

## THE PROPOSED BILL OF RIGHTS

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1. In July 1991, the Bar Council submitted proposals for reform of the Constitution of Jamaica to the Joint Select Committee of Parliament on Constitutional Reform. These proposals dealt primarily with the strengthening of the Rule of Law and the enhancement of the protection of human rights.
  
2. The memorandum expressed the view of the Council that this important Chapter of the Constitution has failed to give adequate protection against the breach or abridgement of the fundamental rights and freedoms of individuals and that this has greatly contributed to public lack of respect for the Constitution as an instrument of justice and as a bulwark against abuse of power. The following four (4) main reasons for the weaknesses were identified:
  - 1) the nullification of the constitutional protection in the face of colonial laws;
  - 2) the procedural handicap resulting from the provision that other remedies must be exhausted;
  - 3) the presumption of constitutionality usually accorded to legislative and executive measures and actions; and
  - 4) the restrictive judicial interpretation of the

provisions.

3. It is worthy of note that all the recommendations of the Bar Council were accepted by the Constitution Commission and are reflected in the Draft Bill of Rights submitted to Parliament in its Final Report. The sole exception is possibly the rejection of the proposal that the local Privy Council should be made amenable to judicial review. If this draft is finally approved and accepted by the necessary parliamentary vote and constitutional referendum, the protection of our fundamental rights and freedoms will not only be greatly improved but it will probably represent one of the most progressive and effective Bill of Rights in democratic countries.
  
4. The draft contains an all-important declaratory section which is not a mere preamble but a substantive and, by itself, eminently enforceable enactment. The Commission decided that this declaratory section should be expressed in simple but comprehensive language. The Commission took the view that the clarity of the provisions does not depend on whether they are expressed in positive or negative terms but on the general manner of their formulation. On the other hand, the explicit prohibition of any derogation or abridgement of the rights and freedoms is an effective way to emphasize the fundamental and sacrosanct nature of the rights and freedoms. Accordingly, the Commission combined both an affirmative commitment to the preservation of the rights and freedoms with a clear

prohibition against legislative or executive infringements.  
See Final Report, paragraph 11.

5. The Commission's draft has sought:

- (1) to make it clear that the genesis of the fundamental rights and freedoms is not confined to English common law but also encompasses universally accepted human rights norms;
- (2) to preserve and strengthen in all aspects the power and jurisdiction of the Courts to determine the constitutionality of any measure or action which has an impact on the rights and freedoms;
- (3) to ensure that any abridgement or infringement of the rights and freedoms will be struck down unless it satisfies a stringent test of demonstrable justifiability; and
- (4) to facilitate the individual's access to the Courts for constitutional redress as well as to ensure that the Court's power to grant adequate remedies will not be hindered or curtailed by technicality.

6. Specifically the proposed Bill of Rights contains provisions to the effect that:

- (1) the rights and freedoms are the entitlement of the people by virtue of their inherent dignity as individuals;

- (2) any derogation from the rights will offend the protective provisions unless reasonably required during a state of public emergency or of public disaster or is demonstrably justified in a free and democratic society;
- (3) the person who seeks to justify the derogation has the burden of proving that it is justified,
- (4) a public or civic organisation or any person authorised by law may initiate proceedings to challenge an infringement or threatened infringement of the right; and
- (5) judicial review applies to the declaration of states of emergency and of public disaster and to action taken in restriction of the citizens' rights during such periods.

Ibid paragraphs 13 - 14

7. In the result the weaknesses in the present Fundamental Rights Chapter will be erased. First, the constitutional guarantees will no longer give way to pre-Independence laws. Second, the present procedural pitfall which has caused a failure of many constitutional actions on the ground that some other remedy exists will no longer have such fatal results. Third, the presumption of constitutionality in favour of the legislature and executive will be removed and the burden of justifying any derogation from the rights and freedoms placed on those responsible for the infringement. Fourth, the traditional restrictive judicial interpretation so endemic in our courts will be more difficult to adhere to in the face of the clear requirements to recognize the conventional genesis of the

protective provisions and the fundamental and overriding character of the guarantees. In addition, the existing facile methods of amending and suspending the operation of the fundamental rights and freedoms are to be dispensed with.

#### A SIGNIFICANT CHANGE

8. The Jamaican Judiciary has been particularly embedded in the misconception that the Fundamental Rights and Freedoms expressed in the Constitution are merely declaratory of the common law. It is a belief which has been encouraged by the statement of Lord Devlin in the Nasralla Case that the introductory words of the Preamble demonstrate that the Chapter proceeded on the presumption that the fundamental right which it covers are already secured to the people of Jamaica by existing law, although it should be clear that the Constitution-makers were not merely thinking of legally enforceable rights and were adopting the formulation of the European Convention on Human Rights. Despite Lord Wilberforce's clear exposition of the genesis of these Bills of Rights in Minister of Home Affairs v Fisher the atavistic attitude has persisted so that in Huntley, Bingham, J. delivering the judgment of the Full Court was able to say that condemned prisoners have no fundamental rights but also that the constitutional guarantees give no greater protection than existed at common law.

9. The Draft makes it clear that the rights and freedoms are claimed by the people of Jamaica by virtue of their inherent right and dignity as individuals and as citizens of a free and democratic society. Moreover, the draft states that, "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".

#### THE BALANCE REDRESSED

10. It is the common experience of human rights advocates and constitutional lawyers that the traditional approach of British oriented Judges impose a severe burden on anyone who alleges that his constitutional rights have been infringed by legislation or high executive action. It is often necessary in constitutional matters to make value judgments of the reasonableness of policy decisions and empirical analysis of the justification for sacrificing individual rights to state power or public interests. The techniques of advocacy and procedural rules of the court support this pattern as detailed sociological, economic or biological or other specialist data in the form of a Brandeis Brief are not countenanced. As a result, the person who complains of an infringement of his fundamental rights has usually had an uphill task. The draft Charter only permits an abrogation of the rights if it is "demonstrably justified in a free and democratic society". It

further states that where a legislative or executive act has a direct impact on the fundamental rights and freedoms the onus rests on the State or other responsible party to justify the derogation. Additionally, it provides that where the right or freedom is subjected to any restriction or qualification it must suffer, "no wider effect than is strictly necessary in the circumstances and shall not be applied for any purpose other than that for which it has been prescribed."

#### A RADICAL CHANCE

11. Although the rights and freedoms may be restricted in periods of public emergency or public disaster, the establishment of these regimes will be subjected to severe restraints. An executive proclamation of such a state only remains in force for fourteen (14) days and can only be extended for maximum periods of three months at a time by resolution of both Houses of Parliament supported by a two-thirds majority of all members in each House. Most significantly, it is provided that "the court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this article, was made or passed for any purpose specified in this article or whether any measures taken pursuant thereto are reasonably justified for that purpose".

WIDENED ACCESSIBILITY TO REMEDIES

12. The Charter provides protection for rights not previously covered, such as:

- (1) The right to equality before the Law;
- (2) The right to fair, humane and equal treatment from any public authority in the exercise of any function;
- (3) The right of every child to such measures of protection as are required by the status of a minor or as part of the family, society and the State;
- (4) The right of every child who is a citizen to free education, at least throughout the primary level;
- (5) 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;
- (6) The right of every citizen to participate and vote in free and fair elections;
- (7) The right of every citizen to be granted a passport and not to be denied or deprived thereof, except by due process of law;

13. The draft provides for an important innovation in Constitutional Law in that it permits an action to be brought for contravention of the protective provisions against private



persons or entities. This is a salutary development in modern times where such extensive powers are being exercised by private persons and corporations. Additionally, it will be permissible for a public or civic organisation with leave of the court or any person authorized by law to initiate applications on behalf of person whose rights or freedoms are contravened by legislative or executive action.

#### HYPOTHETICALS

14. It may be useful and of interest to test the draft against some hypothetical cases.

#### CASE NO. 1

*Leather Processors Ltd. establishes a leather manufacturing and processing factory near the bank of the Rio Cobre. The waste from the factory pollutes the waters of the river and is a nuisance to Mr. Josephs, a farmer downstream. He complains to the Environmental Authority a statutory body, responsible for environmental control but the Authority renews Leather Processors Ltd.'s annual licence although it had for similar reasons refused a licence to Food Processors Ltd. to establish a factory further upstream. Mr. Josephs could bring an action against Leather Processors Ltd. for breach of his right to protection against*

environmental abuse and probably against the Authority for breach of his right to fair treatment. Food Processors Ltd. may also bring an action against the Authority for breach of its right to fair and equal treatment but may be unable to recover if its operations would contravene the rights of others.

CASE NO. 2

The daughter of an Haitian 'refugee' who has been temporarily resident at the Montpelier Centre for three years, entered the common entrance examinations, and won a free place as well as the Marcus Garvey Scholarship. The Ministry of Education advises her parent that she (1) cannot be admitted to Mount Alvernia High School since she has been grown up in the Muslim faith and (2) cannot have the Marcus Garvey Scholarship as she was not born in Jamaica. She complains to the Jamaica Council for Human Rights. The Council may seek leave to institute a constitutional action on the child's behalf for breach of her fundamental right to equality and fairness of treatment, to be protected against discrimination on ground of religion and the right to protection as a child and to free education.

CASE NO. 3

Carlos Esterido arrives at the Norman Manley Airport on a COPA flight. The Jamaican Narcotics Squad is alerted by the U.S. Drug Enforcement Agency in Miami that his journey originated in Columbia and he is suspected to be conveying a quantity of cocaine. A visual search was conducted when nothing was found on Carlos' person or in his luggage. He is nevertheless detained and asks to be permitted to contact the Colombian Embassy. There is a poster in English advising persons not wishing to be searched to have the proposed search reviewed by a Justice of the Peace or to have a legal representative present. Carlos who does not read English well does not notice the poster. Carlos is then taken to the private room where a doctor performs a body search and finds condoms containing a quantity of cocaine in his stomach and anus. He is charged with illegal possession and importation of cocaine, and objection is taken to the admission of the doctor's evidence as to the discovery of the cocaine. Carlos may succeed in an action for breach of his constitutional right to privacy, disrespect for his personal dignity, denial of access to legal representation, and for contravention of his freedom of the person.

CASE NO. 4

James Stewart who is an elder of the Church of the Modern Apostles is summoned to the St. Ann Circuit Court to serve as a juror. He is called up on the empanelling of a jury in a capital murder trial. He explains to the Court that his religious beliefs make it im-possible for him to take any step which may result in the deliberate taking of human life. The Judge tells him that his statutory duty and responsibilities as a citizen make it obligatory on him to serve. The Crown has exhausted their peremptory challenges and the Defence will not oblige. The jury is empanelled with Mr. Stewart as a member and they are told to return on the following day for the trial to begin. Mr. Stewart files a constitutional action and applies for a injunction on the grounds that his freedom of conscience and religion has been or is likely to be contravened. Mr. Stewart may succeed under the proposed Bill of Rights.

CASE NO. 5

A Labour Officer in the Ministry of Labour, Mr. Azariah Munrony, is alleged to have accepted gifts comprising packages of sweets from the owner of a confectionery factory that he visits occasionally to carry out inspections under the Factories Act. His defence is that

they were sent to his wife for use by his children as he had mentioned that the particular make was a favourite of his children. The factory owner was abroad when the disciplinary hearing was conducted by a Disciplinary Committee of the Public Service Commission, which found him guilty of corruption and recommended his dismissal despite his 20 years of unblemished service. Without hearing him the Commission decides to accept the recommendation. He applies to the Privy Council for a review of the decision. Again without a hearing the Privy Council rejects his application and confirms his dismissal. Mr. Munrony has a real prospect of obtaining constitutional redress on the grounds of unfair treatment, and breaches of his right to due process of law and to a fair hearing.

CASE NO. 6

The Excise Tax Inspectors suspected that Excelsior Breweries Ltd. were keeping two sets of books and the malt manufactured by them was much greater in quantity than they make returns and paid excise duties for. They decided to conduct an investigation of the affairs of the company. The Act permitted them to administer interrogatories to suspects and possible witnesses and placed a duty on the interviewee to answer the questions. The Inspectors interrogated the chief Accountant and a Director, Mr. Tom Sleight, in January 1993, August 1993 and February 1994 and made tape recordings of two of the interviews without disclosing that they

were being taped. They then charged him and other officers of the company with conspiracy to defraud the revenue. At the trial before a Judge and jury Mr. Sleight's counsel objected to admission of the evidence but is overruled by the Judge. Mr. Sleight files a constitutional motion seeking an order to set aside the Judge's ruling, and a declaration that the Inspectors have contravened his right against self-incrimination, treated him unfairly and that the admission of the evidence would render his trial unfair. He applies for an injunction to stop the trial until the constitutional question is determined. He may succeed under the new provisions.