

Changing the constitution (Part I)

- The road from monarch to republic

BY DR. LLOYD BARNETT

The Sunday Observer, January 22, 2012

The road from monarch to republic"> [The road from monarch to republic&body=Link: http://www.jamaicaobserver.com/news/Changing-the-constitution_10602537 | Jamaican News Online - JamaicaObserver.com">](http://www.jamaicaobserver.com/news/Changing-the-constitution_10602537)

SINCE the Prime Minister stated in her inaugural address that her Government would in this, Jamaica's Jubilee Year (50 years of independence), initiate steps to convert Jamaica from a monarchical form of government to a republican form, there has been much discussion as to the implications and what measures will be necessary to achieve this objective.

Constitutional Changes

Constitutional changes can be made in different ways, some legal and formal and others conventional and informal. For instance, the Charter of Rights was established in the Constitution by constitutional amendment requiring a two-thirds majority in Parliament. There have been considerable changes in the manner in which the political executive is constituted, some of which do not conform with the constitutional scheme. The abolition of the monarchical form of our Constitution will require strict compliance with constitutional and legal requirements and will also demand other consequential reforms. All this shows the need for public education and informed discussion.

Historical Background

In an effort to facilitate this discussion, I will endeavour to explain the legal status of the monarchy in Jamaican constitutional law and the political, constitutional and legal factors involved in the proposed change. The monarchy originated as an English institution. It is deeply imbedded in English law and legal systems.

It later attained imperial dimension as the English colonised many and varied areas of the world. Interestingly, Jamaica became an early part of this Empire during the Cromwellian interregnum, when for all practical purposes the monarchy had been suspended in England. Since the restoration of the monarchy and for the subsequent three and one-half centuries the British monarch (King or Queen) has been Jamaica's sovereign.

The Independence Constitution of 1962 simply refers to "Her Majesty" and does not define how that person is to be identified, selected or replaced. These matters are governed by the law of the United Kingdom, in particular the Act of Settlement 1700 and the Interpretation Act 1889. Thus Jamaica cannot alter the line of succession.

Although the existing law gives precedence to male over female and is inconsistent with our constitutional protection against gender discrimination, we cannot alter this without amending our Constitution and obtaining the approval of other Commonwealth countries in order to remain a member of the Commonwealth.

There is now a proposal to change this archaic position. However, the decision to remove the present monarchical form and to replace it with a republican form is entirely for the Jamaican Parliament and people. It is our duty to ensure that we apply the correct legal mechanisms and best practices.

Existing Constitutional Provisions

At Independence, the new Constitution contained seven features of Jamaica's monarchical status. These are:

1. The Constitution itself was attached to a Schedule to an Order in Council which was made at the Court at Buckingham Palace in England and stated that it was being made by virtue of powers

vested in Her Majesty by a UK Statute, the West Indies Act, on the advice of her Privy Council on which no Jamaican sat. It was signed by a member of the Queen's staff.

2. It provided that there should be a Governor-General who shall be appointed by Her Majesty and shall be Her Majesty's representative in Jamaica and shall serve during Her Majesty's pleasure.
3. It stated that the Parliament of Jamaica shall consist of Her Majesty, a Senate and a House of Representatives.
4. It provided that the prerogative of mercy is to be exercised in her name and on her behalf.
5. It prescribed as the words of enactment for every Act passed by the Parliament that it is enacted "by The Queen's Most Excellent Majesty" by and with the consent of the legislature.
6. It provided for appeals to Her Majesty in Council and preserved the right to apply for special leave to appeal to her.
7. It provided for oaths of allegiance to the Queen to be taken by the Governor-General, the President of the Senate, the Speaker of the House of Representatives, Superior Court Judges and Ministers of Government.

In 2002, this latter provision in relation to oaths of allegiance was revoked and oaths of allegiance to Jamaica and to uphold the Constitution — which incongruously continued to require the recognition of the monarchy — were substituted.

Requirements for Consequential Changes

Apart from altering these constitutional provisions, the adoption of a republican form of government will require changes to several legal, conventional and heraldic forms. For example, the title of the Act which authorises actions to be brought against the Government is the Crown Proceedings Act. Criminal prosecutions are brought in the name of the Crown and are entitled the Queen (or the Latin form, Regina) against AB.

Some leading attorneys are granted the title of Queen's Counsel. A knighthood is traditionally conferred on the Governor-General by the Queen. The abolition of the monarchical form and its replacement by a republican Constitution will therefore require careful examination of the legal issues and implications as well as detailed planning.

In Part II of this article I will examine various issues and mechanisms involved in the process.

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Changing the Constitution (Part II)

- The legal requirements for change

BY DR. LLOYD BARNETT

The Sunday Observer, January 29, 2012

The legal requirements for change (Part 2)"> [The legal requirements for change \(Part 2\)&body=Link: http://www.jamaicaobserver.com/news/Changing-the-Constitution_10648355 | Jamaican News Online - JamaicaObserver.com">](http://www.jamaicaobserver.com/news/Changing-the-Constitution_10648355)

THE Portia Simpson Miller Administration's decision to replace the monarchy with a republican system of Government will require careful planning and efficient implementation, given the constitutional changes that are necessary for such a move.

According to Jamaica's foremost expert on the Constitution, attorney-at-law Dr. Lloyd Barnett, the fact that the change will require a referendum means that the Government has an obligation to adequately inform the public "of the nature and implications of the proposed alterations prior to the holding of the referendum".

Dr. Barnett, in the final of his two-part examination of the issue, gives details of what needs to be done.

Entrenched Provisions

The Constitution prescribes the manner in which it can be amended. It is specifically stated that any law which amends, modifies, re-enacts with or without amendment or modification, suspends, adds to or makes different provision in lieu of, suspends or repeals any provision of the Constitution must conform with the procedure prescribed by the Constitution.

Where a provision of a Constitution requires for its alteration more than the normal method of amending or changing ordinary laws, it is described as entrenched. Many provisions of our Constitution can be changed by ordinary legislation. Thus the provisions relating to Jamaican citizenship were altered by ordinary legislation requiring only a simple parliamentary majority in 1993, 1994 and 1999.

Similarly, the various Oaths of Allegiance to the Queen were revoked and replaced by Oaths of Allegiance to Jamaica in 2002. However, many other sections of special significance are entrenched and can only be altered if a special amendment procedure is used.

It is now clearly established by the case of **Independent Jamaican Council For Human Rights (1998) Ltd v Marshall-Burnett** [2005] UKPC 3 (February 3, 2005), (the CCJ Case) (available on the Privy Council's website) that a provision which has an impact on an entrenched section may, without any specific alteration of or reference to that section, be regarded as requiring conformity with the requirements for alteration of the entrenched section which is so affected.

For instance, the provision for the establishment of the office of Governor General is not entrenched. However, the entrenched provisions for amending the Constitution require the submission of the amending bill for his assent, so the abolition of the office will impact entrenched provisions.

Changing to Republic requires Referendum

Of the six remaining monarchical features in the Constitution, only two may be revoked or altered by ordinary legislation. These are that Acts of Parliament should contain the words "Be it enacted by the Queen's Most Excellent Majesty" and the provision for appeals to the Privy Council or for application for special leave to Her Majesty in Council. The other four are expressly or inferentially entrenched and can only be amended by the process described below.

The provisions relating to the prerogative of mercy which state that it is to be exercised in Her Majesty's name and on Her Majesty's behalf are ordinarily entrenched and cannot be altered without satisfying special criteria. This is also the case with respect to the monarchy being a legal component of the Executive and the Legislature which, being deeply entrenched, requires conformity with an even more stringent procedure.

The result is that we can only change from a monarchy to a republic if the following requirements are satisfied:

1. The Bill seeking to make the alteration must be tabled in the House of Representatives;
2. Three months must elapse before it is debated in this House;
3. A further three months must elapse between the debate in this House and its final passing in this House;
4. The Bill must be supported by at least two-thirds of all its Members (not of those voting only);
5. If, and only if, the Bill receives this two-thirds majority, may it be sent to the Senate;
6. If the Bill is not passed by a two-thirds majority in the Senate, after an interval of six months it may be sent back to the Senate;
7. If it is then passed by a two-thirds in the Senate, after not less than two months nor more than six months it must be submitted to the electorate in a referendum where it must obtain a three-fifths majority of those who voted;
8. If it is passed by the two-thirds majority in the House of Representatives but not in the Senate, the Bill will only take effect if it is approved by a two-thirds majority of voters in the referendum.

The practical result is that an amendment to remove the monarchical reference in respect of the prerogative of mercy, even if supported by all Government senators, requires the support of at least one Opposition senator or a referendum will have to be held. In any case, an amendment to alter the status of the monarchy as part of the Legislature and Executive, even if all members of both Houses vote in favour, requires the approval of the electorate in a referendum.

Other changes requiring Referendum

There have been a number of other proposals for amendment of the Constitution which will also require approval by a referendum. The principal of these are:

1. The re-enactment of the Constitution in a Jamaican statute;
2. The adoption of the appellate jurisdiction of the Caribbean Court of Justice;
3. The incorporation of the Electoral Commission with the protection of entrenched provisions.

Since there is apparent political consensus in favour of these proposals, it would be prudent to proceed with these simultaneously so as to avoid the costs and efforts which would be involved in holding separate referendums for each of these.

Preparing for the Referendum

There is obvious need for the public to be informed of the nature and implications of the proposed alterations prior to the holding of the referendum. Government has an obligation to facilitate the process of public education, so too do the media and civil society.

A case in which a Constitution has imposed a specific legal obligation on the administration to fulfil this need for public education is the constitutional provision relating to any proposed separation of Nevis from Saint Christopher (St Kitts). That Constitution provides that the secession bill cannot be presented for assent unless:

- a) there has been an interval of not less than 90 days between the introduction of the bill in the Assembly and the beginning of the proceedings in the Assembly on the second reading of the bill;
- b) after it has been passed by the Assembly, the bill has to be approved on a referendum held in the island of Nevis by not less than two-thirds of all the votes validly cast in that referendum; and
- c) full and detailed proposals for the future constitution of the island of Nevis (whether as a separate state or as part of or in association with some other state) have been laid before the Assembly for at least six months before the holding of the referendum and those proposals with adequate explanations of their significance have been made available to the persons entitled to vote on the referendum at least 90 days before it is held.

Conducting the Referendum

The composition of the ballot paper with respect to the constitutional changes proposed in Jamaica will present special challenges. It will have to identify what the voters are being asked to approve or disapprove. Obviously, the provisions of the Bill cannot be set out on the ballot. Each particular amendment will have to be identified by a generic description. In order to ensure fairness it is desirable to give the responsibility to formulate or approve the questions to an independent body such as is done by the UK Political Parties, Elections and Referendums Act.

In view of our problems of illiteracy and our established use of symbols on ballot papers, consideration will have to be given to devising a system which not only identifies a proposal by symbols but also provides a simple method by which the voter can designate "yes" or "no".

Where several issues are being presented, it is my view that it should be possible for voters to approve one proposal and not another. The alternative is unfair and could lead to legal challenges, since it forces a voter to vote "yes" or "no" in respect of several proposals together, although he or she may favour one and not the others. Many referendums have failed totally because of the composite "all or nothing" approach.

It will also be necessary for the referendum legislation to adopt relevant provisions of the Representation of the People Act, including the use of the official voters' list and the rules for conducting the polls.

It is clear that the process should be carefully planned and then efficiently implemented.

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