

Global Law Summit

Beyond the Commonwealth: Magna Carta and the development of law around the world

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Presentation by

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I would like first to apologise for the absence of Sir Dennis Byron, President of the Caribbean Court of Justice, who was originally scheduled to participate in these proceedings. Sir Dennis had every intention of being present here today but, unfortunately, at the last minute he was faced with circumstances which did not permit this. On his behalf, however, I extend heartfelt thanks to the Law Society of England & Wales and the Global Law Summit Committee for the invitation extended to him and for the opportunity for me, in his stead, briefly to address this conference on Magna Carta and the associated development of law in the Caribbean.

When I speak of the Caribbean I refer of course to the Anglophone Caribbean which comprises twelve independent States as well as six British Overseas Territories. Common to these eighteen countries is a shared legal system and tradition and written constitutions boasting entrenched Bills of Rights all rooted in Magna Carta and English common law.

The tale of Magna Carta is a chapter in the ever evolving history of the struggle between power and responsibility, set in a time when ultimate power was concentrated in the hands of a single ruler whose rule could be thwarted by rebellion. Magna Carta continues to be an essential lesson in mediating the tension between the exercise of power and the enjoyment of freedom.

Eight hundred years ago England's King John was entirely oblivious of the islands and states located in or bordering the Caribbean Sea and the native peoples who occupied those lands and after whom that Sea is named. Magna Carta was brought to the Caribbean by English settlers many years after the demise of the goodly king and the ideals it enshrined still flourish today. In preparation for this presentation one of our research assistants was requested to comb through CARILAW, a data base of Caribbean judgments, to discover the number of cases in which

Magna Carta was referred to in Caribbean judgments delivered between 1971 and the present time. She found 46 such cases. In other words, at least once per year, this precious statute is cited with approbation by Caribbean judges. Unsurprisingly these cases invariably have addressed issues of public law. I myself vividly recall a human rights case I tried just a few months after I was first appointed to the Bench. It was a case of freedom of expression in Anguilla – the case of *Benjamin v The Attorney General* that went all the way up to the highest court. One of the reasons I remember the case is because counsel for Mr Benjamin addressed me at some length on the precepts outlined in Magna Carta. Her arguments prevailed.

The resilience of Magna Carta is well demonstrated in England where its statutory status has attained unprecedented longevity. In the Caribbean the Charter's precepts survived colonialism, the odious trade in the trafficking of human cargo, and the evils of slavery throughout which time its tenets were, to put it mildly, unevenly applied. But the Great Charter's relevance not only survived. It emerged from that period stronger than before and its principles became firmly enshrined in all Caribbean constitutions which provide for the fundamental rights of the citizen.

These constitutions are constraining legal instruments. Like Magna Carta they constrain the actions of the organs of the State, whether Executive, Legislative or Judicial. The Executive is not at liberty to take any decision it pleases, nor is Parliament entitled to pass any Act it sees fit. The powers of Parliament are exercised subject to the provisions of the Constitution. And although the judges are entrusted with the responsibility to interpret the Constitution, the courts may not carry out that mandate in a whimsical fashion or else public trust and confidence in the judiciary will be eroded, constitutional values will be diminished and the rule of law itself will be imperilled. It is the unyielding commitment to maintaining this delicate balance upon which our democracies thrive. And what a fine balance it is. Caribbean courts are increasingly being called upon to define precisely the permissible boundaries; to ensure that the scales do not tip too far to one or the other side. It is one thing, for example, to assess whether ordinary laws are constitutionally compliant. But how far do the constraints on Parliament extend? Can a duly enacted constitutional amendment itself be unconstitutional? If so, in what circumstances, and on what basis? These are extremely tough questions that are currently facing courts in the region.

Caribbean constitutions not only set out to protect fundamental rights but in their Preambles they also express the lofty aspirations of the people. The Constitution balances the enjoyment of individual rights with the public interest and determines the mechanisms through which sovereignty is exercised. The Constitution also articulates expressly or by necessary implication core values such as a commitment to parliamentary democracy, constitutional supremacy, the separation of powers, judicial independence and the rule of law. These values are always considered in the light of the constitutional text and a range of surrounding circumstances but they all have their roots in the common law. So much so that there was a time in the early years of the existence of these written constitutions, when the fundamental rights were interpreted in a manner so as to render them in conformity with the common law. Fortunately, that austere approach has now given way to the adoption of a generous approach that gives the citizen the full breadth of the stated rights free from any restriction imposed by the common.

The establishment of the Caribbean Court of Justice (CCJ) has been an important milestone in promoting the development of a Caribbean jurisprudence. The orderly delinking from all vestiges of imperial and colonial rule is a natural and inevitable process that is consistent with Magna Carta's prescription of lawful judgment being rendered by one's peers. As a court of final appeal the CCJ is best equipped to carry forward the goals and aspirations of the Caribbean people, to protect democracy in the region and to advance the noble principles upon which Magna Carta is premised. In the fulfillment of this mandate over the last ten years the Caribbean Court of Justice has had to confront the challenges which face the rule of law and democracy in the Caribbean

What are some of these challenges? Caribbean constitutions have been reasonably efficient at maintaining law and order. Coups d'état and rebellions are exceedingly rare. The challenge is to go beyond the mere maintenance of law and order and actually realize justice in the political, economic and social spheres. We need to deepen democracy. Caribbean societies have not fully freed themselves from the structures, ingrained habits and patterns of thought that are a legacy of centuries of colonial rule. Moreover, by immunizing pre-independence law from constitutional challenge some constitutions have thwarted the ability of the courts to give appropriate redress for obvious infringements of fundamental rights. Notwithstanding these impediments, many significant measures have been taken both by the Parliaments and the Judiciary to expand justice.

I will cite just one example: the treatment of our indigenous people. In both Guyana and Belize, there are native populations who have survived centuries of exploitation and deprivation but who still exist in the shadows of modern civilization. Their plight is characterized by economic hardship, poor education and inadequate health facilities. In light of this, the Belize National Assembly amended that country's Constitution in 2001 to include in its Preamble the requirement that the State adopt policies "which protect the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous peoples". The courts have since taken up the mantle and in *Cal v AG*¹, partly on the strength of the amendment to the Preamble, the Supreme Court recognised the rights and interests of the Maya community in Southern Belize to their customary land tenure; which rights, the court held, prevailed over the rights of the Crown to those lands. The interests of the Maya were held to be "property" within the meaning of that term in the Constitution and so those interests were protected from arbitrary deprivation or compulsory acquisition by the government except in accordance with the carefully laid out provisions of the Constitution.

Similarly, in Guyana, over the years successive governments have transferred title to large parcels of land to Amerindian communities. Guyana's National Assembly has also amended that country's Constitution to acknowledge the right of the native peoples "as citizens to land and security and to their promulgation of policies for their community". A new Article of the Constitution, Art 149G, gives Guyana's indigenous peoples the right to the "protection, preservation and promulgation of their languages, cultural heritage and way of life" and an Indigenous Peoples Commission has been established to "enhance the status of indigenous people and to respond to their legitimate demands."

A second area of challenge in our very small States is the dangers associated with the over centralisation of power in the hands of the Prime Minister. This is aggravated by a winner takes all electoral system, the absence of any effective parliamentary back bench, the lack of internal control of political parties and poor or ineffective mechanisms of public accountability. The result of all this could be Prime Ministerial Government, a concentration of Executive and Legislative power in one individual leading to a culture of patronage and dependency. Some of

¹ (2007) 71 W.I.R. 110 (SC Bze)

these issues were discussed by my Court in a case where we had occasion to decline to enforce an arbitral award that was premised on an unpublished, confidential agreement made by a Prime Minister to exempt a local investor from the tax laws of the country.²

The third area of challenge I would mention is the alarming increase in violent crime. A major cause of this lies in our geography. The Caribbean is wedged between the major producers and consumers of illegal drugs and with long stretches of poorly or unprotected coastlines, Caribbean states provide a significant transit point in the illegal drug trade. This is a major factor in spiraling homicide rates involving gang-related violence. The huge increase in gun-related crime poses a serious threat to national security and heightens to intolerable levels the citizen's sense of insecurity. Control of crime is a multi-faceted enterprise but an important component is Criminal justice reform designed to address, among other things, low conviction rates, unbearably long periods of pre-trial detention, inordinate trial delays and backlogs, inefficient caseflow, sentencing anomalies and low levels of public confidence in the criminal justice system. These maladies are both a cause and a result of the high crime rate. In an effort to address them the Conference of Heads of Judiciary in the region has embarked on a project aimed at improving the justice system by enhancing the technological capabilities of courts in the region, re-engineering court processes in order to expedite caseflow, expanding the range of ADR mechanisms offered to court users, and addressing the training of judges and gender imbalances in the administration of justice. Of course, one of the problems here is that, as earlier intimated, criminal justice reform requires a holistic approach that integrates the coordinated efforts of all the key stakeholders. Since low crime rates and respect for the rule of law will naturally attract investments and lead to increased economic prosperity, the gains to be realized from addressing this challenge extend to economic development and so the major stakeholders also have a vital interest in partnering with the judiciary in this endeavour.

In conclusion it is fair to state that individual liberty, the rule of law and due process, restraint on Executive power are all fundamental tenets of any modern democracy. The Magna Carta

² See *BCB Holdings Ltd v AG* [2013] CCI 5 (AJ). See also in this regard *Antigua Power Company Ltd v The Attorney General of Antigua and Barbuda & Ors* [2013] UKPC 23 at [51] – [60]

principles underlie each of these concepts and it is only fitting that we should use this opportunity to reflect and to express our gratefulness to the prescience of King John and his barons and to the English legal system for establishing, maintaining and developing these principles and bequeathing them to the rest of the world. Congratulations are in order to all those who played a role in organizing this event. Our charge now is to enrich the principles of Magna Carta and to apply them not just to the privileged in society or to those in the main stream but to all of humankind and in particular to the oppressed, the marginalized and the least regarded among us.