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“THE EVOLUTION OF THE MODERN JUDICIAL SYSTEM OF THE OECS”

Place of Judiciary in Government Structure.

Under our present Constitutional arrangements there are three separate and distinct branches of government; the Executive branch, the Legislative branch, and the Judicial branch.

In theory these branches are independent of each other, and each supreme in its own sphere within the limits set by the Constitution. In practice, however, the three branches are interdependent, and to use the Judiciary as the example for present purposes, we depend on the executive to approve our annual budget, and on the legislature to vote the funds to enable the Courts to function. Both the Executives and the Parliaments of the region have been consistently supportive of the programmes of the Eastern Caribbean Supreme Court, and of our reform programme.

The judiciary's role is to interpret, apply and enforce the law, and to adjudicate on disputes between citizen and citizen and between citizen and the state.

A particular and very important power and responsibility of the Courts is to enforce what are called the protective provisions of the Constitution. These protective provisions are generally referred to as the fundamental rights and

freedoms; the right to life, to personal liberty, freedom from slavery and forced labour, from inhuman treatment, from deprivation of property, from arbitrary search or entry, the right to protection of law, freedom of conscience, of expression, of assembly and association, freedom of movement, and freedom from discrimination on grounds of race, sex, place of origin, political opinions, colour or creed.

Contrary to the tradition under the Westminster model of democracy developed in Britain, the Constitution, not Parliament, is supreme under our constitution, so that while Parliament in London could lawfully enact any law it pleased, Parliament in Dominica is constrained in its powers to enact laws which offend the limitations placed on the plenitude of its powers by the Constitution itself.

The executive is also limited in its powers, according to the limitations provided by the Constitution.

It is for this reason, for example, that despite the legislation enacted by the Parliament of Dominica, and the contractual arrangements entered into between the Executive and Cable & Wireless, granting that company exclusive and monopoly rights over telecommunications in Dominica, the Courts were empowered to declare the law and the agreement 'unlawful', leading to the liberalisation of the telecommunications market in Dominica and ultimately in the rest of the OECS. The same is true in relation to the abolition of the mandatory death penalty for murder and treason, and the substitution of a discretionary sentence.

The telecommunications case is an example of the power of the judicial authority to influence economic activity, and the death penalty case illustrates the judicial role in shaping social and humanitarian mores.

Statutory Origins and Evolution.

Our Courts are creatures of statute. There is a hierarchy of Courts, which has varied from time to time. Over the years, just within the lifetime of most of us here, we have seen the Windward Islands and Leeward Islands Courts Order in Council 1959, the British Caribbean Court of Appeal Order in Council 1962, the West Indies Associated States Supreme Court Order of 1967, and the Constitution of 1978. Our Superior Courts of record have variously comprised and included the High Court in its summary and its unlimited jurisdiction, as well as a limited appellate jurisdiction, the British Caribbean Court of Appeal which functioned during the short-lived Federation of the West Indies, our own Court of Appeal, and the Judicial Committee of the Privy Council.

In 1969 we enacted the West Indies Associated States Supreme Court Act, establishing a regional Court system by that name, the precursor of our present Eastern Caribbean Supreme Court. The Supreme Court has its legislative foundation in the Courts Order, which enjoys constitutional status, and in the Eastern Caribbean Supreme Court Act. The Supreme Court enjoys a Constitutionally entrenched status, reflecting the principle that in a democratic society the whole of the Constitution rests on two fundamental tenets, the rule of law and the separation of powers.¹

The Social and Economic Environment.

Irving Andre, in his very interesting biography of Edward Oliver Leblanc, has shown how Mr. Leblanc's success in transforming Dominica's society in the 1960's and '70's created an environment which ultimately led to his disenchantment and eventual withdrawal from public life to relative isolation.

As we begin to realise our social and economic aspirations, as we have increasingly done over the last 50 years or so, our institutions need to change and adapt to accommodate and respond to the new and emerging realities.

¹ Police v Khoiratty, Supreme Court of Mauritius, 9 June 2004. 5 CHRLD 97.

Thirty years ago, we were primarily pastoral, agricultural, rural societies. By far the greater part of our populations described themselves as labourers. Even our smallholders and peasant farmers so described themselves, and indeed to a large extent they were. They worked their own lands and in addition hired their labour out to the estates to supplement their income.

Today the balance has shifted. We are now dealing with independent small farmers in the urban communities, who enjoyed a period of relative prosperity during the '70's and '80's but increasingly, in consequence of the policies of globalisation, have now become largely impoverished. We are dealing with workers in the tourism industry, bus and truck drivers, construction workers, civil servants and office workers, communication workers, professionals, knowledge-based industry workers, operators in the offshore and service sectors. Our populations have become urbanised and increasingly middle class, with all the ramifications that attend this change, including urban crime, competitiveness, unbridled talk on the airwaves, and so much more. The new and changing environment puts tremendous pressure on our public and private institutions to adapt, to keep up with the new demands and imperatives. We cannot continue to operate in the same way we did 20 years ago, with the same systems, the same bureaucracy, the same technology, the same relationships. We are living in a different world, in which new, and ever evolving demands are made on us.

Specifically in relation to the judiciary, the growth in and the changing nature of crime, the constitutional developments and the growth in awareness of the rights of the citizen and demands for public accountability, resulting in ever-increasing public law litigation, the growth in the offshore financial and service sectors, the changing commercial environment, all these and many more societal changes have placed new demands on the legal profession and the public institutions of law enforcement that cannot possibly be met by the traditional approach to the business of the Court. It is a recognition of these

realities that has led to the very significant reforms within the judiciary that began in or about 1997 (the Byron Reforms), and continue today.

The Reforms in the Millennium.

The first concrete output of the reform programme was the introduction and implementation of new Civil Procedure Rules in 2000, to replace the Rules of 1970, which themselves reflected rules of procedure which had been essentially unchanged in 100 years. The legal profession being one of the most conservative, there was initial strong resistance to the reforms and to the pressures inherent in the new disciplines involved. However, I believe the benefits in terms of expeditious disposition of cases at the trial and appeal levels, the client satisfaction which results from a greater degree of involvement, sense of ownership, and early disposition, the increased efficiency and certainty, and the opportunity to handle more work and therefore earn more income, must by now be apparent to the practitioners who, although continuing to complain about the pressures of timelines and the discipline demanded by the new rules, seem to be becoming more comfortable in the new environment.

The Law Schools are now training students in the new Rules, and the judiciaries of both Trinidad & Tobago who are about to introduce the new Rules, and Barbados who are working on doing so, have used the experience of former Judges of our Court to prepare their judiciaries for the introduction of the Rules. Our Rules are also being looked on as a model in jurisdictions as far away as the Pacific.

The new regime has succeeded in considerably reducing the time from filing of proceedings in court to final disposition (I am told by a practitioner in Antigua that the time to disposal in that country has been reduced from 8 years to 8 months). This has undoubtedly enhanced client satisfaction.

We have also introduced alternative dispute resolution processes, particularly mediation, into the trial process. We have trained a cadre of mediators in each jurisdiction and the benefits are clearly recognised by the lawyers and the litigants.

The aspect of the administration of justice most in need of urgent attention is the area of criminal justice. In almost every one of our countries the growth in crime is phenomenal. We have experienced an explosion in violent crime, including gang violence. Sexual offences, domestic violence, housebreaking, shop-breaking, drug trafficking and economic crime including money-laundering are increasingly important concerns to the public, to governments, to the Police and to the courts. The backlogs and delays which are endemic, are no longer acceptable. Public confidence in the administration of criminal justice is at an all-time low, certainly in some of our countries.

The Court is presently implementing a Criminal Justice reform project as a pilot project in St. Lucia with the objective of replicating it in the other countries of the OECS once it has been successfully implemented in St. Lucia. This project involves a degree of administrative integration of the Magistrates or District Courts with the High Court into a Criminal Division of the Supreme Court, eliminating some of the time-wasting activities involved in the processing of criminal matters, both summary and indictable, and introducing significant efficiencies, or should I say eliminating inefficiencies, in the investigating, reporting, and trial processes in the criminal justice system. We do not seek to assign blame, but to identify the areas of weakness and to devise methods and strategies to deal with them. The pilot is well advanced and we expect to begin to see concrete results very shortly. One of the most serious bottlenecks is the statutory requirement for a preliminary inquiry in the prosecution of serious crime. This preliminary, and relatively pointless exercise, can in many cases take up to three years. The reform proposes to eliminate this step altogether and bring criminal prosecutions to a head within

six months. Steps are being taken to ensure that all the protections presently available to accused persons are preserved if not enhanced in the process.

It is clear that delays in the administration of criminal justice result in injustice to both victims of the crime and the person accused of the crime. Justice therefore demands that we take immediate steps to eliminate such undue delays.

We also intend to establish a Commercial Division of the Court, located initially in the BVI, to deal with the extensive business in this highly technical and specialised, and economically crucial area of the law, more so in some jurisdictions than in others, but of growing importance in most; a Family Division to deal with divorce and related matters, affiliation and maintenance, domestic violence short of serious crime, juvenile justice and similar matters. This will require the provision of adequate social services arrangements and other mechanisms to administer non-custodial sentencing options such as community service sentences. Crucially, there will be a Civil Division, with separate procedural rules and arrangements for the adjudication of small claims.

These reforms have two principal purposes; to adapt procedural rules and institutional arrangements to the special needs of the particular category of litigation, and to integrate the Magistracy into the judiciary, so as to enhance administrative capacity, accountability the overall efficiency of the justice system.

The Court has also recognised the need for public accountability, and has initiated the practice of publishing an annual report, and maintaining a monthly electronic newsletter and a comprehensive website. We have also published and intend to continue a series of Eastern Caribbean Law Reports, as well as publishing all our written judgments from the High Court and Court

of Appeal on our website, in a timely manner. The public must know what their Courts are doing, or are failing to do.

We look forward to the establishment of the Caribbean Court of Justice as our final, and indigenous, Court of Appeal, and the closing of the circle of our independence in the judicial field.

We emphasise that the CCJ is, in terms of its financial and administrative arrangements and the provisions for appointment, discipline and removal from office, one of the most, if not the most, independent Courts anywhere in the world, insulated from political influence and control as far as that is possible.

The Magistracy.

The Magistrates are in an anomalous position. They are judicial officers, who adjudicate in approximately 90% of the cases which come before the courts in the OECS. Their role is of crucial importance in our judicial environment. Despite that, they lack the security of tenure or the independence from the executive that is an indispensable characteristic of a judiciary in a democratic society.

Magistrates by and large also do not appear to enjoy opportunities for professional advancement and a career path such as would encourage aspirations and the commitment to quality service and professional growth that one would expect. Our experience of the Magistracy probably well illustrates the saying that 'routine leads to stagnation, lethargy and eventual paralysis.'²

² 'God, Father and Creator' by Pope John Paul II.

The premises in which Magistrates function do not generally reflect the dignity which ought to characterise the administration of justice. As was said in a 2001 study,³ “in many cases these Courts have a look and feel of a service that is not highly valued or properly maintained.”

In many cases Magistrates are engaged on short-term contracts, which are renewable at the ‘pleasure’ of the executive. While, admittedly, this is often what is desired by the Magistrates themselves, it undoubtedly has the potential to compromise their independence if, at the end of their contractual term, they wish to renew or extend their contract. The Constitutional provisions for the appointment of Magistrates vary somewhat in the different countries.

It has long been recognised that replacing the present system of national Magistracies with a regional Magistracy would go some way towards improving independence. However, there are implications in terms of Constitutional amendment which inhibit this route.

The reform proposals do not seek to follow that route, but to integrate the Magistracy administratively into the several Divisions of the Supreme Court, enabling the Supreme Court to manage the cases within the Division, including the cases, or the aspects of the cases, to be dealt with by the Magistrates.

This is expected to remove any uncertainty concerning the lines of authority and accountability on the part of the Magistrates.

It is sometimes assumed that the Magistrates are answerable and accountable to the Attorney-General. This, if applied to the judicial as opposed to the administrative functions of the Magistrates, would be a clear

³ OECS Magistrates Courts Review.

breach of the fundamental principles of the independence of the judiciary and the separation of powers, and if accepted would be a dangerous incursion into the Constitutional rights of equal protection of law.

It is important to recognise that the principles of independence and security of tenure are not for the benefit of the judicial officer but for the protection of litigants' right to impartial treatment free from political influence or interference or improper influence or interference from any other source.

The Registrar/Court Administrator.

Under present arrangements the Registrar of the High Court is both Registrar and Administrator of the Court office. The demands of administration are such that the Registrar has little time to devote to legal/judicial functions and thus to develop his/her professional abilities. Like the Magistracy, the office of Registrar is often seen as a professional dead end. At the same time, one of the principal objectives of the reforms, to relieve judges of the burden of adjudicating in Chambers applications, is of only limited success, with two Masters serving 9 jurisdictions. It is my view that it would contribute greatly to the prospects of professional development of Registrars, and create a real judicial career path and prospects of promotion through the judicial hierarchy, if professional administrators were given the responsibility to manage the Court Offices, under the supervisory control of the Registrars, releasing the Registrars to focus much more of their time (and professional training) on judicial work, in support of the work of the Judges and Masters. We are doing a study of the jurisdiction of the Registrars under the Supreme Court Acts with a view to equating that jurisdiction to that of the Masters. That would have the bonus benefit of releasing the Judges from having to devote so much time to Chambers work.

The Impact and Expectations of the Reform Programme.

The already realised benefits of the reform programme barely scratch the surface of the problems confronting those of us involved in the administration of justice.

There are no easy answers or quick fixes for the several issues that confront us. We have to deal with entrenched attitudes and practices, administrative and bureaucratic traditions, and constitutional constraints which inhibit our ability to move quickly and decisively.

The reforms involve introducing radical changes in the administration of the Courts, the Police services, process servers, legislative and even entrenched Constitutional provisions, and entrenched administrative traditions.

We will not achieve our objectives overnight. The participation of all sectors of society is necessary. The Judiciary must provide the leadership and the inspiration to the Bar, the Executive and the Legislature, the Police, and encourage the active involvement and participation of civil society, if we are to meet the challenges of the times. It will not happen overnight, but it must happen, as we 'lean towards a future better than the past'⁴.

⁴ 'God, Father and Creator' by Pope John Paul II.