

LAW IN SOCIETY: THE CHALLENGES OF DEVELOPING A RULE OF LAW FRAMEWORK¹

SALUTATIONS.

1. It might appear redundant to ask the question, what does the Rule of Law encompass or mean? Yet, a question as obvious as this in the reality of Caribbean society today is not redundant when viewed critically from the **confidence** perspective of those who really matter, **The Citizenry**.
2. In the context of our history as a people and, the Rule of Law which we as lawyers have sought to adhere to and to promote I was recently profoundly struck by a concept inherent to the Rule of Law referred to simply as "consent".
3. With the force and momentum of centuries of history behind him, a Caribbean Son, Professor Richard Drayton² spoke of the "*profound*

¹ The Eleventh Annual Dr. The Hon. Lloyd Barnett O.J Lecture,; St. James Club, Antigua & Barbuda, 1st September 2016.

² Professor Richard Drayton is Rhodes Professor of Imperial History, Kings College, London. He was born in Guyana, of a Trinidadian mother, grew up in Barbados, where he went to school at Harrison College. He left the Caribbean as a Barbados Scholar to Harvard University, going then to Yale, where he wrote his doctoral dissertation under the direction of Paul Kennedy and Frank Turner. He also spent two years as a graduate student at Balliol College, Oxford as the Commonwealth Caribbean Rhodes Scholar. In 1992 he first went to Cambridge as a Research Fellow of St Catharine's College, moving back to Oxford in 1994 to be Darby Fellow and Tutor in Modern History at Lincoln College. After 1998, he was Associate Professor of British History at the University of Virginia. In 2001, he

and unacknowledged constitutional crisis” in which we find ourselves across the Caribbean, whilst pointing out that he was not referring to a crisis of an armed gang kidnapping the legislature or seeking by force of arms to command the executive, nor of the executive seeking to act outside the law, or to control the judiciary. He referred to the Rule of Law emerging *“at the tension between three elements”*, the legislature, judicial review and consent. He identified consent as being the condition *“through which men and women choose to live within [the] rules, even to embody them, so that the law describes not external compulsion but the way a community freely lives.”*

Developing on his thesis that our colonial history has denied this consent and rendered deficient the inherent fabric of our Rule of Law framework, he posits this crisis as being applicable to *“ both governors and governed, and of their relationship to the res publica, to the commonwealth and the collective good.”* He was at the time delivering a riveting Tour de Force of a lecture, entitled **Whose Constitution? Law, Justice and History in the Caribbean** in March, 2016.³

returned to Cambridge as University Lecturer in Imperial and extra-European History since 1500, and as Fellow and Director of Studies in History at Corpus Christi College. In 2002 he was awarded the Philip Leverhulme Prize for History. He was Visiting Professor of History at Harvard University in Spring 2009.

³ The sixth edition of the Judicial Education Institute of Trinidad and Tobago's Distinguished Jurist Lecture Series was delivered by Professor Richard Drayton PhD FRHistS on Wednesday 2nd March 2016 at the Convocation Hall, Hall of Justice, Port of Spain, Trinidad and Tobago.

4. We were reminded of the endemic violence which pervades the Caribbean - now, our everyday normal. This crisis is daily evident in that other normal in the very fabric of our societal structure.

Professor Drayton again: "*Less immediately shocking but over time far more destructive ...our at best careless attitudes to work, and to the care of nature and our buildings, and at worst a predatory relationship to the state apparatus and the environment, where individuals and companies seek to strip private wealth out of state assets...*"⁴
5. Consent derives from the consultative process, spoken to in conversations on the Rule of Law, espoused in a 2011 UN Report entitled **NEW VOICES: National Perspectives on Rule of Law Assistance.**
6. This **Report** brought together considerable talent, resources and work from Uganda, The Eastern Caribbean, Cambodia, Nigeria, Timor-Leste, Occupied Palestinian Territory, South Africa, Kenya, Ukraine, Peru, Sierra Leon, Nepal, Liberia. **NEW VOICES** was a platform for a conversation amongst national experts involved in strengthening the rule of law in developing and conflict-affected countries, in order to enrich the debate on the effectiveness of Rule of Law assistance.

⁴ Drayton pp 2-3

7. Among those **NEW VOICES** were the Right Honourable Sir Dennis Byron, (then President of the International Criminal Tribunal of Rwanda), whom we salute this evening amongst us, President of the Caribbean Court of Justice, and the Honourable Mr. Justice Adrian Saunders, then and now, Judge of the Caribbean Court of Justice.
8. The conclusions and recommendations of **NEW VOICES** stressed repeatedly the value input of national leadership in a rule of law framework, grounded in the needs of society and, responding to the circumstances of the people.
9. **NEW VOICES** stressed too the need for continued oversight and, an enduring measurable rule of law framework. Where local stakeholders bring to the table knowledge of local context and conditions, legal systems and cultures of change.⁵ This must be prioritized and understood as a process, not an event, investing in the collection of solid baseline data including administrative and perception surveys, at the design stage and before the implementation of programmes.⁶
10. There can be no gainsaying that among our Caribbean Island States, the Institutions to be nourished and strengthened through **National Leadership** will be those which secure to our citizenry the core attributes of such a rule of law framework.

⁵ New Voices; pp 47-48

⁶ Ibid p. 23

11. This evening, in our stocktaking, we can salute our very own Council of Legal Education, allied with the University of the West Indies Faculty of Law. We can reflect with pride, on the National Leadership role of the many Lawyers spawned by these Institutions over four decades in their service to our Caribbean Society. We can look too, with justifiable pride at the Institution of a Caribbean Judiciary, led and manned in most part by Graduates of the UWI and the CLE. Living testimony to the foresight and vision of the Caribbean Founding Fathers of a Caribbean legal education.

12. The history and origins of the concept of West Indian legal education are all well chronicled.⁷ **Repetition is not warranted.** Permit me to pause to salute amongst us this evening, as well, the Right Honourable Dr. Lloyd Barnett O.J. We may nevertheless remind ourselves from among the founding fathers of one particularly prescient (1965) Lecture⁸ by Sir Hugh Wooding TC, QC, Chief Justice of Trinidad and Tobago as he heralded the coming into being of the UWI Faculty of Law and in due course, the Law Schools under the auspices of the Council of Legal Education:

⁷ We need go not much further than the seminal Barnett Report and, among others, publications by other Chairmen, not least J. Emile Ferdinand QC and, the Honourable Mr. Justice Dennis Morrison, President of the Court of Appeal of Jamaica.

⁸ COURTS AND METHODS OF ADMINISTERING JUSTICE. Paper submitted at Third Commonwealth Law Conference, Sydney, Australia, August 1965.

"The place of law as a continuing moral force in any community can only be secure if law possesses an element of growth such as will make it adaptable to new situations and to the constant shifting of social pressures which are inevitable in the modern democratic society. That has been the virtue of the common law. But the conservatism which is so characteristic of lawyers has too often... kept in check, and sometimes for unduly long periods, the advancement of legal ideas and the improvement of the administration of justice..." (Emphasis supplied)

13. In our stocktaking in 2016 there can be no room for conservatism, nor for indifference or complacency. The challenges are many; some might say urgent. The Question is - ***Where do we go from here?*** It would be a mammoth undertaking in its own right, beyond this evening's conversation to attempt to address the many pressing issues which that question prompts.

14. It is however a Pivotal Question! With more time we will need to reflect on it against the undeniable backcloth of our history, so recently rendered by Professor Drayton. If we accept the thesis postulated by his searing expose⁹ of the degree to which our British Colonial history has left us and our publics today *"like victims of a long period of confinement ...[still carrying] ...the manners of the prison even after our liberation"*, that *"The worm in the mango of our constitution is an idea of law as*

⁹ 1962 Colonial Office archives

domination and subordination..."¹⁰ we may be the more competent to seize the opportunity at the crossroad at which we find ourselves, tasked as we are with responsibility for the administration of a Caribbean Legal Education.

15. We might pause, appropriately to acknowledge Sir Hugh's 1965 challenge.

This gives pertinent meaning to the 2016 injunction of Professor Drayton, *"It may be in the Caribbean, 50 years after independence, that we must become our own founding fathers and mothers. Our task, one in which legislators, judges and citizens must share, is to create a constitutional identity which we can claim as our own precious heritage. The first step towards this is to recognise that parliamentary sovereignty as won in 1962 was only the prelude to a much harder and slower work of economic, cultural and spiritual decolonisation ... This deserves your attention as judges and citizens because no incarceration, flogging or hanging can do the work of rooting the law in the spirit of the people. ... Laws can only move from external constraint to inner inspiration, if they are grounded in justice and embody the personality of all citizens. ... It would involve too the search within all our ancestral traditions – Amerindian, African, Hispanic, French, East Indian and Chinese for resources of value to bring to the ordering of our world ..."*¹¹

¹⁰ Professor Drayton, 6th JEI Distinguished Lecture. (emphasis supplied).

¹¹ Professor Drayton. *supra*. (emphasis supplied).

16. If we are persuaded by this thesis, it appears then that the challenges are more than space, market saturation or standards, as legitimate as those are.

We are having to come to terms with the crisis of the governors and the governed, the worm eating at our self esteem and, finding and affirming our Caribbean identity. There are conversations which must begin to occur and be sustained:

Among our **Universities**, the UWI (the University of Guyana and other Caribbean Universities) our **uniquely constituted Council of Legal Education** through its constituent parts¹², the **legal profession**, both in its traditional and broader identity to include its blend with business and transactional enterprise, **corporate society, civil society** and other **stakeholders of our Caribbean space. Conversations about the legal profession in the Caribbean today, relevance, resources and societal needs.**

17. In reflecting, well might we remind ourselves of the relevance and quality which now transcends through, forged from the vision which founded the UWI/CLE and existing today in the promise of our Judiciary. A beacon of that transcendence was delivered by the Honourable Mr. Justice Saunders JCCJ¹³ in 2012.

¹² Chief Justices, Attorneys General and Bar Representatives.

¹³The Judicial Education Institute (TTJEI) hosted its second Distinguished Jurist Lecture in the Convocation Hall at the Hall of Justice, Knox Street, Port of Spain, on July 12, 2012 with that year's presentation by the Honourable Mr Justice Adrian Dudley Saunders, JCCJ.

18. I hope that I do no significant injustice to that seminal Lecture by attempting to summarise¹⁴ what I consider (for these purposes) to be the most salient points:

- i) Interpretation of law is never neutral. The law serves interests and, judges must seek to discover precisely what those interests are, in order to better inform themselves about the manner in which effect should be given to the law. The interpretive function should always consider the history of the law, the purposes it served when it was made and the interests it currently serves.
- ii) The **rule of law** in this context means a lot more than guaranteeing simple adherence to the law. **It implies as well legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of the powers, equality before the law, the absence of arbitrariness.**
- iii) The advancing of good governance and the rule of law is central to the role of Courts in our developing democracies. It creates the conditions for the optimal social and economic development of our societies, quite apart from producing

¹⁴ Whilst I do not, throughout, attribute direct quotations, the statements at sub-paragraphs (i) through (iii) are my summarized recap of some of the remarks of Saunders JCCJ, for which I take no credit and accept responsibility for any error..

justice for the citizenry. In multi-ethnic and multi-cultural societies, in particular, courts have a special responsibility to ensure equality of treatment.

19. The remarks of Mr. Justice Saunders, JCCJ lead me then, finally, to reflect on one of those core institutions through which we must help to create our awakening constitutional identity, the Caribbean Court of Justice,. At the end of Professor Drayton's lecture in March, I was among those invited by the Honourable Chief Justice of Trinidad and Tobago, the Honourable Mr. Justice Ivor Archie, ORTT to make brief remarks. I commented then on one further statement made by Professor Drayton, in his own focus on the contradiction of the continuing reliance of some of us on the Privy Council as our final Court of Appeal. He said this: *"Any evolution towards a constitution suited, in Montesquieu's or Bolivar's sense, to our climate and manners, is thus permanently postponed. The importance of the Caribbean Court of Justice lies not merely in the better, cheaper and quicker justice it might provide us, but in the opportunity it gives us to become the centre of our own legal order, instead of being permanently at the periphery of another."*

20. I endorsed that statement then as I do now. We have to take ownership of our process; a process which must involve not just historians, not just legislators, judges, lawyers, and educators but also our churches, civic society and more than ever, our consenting Caribbean people. The reality

is that as a Caribbean people today, if we are to take ownership of our destiny, we **cannot continue to exist at the periphery** of someone else's society.

21. Our quest for ownership, finally affirming our Caribbean Identity involves making hard choices ... difficult choices – no one is suggesting a panacea. We can reflect on the parallel ... those of us who have children, nieces or nephews. There comes that point in our lives when our young people will step out on their own ... Tremulous though we might be, as parents, uncles/aunts in our fears that they will stumble and fall, we do not serve them well in **their** charting **their** destiny to lock them in their bedrooms, **wrapped in the cotton wool of our insecurity.**

22. Already the decisions of that Court have stamped their indelible print. To mention briefly only a few: The case of **Myrie**, out of Barbados. How many of us know of that case, all through the Caribbean, from Kingston in the north to Belmopan in Belize? The publics of the Caribbean are still speaking about the case. A young woman from Jamaica who went into Barbados and was strip searched by the Immigration and Customs officials. She brought her claim before the Caribbean Court of Justice in vindication of something that all of us as Caribbean people take for granted and treasure. Freedom of movement through the Caribbean, to play cricket, to marry, to love, to party, to work, to live, **To Be Caribbean.**

She was awarded damages and compensation.

23. Another: **Marin**, out of Belize. Professor Drayton reminds us in his opening remarks that at worst, our tortured history has impelled us to seek predatory relationships with the State apparatus, with individuals and companies seeking to strip private wealth out of public assets. What was **Marin** about? **Marin** is the first case in the Commonwealth Common Law in which a court has given the right to a former Member of Cabinet, to bring a motion for misfeasance in public office against another member of government, who had sought to strip private wealth out of public assets.

Who will guard the Guards? Understanding our Caribbean ethos as no other can, the Caribbean Court of Justice!!.

24. Yet Another: The **Maya Alliance** out of Belize, which has given legitimate recognition to rights of the indigenous people of Belize; a judicial decision that has transcended anything that any previous international tribunal has done for indigenous people.

25. Additional to its judicial decision making, the Court is contributing meaningfully in lending technical assistance and stakeholder empowerment in improving the national domestic judicial infrastructure among member States.

26. This then is our nascent Caribbean Court of Justice: Rooted in the spirit of the Caribbean and the history of the people that it serves, working to

develop a society in which the Rule of Law will sustain the rise of a Caribbean people, not their subjugation.

Conclusion

27. Forgive me for my meandering. In the end I ask your leave, really, to make these three short points this evening.

One. We are products of our history from which we must learn; part of the lesson is that we have not all, yet, shed the insecurities beaten into us and, are still carrying the manners of our long imprisonment.

Two. The combined experiences of (other) New Voices tell us that we must have the courage, the confidence, the will and the tenacity, to rely on our intelligence, our creativity and our resources, all of which we have in abundance.

Three. The UWI and the Council of Legal Education, in the navelstring of their founding, have together, produced national leaders of many of our core institutions, including our Judiciary. We have come a long way, in a short time; there is, still, a long way to travel. We must be neither indifferent nor complacent. **We must be bold.**

These two Institutions must commence a new conversation, with our other Caribbean Stakeholders. It is our duty to continue the vision for a Rule of Law framework which will give realization to those early

foundational dreams and to the loftiest aspirations of our children's
children.

Thank you for this privilege and honour.

REGINALD T A ARMOUR SC

1st September 2016