect of which marriage-related benefits are conferred on persons who have cohabited as if they were in law husband and wife, to persons who are not of the same sex, should never be regarded as

contravening, or as being inconsistent with, any fundamental right or freedom.

- (ii) the only marriage that can be contracted in Jamaica, or that will be recognized in Jamaica, is a union of persons who are not of the same sex, and that any union conferring benefits similar to benefits conferred on marriage is to be a union of persons who are not of the same sex.

DEATH PENALTY

29. The Constitutional Commission recommended that since no consensus could be obtained as to how the death penalty should be treated, the special savings clause now present in subsection (2) of section 7 should be removed and the determination of the constitutionality of the death penalty left to the Court and the emerging jurisprudence. The Bill tabled by the Government, without any explanation or consensus being arrived at provided for the unqualified preservation of the death penalty and the exclusion of any judicial review in the following terms:

“(6) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.

(7) Nothing contained in or done under the authority of any law which provides for capital punishment shall be held

to be inconsistent with or in contravention of subsection (6)".

30. This provision if accepted would not only rescind the Privy Council decisions in *Pratt & Morgan, Lewis and Watson* but would empower Parliament to execute the death penalty without restrictions and to prescribe any manner of execution. Judicial review would be totally excluded. The Joint Select Committee of Parliament has recommended that the issue of the abolition of the death penalty is appropriate to be put to the members of Parliament for determination on a free conscience vote.

31. However, there is a grave danger that the questions which arise may not be adequately considered in a debate on the single question of abolition or no abolition. There are distinct questions which arise:

- (1) Should the death penalty be abolished?
- (2) If so, what consequential measures should be put in place, with respect to duration of imprisonment and non-release or parole?
- (3) If it is not abolished, should Parliament be free to extend it as the Bill provides without restriction?
- (4) If it is retained should it be subject to the present regime laid down as a result of the trilogy of Privy Council Opinions and implemented by the amendment to the Offences Against the Persons Act.

- (5) Should the question of abolition be left to the Courts in the application of the Charter?

FREEDOM OF RELIGION

35. The Constitutional Commission had taken the approach that freedom of conscience was the inherent right of all persons irrespective of their religious belief or lack thereof. Once this freedom is expressed in general terms it could only be curtailed if the curtailment could be proved to be demonstrably justifiable in a democratic society. The Lawyers Christian Fellowship advocated that freedom of religion should be dealt with separately and that some of the incidents of that freedom should be spelled out. This approach has its own dangers as once enumeration begins a non-listed item may be treated as not included. Thus they insisted that a provision that the Constitution of a religious body shall not be altered except with the consent of that body. Apart from the fact that it is possible for such a Constitution to contain provisions which threaten the health, safety or fundamental rights of its own members or the national interests, the express mention of the constitution of the body may impliedly exclude other more important documents, like Declarations of Faith which are common in some denominations.

36. However, the Parliamentary Committee agreed to recommend a separate and detailed statement of the freedom of religion in the following terms:

“(1) Every person shall have the right and freedom of religion and freedom to change his religion and the right either alone or in community with others, and both in public and in private to manifest and propagate his religion in worship, teaching, practice and observance.

(2) The constitution of a religious body or denomination shall not be altered except with the consent of the governing authority of that body or denomination.

(3) Every religious body or denomination shall have the right to provide religious instruction for persons of that body or denomination in the course of any education provided by that body or denomination whether or not that body or denomination is in receipt of any government subsidy, grant or other form of financial assistance designed to meet, in whole or in part, the cost of such course of education.

(4) No person attending any place of education, except with his own consent (or, if he is a minor, the consent of his parent or guardian) shall be required to receive religious instruction, or to take part in or attend any religious ceremony or observance, which relates to a religion or religious body or denomination other than his own.”

D. EPILOGUE

38. It is not possible to advance any conclusion. The consideration of constitutional reform and in particular the reformulation of the fundamental rights Chapter have been going on for decades. In the present climate of political tension and electoral uncertainties, there is no basis for optimism that the Charter will be implemented in the near future.

39. Our experience is that after the lapse of some time new sets of issues or proposals are likely to emerge and the discussions will resume so that the agreed changes will not be implemented.

40. On the whole, it appears that the enactment of the Charter, if and when that occurs, will greatly enhance the protection of the fundamental rights and freedoms of Jamaicans.

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B. FINANCIAL

38. It is not possible to estimate any expenditure. The expenditure on construction of the new building and in particular the replacement of the old building with a larger one has been going on for several years. It is not possible to estimate any expenditure on the new building at this time. The Committee will be kept informed as the work progresses.

39. Our experience in the past has been that the cost of some new work of a similar nature is likely to be higher and the discussion will be held in the light of the above.

40. On the whole, it appears that the amount of the Committee's work will be about the same as in the past and will probably continue to be about the same.