

The Rule of Law in the Caribbean

Presentation by

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I extend heartfelt thanks to the Government and people of St. Kitts and Nevis for the invitation extended to me to address you this evening on the rule of law.

I welcome occasions like these because they allow one to get a better sense of the pulse of Caribbean people while at the same time they provide an opportunity to share with you information about the work of the court. I think this kind of dialogue, this periodic exchange of information and views has a role to play in fostering respect for the rule of law.

The development of the principle of the rule of law is credited to the Greek philosopher Aristotle whose view was that *“it is more proper that law should govern than any one of the citizens”*. In other words, even the King, the supreme ruler, should be under the law. And in this regard I like to cite what is actually a true story, occurring in Aristotle’s time, that illustrates the principle. The

Macedonian king at the time of Aristotle was Phillip II, the father of Alexander the Great. Philip exercised supreme authority over his people. One day, as he was holding court, one of his female subjects petitioned him for justice. She stood before Philip pleading her case. But Phillip had been drinking heavily. To be quite blunt about it, Philip was drunk. In short order he dismissed the petition. "I will appeal this judgment", the woman exclaimed defiantly. "To whom", Philip indignantly roared. Without losing a beat, the woman responded, "I will appeal to Philip, sober". Now, according to the Roman historian Valerius Maximus, the worthy petition was indeed re-submitted. And it was decided in the woman's favour by a clear-headed Phillip. The moral of the story is that ultimately what must prevail is law and justice and not the arbitrary whim of the ruler, especially if he is inebriated whether with power itself or with alcohol.

The people of this Federation, like the people of the entire Caribbean must jealously guard and protect the rule of law, in part because as a people we have come such a very long way in such a comparatively short time. Just imagine, less than 2 centuries ago, about 4 or so generations ago, our forefathers were looked upon as nothing; we were bought and sold like chattel. Indeed, the law regarded us as chattel.

Rex Nettleford rightly refers to The Emancipation Act of 1834 as our collective birth certificate. And the reality is that it is only since emancipation, in the eyes of the law, we became human beings and ceased being the property of slave owners. From that time to now we have made steady and rapid progress in reclaiming our dignity and having our human rights respected. Our continuous struggle against the yolk of colonialism has also helped to win us the right to self determination.

If the emancipation proclamation was our birth certificate, our Independence Constitution can be likened to a document that marks our coming of age. But with independence, with adulthood, with the Constitution has come not only enhanced rights but also new responsibilities.

The Barbadian writer, George Lamming painted a vivid picture of the background against which we take up these post-colonial responsibilities. He noted that:

[Colonialism] was not a physical cruelty. Indeed, the colonial experience of my generation was almost wholly without violence. No torture, no concentration camp, no mysterious disappearance of hostile natives, no

army encamped with orders to kill. The Caribbean endured a different kind of subjugation. It was the terror of the mind, a daily exercise in self-mutilation ... This was the breeding ground for every uncertainty of self.

“The breeding ground for every uncertainty of self”. A major challenge we still face is, as Bob Marley says, to emancipate ourselves from mental slavery; to imbue ourselves with the confidence befitting a responsible adult who must stand on his own feet. Yes, we may at times wish to emulate or draw on the experiences of others if the example is useful and suitable to our unique circumstances, but we need to be firmly aware that we do have the intellect and are actually best placed to interrogate our own societies and determine for ourselves the optimum measures that must be taken to improve it.

If I had to sum up our principal responsibility in this age I would say that it is to maintain and enhance the rule of law. To my mind that is an essential platform for achieving and maximising social and economic progress. But what exactly do we mean when we speak of the rule of law? What are the elements that comprise this precious principle? In my view the rule of law means a lot more than its most basic ingredients. Those basic ingredients have usually been listed as firstly, the making of laws in a public manner with the laws being

accessible to the population; secondly, the laws made should take effect generally in the future; and thirdly, the laws must be publicly administered by courts that are independent and impartial. In other words, at its most basic, the rule of law signifies the sovereignty of the law over arbitrariness. But while essential, that is, in my view, an insufficient characterisation of the rule of law. In addition to those elements, the rule of law also imply legal accountability, fairness, respect for minorities, the observance of human rights, the separation of the powers and equality before the law.

Our Constitutions are excellent guarantors of the rule of law because they serve as a fundamental brake on tendencies to arbitrariness, They are designed to keep government in check; to constrain the actions of all 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 law it sees fit. And judicial power must be exercised with care. Yes, even the judiciary, which is entrusted with the noble task of interpreting and applying the Constitution, must ensure that it exercises judicial power within limits. If, like the drunk Phillip II of Macedon, judges carry out their mandate in a capricious fashion, public trust and confidence in the judiciary will be eroded, constitutional values will be diminished and the rule of law will be imperilled. So, for example, when,

some years ago, a judge in Trinidad exceeded his powers by holding a lawyer in contempt of court, sending the lawyer off to prison without due process, a higher court said that the judge had overstepped the mark and the lawyer was entitled to redress from the State for the violation of his constitutional rights.

I am deeply honoured to sit as a Judge of the Caribbean Court of Justice (CCJ), the highest court in the Caribbean. The establishment of the CCJ is an important milestone in the orderly delinking from all vestiges of imperial and colonial rule. It is the next logical step in the decolonisation process and, until it is taken, we cannot be said to have completely rid ourselves of vestiges of our colonial experience. We in the CCJ have not hesitated to take the measures we consider appropriate whenever we were convinced that a Caribbean government was compromising the rule of law.

We are privileged to be able to apply the rule of law in the Caribbean both on a regional as well as a domestic plane. At the regional level, as you all know, Caricom countries have made a pact, a treaty. Through the Revised Treaty of Chaguaramas they have agreed to encourage the free movement of goods, services, labour and capital among Caricom states. You can think of the Caricom Treaty as a kind of Constitution each country must abide by and the

CCJ is the court one can turn to when any Caricom country violates that Constitution. The Court therefore resolves disputes between Caricom states arising under the treaty. Because each CARICOM state has its own peculiar interests, its own priorities, its own challenges, aspirations and goals, strained relations among states are just as likely to occur as among persons in society. Let's look at a few countries for examples of what can give rise to such strains. For its small size, the island of Barbados has a huge population that is exacerbated by the million plus tourists who visit annually. The relatively dense population places severe pressures on limited social infrastructure and amenities. But due to its social stability Barbados is targeted by many Caribbean people who seek a better life. One result of this is that Barbadian immigration officials can be very zealous in protecting their country's borders.

Jamaica, the biggest island, also has the largest population size in Caricom. Jamaicans are an enterprising people. Their economy is not surging in the way it was when they chose to separate themselves from the West Indies Federation. Some Jamaicans now find such great difficulty finding jobs at home that they are on the move, fully prepared to explore whatever opportunities exist in other countries.

Trinidad and Tobago is blessed with abundant energy supplies which has allowed TnT to dwarf the rest of Caricom in light manufacturing. Trinidad is keen to ensure that its manufactured products penetrate the region in preference to comparable products from extra-regional sources. Of course, the not-so-well-off States in the region would love to purchase cheap goods and not necessarily those manufactured by a sister Caricom state.

These are the kinds of realities that make for stresses and tensions. Every Community must endure them. Their existence doesn't mean that Caricom does not or cannot work. What it means is that there must be give and take. In any Community, what is critical is that strains and pressures must be managed in an orderly and lawful manner so that no serious injustice prevails or that where injustice rears its head the wronged party has recourse that they can easily access. In other words, The rule of law must prevail. The CARICOM treaty sets out a framework for ensuring this and the CCJ is entrusted with the pivotal role of dealing with the disputes that arise. When a state or an individual feels unfairly disadvantaged because a sister state is not playing by the rules, complaint can be made to the CCJ. And the CCJ is authorised to provide appropriate redress.

So it is that we have had cases of Trinidadian companies that complained, in one case, that Guyana was wrongfully importing cheap cement from outside the region when instead it should have been purchasing that cement from Trinidad. In another case the Trinidad company complained that Suriname was importing flour from The Netherlands when it should have been buying that flour from the Trinidad company. In each case the CCJ gave judgment for the Trinidad company.

In the well-known case of Shanique Myrie, a young Jamaican lady attempted to visit Barbados for a short holiday. She was not welcomed at the airport as a Caricom citizen should be. Over-zealous Barbadian border officials placed her in a dirty cell and deported her the next morning. They dealt with her in a most inhumane manner. She complained and the CCJ denounced the mis-treatment and awarded Ms Myrie significant monetary damages which Barbados paid.

In these examples you see the CCJ playing a dynamic role touching the lives of the people, safeguarding the jobs of workers in the manufacturing sector in Trinidad, maintaining the integrity of the CSME, protecting the rights of ordinary Jamaicans, and by extension all Caricom citizens, and generally upholding the rule of law on the regional plane.

The court plays a similar role at the domestic level as the highest appellate court. It takes action to preserve the rule of law and protect the rights of the people. So, for example, we had a case from Barbados where the critical evidence linking an accused to a murder was from a dentist who testified that the accused, when arrested very shortly after the murder, had a wound on his arm that resembled a bite mark. The dentist testified that his investigations had determined that this bite mark could only have been made by the deceased woman. The problem was that bite mark evidence belongs to a highly specialised scientific field called forensic odontology; the dentist was not himself a forensic odontologist and his bite mark evidence was effectively the only evidence against the accused. Forensic odontology is itself a very controversial field. As a forensic tool it is not as respected as DNA or fingerprint evidence. In the United States the reliance on bite mark evidence has resulted in many wrongful convictions. The accused claimed he was not guilty of the murder.

In the court's estimation a fair trial of this accused person could not have been held if the accused, who was potentially facing a death sentence, was unable to adduce expert evidence to test the evidence being adduced by the State. The CCJ therefore instructed the Prosecution that it either had to pay for the

services of a forensic odontologist to assist the defence or else it had to drop the murder charge against the man. We found that this was an appropriate way of guaranteeing the right of the accused to a fair trial. This was the case of *Gibson v The AG*.¹

In another case from Belize, the Court was called upon to examine legislation that had been enacted by that country's parliament that had introduced very steep mandatory minimum penalties for a particular offence. We noted then that, given our solemn responsibility to protect human rights and uphold the rule of law, courts would usually regard mandatory or mandatory minimum penalties with a watchful eye. After examining the legislation carefully the court took the view that the mandatory character of the sentencing regime should be invalidated.

Caribbean governments and parliaments have their own role to play in promoting the rule of law. And they have been doing so. One of the challenges to the rule of law lies in the dangers associated with the over centralisation of power in the hands of the Prime Minister. In a book on Caribbean Constitutional Law recently published by Tracy Robinson, Arif Bulkan and

myself, we drew attention to this feature. In fact, we labelled the dominant system of governance in the region as prime ministerial government, that is a system where the prime minister wields immense power as the head of government and typically controls the majority in the houses of parliament. Prime Ministerial Government results in a concentration of Executive and Legislative power in one individual leading to a culture of patronage and dependency. This feature is aggravated by a winner takes all electoral system, the absence of any effective parliamentary back bench, the lack of or poor internal controls of political parties and ineffective mechanisms of public accountability. Some of these issues were discussed by the CCJ 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 In that case the CCJ characterised Prime Ministerial governance as a malignant tumour that eats away at democracy.

I note with tremendous interest that in some States there are those who would have parliament take measures to address this situation. In Guyana a Bill was

² See *BCB Holdings Ltd v AG* [2013] CCJ 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]

enacted to limit the term of office of the President. And my understanding is that here in St Kitts and Nevis it is proposed to enact legislation that will similarly limit the term of office of the Prime Minister. The issue of the constitutional validity of such legislation has been placed before the courts in Guyana. Since it is likely that this dispute will or could soon reach the CCJ I must restrain myself from expressing any further views on it.

Other more obvious measures have been taken by Caribbean governments and parliaments to advance the rule of law. These have included, to name just a few, the establishment of Freedom of Information legislation. It was the great American Supreme Court Justice, Louis Brandeis who first coined the phrase that “Sunlight is the best of disinfectants”. Access by the public to relevant information is a powerful tool to foster the rule of law. So too, naturally, is anti-corruption or Integrity legislation. Of course, if these measures are intended only as what we in the Caribbean call “a pappyshow”; if integrity commissions are not well resourced and afforded the necessary enabling powers and immunities, then they will be ineffective, the public will become disillusioned and the rule of law will suffer a terrible blow.

The duty to uphold the rule of law does not end with the government, parliament and the Courts. Civil society can also play a huge role as they are often the mouth piece for minorities and the more vulnerable groups in our societies who are ever so susceptible to abuses of the law. One indicator of the extent to which the rule of law is observed is the attitude of the Executive to civil society bodies that are either critical of the government or passionate in the promotion of their interests.

I believe the most significant area of challenge to the rule of law in many States of our region is the alarming increase in violent crime. A major cause of this lies in our geography. Small, poor Caribbean island states are wedged between the major producers and consumers of illegal drugs. With long stretches of poorly or unprotected coastlines, Caribbean states provide a much utilised transit point in the illegal drug trade. This is a significant factor in spiralling homicide rates involving gangs. 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, intolerable backlogs resulting from

inefficient caseload, and low levels of public confidence in the criminal justice system. Effective criminal justice reform requires a holistic approach that integrates the coordinated efforts of all the key stakeholders. Each of the stakeholders must be on the same page, walking in step with each other because, if not properly coordinated, any innovation made by one body is likely to have unexpected consequences for another. 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 meeting this challenge are enormous.

I am optimistic that as a people we are capable of meeting all these challenges to which I have alluded. Doing so will require a huge effort and steadfastness and patience and respect for each other's views. But I really do believe that as the consciousness of the people forever rises, people will continually hold governments and public officials to higher standards of accountability which in turn will produce better government. And I am certain that if we compared ourselves now to where we were 30 or 50 years ago, we will see the progress that has been made. What we need to do now is to press on with urgency and confidence and faith.