The Constitution at 50: Where do we go from here?

Advocates Association of Jamaica Seminar

at

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Presented by

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1. The Constitution of Jamaica came into force on August 6, 1962 as a result of an Order in Council issued at Buckingham Palace the previous month. Its provisions were arrived at through the deliberations and negotiations of a constitutional commission made up of representatives of various interest groups in Jamaica, including the two major political parties.

2. In the 47 years since then, the Constitution has been amended on a number of occasions but for more than two decades there have been calls for more fundamental and far reaching changes. Almost everyone agrees that significant change is needed but there is disagreement as to what those changes should be and how they should be made. This paper will focus on how the Constitution can be amended, and the complications which may determine what amendments take place.

The Prescribed Procedure

3. The Constitution itself sets out a procedure by which any of its 138 provisions can be amended. Section 49 (1) provides that Parliament may alter any of the provisions of the Constitution, but the section goes on to provide different procedures, depending on which section is to be altered. The Constitution's sections are divided into three groups for this purpose:

a) Approximately 58 sections (or parts thereof) can only be amended by an Act which is supported by the votes of not less than two-thirds of all the members of each House of Parliament. These sections are set out in Section 49 (2). In addition to the requirement of a two-thirds majority, the Constitution requires a three-month period between the introduction of the bill in the Lower House and the commencement of the first debate, and a further three months between the conclusion of the debate and the passing of the bill. (These sections are usually described as being “entrenched”.)

b) 11 sections (or parts thereof) require not only the two-thirds majority which applies to entrenched provisions and the delays referred to above, but they must also be the subject of a referendum. (These sections are set out in section 49(3), and are usually described as being “deeply entrenched”).

c) The remaining sections (approximately half of the total) may be altered by the vote of a majority of the members of each house. The Constitution makes no special requirement as to periods of time for debate or as to the procedure for
enactment in relation to an Act to amend these sections. (These sections are usually described as being “not entrenched”.)

4. Two observations can be made about this structure. The first is that the reason for the 2/3 requirement is obvious when one considers the way in which members of the Senate are appointed. The Prime Minister appoints thirteen out of the twenty-one Senators which is just less than 2/3. Amendments to entrenched or deeply entrenched terms will therefore require the support of at least one opposition Senator.

5. The second observation is that amendments to the deeply entrenched sections require not only a referendum, they also require the same 2/3 majority vote. Before the matter can be sent to the electorate therefore, it must also be supported by the opposition.

6. There is an exception to each of these rules. An entrenched section can be amended without being passed in the Senate if it gets a 3/5 vote in a referendum, and a deeply entrenched clause can be amended without being passed in the Senate if it gets a 2/3 vote of the electorate. These are only theoretical exceptions, however, as it is extremely unlikely that a proposed amendment which is not supported by the opposition party will receive a 2/3 or 3/5 vote in a referendum.

The Changes so Far

7. In the forty seven years since it came into effect, Parliament has amended the Constitution ten times. The details are set out in Appendix I. The very first amendment was effected by the Legal Profession Act in 1971, and changed the composition of the Judicial Service Commission to include persons nominated by the General Legal Council. All but one of these ten amendments related to sections which were not entrenched, and therefore the government of the day did not need the agreement of the opposition.

8. Some may also find it interesting that of the 10 amendments, 1 was effected in the 60s and the 80s and 8 in the 70s and the 90s (and 2002). The last one was effected in March of this year with bipartisan support and increased the maximum number of constituencies from 60 to 65.

The Privy Council

9. The judiciary or more specifically, the Judicial Committee of the Privy Council has altered the process by which the Constitution can be amended in three fundamental
ways. One doubts that the framers of the Constitution would have imagined at least 2 of them. The Privy Council has:

(a) Implied a term;
(b) Held that the Constitution changes itself; and
(c) Ruled that one can amend by implication.

The Implied Term – Separation of Powers

10. The Constitution does not expressly provide that there is to be a separation of powers between the three branches of government. In fact, it does not even use the phrase "separation of powers". In a number of decisions, the correctness of which no one now questions, the Privy Council has held that the separation of powers principle (like the overriding objective in the Civil Procedure Rules) permeates the Constitution.

11. In Hinds v The Queen\(^1\) Lord Diplock put it this way:

"What however is implicit in the very structure of a constitution on the Westminster Model is that judicial power, however it is to be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution."

12. In that case Parliament passed a law in the mid 1970's establishing the gun court. Among other things, the Act provided that a person convicted of certain offences would be subject to a mandatory sentence of hard labour at the Governor-General's pleasure, and a review board would decide when he could be released. Only 1 of the 5 members of the review board, the chairman, was to be a Supreme Court judge. The Privy Council held that this was a breach of the Constitution because it would allow persons who were effectively members of the executive to carry out a judicial function.

13. Similar decisions have been arrived at in many other appeals. In Director of Public Prosecutions v Mollison\(^2\) (an appeal from Jamaica) Lord Bingham described the principle as "a characteristic feature of democracies"\(^3\). (In that case, the Privy Council struck down the provision in Jamaica's Juveniles Act which provided that persons under 18

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\(^1\) at page 213D

\(^2\) [2003] 2 AC 411

\(^3\) At paragraph 13
who were convicted of murder would be detained "at the Governor-General's pleasure" since the Governor-General was a member of the executive and was being allowed to carry out a judicial function.)

14. I am not aware of any pronouncement by the Privy Council as to whether this implied provision in Jamaica's Constitution can be altered, and if so how, but given the basis on which it is implied, it is safe to say that the courts would strike down any attempted amendment which breaches the separation of powers principle unless it is effected by the procedure required for deeply entrenched provisions.

A "living instrument"

15. The Privy Council has held in a series of cases that the Constitution is a living thing which changes over time. Even if the words do not change therefore, their interpretation should change in light of changed circumstances. In 

Reyes v R

for example, Lord Bingham of Cornhill said:

"The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society."

16. Much more recently, and applying the same reasoning, the Privy Council ruled in

Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v The Attorney General of Trinidad and Tobago

that "the institution of the award of the Trinity Cross as the nation's highest honour was... an infringement of the rights and freedoms of members of the Hindu and Muslim communities in Trinidad and Tobago and it was unconstitutional".

17. Their Lordships continued: "the appellants are entitled to a declaration that creation of the Trinity Cross of the Order of Trinity established by the Letters Patent given on 26 August 1969 breached their right to equality under section 4(b), their right to equality of treatment under section 4(d) and

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4 [2002] 2 AC 235

5 Paragraph 26

6 [2009] UKPC 17, delivered April 28, 2009

7 Paragraph 40
their right to freedom of conscience and belief under section 4(h) of the Constitution of Trinidad and Tobago 1976. Their Lordships will allow the appeal and make a declaration to that effect”. 8

18. An interesting aspect of the decision is that the court recognized that one of the differences between Parliamentary action and Judicial decisions is that the former are usually prospective in effect, since they change the law, while the latter are retrospective, since they merely declare what the law always was. The Privy Council expressly took the former course. They said: “The retrospective effect that normally attaches itself to a judicial declaration of the kind sought in this case is undesirable in these circumstances. So nothing in this judgment should be taken to apply to any awards of this high honour that were made under the system that the Letters Patent established before the date of the Board’s judgment. For the avoidance of doubt their Lordships will make a declaration to that effect also.” 9

Amendment by Implication

19. The most significant development for our purposes however, is that the Privy Council has held that if an amendment to an un-entrenched section would affect an entrenched section Parliament must follow the procedure necessary to amend an entrenched section. In **Independent Jamaica Council for Human Rights (1998) Limited and Others v Hon. Syringa Marshall-Burnett and the AG**10 (the CCJ case), Parliament purported to amend section 110 of the Constitution by deleting references to Her Majesty in Council as Jamaica’s final appellate court and replacing them with references to the CCJ. The legislation was passed by the procedure appropriate for un-entrenched sections.

20. The Privy Council accepted that section 110 is not entrenched and that it could be repealed by an Act passed by a majority of the members of both Houses in the way that the relevant legislation were passed. Their Lordships however accepted a submission that the legislation also “impliedly altered” certain entrenched sections. Lord Bingham of Cornhill said:

“It is clear, in the opinion of the Board, that the present question must be approached as one of substance, not of form, and the approach commended by Lord Diplock in *Hinds* at pp 211-214 is that which should be followed. It is noteworthy that in section 49(9)(b) of the Constitution “alter” is defined to

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8 Paragraph 41

9 Paragraph 42

10 [2005] 2 AC 356
include “amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to”. The Board would accept... that the words “amend or repeal” cover an alteration by implication.  

21. He concluded: The Board is driven to conclude that the three Acts, taken together, do have the effect of undermining the protection given to the people of Jamaica by entrenched provisions of Chapter VII of the Constitution. From this it follows that the procedure appropriate for amendment of an entrenched provision should have been followed.

22. The following year, the Privy Council took this approach even further. In 1986, the parliament of Mauritius had passed a law which stated that persons who were charged with a drug or terrorism offence and who had previously been convicted of such an offence should not be granted bail. The court had struck it down as breaching the separation of powers principle and therefore unconstitutional.

23. Mauritius’ Parliament then passed an act to amend their equivalent of our Constitution’s section 15(3), to specifically provide that an arrested person would not be admitted to bail in certain circumstances. This was an entrenched section, and the act was passed by the procedure appropriate to amend such a provision, i.e., with a 3/5 majority in the Assembly. Nonetheless, in The State v Khoyratty the Privy Council struck down the Act on the ground that by implication, it would amend section 1 of Mauritius’ constitution, and as that section is deeply entrenched, the Act had not been passed with the appropriate procedure.

24. Section 1 read: “Mauritius shall be a sovereign democratic State which shall be known as the Republic of Mauritius.”

25. After noting that section 1 is deeply entrenched, the Board held:

“By its clear intendment it militates against a right to bail, qualified as it is, being abolished by ordinary legislation or by a constitutional provision which does not comply with the requirement of deep entrenchment of section 1.”

26. Any consideration of possible amendments to the Constitution must be guided by these decisions.

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11 Paragraph 19
12 Paragraph 21
13 In Nordally v the Attorney General [1986] MR 204
14 [2007] 1 AC 80
27. A number of possible changes to the Constitution have been mooted. Some of them clearly require amendments to deeply entrenched terms and will require the procedure referred to at paragraph 3(b) above. This would include, for example, changing Jamaica’s Head of State. Others, such as the proposed Charter of Rights will require amendments to entrenched clauses and therefore bi-partisan consensus. As indicated earlier, there has only been one amendment in 47 years which required and was made with opposition support.

28. On the other hand, there is a long list of proposed changes which have been pending for years. The most striking of these may be the Charter of Rights. The first commission for this purpose was established in 1992, and the basic terms of the Charter have been agreed for more than a decade. Some may say that political enthusiasm for change has surged or waned depending on whether one is in government or opposition. But that would require an entire presentation.

29. Of more interest for our purposes, are the proposals which would appear to only involve un-entrenched provisions in the Constitution but which may be subject to challenge if that procedure is followed. These include:

   a) A fixed period for the holding of General Elections;
   b) A fixed term for Prime Ministers;
   c) Removing or changing the “dual citizenship” rule.

**Fixed Period for the holding of General Elections**

30. The timing of the holding of general elections is governed by sections 64 and 65 of the Constitution, and is based on the dissolution of Parliament. Section 65 requires the holding of a general election within three months of the dissolution of Parliament and section 64 provides that Parliament can be dissolved in any of three ways:

   a) The Governor-General (acting on the advice of the Prime Minister) may dissolve it at any time (S. 64(1));
   b) The Governor-General must dissolve it if there is a successful no-confidence resolution in the House of Representatives (S. 64(5)); and
   c) Parliament will automatically dissolve five years after its first sitting, if not earlier dissolved (S. 64(2)).
31. Section 71 deals with the tenure of the Prime Minister and other Ministers. Subsection 2 requires the Governor-General to revoke the appointment of the Prime Minister if a majority of members of the Lower House have passed a resolution to that effect, and subsection 3 provides that the Prime Minister can prevent the revocation of the appointment by requiring the Governor-General to dissolve Parliament.

32. The Prime Minister’s power to call general elections at any time during the five-year period is therefore based on the provisions set out in section 64(1) and in section 71(3). Were it not for these provisions, Parliament would automatically last for five years, unless it is earlier dissolved as a result of a no-confidence resolution.

33. Sections 64(1) and 71(3) are not entrenched. Prima facie therefore, Parliament could by a simple majority of all the members of each house, amend or repeal those sections with the result that in the absence of a no-confidence resolution, general elections would take place every five years within a fixed three month period. The question, however, is whether amending or repealing sections 64(1) and 71(3), would by implication, alter any entrenched provisions.

34. It is significant that subsections (2) and (5) of section 64 are deeply entrenched. Some persons are of the view that legislation to amend sections 64(1) and 71(3) can only be enacted by way of the procedure required for amending deeply entrenched provisions of the Constitution. The Court could hold that the overall scheme is one in which the duty to have general elections every five years is meant to be counterbalanced by the Prime Minister’s power to call “snap” elections. Thus, since the effect of amending Section 64(1) and 71(3) is to alter that balance, there could be an amendment by implication of Section 64(2), a deeply entrenched provision.

Fixed terms for Prime Ministers

35. Section 71 of the Constitution provides that the Governor General must appoint as Prime Minister, the person who commands the confidence of a majority of the members of the House of Representatives.

36. No restriction is placed on the number of times that a particular person can be appointed Prime Minister. To provide for fixed term limits in the Constitution, section 70 (which is not entrenched) could be amended to add a proviso to disqualify a person who has already served as Prime Minister for a specified period or been appointed as Prime Minister on a specified number of occasions. The same issue may arise, however:
would such an amendment change the overall scheme and so affect other entrenched provisions?

"Dual Citizenship" Provisions

37. We come finally to what is perhaps the most controversial provision at this time. Section 40 (which is not entrenched) sets out the bases on which someone may be disqualified from being a member of the House of Representatives or the Senate, including being “by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state.” On the other hand, sections 35 and 36 (both of which are deeply entrenched), provide that the Senate and the House, respectively, “shall consist of persons who [are] qualified ...in accordance with this Constitution.” Changing the qualifications under section 40 would arguably affect sections 35 and 36 as there would be a change to the persons who are qualified.

38. It may therefore be that the anomalies that now exist can only be addressed with bipartisan support, and a referendum. Our experience over the last 47 years suggests that this is not going to happen any time soon.

June 7, 2009

E. St. Michael Hylton, Q.C.
<table>
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<tr>
<th>Date</th>
<th>Section Amended</th>
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<tr>
<td>1 February 14, 1971</td>
<td>111 (3) – (by the Legal Profession Act) to add the GLC’s nominees to the Judicial Service Commission</td>
</tr>
<tr>
<td>2 October 31, 1975</td>
<td>77 (1) – to provide for Ministers from the Senate</td>
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<tr>
<td>3 January 24, 1977</td>
<td>69 – to change the size of the Cabinet</td>
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<tr>
<td>4 November 22, 1986</td>
<td>69 (3) – to provide for a minimum of 2 and a maximum of 4 Ministers from the Senate</td>
</tr>
<tr>
<td>5 July 9, 1990</td>
<td>100 (1) (SC) and 106 (1) (CA) – to change the retirement age of judges from 65 to 70 and to delete the proviso</td>
</tr>
<tr>
<td>6 March 5, 1993</td>
<td>3, 5, 6, 7 &amp; 12 – to allow citizenship from either parent</td>
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<tr>
<td>7 January 24, 1994</td>
<td>4 – to allow citizenship by a pre 1962 marriage to a Jamaican husband or wife</td>
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<tr>
<td>8 March 26, 1999</td>
<td>3-8 - To allow citizenship by descent from either parent</td>
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<td>9 September 23, 2002</td>
<td>Schedule – to change the oath of allegiance</td>
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<tr>
<td>10 March 27, 2009</td>
<td>67(1) - to increase the maximum number of constituencies to 65</td>
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