The Faculty of Social Sciences, Constitutional Affairs and Parliamentary Studies Unit, St Augustine, Trinidad and Tobago
University of the West Indies Open Campus (Cayman Islands)
Magna Carta 800th Anniversary Committee

Magna Carta and Human Rights in the Cayman Islands

25th March 2015

at the University College of the Cayman Islands

Paper presented by Hon. Sam Bulgin QC JP,
Attorney General, Cayman Islands

A historical perspective on how Magna Carta influenced the development of human rights and governance in the Cayman Islands

Permit me to begin with an observation by UK Supreme Court Judge Lord Sumption :

> "*It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently. So you must not expect any startling new line from me*"[1].

And so with that caveat, I must advise you that it is difficult to know what to say that hasn't already been said in this 800th anniversary year, or, indeed over the past 800 years, in praise of the Magna Carta. After all, in its first draft, it was a failed peace treaty, which was denounced by a thirteenth century Pope as "shameful".

[1] Magna Carta then and now, Address to the Friends of the British Library, Lord Sumption, 9 March 2015

Pope Innocent III was so incensed that King John had , granted his subjects such rights without papal authorization that he considered the Magna Carta to be interference with his ownership of England and so the Pope proclaimed it invalid "*forever*"[2].

The world should therefore be grateful to the Regents to King John's successor, the child-king Henry III[3], those thirteenth century advisors, whether they knew themselves to be forward-thinkers or not. They resurrected and remodeled the document after the death of King John; a document which is now widely regarded as the cornerstone of liberty and the Rule of Law in the English-speaking world.

I think it is important to note that 2015 is also the somewhat overlooked anniversary of another significant, and somewhat related, event. 750 years ago, in 1265, an extraordinary parliament opened in Westminster. This was the brain child of French-born Simon de Montfort, who became Earl of Leicester and was married to King Henry's sister, Eleanor.

The 1265 Parliament followed on from de Montfort's previous attempt at a parliament – i.e. the 1258 "Great Council, which met at Oxford, and at which a

[2] Papal declaration 24 August 1215: "*We refuse to overlook such shameless presumption which dishonours the Apostolic See, injures the king's right, shames the English nation, and endangers the crusade... on behalf of Almighty God, Father, Son and Holy Ghost, and by the authority of Saints Peter and Paul His apostles, [we] utterly reject and condemn this settlement. Under threat of excommunication we order that the king should not dare to observe and the barons and their associates should not insist on it being observed. The charter with all its undertakings and guarantees we declare to be null and void of all validity forever*."

[3] Henry was only aged 9 when he became king.

small number of commoners (essentially the land-owning Barons) were given a wider say in the government of England. Simon de Montfort had become leader of those who wanted to reassert the Magna Carta and force the King to surrender more power to this baronial council.

King Henry had little choice but to agree to the "Provisions of Oxford" which emanated from the Council and which called for regular parliaments with representatives from the counties, but, after Papal intervention again, Henry reneged on his oath[4].

This rejection by King Henry prompted a civil war between the Barons and the Royalists, which de Montfort, as leader of the Barons, won. The subsequent "January Parliament", meeting for the first time on 20th January 1265[5], is described as an embryonic House of Commons and considered to be one of the most significant events in British democratic history.

For the very first time, elected representatives from every county and major town in England were invited to parliament on behalf of their local communities. During this first parliamentary sitting, it is thought that the text of the original Magna Carta was altered slightly and subsequently circulated more widely than before.

[4] In the Spring of 1261, Henry obtained a papal dispensation from his oath to respect the Provisions of Oxford.
[5] It is interesting to note that the delegates coming to parliament in 1265 even had their costs covered; a sort of 13th-Century MP's expenses?

And thus the beginnings of the Westminster system of governance, and its corresponding model of constitution, both of which spread throughout the world, and can be traced back to the 13th Century and eventually to the Magna Carta; these two historical events can be seen as marking the start of a journey towards modern day rights and representation.

Notwithstanding the reverence in which the Magna Carta is held today, it may have remained legally inconsequential had it not been resurrected and reinterpreted by Sir Edward Coke in the early 17th century. Coke, Attorney General for Elizabeth I, Chief Justice during the reign of James, and a leader in Parliament in opposition to Charles I, was an English barrister and judge considered to be the greatest jurist of the Elizabethan and Jacobean eras.

He used Magna Carta as a weapon against the oppressive tactics of the Stuart kings arguing that even kings must comply with common law. Charles I had raised loans without Parliament's sanction and imprisoned, without trial, those who would not pay. This imprisonment was declared illegal by the Courts and because of this defiance of the King's will, the Chief Justice was dismissed; unfortunately the remaining judges succumbed to the King's pressure. However, more and more refused to pay, leading to Darnell's Case[6], in which the courts, incredibly,

[6] 3 How. St. Tr. 1 (K.B. 1627)

proclaimed that "*if no cause was given for the detention ... the prisoner could not be freed as the offence was probably too dangerous for public discussion*".

The court had found in favour of the King, since common law had no control over the royal or absolute prerogatives of the monarch. The unrest grew to the extent that eventually Martial Law was declared; anyone who refused to pay continued to be imprisoned and soldiers were billeted in the homes of private citizens in an attempt to intimidate the population, thus the origin of the famous saying: "an Englishman's home is his castle"[7]. The Commons responded to these measures by insisting that Magna Carta, which expressly forbade the imprisonment of freemen without trial, was still valid. The **Petition of Right of 1628** clarified this situation and limited the monarch's absolute prerogatives. Coke was able to proclaim to Parliament in 1628, "*Magna Carta . . will have no sovereign*". Which in modern day parlance means: "no man is above the law".

[7] From Coke's famous declaration that "the house of an Englishman is to him as his castle".

Coke later went on to oversee the introduction of the **Habeas Corpus Act 1679**, which reaffirmed that Magna Carta was still in force, and that:

> *"1. No freeman is to be committed or detained in prison, or otherwise restrained by command of the King or the Privy Council or any other, unless some lawful cause be shown.* (Translation - no imprisonment without due process of law)
>
> *2. The writ of habeas corpus cannot be denied, but should be granted to every man who is committed or detained in prison or otherwise restrained by the command of the King, the Privy Council or any other.*
>
> *3. And further, any freeman so committed or detained in prison without cause being stated should be entitled to bail or be freed."*

Instructively, the writ of habeas corpus had existed in England for at least three centuries before, tracing its origin back to article 39 of Magna Carta:

> *"No freeman shall be taken or imprisoned or disseised (dispossessed) or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgement of his peers (the origin of Jury trial) or the law of the land."*

Further, Habeas Corpus Acts were passed by the British Parliament in 1803, 1804, 1816 and 1862, but it is the Act of 1679 which is remembered as one of the most important statutes in English constitutional history. Though amended, it remains on the statute book to this day.

Many distinguished judges, politicians and chroniclers from all over the globe have commentated on the Magna Carta's place in history. Indeed in 1766, before drafting the US Declaration of Independence, the Founding Fathers searched for a historical precedent for asserting their rightful liberties from King George III and the English Parliament, and found it in Magna Carta. Around the same time, William Pitt (the Elder), ironically Prime Minister of England during great unrest in the American colonies, declared Magna Carta as "*the Bible of the English Constitution*". And whilst war was raging around the world, a war fought on the basis of restoring and preserving democracy, President Roosevelt, in his third inauguration address in 1941, , said: "*The democratic aspiration is no mere recent phase in human history. It is human history. It permeated the ancient life of early peoples. It blazed anew in the Middle Ages. It was written in Magna Carta*".

In 1956, Churchill wrote: "*Here is a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the*

respect in which men have held it"[8]. In the same year, the great British jurist Lord Denning described Magna Carta as; "*The greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot*".

In 1988, Mrs. Thatcher, in her famous Bruges Speech[9], stated that: "*We in Britain are rightly proud of the way in which, since Magna Carta in the year 1215, we have pioneered and developed representative institutions to stand as bastions of freedom."*

It is argued that the Magna Carta led directly to the first Bill of Rights in history, which Britain passed in 1689 and which codified the civil and political rights of all men, not just the lords and barons. It granted freedom from taxation by royal prerogative, freedom to petition the monarch, freedom to elect members of parliament without interference, freedom of speech and of parliamentary privilege, freedom from cruel and unusual punishments and freedom from "fine and forfeiture" without trial. Magna Carta formed the basis of the US Constitution in 1797 and, two years later, the Declaration of the Rights of Man, issued at the start of the French Revolution. By the time the 20th century arrived, a different, more

[8] In his book "A History of the English-Speaking Peoples"

[9] On 20 September 1988, at the beginning of the academic year of the College of Europe in Bruges, the British Prime Minister, Margaret Thatcher, delivered a speech on the future of Europe. The speech was a defining moment in the debate on Europe in the UK and is considered by many commentators to mark the birth of the Euro-sceptic movement in Britain.

complex and sophisticated world required different solutions. But even so, when the genocide and destruction of the Second World War led the members of the UN to adopt the Universal Declaration of Human Rights, Eleanor Roosevelt, one of its architects, described it as the "international Magna Carta" for mankind.

More recently, in 2014, in the run up to the celebrations of this year, the Rt. Hon. Fiona Woolf CBE, 686th Lord Mayor of the City of London, said that Magna Carta was: "*The single most important legal document in history*. *The foundation for global constitutions, commerce and communities. The anchor for the Rule of Law*[10]."

It is this latter theme I would like to take up and briefly explore with you this morning, if I may. The "*foundation of global constitutions*" and "*the anchor for the Rule of Law*" and in particular, examine the influence of Magna Carta on the development of the Cayman Islands as it evolved as a thriving and vibrant financial services jurisdiction, firmly underpinned by the Rule of Law.

The Cayman Islands were discovered on 10th May 1503 by Christopher Columbus and the Islands officially became a British Territory when the Treaty of Madrid was signed in 1670, just over 450 years after the sealing of Magna Carta. The Cayman Islands, whilst initially under the governance of Jamaica, enjoyed

[10] When she spoke at the Global Law Summit's "one year to go" anniversary at Mansion House

considerable self-governance; in 1831, a legislative assembly was established by local consent at a meeting of principal inhabitants and passed the first local legislation on 31st December 1831, including an act to regulate the times of holding Courts, a tax levying law and a law to regulate the attendance of jurors. So, already the legislature was addressing issues related to the "Rule of Law".

In 1898, Jamaica appointed a Commissioner in the Cayman Islands to oversee the affairs of the Islands as it was becoming increasingly difficult to do so from Jamaica. Under these first Commissioners, the Islands began to develop, with schools, a bank, a small hospital, and a public works programme. By 1909, the Legislative Assembly of Justices and Vestry was firmly established, meeting in the Court House on the waterfront in what is now the headquarters of the Cayman Islands National Museum. The building served as the seat of government and the court house.

In 1953, the first airfield in the Cayman Islands was opened as well as the George Town Public Hospital. Barclays ushered in the age of formalised commerce by opening the first commercial bank and, during 1966, legislation was passed to enable and encourage the banking industry in Cayman.

Following Jamaica's independence and withdrawal of membership from the short-lived West Indies Federation that was formed in 1958, the Cayman Islands

emerged as a separate British colony in 1962. Cayman Islands law consequently has been influenced by English and Jamaican law and English law understandably remains influential in the development of the Territory's jurisprudence today.

In Europe, led by Sir David Maxwell Fyfe, the former Nuremburg prosecutor and chair of the Council of Europe's legal division, British lawyers relying heavily on the principles found in the Universal Declaration drafted the European Convention on Human Rights in 1950, which came into force in 1953. The UK was one of the first signatories.

The UK sought to include OTs in the application of the ECHR, accordingly, in a bid to enable citizens to have their rights recognized and enforced. The individual right of petition to the European Court of Human Rights was initially extended, in 1981, to the Cayman Islands for a period of five years; however that extension expired in 1986 and was not then renewed.

Recognising a need for this remedy to be available to its people on a continuing basis, the Government of the Cayman Islands requested that the right of individual petition to Strasburg be reinstated on a permanent basis. The right of individual petition was thus permanently restored in February 2006.

Interestingly, only one such petition from Cayman was ever made to and heard by the European Court, a case concerning fair trial. Although the applicant failed to persuade the Strasburg court that he had not received a fair trial,[11] it was clear that even without a justiciable Bill of Rights in our local courts, there was access to justice all the way to the ECHR. The incremental extension of these human rights framework laid the ground work for the Cayman Islands to embrace the full gamut of fundamental rights and freedoms when The Cayman Islands (Constitution) Order, 2009 was adopted as the Territory's fourth constitution.

And so, fast forwarding to 2009, this Constitution further streamlined the roles and functions of the Executive, including the Governor, the Legislature and the Judiciary. Most significantly, for the first time, the Constitution includes a Bill of Rights, which came into force on 6th November 2012, and broadly reflects the European Convention on Human Rights, setting out the fundamental rights and freedoms of the individual and rules for their enforcement.

The framers of the Cayman Islands Constitution no doubt learnt lessons from their Commonwealth neighbours, most of whom had used the European Convention as a template for the human rights provision in their independence Constitutions. As a result, and drawing from the jurisprudence that had already emerged in those

[11] *Case of Ebanks v The United Kingdom*, Application no. 36822/06, Strasbourg, 26 January 2010

jurisdictions, the scope of the rights in the Cayman Islands Bill of Rights are articulated in far greater detail.

Accepting some differences in construction, it is still evident that the human rights recognised in Constitutions across the Commonwealth are, for the most part, similar; a fact that serves to further illustrate the universality of human rights that can be traced back to the principles enshrined in Magna Carta.

Indeed, at various intervals and as late as 2007, prior to our Bill of Rights, litigants before our courts were praying in aid, the principles of Magna Carta and the UK 1689 Bill of Rights. For example in *Ebanks v R*[12], Mr. Ebanks through his Attorneys, contended that his sentence for firearms offences was a retroactive punishment and was thus unfair and that the concept against such unfairness can be traced back to Magna Carta, he quoted the section which provides that:

> *"No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right*."

[12] *A.G. Ebanks v R* [2007 CILR 403], see also *Cranston v M.R. Mothersill and L. Mothersill* [2004–05 CILR 417]; *Request for International Assistance* [1997 CILR 330]; *Warren v Immigration Board* [2002 CILR 188]

Mr. Ebanks will no doubt be happy to learn that the presumption against retrospective punishment is now firmly entrenched in the new Constitution[13].

The well-established judicial system in the Cayman Islands has, over the years, played a major role in the development of the Islands as a leading international financial services centre. The Grand Court and Court of Appeal routinely decide complex cases of substantial commercial value, including cross-border insolvency cases, major trust litigation, international fraud and commercial disputes. None of this would be possible without a strong commitment to the Rule of Law underpinning a jurisdiction providing not just stability and consistency but being one of the best known regulated in accordance with international standards.

Without the fundamental principles enshrined in Magna Carta and adopted throughout the legislation and jurisprudence of the Cayman Islands, such stability and continuity would have been hard, if not impossible, to maintain as the country developed into such maturity, and with such admiration. I am happy to emphatically state that the Cayman Islands is now one of the best regulated and most respected jurisdictions and, reportedly, the fifth largest financial services centre in the World and with one of the most robust economies in the Region.

[13] Section 8 - No punishment without law: 8. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed; nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

As the UK Lord Chancellor, The Right Honourable Chris Grayling MP, stated in his speech to the Global Law Summit in February of this year:

> "*a thriving legal system and respect for the Rule of Law go hand in hand with economic prosperity. In fact they are the necessary foundations on which a strong and resilient economy is built*".

The Cayman Islands is an apt illustration of such combined qualities.

Since the coming into force of the 2012 Bill of Rights, already the Cayman Islands courts have addressed several Constitutional matters, including human rights issues, and have generally been persuaded that the laws of the Cayman Islands are compatible with international principles of rights and freedoms for all. Indeed even in the one case[14] where a declaration of incompatibility was made, the incompatibility point was quickly rectified by the legislature, thereby demonstrating the determination to adhere to those principles and uphold the Rule of Law. This challenge was started, ironically, by writ of Habeas Corpus (similar to the UK 1679 Act); seeking the release of a detainee.

In 1215, when King John confirmed Magna Carta with his seal, he was acknowledging the now firmly embedded concept that no man, not even the king, is above the law. That was a milestone in constitutional thought for the 13th

[14] *In Re Canute Nairne* Cause Nos. 10 of 2013 & 18 of 2013

century and for centuries to come. Throughout history these rights have been clarified and expanded and much jurisprudence exists which has interpreted and reinterpreted how these rights are applied. Magna Carta established important individual rights that have a direct impact on the Cayman Islands Bill of Rights as part of a Constitution based on the Westminster role of governance, and adapted and applied to best serve the population of the Islands.

Some 2000 delegates from around the world, including yours truly, recently gathered in London at the Global Law Summit held in February this year to mark the 800th Anniversary and the beginning of a year-long series of events to celebrate Magna Carta. This morning's event by UWI is obviously one of those. The scale of the attendance was said, by the United Kingdom's Lord Chancellor, to be a testament not only to how important Magna Carta is around the world, but to the commitment to its values of justice and the rule of law.

In conclusion: whatever might have been the real motive behind Magna Carta in 1215, one thing that is beyond doubt is that today's civilized democracies owe their genesis to that tumultuous declaration contained in that bit of parchment in all its various iterations.

Thank You

Hon. Sam Bulgin QC, JP
Attorney General

March 2015