

COMMENTARY

What Cayman needs in a Bill of Rights

By A. Steve McField
GUEST COLUMNIST

Constitutional Commissioners Sir Frederick Smith and Walter Wallace reported in their review of the Cayman Islands Constitution that "there was almost a unanimous request for the fundamental rights and freedoms, i.e. a Bill of Rights, to be included in the Constitution."

The commissioners continued: "With this request there can be no disagreement and since these fundamental rights and freedoms are to be found in the constitutions of nearly all other dependent territories, we recommend that they be enshrined in any amended Constitution for these islands."

The commissioners went on to report that "the word sex (in the Turks and Caicos Islands Constitution) is included after the word 'creed'... whereas in section 78 (3) the definition of 'discriminatory' makes no reference to sex." "Unless there is some good reason of which we are unaware the word 'sex' should be inserted after the word 'creed' in the definition of 'discriminatory'."

It was unanimous among Caymanians that a new Caymanian Constitution must be entrenched for their protection with those individual rights and freedoms considered fundamental to a free and just society.

Since our Constitution is not ours and we can only receive what the British Parliament will allow us to have, it is relevant to examine historically how the rights and freedoms of the British people were established and passed down and around through the ages. Even in the established democratic-parliamentary system of Britain, British people are skeptical about their fundamental rights. The Magna Carta, 1215, the

Petition of Right, 1628, the Habeas Corpus Act, 1679, the Bill of Rights, 1689, and the Act of Settlement, 1700, impose upon the unwritten British Constitution that Parliament in all its branches must act without crushing the rights and freedoms of the British people. Magna Carta laid down the framework of Rights pertaining to the Administration of Justice, the right to hold property, the framework of the Rights of equal protection under the Law, compensation for confiscation of individuals' property, and Habas Corpus. Section 39 and 40, Magna Carta states thus:

(39) No free man shall be taken or imprisoned or diseized or out lawed or exiled or in any way ruined, nor will we go or send against him, except by the Lawful judgement of his peers or by the Law of the Land.

(40) To no one will we sell, to no one will we deny or delay Rights of Justice.

Lord Blackstone writing in the eighteenth century about the Rights declared by the statutes mentioned above had this to say: "...these may be reduced to three principles or primary articles; the right of personal security, the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free-will but an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense."

The Caymanians as a British colonial people believe in those Rights. They accept what Blackstone has stated to be true. They believe that those rights apply to them. Unfortunately, in Britain the British unwritten Constitution does not guarantee Constitutional Fundamental Rights and Freedoms. And this is equally the true position under the present Cayman Constitution Order 1972. One does not have to look far in Cayman to see that there are many rights not being protected. Just to name a few: There is no Right to bail. The presumption of innocence has been eroded to the point where an accused must prove his innocence before the courts on some offences. Accused persons' rights to Justice are often delayed by a system that believes in incarceration rather than liberation. This inherent delay of the right to Justice caused His Lordship Mr. Justice Zacca, President of the Cayman Islands Court of Appeal, to say that an accused person's trial ought to take place within three months from the time of his arrest.

And how many accused persons we know are still kept in custody without bail because of some protest to bail by the police, or an accused part-heard case being put off,

whilst he is in custody, because law officers of the Crown are busy elsewhere? How often today do we hear of Caymanians' property being taken by the government and there is a serious rift between the government and the property owner about proper compensation? What about the Right to Lawful Judgement by one's peers in all serious cases including drug cases? What about the right to natural Justice? The natural Justice Rules say that:

a) A man may not be a Judge in his own cause.

This principle means that a person should not hear or adjudicate matters to which he has a personal interest. An adjudicator must not only be free of bias, he must not appear to be bias. Thus, Ministers or any other officials should not adjudicate on matters of which they are connected by personal interest by themselves or through friends.

b) Every party must have reasonable notice of the case against them and they must be given a chance of stating their case and contesting or answering arguments put forward against their case.

This principle is called the *Audi Alteram Partem* rule. The Watershed House of Lords Case of Ridge V Baldwin held that failure to give a person a fair hearing is illegal. In another English case of Cooper V Wandsworth Board of Works, the Court quashed the Local Board's Order to demolish Cooper's house because Cooper, being the owner, had received no notice from the Board, no opportunity to be heard and to state his case. In Dr. Bentley's case, Mr. Justice Fortescue had this to say: "The objection for want of notice can never be over. The Laws of God and

man both give the party an opportunity to make his defence if he has any. I remember to have heard it observed - by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam," says God, "What art thou? Hast thou not eaten of the tree thereof I command thee that thou shouldest not eat?" And the same question was put to Eve also.

The questions that the writer put are these: Will the Caymanian Protection Board have to observe the rules of Natural Justice? Will Ministers of government be able to take a Caymanian's property without first giving him notice or serving their Order upon him? Will Ministers or other officials perform Judicial or quasi-Judicial functions but still refuse to give reasons for what they have decided? These are some of the fundamental issues that every Caymanian should and must be interested in. A Bill of Rights recommendation by the Constitutional Review Commissioners is clearly intended to answer all these questions by the Constitution. Thus, clearing these inadequacies in the system.

Further, the recommendations are predicted on a realistic view of the true feelings of most Caymanians. Our wholehearted support to these recommendations would help dispel the view held by a few that Caymanians do not need a Bill of Rights. The writer calls on every Caymanian to insist on a fair hearing in accordance with the principles of fundamental Justice to the determination of their rights and obligations.

The reader of British Constitutional History and British Constitutional Law will remember that the British systems of democratic institutions developed only after many centuries of pragmatic evolution. A Bill of Rights in a new Caymanian Constitution will guarantee fundamental freedoms in Cayman. Thus, this substantive guarantee of fundamental rights for Caymanians will have to cause equal substantive changes among the persons who are entrusted with the rights of Caymanians and changes in legislations and attitudes. It will not be enough to entrench the Constitution with fundamental rights and freedoms then leave them to officials. A Bill of Rights in our Constitution will require a strong and responsible watch-dog legislature ensuring free political process and receptive to the openly expressed aspirations and expectations of the Caymanian people.

A person within the Jurisdiction of the Cayman Legislature should only have his freedoms curtailed or limited, for maintenance of public order, for the prevention of the corruption of public morals, incitement to crime and the like. The United States Congress and House of Representatives impose no limitation of the fundamental rights of Americans under their Constitution. The Su-

preme Court of the United States, in interpreting that Constitution, have held that the States can only impose restrictions upon an American's fundamental rights as are necessary to protect the common good, such as public health, safety and morals. There should not be any right which is injurious to the Caymanian community as a whole. Thus, if a Bill of Rights is adopted in a new Caymanian Constitution by the British Parliament, Caymanians ought to have some remedy to enforce their Rights against developers who dredge their habitats and cut down the trees indiscriminately resulting in injury to the common good of Caymanians—their fragile environment.

PRESSFREEDOM: Freedom of the press in Cayman will no doubt be the most difficult freedom to ensure. When one observes how petty and defensive some persons in authority get when the press comments or reports on something that touches them, one is apprehensive about press freedom, notwithstanding a Bill of Rights. It has been said time and time again that the press is an organ through which thoughts and ideas are expressed and discussed. The attitude in Cayman differs from that of many countries, especially in the United States. In Britain, the Law does not recognise any special privilege of the press. Dicey once said, "the simplest way of setting forth broadly the position of writers in the press is to say that they stand in substantially the same position as letter writers." The Privy Council in the case of Arnold V King Emperor states: "the freedom of the journalist is an ordinary part of the freedom of the subject, and whatever lengths the subject in general may go so also may the journalist, but apart from statute law, his privilege is no other and no higher."

"The responsibility which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful: but the range of his assertion, his criticism or his comments, is as wide as, no wider than, that of any other subject."

Lord Mansfield in the case of R. V. Dear of St. Asaph said that, "the liberty of the press consists in printing without any previous licence, subject to the consequences of the Law." The British have a negative attitude towards press freedom. Their law and judgements reflect those attitudes.

In the United States, the Constitution specifically guarantees press freedom. The United States Supreme

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