

# Press Release

3 February 2020



## Open Letter To His Excellency The Governor, Martyn Roper

c/o Cayman Islands Government  
Government Administration Building  
Grand Cayman KY1-9000  
CAYMAN ISLANDS

### FOR IMMEDIATE RELEASE

## CONSTITUTIONAL REFORMS: HOW DO THE GOVERNMENT AND OPPOSITION LEADER PROPOSE THAT WE SECURE OUR CONSTITUTIONAL RIGHTS AND FREEDOMS?

### Your Excellency,

As you are very well aware the UK is a parliamentary democracy. In contrast, the Cayman Islands is a constitutional democracy. This is a difference that our local politicians are struggling to grasp. In brief, it means that, in the UK, their parliament is supreme, whereas in the Cayman Islands, our written constitution, instead, is supreme. The effect of this is that our written constitution sits 'above' all branches of local government and all local [i.e. Cayman Islands] legislation.

The Cayman Islands' written constitution has nine parts. Of the nine parts of the Cayman Islands constitution, however, eight of those nine parts remain supreme. This is because of the existence and operation of the *Colonial Laws Validity Act 1865*. In other words, anything that the local Cayman Islands government or legislature (soon to be renamed parliament) does that is contrary (technically "repugnant") to any of those eight parts of the Cayman Islands constitution "is and shall remain absolutely void and inoperative." It is only "Part I" (i.e. the Bill of Rights) that is treated differently. Why? Because the effect of Section 23(2) of the Cayman Islands constitution is to disapply the operation of the *Colonial Laws Validity Act 1865* in regards to "Part I" only.

This was done in 2009, presumably, because of an attempt to bring about a system in the Cayman Islands that is similar in effect to that of the *Human Rights Act 1998* in the UK, where laws passed by the UK Parliament found to be in breach of the *Human Rights Act 1998* are declared incompatible. This system works in the UK, because the UK is not a constitutional democracy that has a codified written (and supreme) constitutional text in place, from which the powers of the legislator, executive and judiciary all derive.

In the UK, as noted previously, it is the parliament (not the constitution) that is supreme. In the Cayman Islands, the *Human Rights Act 1998* type system, which is reflected in the Cayman Islands constitution since 2009 (i.e. by disapplying the *Colonial Laws Validity Act 1865* to "Part I" only and adopting the 'declaration of incompatibility' approach), does not work. This is because a constitutionally codified system of government means that the constitution itself must be supreme to laws passed by the local legislature; otherwise the constitution becomes just an expression of desires and wishes only.

We are currently experiencing the failure of the *Human Rights Act 1998* type system in the Cayman Islands in relation to the adoption of a legal framework for same sex-couples. The Court of Appeal declared in November that LGBTI+ people have a constitutional right to a legal framework and ordered the government to put that framework in place "expeditiously," yet there is no evidence of anything having been done. In this respect, could you, Your Excellency publicly state by when the UK would deem the Cayman Islands government not to have acted "expeditiously" in

accordance with the order of the Court and, as such, would step in and legislate by Order in Council as you have previously suggested would happen in those circumstances. Respectfully, we need a definitive deadline.

Regrettably, the fact that we are having to essentially beg for your intervention when there is a breach of the constitution and an order from our Court of Appeal to address it “expeditiously” is not being acted upon, demonstrates that the current system adopted in the Cayman Islands constitution for “Part I” is not working. This is so because it subordinates the fundamental rights and freedoms of all persons in the Cayman Islands to the whims of the majority to the extent that, locally, there is absolutely no effective legal means of ensuring the enforcement of the Bill of Rights.

There is one exception and one exception only: Section 81, which gives you, the UK appointed Governor of the Cayman Islands, the powers to legislate if you deem that “necessary or desirable”, e.g. to secure compliance with international human rights obligations.

The constitutional reform that has been agreed will repeal this section. Its removal will take people of the Cayman Islands back to the times of pre-French revolution. Not wishing to get too historical, but Section 16 of the *Declaration of the Rights of the Man and of the Citizen of 1789* set the pivotal principle that any codified written constitution should follow since then:

*“16. A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”*

This principle is, therefore, enshrined in every single constitution in the American continent from Alaska to Tierra del Fuego. It is also enshrined in every single constitution of the remaining 13 British Overseas Territories by operation of the *Colonial Laws Validity Act 1865*. It does not, of course, apply to the UK as a matter of legal principle because it does not have a codified written constitution, but it does apply as a matter of constitutional convention. However, it ought to apply to the Cayman Islands because it does have a codified written constitution; as explained above it does apply, save in respect of fundamental human rights.

With all due respect, Your Excellency: why do human rights not matter? All other parts of the constitution are treated differently. The local judiciary must enforce every single part of the constitution, even against the will of the majority, save for the Bill of Rights; now your powers to do so at your discretion are being repealed.

Why is it that only human rights are left without effective legal remedy in this jurisdiction, such as the lack of a legal framework for same-sex couples [to which we have a constitutional right]? Is the UK setting the foundations for a system of governance in the Cayman Islands that is able to trample over the rights of minorities at the whims of the majority?

These are key questions that remain unanswered. If protection and enforcement of the fundamental rights and freedoms of all people in the Cayman Islands can only be achieved by petitioning and pleading with Her Majesty to effect change in the law by way of Order in Council directly from their colonial master how on earth is that a step in the correct direction of devolution and respect for the largely devolved system of governance? Even if rarely engaged, there must be a local back-stop means by which to ensure that all persons in the Cayman Islands are able to have their fundamental rights and freedoms set forth in the Cayman Islands constitution enforced.

*Colours Cayman* believes that it is absurd to suggest that “good governance” does not include having the power and mechanisms to ensure, locally, adherence to the rule of law only where it pertains to human rights, i.e. that the Governor should have the ability, and the people of the Cayman Islands should expect that its Governor has the ability, to secure that the supreme written constitution is respected and complied with, without having to resort to seeking Orders in Council or acts of law from the UK parliament. In this respect, I restate that *Colours Cayman* is not seeking to derail the constitutional reform. Far from it, *Colours Cayman* seeks a solution that respects our local constitution, voted to be put in place by referendum and supported by a majority, and our ability to solve issues locally in the Cayman Islands.

*Colours Cayman* remains therefore open to a constructive dialogue, notwithstanding that our efforts to reach out and discuss this matter with the Premier have fallen on deaf ears. In this regard, please see the attached letter to which we have received no response, nor a mere acknowledgment.

Finally, Your Excellency, please be aware that we are currently lobbying the UK parliament and will take this matter to the High Court in London on judicial review if the Order in Council affecting the constitutional reform goes ahead. If all those remedies fail, we will bring this to the attention of the relevant body of the *United Nations* for failure of the UK government in complying with its duties under the *Charter of the United Nations* to secure good governance in its non-self-governing territories.

**Respectfully,**  
**Billie Bryan, Founder & President,**  
***Colours Cayman***