The Law and Social Change- A Look at Legal Reform in The Bahamas

A. Introduction

The topic may well beg the question as to whether law has any necessary connection with social change, and the answer to that question will depend on ones definition of society. For the present purposes I adopt the definition posited by Benn & Peters in their book "Social Principles and the Democratic State" which is, "*a group of individuals bound together by an order of normative rules*." The rules are a combination of rules of ethics, rules of morality, rules of civility and rules of law.

Apart from rules of law those mentioned above together comprise what sociologist call the norms of society and members of society tacitly agree to conform to them thereby constituting a social contract. These rules are not enforced by actions before the court or punishment by the state but by disapproval of the individuals who make up society and sometimes by being ostracized.

The rules of law, of course, carry sanctions of various kinds ranging from punishment for crimes to damages and sundry orders for violation of the rights of other members of the society. Therein lies the connection between law and social change.

B. The Reception of English Law and it Effects on Bahamian Society.

Given our history as a colony of Great Britain which began by settlement, we found ourselves bound by rules of English law both common law and statute which arose out of English social situations and that were considered necessary for ordering English society. Indeed, I am sure that we all accept that the overwhelming percentage of the people who comprise Bahamian society today and in fact for nearly two hundred years are the descendants of African slaves who were not part of the Bahamian society at the time that the laws of England were brought here by the Eleutheran Adventurers. As we know slaves were not allowed to establish their own societies and the customs and practices such as they had imparted to them by their elders were forbidden by the English law. Their marriages were not recognized and their children were classified as illegitimate and according to English law were *fillius nullius* i.e. they had no father.

The African customary law of "generation property" which many of the free blacks observed was and still is not recognized by the English law relating to real property notwithstanding that on most of the Islands these rules were observed by the free blacks that settled after the abolition of slavery.

Moreover, the rules relative to the succession of title to land in the case of a person dying intestate provided that all of the interest in real property held by the deceased at the date of his death devolved to his heir at law; and the *agnatic primogeniture* principles applied whereby the eldest son or eldest male relative, and only in the absence of any male relative would a female be considered as being the heir.

The legal discrimination against women continues today and is in fact on a much higher plain in the laws of our Commonwealth. Indeed it goes to the supreme law of our land because Article 26 which provides for the protection against discrimination defines the kinds of discrimination that is thereby protected and alas gender discrimination is conspicuously and noisily absent. The upshot of this is that any other law that may be passed by Parliament or which now exist that promotes or tolerates discrimination on the basis of gender could not be struck down for offending the constitution. The door is therefore wide open in this respect. Indeed it appears to me that this thinking is consistent with the omission from article 5 relative to persons entitled to be registered as citizens of any mention of husbands of Bahamian women. These are two of the provisions of the Constitution that are blatantly in need of reform to bring our supreme law in step with modern day Bahamian society.

These are some of the issues that have confronted or still confront Bahamian society that needed or still need to be addressed.

C. The Need for Law Reform

Now I have been asked to consider law reform in the Bahamas against this background, and so the question immediately arises as to what is indeed "*Law Reform*" the word "*reform*" is defined by Webster as inter alia "*to put or change into an improved state or condition*" or "*to put an end to by enforcing or introducing a better method or course of action*." Law reform, then, would involve some fundamental restructuring or complete replacement of the existing law with a new and improved one. It is to be contrasted with law revision which is to make an amended or improved version of the same law without any fundamental changes.

Given what I have identified above to be the sociological issues that needed to be addressed it is apparent that there was a pressing need for law reform from as early as 1834 upon the abolition of slavery. On the contrary, however, the English colonizers extended many legislations that were made by the English Parliament for application to the English situation to The Bahamas without any consideration of the sociological difference or indeed any differences at all. In addition in many instances the local legislature, enacted provisions which adopted English statutes in whole or in substantial part, or simply copied the wording and numbering of English acts. Another strategy was to provide in a section to an Act that the law of the Bahamas will be whatever the law of England

is from time to time. An example of this is section 4 of the Evidence Act, 1904 which provided that:

"Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence in any court in England or Northern Ireland, shall be admissible in evidence in the like manner and to the same extent and for the same purposes in any court in the Colony."

I am not to be taken as suggesting that in every case these laws were wholly inapplicable to the Bahamian situation because that would not be fair or indeed true but I do suggest that as a law-making strategy this is fundamentally flawed

Happily, there have been genuine efforts made through the years to reform the law of this country in various and sundry respects some of which were intended to reflect or to assist in bringing about social change. In the time that is available to me I shall not be able to address such efforts in detail but I shall touch on a few to illustrate the point that I am seeking to make.

Before addressing the efforts made at law reform, however, I should like if I may to go back to a proposal I made many years ago, in 1985 in fact. In a speech I made in October of that year which was televised nationally and carried by all news papers, I proposed the annual appointment of a Law Reform and Revision Committee made up of lawyers, sociologist, psychiatrist and I now think psychologist and other persons who are deeply involved in the community such as youth workers and clergymen to investigate the need for changes in the law having regard to changing social dymanics and to report to the Government making recommendations as to what law reform and revision is necessary. That proposal was met with loud enthusiasm and promises of implementation both of which dissipated shortly thereafter.

I am today even more convinced of the absolute necessity to have a body which constantly monitors the changes that are taking place in our society, to identify trends and tendencies and to anticipate social problem thereby avoiding our constantly having to react after the onset of such problems. This is particularly important on the criminal side but it is applicable across the board.

Now I know that we say that we have a Law Reform and Revision Commission but with due respect to those fine and dedicated public servants who hold those offices that does not come near to meeting what I consider to be the needs of the country. I am speaking about a body that is multi-disciplined in its composition, that is given the mandate to conduct investigation and research where necessary, to call for persons and papers, as they say, to get to the nitty-gritty of what is happening in our society, and then to fearlessly recommend the necessary reform in a public setting so that the people may hold the feet of the politicians to the fire and ensure that they do what they are elected to do.

The reform that has been brought about over the years is commendable but they have, for the most part, come about as a result of upheavals of one kind or another which made it necessary for changes to be made. In my view this is entirely the wrong way to deal with a matter as fundamentally important as law reform because it means that we are reacting to a crisis and consequently we are not able to carefully investigate and research the matter and then give appropriate consideration to all of the implications of reform of one kind or another The recent amendments in the criminal area is an example of this. But I shall return to this issue in due course.

D. Areas of Law Reform

Let us then look at some of the major areas of law reform that have been undertaken over the years which I propose to do in no particular order.

1. Law of Succession

In 2002 Parliament enacted three legislations which all received the Royal Assent on 31st January 2002, and came into force on 1st February 2002, which together represent a significant reform of the law relative to the succession of title to real and personal property of deceased who died intestate. The three legislation in question are:

i. The status of children Act No. 6 of 2002
ii. The Inheritance Act No. 3 of 2002
iii. The Administration of Estates Act

i. The Status of children provides in Section 3 as follows:

3.(1). **"Subject to the provisions of section 6 (1) and 16 for all purposes of the law of The Bahamas the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly."**

By section 6 the provisions of section 3 apply to persons born before and after the enactment of the Act and whether or not they were born in The Bahamas. Section 16 is a transitional provision which provides that all dispositions made before the 1st February 2002 shall be governed by the law in force at that time.

The overall effect of this legislation is to abolish the law by which children born outside of a marriage were classified as illegitimate and therefore had no father as a matter of law so that they could not inherit any property whether real or personal from their biological father under the inheritance law; and also whereby the man had no rights in relation to his biological progeny even when he was adjudged putative father of such and was ordered to pay maintenance for the financial wellbeing of the child.

This legislation represents a fundamental change in the law in this area as it removes the distinction between children born in a marriage and those born outside of a marriage so that the inheritance laws now apply to all children equally.

ii. The Inheritance Act, first of all, abolished **"All existing modes, rules and cannons of descent and devolution of special occupancy or otherwise of real estate or personal estate**, and secondly it abolished the tenancy by courtesy and dower. (Section 3) section 4 of the Act lays down a new formula for determining how the residual estate of a deceased who dies intestate is to be distributed which enables children born out of wedlock to share equally with those born in wedlock.

Another very significant provision in this Act is section12 which enables a surviving spouse, a child under 18 or an older child under the age of 23 who is enrolled in an institution of higher learning, or one who in incapacitated to apply to the court on the ground that the will does not make reasonable financial provisions for the applicant, for an order that such financial provisions be made. Section 13 empowers the court in making such an order to order the payment of a lump sum or periodical sums in an appropriate case.

Section 24 gives the court the power to order that a surviving spouse may remain in the matrimonial home upon the death of the deceased.

iii. The administration of Estates Act established an essentially new regime for the administration of the estate of deceased person. This Act has been subsequently repealed and replaced by the Administration of Estates Act, 2010 which essentially codifies all of the law relative to administration of the estate of a deceased person.

These three legislations have reformed the law relating to intestacy, inheritance the administration of estates and the rights of children born out of wedlock vis-à-vis their father.

The treatment of children before the law generally and juvenile offenders before the courts in particular has been a matter of concern for some time because as far as I know no research has been conducted to determine to what extent, if any, the problem of crime and other social ills are impacted by this issue.

2. Law Relative to Children

Apart from the common law relative to persons under disability of which infants is a category, the only legislations dedicated to the legal rights and status of children were the Education Act which came into force in 1962 and the Children and Young Persons Act which was passed in 1947. Each of these Acts dealt

with children and young people in a specific context, and so neither dealt with, for example the rights of children generally. That remained a lacunae in the law of The Bahamas until the Child Protection Act was given the Royal Assent in January, 2007 but has a commencement date of 1st October 2009. This legislation implements into the domestic law of The Bahamas the principles contained in the United Nations Convention on the Right of the Child and is a comprehensive code on the rights of children and the duties of all those who come into contact with them including parents, teachers and the courts, and lays out the guiding principle which is the welfare of the child.

This legislation represents a very significant chapter in law reform in the country which was dictated by the burning needs of the society.

3. Family Law

In the area of family law and in particular the law relating to divorce the Matrimonial Causes Act of 1879 came into force on 11th March of that year, and section 3 provided that a decree of judicial separation could be obtained on any ground or grounds on which such a decree could be obtained in England. Under this Act a magistrate could, upon the conviction of a husband for aggravated assault against a wife, and if satisfied that the safety of the wife was in peril, make an order that the wife was no longer bound to cohabit with her husband and this order had the effect of a judicial separation. The court was further empowered to order the payment of maintenance by the husband and that the wife be given custody of all children under the age of ten (10) years. However, no order for maintenance or custody was to be made in favour of a wife who was proved to have committed adultery which has not been condoned by her husband.

As for divorce the single ground on which a husband could petition the court in this regard was that since the celebration of the marriage his wife has been guilty of adultery. The wife on the other hand could rely on the ground of adultery, rape, sodomy or bestiality in a petition against the husband. An interesting feature of this law was that the husband could claim damages against any person who committed adultery with his wife.

In 1983 considerable amendments were made to this law whereby the grounds for divorce were standardized as between a petitioning wife and a petitioning husband except that the wife may rely on the ground that her husband has since the celebration of the marriage been guilty of rape. The grounds are adultery, cruelty, desertion for 2 years, 5 years separation, a homosexual act, sodomy or sexual relations with an animal.

The right of a husband to claim damages against a man who committed adultery with his wife has been abolished, and the court has been given the power to make adjustment of matrimonial property.

In my view, having regard to the changes which these amendments have made they qualify law reform as defined above. But there is room for further reform, in my humble submission particularly, in regard to additional grounds. A common feature of all of the grounds with the possible exception of five (5) years separation is fault in the Respondent. This lends itself to acrimony which exacerbates a situation which is difficult enough on its own, and leaves a larger psychological scar on infant children than would otherwise be left.

I think that the addition of an all encompassing ground such as that the marriage has irretrievably broken down or that there are irreconcilable differences between the parties would remove some, if not all of the acrimony.

4. Employment Law

The law relating to Employment has seen many changes through the years mainly by legislation which sought apparently to alleviate the harshness of the common law and thereby bring relief to the workers of the country. These legislations range from the Combination of Workmen Act, 1925 to the Employment Act 2001 including the Industrial Relations Act 1970 and the several subsequent amendments which introduced the system of conciliation of trade disputes by the Minister of Labour and subsequently the Industrial Tribunal with powers consistent with those of the Supreme Court to hear and determine cases in the area of Employment law. These were huge reforms which were sorely needed at the time that they were introduced but none of them went so far as to abolish the common law principles which do not recognize any right of an employee to his employment so that once he is dismissed by an employer it is very rare indeed that the court will, unless some statute so provides, hold that he is entitled to be re-instated.

In the Employment Act, however Parliament introduced the concept of unfair dismissal in Section 34 and identified the circumstances under which it may arise in Section 35. In his book, "*Labour Law in The Bahamas*", former Justice of Appeal Osadebay wrote on page 26 "**Cases of unfair dismissal are different from cases of wrongful dismissal. "unfair dismissal" seems to confer on the employee a quasi-property in his employment whereas at common law provided proper notice is given, an employee has no right to retain his employment or to be compensated if he is dismissed."** I respectfully agree with that view. Those words were written in 1985, sixteen years before the enactment of the Employment Act. At that time and far more so now men and women train themselves in many cases from kindergarten to University and sometimes post graduate institutions to qualify themselves to undertake a certain employment. It is entirely undesirable that they could be removed from that employment by the caprice of an employer and be left with no remedy save for salary in lieu of notice.

On that view, now that the concept of unfair dismissal has been introduced into the Bahamian jurisprudence, I believe that the door is open for a more fundamental change to take place. Section 35 limits the application of unfair dismissal to dismissal for reasons related to membership of trade unions or trade union activities. I would suggest that the provisions relative to unfair dismissal be amended so as to require that in all cases of dismissal the employer must show a reason for the same which is fair and sufficient to terminate the employment and that the conduct of the employer in dismissing the employee was reasonable in all the circumstances.

5. Criminal Law

Reform in the area of criminal law is of the highest importance because of its obvious implications to the security of the society but at one and the same time it must be approached with greatest care because of its possible implications to the constitutional rights of persons in this country. The approach which we have adopted in this connection, however leaves much to be desired as we often choose to wait until criminal activity reaches epidemic proportion and the public outcry reaches an hysterical crescendo before we seek to determine what is necessary to address the problem. More often than not we wind up addressing the public outcry and not the problem that brings it about. I have expressed my view on the approach that should be adopted in determining the exact nature of reform that is needed generally, and in particular, in the area of criminal law and procedure.

In his address to the nation at the time of presenting the most recent crime bills to Parliament the Prime Minister spoke of **"*how we got here*"** referring to the state of high criminal activity. He began in these words:

"To combat crime and its various causes requires us to understand how we got here, and that we all have a role to play in confronting this complex and vexing challenge."

With all of that statement I fully and completely agree as indeed it coincides with the view I expressed above. We simply cannot successfully combat crime unless we know the cause of it – how we got here indeed. The prime Minister goes on to state:

"Today's culture of crime and criminality has deep roots and multiple causes, all of which must be addressed by each of us.

In far reaching and destructive ways, those roots and causes sank deep into our culture feeding off and growing from the rampant drug trafficking and gangsterism which ran wild in the 70's and 80's"

This information obviously came from the report of the Commission of Inquiry into Drug Trafficking published in December, 1984. There was, however, the report of the Crime Commission published in 1998 which included the conclusion that the Bahamian society was threatened by "***a pervasive culture of dishonesty,***

greed and casual disregard for social norms and regulation" and the 1994 Task Force on Education concluded that indiscipline, materialism and low self esteem among young Bahamians had the potential to cause a social catastrophe.

In my humble opinion the latter two reports could possibly be relied on as evidence of the cause of the rampant drug trafficking and gangsterism to which the Prime Minister referred.

We therefore have the evidence of the cause of the crime problem and therefore the next question is; what is the remedy? It reminds me of an example I gave in a speech to the Kiwanis Club some years ago in which I suggested that it is liken to a town in which there is a contaminated pool from which bacteria seeps and polluted the water table and as a consequence many of the town folk fall severely ill. The government is aware of the pool and that it is contaminated but chooses to approach the problem by building larger hospitals and clinics to accommodate the sick, employing more doctors, nurses and other health-care professionals but ignores the pool. As a result more people became ill and the cycle of expenditure on hospitals and clinics and doctors etc. continued.

In short we need to address the problems identified in 1994 and 1998 and it will obviously take more than legislation so to do, but legislation may be a part of the total solution. This is where the multi-disciplined composition of the committee that I suggested becomes relevant because the different professionals would be able to advise on appropriate strategies from the point of view of their expertise.

May I now briefly comment on some of the amendments made to the various criminal statutes.

The amendments to the Criminal Procedure Code make six changes to the existing law; the most significant of which was the abolition of the statement from the dock and include increasing the maximum sentence of magistrates to 7 years and increasing the maximum period of time that a magistrate may authorize the police to keep a person in custody who is suspected of serious crime to 72 hours. The Court may hear from victims of crime on the impact of the crime on them before the Court passes sentence on a convicted person, the accused person who intends to rely on alibi as a defence must give notice of the same to the court within 21 days and evidence as to whether a firearm is licensed is permitted to be given in writing.

The amendment to the Bail Act seeks to restrict the exercise of the discretion that the Judge has by virtue of Article 19 of the Constitution in deciding on the question of Bail in cases of murder, armed robbery and rape.

May I say quite frankly that I am satisfied that this amendment is inconsistent with the constitution and therefore void. I shall not argue my case tonight as I

have not been properly instructed. I will say however, the core right which is protected by article 19 is the right to personal liberty and most of the paragraphs of that article address the exceptions to that right. Paragraph 1 (d) provides an exception in the case of a person who is arrested on reasonable suspicion of having committed a criminal offence, and paragraph 3 states that if such person is not released he must be brought before a court without undue delay and if he is not tried within a reasonable time he shall be released either unconditionally or upon reasonable conditions to ensure his appearance for trial or proceedings preliminary to trial. The constitution sensibly leaves up to the judge to decide on the evidence before him/her whether the accused can be tried within a reasonable time and in connection with this decision Lord Bingham in his speech in the House of Lords in the *Attorney General's Reference No.*
As follows:

"*The threshold of proving a breach of the reasonable time requirement is a high one not easily crossed. Judges should not be vexed with applications based on lapses of time which even if they should not have occurred arouse no serious concern. There is however a very real risk that if proof of breach is held to require automatic termination of proceedings the judicial response will be to set the threshold unacceptably high*." As Laforest J. said in ***Rahey v R. [1987]*** DLR481 at 516 *, "Few if any judges relish the prospect of unleashing dangerous criminals on the public."*

Even though these pronouncements were both made in connection with cases of alleged breaches of the right to a fair trial within a reasonable time and the remedy of staying those proceedings, I consider that the same consideration should apply to the question of releasing from custody a person who could not be tried within a reasonable time although it may not be appropriate to set the threshold as high in the case of the latter situation.

Accordingly, I have said on occasions before that I would not be surprised if a judge were to find that given the large numbers of offences which are being committed in the country resulting in the large number of cases that are pending before the criminal courts and given the limited human and financial resources and infrastructure available it is not unreasonable for a person charged with murder to be awaiting trial for years.

To my mind it is wholly artificial and undesirable to set any time as a one size fits all mechanism to address this situation. It is still a truism that every case has to be decided on its own merit and that is as applicable to the case of bail as it is in any other case.

Moreover, it is not the function of the Legislature to interpret the constitution as that duty is constitutionally the province of the Supreme Court and the Appellate Courts; and it certainly is repugnant for the legislature to seek to restrict the application of the supreme law of this land.

It is my humble opinion, then, that whereas some of these amendments may have some impact on the progress that criminal cases make through the court system which should result in a reduction of the number of persons granted bail in cases of serious offences and thereby potentially impact the number of repeat offenders, none of them will in any way play any significant part in reducing the number of persons committing crime because none of them address the causes of crime. We simply cannot break the back of our crime problem unless we attack the causes of crime in the first place.

E. Conclusion

The sociological issues which confront the modern Bahamian society as discussed above may be directly attributable to many causes including those which have been identified by the various commissions and, perhaps also to the history of these islands. From piracy to slavery wrecking to rum running, sponging industry and the contract which took away the father figure from many homes to drug tracking the moral compass of this society has been somewhat tilted towards expediency and extreme pragmatism. We seemed at times to think that there is some truth in the axiom "*what is needful is lawful*."

The wholly unsatisfactory state of affairs that exist with regard to land tenure particularly in the Family Islands is long overdue for attention. As it is painfully obvious that the situation has a serious negative effect on the economic circumstances of the people of those islands

Meaningful and effective law reform then must be designed to address these sociological issues as they arise from age to age and it is only then that we would be able to truly say that legal reform in the country has kept abreast with social change.