

Jamaica's Charter of Fundamental Rights and Freedoms: An ineffective safeguard for oppression

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By Kayla Theeuwen

At the signing of the Proclamation of the *Constitution Act* – and Canada's *Charter of Rights and Freedoms* – in April 1982, the Right Honourable Pierre Elliott Trudeau, former Prime Minister of Canada, described the importance of a bill of fundamental rights. Prime Minister Trudeau explained that “if individuals and minorities do not feel protected against the possibility of the tyranny of the majority... it is useless to ask them to open their hearts and minds to their fellow Canadians”.^[1] These words ring true for any constitutional democracy, including Jamaica's. Despite the theoretical benefit of bills of rights, how effective are they at protecting the minority against tyranny – or the possibility of the tyranny – of the majority?

This article explores the ways in which Jamaica's Charter of Fundamental Rights and Freedoms^[2] fails to adequately safeguard individuals and minorities from the possibility of tyranny by the democratically-elected Government.

First, procedural handicaps stifle access to the Charter and remedies for the breach of rights it is designed to protect. For example, though s. 19(1) gives standing to any person alleging a contravention of the Charter to make an application to the Supreme Court for redress, s. 19(4) permits the Supreme Court to decline to exercise its powers if it is satisfied that “adequate means of redress” for the contravention alleged are available under any other law.^[3] Denying access to the Supreme Court for the purpose of enforcing fundamental rights against the state risks oppressing the rights of minorities, whose legitimate interests are at stake.

Second, the very nature of constitutional reform opens the possibility for tyranny by the majority. The amendment of Jamaica's Constitution in 2011 by the introduction of the Charter is illustrative. Though progressive in many ways, the “new” Charter represents a dilution of or regression from previously existing constitutional protections.

Third, as we will see in the foregoing discussion on reform, though progress has, in some ways, been made with Jamaica's Charter in terms of the number of rights for which it affords protection, there are still a number of marginalized groups, such as same-sex couples, that are unaccounted for, and may easily be trampled by the majority.

A. Procedural Handicaps Disable Individuals and Minorities

The written text of the Charter places limits on the fundamental rights and freedoms it guarantees, which hinder the ability of individuals and minorities to enforce their rights as against the State.

The availability of “adequate means for redress” outside the Charter for an alleged infringement may foreclose the possibility that an applicant can obtain relief under the Constitution. Jamaica's Charter specifically empowers the Supreme Court to decline to grant constitutional relief if it is satisfied that there are adequate means of legal redress available outside the Constitution.^[4] Though the mere existence of an alternative remedy will not preclude constitutional relief, what it means for an alternative parallel remedy to be “adequate” is unclear, as adequacy is not defined in the Charter. Courts have provided limited guidelines. The Judicial Committee of

the Privy Council, for example, has stated that “where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course”.^[5]

What is troublesome is that the Privy Council has taken the position that an alternative remedy is not *inadequate* simply because it is slower or more costly than constitutional relief.^[6] This approach detracts from the fundamental protection of “all persons” under the Charter. Take, for example, a situation where a government employee is being discriminated against for her religious beliefs because she is repeatedly being scheduled to work on the Sabbath. If she is required to get relief through a slower tribunal process before approaching the Supreme Court for constitutional relief because the remedy provided by the tribunal is not “inadequate”, are her rights really being protected? What is more, in a situation like the one described, requiring that government employee to get relief from a tribunal for religious discrimination does not provide for a “top down” protective solution. The tribunal may settle the dispute with that employee, meaning that the next victim of discrimination will not be able to rely on precedent handed down by the Supreme Court in enforcing her rights, but will have to seek an alternative, less adequate remedy first.

Moreover, fundamental rights and freedoms are subject to limitations and are not absolute. The rights that are guaranteed can be infringed if the State can show that the infringement is “demonstrably justified in a free and democratic society”.^[7] This limitation demonstrates an inherent weakness in guaranteed protections intended by a constitution, and in this case, the Charter.

B. A Lack of Constraints on Constitutional Reform Enables Tyranny

A bill of rights within a constitution has been described in many jurisdictions as a “living document”^[8]; bills of rights should therefore operate and be interpreted accordingly. The power to amend the constitution speaks to its primary role as a “social contract”, which must reflect and embody the normative views and beliefs of the parties it binds, which views inevitably change over time. As Sir Hugh Wooding explained,

[a] Democratic Constitution is a body of basic rules by which the people of a country agree to govern themselves . . . But a Constitution should not be a straight-jacket. It is intended to operate in a world of movement and change.^[9]

In April 2011, the Charter replaced Chapter III of the Constitution, which failed to provide for social, economic or cultural matters and instead expressed the Rule of Law in the negative form, which did nothing to protect the individual “from many insidious forms of oppression”.^[10] The introduction of the Charter has been described as a “significant ‘moment’ for constitutional reform” in the Caribbean region^[11]. The discussion that follows will demonstrate how the “moment” was paradoxical.

It is important to understand the background of the reform process, which began in the early 1990s, in order to appreciate how the democratic process was eroded at the expense of the Constitution and the individuals it is meant to protect.

To encourage public input and involvement in the reform process, a “Constitutional Commission” was established. The Commission comprised, among others, diverse representatives of educational institutions, trade unions, the press, and groups representing women, farmers and children.^[12]

The draft of the new Charter reformed Chapter III in a number of key ways: it increased the number of protected rights, it sought to improve protections of freedom of the person, the right to due process and property rights, and it stated the protected rights in positive terms.^[13] One of the most important features of the draft Charter was that it did not include “partial and general savings clauses for pre-independence laws that were inconsistent with the rights guaranteed by the Charter”.^[14]

The draft Charter was approved in May 1995; however, it was not enacted in time for the 1997 general election. At the request of Prime Minister P.J. Patterson, the draft became subject to further review by a “Joint Select Committee” (JSC), which was appointed in 1999.^[15] The JSC published a report in 2002 recommending a number of changes to the draft Charter. The JSC’s recommended

changes, along with additional amendments to the draft that were introduced as the Bill that wound its way through the legislature, appear in the Bill that was finally approved by Parliament in March 2011.^[16]

The version of the Charter that received Royal Assent contains a number of the “progressive” revisions introduced by the Constitutional Commission, but it also contains a number of clauses that have been described as “the antithesis of fundamental rights’ protection”^[17], “profoundly unconstitutional”,^[18] and disruptive of the overall coherence of the Constitution.^[19]

For example, s. 13(8) of the Charter immunizes the process by which the death penalty is carried out; this provision stipulates that a delay in carrying out capital punishment is will no longer constitute a violation of the prohibition against “inhuman and degrading treatment”.^[20] This provision was not included in the draft approved by the Constitutional Commission; it was only included in the final version approved by Parliament “as a result of an amendment proposed by the Opposition People’s National Party”.^[21]

In addition, though one of the prohibited grounds of discrimination is “being male or female”,^[22] this clause does not open the door to the constitutional protection of another marginalized group in Jamaica, the LGBTQ community.

Moreover, by defining marriage or similar relationships as being between “one man and one woman”, s. 18 of the Charter expressly forecloses the recognition of rights for same-sex couples, and immunizes laws that provide that marriage must be between a man and a woman.^[23]

The inclusion of these arguably unconstitutional provisions in the Charter demonstrates how quickly the majority can erode the effectiveness of a bill of rights to the detriment of vulnerable groups. These provisions immobilize the minority, and undermine the value of equality espoused by the Charter.^[24]

C. Conclusion

A bill of rights alone is ineffective to protect the tyranny of the majority and the trampling of the minority. First, there are aspects of the written text that limit the fundamental rights it is intended to protect. Second, oppression runs rampant when marginalized groups are not consulted in the process of amending the bill of rights. In this situation, there can be no assumption that rights are secure from legislative interference, even though all laws are meant to be consistent with the Constitution. Fortunately, an independent judiciary backstops the enforcement of the Constitution and protects against unfettered exercise of governmental powers in upholding the rule of law.

^[1] The Right Honourable Pierre Elliott Trudeau, *Remarks at the Proclamation Ceremony* (April 17, 1982), online: Library and Archives Canada <<https://www.collectionscanada.gc.ca/primeministers/h4-4024-e.html>>.

^[2] Jamaica’s *Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011*, No 12 of 2011. [**Charter**]

^[3] *Charter*, *ibid* at ss. 19(1) and (4).

^[4] *Charter*, *supra* note 2 at s. 19(4). The author of this paper notes that the proviso in the *Charter* gives more discretion to the Supreme Court in situations where parallel remedies exist. The predecessor of s. 19(4) of the *Charter* was s. 25(2) of the Constitution, the proviso to which gave the Supreme Court very little – if any – discretion to award constitutional relief where adequate means of redress were available: see, for example, the discussion of this point in *National Solid Waste Management Authority v Johnson*, 2018 JMCA App 22 at paras 51-52.

[5] *AG v Ramanoop*, [2005] UKPC 15 [**Ramanoop**] at para 25. One example of a “feature” that would make it appropriate to seek constitutional redress notwithstanding the existence of a parallel alternative remedy is the arbitrary use of state power: see para. 25.

[6] *Ramanoop*, *ibid* at paras 28-29.

[7] *Charter*, *supra* note 2 at s. 13(2).

[8] *Cameron v AG*, [2018] JMISC FULL 1 at paras 24-25 (per Sykes J, as he then was, dissenting).

[9] The Constitution Commission (1987) of the Republic of Trinidad and Tobago, *Thinking Things Over*, at p 5, online: <<http://www.ttparliament.org/documents/1046.pdf>>.

[10] Derek O'Brien, Se-Shauna Wheatle, *Post-independence constitutional reform in the Commonwealth Caribbean and a new charter of fundamental rights and freedoms for Jamaica*, (Public Law, October 2012) at 691. [**Post-independence constitutional reform**]

[11] *Post-independence constitutional reform*, *ibid* at 684.

[12] *Post-independence constitutional reform*, *ibid* at 692.

[13] *Post-independence constitutional reform*, *ibid* at 692.

[14] *Post-independence constitutional reform*, *ibid* at 693.

[15] *Post-independence constitutional reform*, *ibid* at 693.

[16] *Post-independence constitutional reform*, *ibid* at 693.

[17] Tracy Robinson, Arif Bulkan, Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (London: Sweet & Maxwell, 2015) at 5-025. [**Fundamentals**]

[18] *Post-independence constitutional reform*, *supra* note 10 at 684.

[19] Arif Bulkan, *The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the 'Perfect Nation'*, [2013] 2:1 Can J Hum Rts at 115. [**Bulkan**]

[20] *Bulkan*, *ibid* at 83.

[21] *Post-independence constitutional reform*, *supra* note 10 at 695.

[22] *Charter*, *supra* note 2 at s. 13(3)(i).

[23] *Fundamentals*, *supra* note 17 at 5-025.

[24] See, for example, *Charter*, *supra* note 2 at s. 13(3)(g).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Kayla Theeuwen

Toronto
+1.416.619.6290

Email:
ktheeuwen@weirfoulds.com

Kayla Theeuwen is Chair of the Caribbean Practice Group and a Partner in the Commercial Litigation Practice Group and at WeirFoulds LLP.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035