

THE CHARTER OF FUNDAMENTAL RIGHTS & FREEDOMS



It may have escaped many people's attention that the Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act 2008 was laid in the House of Representatives on April 23, 2008. However, a Constitutional amendment that so drastically changes the scope of our fundamental rights and freedoms as citizens of Jamaica ought to be of particular importance to each and every one of us and the possible implications of its provisions should therefore be understood by all.

The Charter now tabled incorporates the recommendations made by the Joint Select Committee (JSC) of the previous Parliament.

It is therefore different in important respects from the draft that the JSC considered, though it represents a true continuation of the legislative process, despite the change of government.

The State's Promotion of Rights

Importantly, the requirement that all persons promote and observe the rights recognised in the Charter has been omitted. Instead, that obligation has been placed on the State, where it belongs. This addresses a concern raised to the JSC that each individual ought to have the right *not* to promote rights with which one disagrees. The Charter therefore embraces an important philosophy for a plural society - we should respect the rights of others, even where we may disagree with them, but we ought to be able to disagree.

Horizontal Application: Citizen versus Citizen Claims

A related concern was that the floodgates of litigation would be opened if citizen versus citizen constitutional claims were allowed where it was felt that an individual had not promoted a recognised right. While the non-promotion of rights will no longer warrant litigation, the Charter retains the possibility of citizen versus citizen constitutional remedies. For example, if someone is not hired by a private entity as a result of discrimination on the grounds of social class they may, if the Charter is passed, be able to seek Constitutional redress. In an effort to constrain what may become a virtual tsunami of costly litigation, the Charter is careful to limit its application to 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." It will be interesting to see how these words will be interpreted by the judiciary who may now be at liberty to 'harmonise' all laws with the Charter which applies to all law and binds the legislature, the executive and all public authorities.

The Jurisdiction of the Supreme Court and Standing Rights

The Supreme Court will have original jurisdiction for hearing applications relating to the Charter. These may come either from an individual who feels his rights are being contravened or from a public or civic organisation who acts on behalf of aggrieved persons, though the remedies available to the individual are far more comprehensive than the declaration available to organisations.

Rights of the Accused, Secondary Social Rights and Leaving Jamaica

The controversial section 31D of the **Evidence (Amendment) Act** is overruled in the Charter which gives every person charged with a criminal offence the right to examine or have examined, at his trial, witnesses against him. The Charter also magnanimously creates secondary rights such as the right to enjoy a healthy and productive environment and the right of every child who is a citizen to public primary education. The important right to leave Jamaica, curiously left out of the Constitution and previous drafts, is included in the Charter. However, immunity from extradition has, once again, been left out.

Freedom of Religion

Whereas the draft lumped freedom of thought, conscience, belief and observance of religious and political doctrines together and dealt with them in a woefully inadequate line, the Charter provides the same protection for freedom of religion as is currently provided in the Constitution. The Charter also maintains the sanctity of religious organisations providing that their constitutions cannot be altered except with the consent of the governing authority of that body. Where education is provided by religious bodies the Charter gives those organisations the right to provide religious instruction to their own members whether or not government subsidies are provided, but respects the rights of others, who must give their consent.

Marriage

Marriage has also been protected with a specific provision that nothing restricting marriage, or any other relationship with similar rights and obligations, to one man and one woman is to be regarded as inconsistent with the Charter. It goes further by stating that no form of marriage or other relationship other than the voluntary union of one man and one woman may be contracted or legally recognised in Jamaica.

Emergency Powers of the State

Thankfully, the Charter significantly curtails the powers of the State during a time of public emergency or disaster by giving the court competency to enquire into the procedure by which such proclamations are made and the authority to consider whether the measures taken are reasonably justified; limiting the derogation to anything contained in or done under the authority of any law; specifically mentioning the rights and freedoms that may be affected during such time; providing for the review, on request, of any decision affecting freedom of movement at least every six weeks by an immediately established, independent and impartial tribunal presided over by someone qualified to be a Judge of the Supreme Court and appointed by the Chief Justice; and, finally, and perhaps most importantly, providing that the tribunal's decision must be followed.

Discrimination

The Charter also solves one substantial omission in the current Constitution by preventing discrimination on the grounds of sex, but, by providing protection from discrimination on the ground of social class, makes it conceivable that a progressive tax scheme, if introduced, could come under attack.

Limitations

The Charter still vaguely allows Parliament or any organ of State to limit the protected rights “save only as may be demonstrably justified in a free and democratic society.” This unclear phrase was severely criticised for good reason and has now been somewhat circumscribed. Whereas the phrase once applied generally, it now prohibits the government from passing any law or taking any action which affects protected rights except in those circumstances. In other words, instead of the possibility that the rights and freedoms of the Charter could be set aside by any means if demonstrably justified in a free and democratic society, it now appears that this could only happen through the passing of a law or the action of an organ of the State. This is still not ideal. Any derogation of our fundamental rights and freedoms ought to be limited to an act of Parliament alone, the only organ of State “directly” accountable to us.

Savings Clauses

Savings clauses leave static the current legislation in relation to forms of punishment (subject to a conscience vote of Members of the Houses of Parliament regarding the retention or abolition of the death penalty), sexual offences, obscene publications and offences regarding the life of the unborn. This serves to preserve the society’s values; however, to the extent that these laws require clarification, the savings clauses only defer the debate. Instead, the passing of the Charter could be taken as an opportunity to, for example, define when life begins and is worthy of protection.

Conclusion

The Charter has, for over fifteen years, been at the centre of intense debate, which has sometimes served to alienate the public from its importance to our future as citizens and as a nation. The Charter now before the House has a lot going for it and should be championed; however, there remain concerns that still need be addressed, whether now or by amendment. After fifteen years of debate one more look at it would be a drop in the bucket compared with the overall effect that getting it right will have in ensuring that the fundamental rights and freedoms of all persons in Jamaica are effectively and comprehensively provided for.

Alexis Robinson

Alexis Robinson is an Associate at Myers, Fletcher & Gordon and is a member of the firm’s Litigation Department. Alexis may be contacted at alexis.robinson@mfg.com.jm

