ENSURING EFFECTIVE JUSTICE FOR ALL

Sir Burton Hall*

Remarks at Luncheon of Trade and Legal Aid Conference

Sponsored by the American and Caribbean Law Initiative and the Northeast People of Color Legal Scholarship Conference
Hosted by the Eugene Dupuch Law School
Friday, 7 July 2006

For too long the courts, the law and the justice system, and constitutional issues have become the preserve of the professional. They are not. They are areas which have a vital effect on the daily lives of the public. That does not mean there is not a vital role for the judges, lawyers and the constitutional thinkers. What it does mean, though, is that all changes to the justice system and an examination of that system and the constitution have to be measured by reference to: how do they serve the public

Just as reform must be for a purpose, so must conservation. We must be astute to preserve that which works well. But we must, perhaps much more than we have in the past, measure our institutions against the needs of the public, in to-day's circumstances. . .

An effective justice system is not just about the courts and the judges; it is also about the extent to which the public genuinely has access to the justice system. Access depends first on knowing that there are rights which can be enforced, and then having the resources to seek to exercise those rights.

The people who most need that access are the poor, the vulnerable and the victimised. Making their rights a reality can help prevent or reduce social exclusion. Solving debt or welfare problems or preventing homelessness stops problems spiralling out of control. . .

M ___________________________

Ladies and Gentlemen:

The topic on which I have been invited to address you is such an elemental blend of politics and morality that, apart from lending itself to a full length university course, it may be approached from such a variety of angles that I must be very selective in my brief remarks, not so much from the fear of disturbing your digestion over lunch, but from exhibiting any aspect of that hubris of which lawyers are often accused – presuming to trespass into areas in which they have neither formal training nor practical experience.

“Justice” is, essentially, a moral concept because in its attempt to “do right to all manner of persons” or “give every person his due”, it can only do so in any particular society, at any particular point in time, if that society, at that time, has evolved a consensus as to what is “right” or what is ones “due”. For example, when, 230 years ago, a liberal elite from among the residents of 13 British colonies on the North American Continent rejected English overlordship and triumphantly proclaimed a republic based on the principle that “all men are created equal”, that “equality” was not conceived of as embracing women, persons of colour or non-property owners. Similarly, in the time of persons in this room of my generation, we would have obligingly sang the verse (now abandoned in modern versions of hymnals) from the popular children’s hymn, “All things bright and beautiful”, produced in Victorian England:

> the rich man in his castle, the poor man at his gate
> God made them high and lowly and ordered their estate.

elevating to virtue the demand of those who possessed wealth and wielded power that all others not so favoured be content with their lot and not challenge the social order.

Today, in this portion of the globe popularly referred to as the “West”, we take as indispensable aspects of justice such manifestations of the ideal as the right of all adult persons to vote, the freedom from arbitrary detention or deprivation of property and the limitation on restrictions by the state on expression of ideas and there are strong movements to enlarge these “rights” to include, for example, recognition of affirmative rights for the disabled and the positive public confirmation of sexual orientation.

In countries such as The Bahamas and the United States, while it could be persuasively argued that we should further expand our expectations of justice to include a right to clean water, affordable health care and post secondary level education, there are territories within our own region where these desiderata are so beyond the capacity of the society to provide them that it is almost a cruel joke to espouse them as components of “justice”.

In sum, while it can be said without fear of contradiction that all persons want “justice”, there is never certainty as to how much of what anyone is entitled to at any time or place.

I began by quoting a passage from the 2003 manifesto of the Department of Constitutional Affairs, created as a consequence of extensive constitutional reforms in process in the English legal system. I find it fascinating that there tends to be, among the inheritors of that system, the former colonies, such as The Bahamas and the other countries referred to as “the Commonwealth Caribbean”, a tendency towards inertia and even spirited defence of the status quo when suggestions for reform are advanced. One would have thought that these territories, still imbued by the spirit which nurtured political independence, would exhibit a burning ambition to critically examine all the institutions bequeathed to us during the colonial tutelage to discern their capacity to move our new developing societies forward to meet the needs of as many of its members as possible for those services which a credible system of justice should guarantee and sustain.

The matrix in which the courts and the systems for the delivery of justice exist is the political process, understood not merely as the partisan competition to hold elective office, but the entire ordering of society including the ongoing contentions as to the exercise of power by those who succeed to such offices for how the scarce resources of the society are allocated. It is at this level that the continuing agitation of a dissatisfied citizenry, either as individuals or as groups – such a journalists, trade unions, professional associations, charities or churches – is necessary to galvanise and focus those who, for the time being, exercise governmental authority. While the idea of “ensuring” justice is a political demand because it is **ultimately** the legislative, administrative and, most importantly, budgetary, machinery that has the means to make real the expectations of the society of its justice system, the **primary** responsibility is that of those who serve in, make our living from, the system, employing the modern cliché, the “stakeholders”. We cannot sit back and await the disposition of “politicians” to do those things necessary to make the system effective and responsive.

I find instructive the approach taken by the Australian Law Reform Commission in an inquiry it launched in 1997 “to look at the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals . . .”.

The inquiry had been prompted by “concerns that legal proceedings in Australia are excessively adversarial and that this [was] having a damaging effect”:

> In broad terms the 'present adversarial system' of conducting proceedings refers to a system in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward.

> In its simplest form this system has a number of consequences, some of which have been challenged as counterproductive or inefficient, for example
>
> - the system is about winning and losing — each party has responsibility for advocating its own case and attacking the other party's case; this puts an emphasis on confrontation
> - the lawyer's role is strictly partisan — the lawyer has a duty to represent the interests of his or her client and is not ethically accountable for the client's goals or the means used to attain them, although the lawyer does have certain countervailing duties to the court and third parties — this gives lawyers an incentive (and perhaps even an obligation) to exploit any advantages the legal system allows for their clients
> - the judge is responsible for ensuring that the proceedings are conducted fairly — this makes judges sensitive about limiting the issues and arguments raised by parties and putting other controls on proceedings in case that is considered biased or unfair
> - the judge is not responsible for how much evidence is collected, how many different arguments and points are put to the court, how long the proceedings take or how much they cost
> - the judge must adjudicate questions of fact and questions of law submitted to the court, but is not responsible for discovering the truth or for settling the dispute to which those questions relate.
>
> These and other features of the adversarial system have been criticized as contributing to (among other things) excessive costs and delays, overservicing, lack of accountability and an unduly confrontational approach to dealing with disputes.

Accepting the practical futility of debating the abandonment of a pure adversarial model in favour of an inquisitorial modern the inquiry was directed to concentrate its attention on the revision of practices and procedures to ameliorate the adverse consequences in the existing system:

> The . . . legal system and its processes have a far reaching impact on commercial and social relationships and decision making processes in government and throughout the community. They affect the way contracts are drawn up, the insurance policies that people buy, the systems and procedures that government agencies establish, the way separated or divorced parents treat each other and their children, and numerous other aspects of day-to-day activities.
>
> These consequences of the legal system are as important as its impact on a particular proceeding. The costs which legal systems generate and their

> impact on . . . society need to be examined and taken into account as part of the assessment of the present system.

Among the options for reform proposed were to:

- remove or streamline existing processes and procedures
- introduce special procedures and rules for multi-party disputes
- introduce 'multi-door' systems and processes that allow for screening of disputes into different processes
- introduce new forms of representation, such as an Advocate General for public interest issues
- identify and encourage best practice judicial and case management in courts and tribunals
- better assist litigants in person
- introduce wider community awareness programs
- ensure that adjudication occurs in an appropriate court or tribunal

The Australian experience had already established that:

> The growth in facilitative dispute resolution processes and external adjudicatory processes has served to narrow issues in dispute that are dealt with in the final determination of disputes before many courts and tribunals. These processes have also resulted in the total resolution of many disputes that have been commenced within the legal system.

And the Commission was expected to:

> . . . review the increasing role of non-adjudicatory dispute resolution processes and . . . examine referrals to adjudicatory dispute resolution processes that are external to courts and tribunals. The future role of these processes and their relationship to other elements of the litigation system [would] be considered and analysed.
>
> A further aspect to be considered [was] the effect of providing early legal and other advice and information. When this is broadly and easily accessible, such advice is said to be effective in avoiding disputes or in resolving disputes quickly without the need for formal processes. For some types of disputes and litigants it is considered far more important and valuable than reforms to court and tribunal procedures. . .
>
> The development of 'multi-door' systems and processes that allow for screening of disputes into different dispute resolution processes [would]

> be examined. The ability of courts to use 'in house' experts, to refer parties to outside expert evaluators by agreement and to use alternative dispute resolution techniques such as mediation or provisional adjudication are important complements to court and tribunal adjudication**. . .**

I have quoted extensively from that Australian pamphlet as I consider that it usefully summarises the ongoing dialogue in which we, in common with all who accept the need to ensure the effective provision of judicial services in any of our societies need to be engaged.

For example, for this jurisdiction, I have urged, and continue to urge at the appropriate levels:

- The establishment of Community Courts, physically situated in major population centres and presided over by lay persons in whom the community repose respect, to which a range of minor criminal offences would be assigned;
- The formation of "Community Caution committees" to divert, especially, youthful offenders from involvement with the formal criminal justice system on account of their early and correctable misbehaviour;
- The creation of special procedural tracks, especially in family and labour law matters where parties find that the several issues in the same dispute require the intervention of different courts. For example, at present, the High Court has jurisdiction in divorces and ancillary matters. Therefore, parties of limited means whose property is modest are faced with the expense of dealing with the post-suit stages of the matter before a judge of the High Court. I have proposed that in these matters procedural tracks be created so that, while a matter would be required to be initiated in the proper court, that matter or any part of it may be referred by the presiding judicial officer to the court at another level along the track without the parties having to initiate a new application. These tracks would remain open in either direction until the matter is finally disposed of without the party having to suffer the expense and inconvenience of initiating separate applications in different courts.

I expect to continue to press these proposals during the remainder of my tenure and, in addition, am in the process of formulating proposals directed to addressing the urgent need to bring The Bahamas into modernity by adding alternative dispute resolution as an indispensable component of delivering services which, by sheer demand of numbers on the system, the courts cannot properly address.

Life is always about choices and the basal individual choice of each of us who directly participates in the system of justice is whether to perfunctorily perform – merely to satisfy the minimum demands of our clients or employers – grudgingly – or, at best, unenthusiastically – those daily tasks that an inadequate system

permits. The alternative is, as we serve employers and clients, to see in every frustration that confronts us the opportunity to effect change, not for its own sake nor to mindlessly follow the path developed by other societies according to their own needs, but – whether by agitation, research, directly volunteering – whatever the occasion requires us to do – to seek to ensure that the deficiency thus revealed is removed as an obstacle in the path towards the realization of what we, in our time, accept as an incident of "justice".

Those of you who would have participated in this Conference all, I am confident, appreciate this principled, disciplined work and would have made that fundamental decision to which I have just referred at an early point in your professional development and I thank you for the courtesy of inviting me to address you and apologise for the presumption of attempting to articulate what you know better than I.

---

*Sir Burton Hall is Chief Justice of The Bahamas