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CODIFICATION OF THE LAW IN BERMUDA

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- **Introduction of the Bermuda Criminal Code and its origins in Australian Law.**

The Law of Bermuda originated from the Law of England at the time when the first settlement was established on the 11th of July 1612. In the following years subsequent changes in the Laws of England were generally adopted in Bermuda through ratification, usually after some period of delay.

In the 1870s there was a significant overhaul of the English Judicial system. The impact of these changes on Bermuda in the form of legislation did not occur for another thirty years or so. When they did come, the changes in the Bermuda judicial system were facilitated predominately by the Chief Justice of the day, Sir Henry Gollan, who had the guiding hand in drafting the Criminal Code of 1907 as well as a raft of other legal changes. It is believed that the Criminal Code of Bermuda was itself largely based on the earlier work of Sir Samuel Griffith, who was the Chief Justice of Queensland, Australia between 1893 and 1903, although there seem to have been other sources, including the Law of New Zealand.

Like Sir Henry Golan, Chief Justice Griffith was a man of enormous energy and admirable output and achievements. While he served as Chief Justice of Queensland he managed to successfully codify the criminal legislation as it stood at the time. This was a massive task, which occupied much of his spare time between 1896 and 1899. This codification appears to have been one of the earliest and most successful examples of codification within the English colonies. The Griffith code was adopted in Queensland in 1899. A Criminal Code similar to that of Queensland was adopted by the federal states in Tasmania and Western Australia. Following this trend, Papua New Guinea and several other Colonial territories with a link to England adopted similar codes.

Accordingly, due to the work of these two jurists, along with many others who followed their lead and assisted in their projects to modernize the criminal law, almost three hundred years after the establishment of Bermuda, the Bermuda Criminal Code received the assent of the then Governor, Lieutenant General R.M. Stewart in 1907 and subsequently became law.

- **Why did Bermuda need a Code**

It is always attractive to have consistency and clarity in the criminal law. A Code can and should provide this both to the Judge and to the legal practitioner. It also establishes the general rules as to individual criminal liability. It should ideally allow members of the public, with the assistance of a Code, to discover whether there has been a crime, what the defences are, what the ingredients are and what are the possible sentencing consequences. Having said that, it should be emphasized that providing clarity to a lay person is not the only priority and that exactness and accuracy in setting out the relevant issues should not be sacrificed in order to make it easy to understand for a non-lawyer. There needs to be appropriate balance between these differing priorities.

A significant question arises however as to why the practice of criminal law, which had up until that time been based on the common law and statute, diverted in Bermuda and elsewhere from that in England. One must assume that the act of bringing a complex series of laws into a single enacting document makes the law more handy and accessible. It can also provide the opportunity for law reform, as there is a chance to update criminal laws, remove outdated aberrations and include new developments. There is a danger though that a Code can crystallize the Law as it stands at a certain point in time, removing much of the flexibility and adaptability of the Common Law to address the many changes that occur from time to time.

- **Methodology used for adopting the Code.**

The Criminal Code of 1907 was debated by the Joint Committee of the Legislative Council. Chief Justice Sir Henry Golan was a member of that Committee. At the time when it went before the House as a Bill it was noted that the proposed Criminal Code was probably the longest Bill¹ ever to be presented to the House, requiring a very significant amount of time for the reading of the clauses one by one. In any event, the work was successfully completed and with recommended subsequent amendments the Bill became the Criminal Code of 1907.

It is interesting to read back into the debates of the House of Assembly from 1906 – 1907 wherein these matters were discussed. Rereading the arguments makes it very clear what was in the mind of the law makers. Quoting from the Bill's second reading, a Dr Outerbridge stated that the proposed Law "is a consolidation of the statute law of Bermuda together with what is termed the 'common law'². It contains some clauses from the New Zealand Criminal Code and from the English statutes." He went on to give an example of the benefits of the Code. "It may be remembered that a very short while ago there was a case brought before the court where a person was arrested on suspicion by the police that he was about to break into a store or dwelling house, and there was no statute in this colony at that time for his punishment or conviction and the party escaped by the reason of that fact. This Code makes provision for such cases, besides providing for other cases, and it is supposed to be a complete Act to meet all criminal cases. With the exception of those additions which have been copied from the English law and the New Zealand Code, I do not think there is any other change from our present Acts except the proposition to abolish the grand jury."³

- **Regional situation**

Regional jurisdictions with Criminal Codes include territories such as Canada⁴, the United States of America⁵, Belize⁶ and the British Virgin Islands⁷. There is widespread

¹ It had 602 clauses.

² Dr T H Outerbridge, *28 December 1906*, Debates of the House of Assembly, page 550.

³ Dr T H Outerbridge, *28 December 1906*, Debates of the House of Assembly, page 550 continued.

⁴ Criminal Code Act 1892, *Canada* has a federal code covering all provinces.

⁵ With its 52 Criminal Codes and a model Criminal Code.

⁶ Independent from the United Kingdom since 1981. Criminal Code dated 1980.

⁷ Criminal Code 1997, it is also, like Bermuda, a British overseas territory.

criminal law codification throughout the Commonwealth (other examples include the Cayman Islands penal Code of 1975, which simply restates the common law at the time and the Criminal Code of Anguilla of 2000, which also simply restates the statute and common law) with perhaps the most obvious current non-participants being separately England, Scotland and Ireland. There are other countries though which are satisfied with their experiences with the common law. Regional examples of such jurisdictions which do not have a Criminal Code include Antigua and Barbados.

Of note, there was a codification bill drafted for England, which reached its second reading in the House of Commons in 1878 but died at that stage. This bill appears to have been the source for some of the other Codes within the Commonwealth. It seems the author⁸ of the hoped for English Code was no match for the apathetic Royal Commission of the time. Since then, there have been other sustained efforts to produce an English Code but as yet to no result.

- **Is codification the best approach for Bermuda?**

In 1907 the introduction of a Criminal Code focused on Bermuda and its unique requirements seemed a step forward into a more consistent and clear legal framework. It is acknowledged that with the Common Law there is an inherent risk of ambiguities and inconsistencies within the decisions being handed down by different Judges. For example, an offence might result in one penalty from one Judge and quite a different one from another. Furthermore, the small size of the jurisdiction and thus the relatively small number of cases created its own challenges. Arguably insufficient cases and rulings existed to provide the full cross section of precedent needed, whether in trial related legal issues or issues of sentencing, to allow a Judge sufficient precedent on which to base a consistent decision. There was not necessarily a simple answer in looking for precedent to other jurisdictions, as they were in many senses far from identical in law or social concepts to those held in Bermuda.

The function of a Code is that it provides a definitive framework for a Judge to work within. With such a framework in place the accused has an enhanced ability to predict what may occur in a trial and what the sentence may be for that particular offence. The Code also provides much greater certainty in procedural matters. Accordingly in Bermuda, the enactment of the Criminal Code has provided greater clarity for prosecution and defence counsel. However, the Judge does have the ability to vary from the Criminal Code when taking into account section 54 and 55 of the Criminal Code. These sections allow the Judge to vary slightly the sentences indicated in the Criminal Code if the circumstances are such that they would warrant such a variation.

Experience shows that legal development can be more planned and consistent with codified law than was the case under the Common Law. Legislation based on what can be seen as ad hoc judicial decisions may be viewed as inferior to that which is developed utilizing the capacity which structured law reform bodies have to invest resources into

⁸ James Fitzjames Stephen.

intense and focused study of the issues, as well as collection of input from relevant interest groups.

- **What could be done to have a better Code?**

The current Criminal Code and its subsequent amendments are widely considered within the legal profession to be in need of a significant degree of amendment. Several sections are not considered to be particularly relevant or appropriate by members of the legal profession. An example of a current area of concern and debate among lawyers is mandatory minimum sentences.

It is potentially illuminating to consider some arguments which have occurred in Australia on this topic of moving a Code into the present with sufficient capacity for the future. There each state or territory has its own Code. There is significant inconsistency and for the layman no doubt inexplicable diversity in certain areas. Essentially the Griffiths Code has been followed by certain territories and states while other territories and states remain more based on the Common Law, these include New South Wales, Victoria, South Australia and the Australian Capital Territory. One of the main criticisms of the Code in the territories or states based upon the Griffiths Code is that they are locked into what was correct a century ago. Since Bermuda is also based on the Griffiths Code, it will no doubt observe the developments in Australia with great interest.

Recommendations in Bermuda could perhaps include the public being provided with a wider and more consultative role to establish what they deem appropriate for the sentencing of certain crimes. An additional approach might be to look carefully at other jurisdictions to assess the efficacy and appropriateness of their sentencing penalties.

- **Development of the Code.**

The Bermuda Law Reform Committee (the LRC) is an ad hoc body that was established as a Cabinet Committee around 1968. The LRC's initial role was to research reform issues which had been identified and approved by Cabinet. The purpose of such research was to provide legislative recommendations to the Bermuda Government with the expectation of improving the Criminal Code. The LRC today is still an ad hoc body, but is now appointed by the Attorney-General and Minister for Justice to which it reports. In theory the LRC is expected to follow a Government Agenda and to fulfill the objectives of the Government of the day. In practice the LRC, which in recent years has been chaired by a Supreme Court judge, largely sets its own agenda and addresses uncontroversial topics (such as outmoded laws or loopholes in the law) which fall outside of the Government of the day's main political agenda. The LRC has recently proposed legislation to address the following:

- establishing an independent statutory Law Reform Commission
- broadening the range of persons eligible to act as notaries;

- equating the judicial immunity of magistrates to that enjoyed by superior court judges, and
- ensuring that the order of speeches in criminal cases conforms to best Commonwealth practice.

When the LRC recommends new legislation or amendments to existing legislation, such proposals are set out in a report but may also take the form of a Bill. The proposal must receive the approval of the Cabinet before it can be introduced to the Legislature.

The normal methodology of amendment is to create a new piece of legislation by statute and then as a secondary step amend the Code by amending the core issues referenced in the new statute and importing them into the Code. This does however mean that there is still a need to search outside the Code into the statutes to find out the details of many legal issues.

- **The Code in operation today**

The Code has had to deal with a great number of new developments since its inception over 100 years ago. There has been inclusion of new offences such as money laundering and stalking. There have been amendments to reflect a change of attitudes towards certain crimes, such as a great increase in abhorrence for offences such as crimes within the family and greater intolerance for the use of weapons. There has been a change in attitude to punishment such as the significant reduction in the draconian approach to punishment, examples being the removing of whipping and capital punishment from the Code, while simultaneously there has been a recent increase in the maximum sentence for a number of crimes, showing the concern of the public to growing crime trends, particularly of very serious crimes. The Code has had to be flexible and the main agent for change has been the introduction of new Acts. The Criminal Justice (International Co-operation) (Bermuda) Act 1994 was introduced to encourage reciprocal assistance with other jurisdictions in criminal investigations and prosecutions. More recently new Acts have included the Proceeds of Crime Act 1997, the Stalking Act 1997, the Domestic Violence (Protection Orders) Act 1997, the Bail Act 2005 and the Criminal Code Amendment Act 2007, which principally deals with child pornography.

In 2005 the Criminal Code Act 1907 was amended to create the offence of 'Having a Bladed Article in a Public Place' (which imposed a mandatory minimum sentence), to combat the influx of machete related offences on the island. Amendments included increased penalty zones, which included those areas close to schools.

This legal change via statute creates a type of hybrid situation because while the Code contains the main criminal provisions there is also need to access other Acts and refer to Common Law case decisions in higher courts when looking for guidance on matters such as sentencing and legal interpretation.

- **The way ahead**

Bermuda is now also driven by the need to incorporate ratified International conventions into its legislation. The Hague Convention 1980 on child abduction and the conventions which followed and were based on the protection and rights of the child have been incorporated into legislation in Bermuda under the International Child Abduction Act 1998. These changes are referenced in the amendments of the Criminal Code which makes cross reference to the relevant new statutes. The Human Rights Amendment Act in Bermuda was based on Canadian and New Zealand models⁹. The decision to source the law from Canada and New Zealand may have been based on what was viewed as superior methods of dealing with abuse of process and disabilities. It also had something to do no doubt with the personal experience of the draftsmen¹⁰.

Bermuda sends all its law students abroad, often to the United Kingdom, Canada and other English speaking countries. This of itself creates an international outlook at the Bermuda Bar. When one adds to this the increasing internationalization of all aspects of life in every country, one can expect in future that legal developments will be ever more based on a widening international context.

Currently consideration is ongoing as to the establishment of a statutory body to streamline law reform within Bermuda. This was recommended in a recent report of the Law Reform Committee.

International gatherings such as this one today also focus welcome attention on the issue and generate fertile debate which one hopes will lead to reform. Assuming there is no way back from the Code to the Common Law one must therefore utilize the undoubted benefits of the Code to the maximum, making it as plain and comprehensive as possible while incorporating as much up to date legislation as can be done. Technology and communication have speeded up change in all things including legislation. In my opinion, the best response to this accelerating change is the setting up of permanent reform mechanisms to ensure that the Code, which can, if not properly managed, be less flexible than the Common Law, is instead kept up to date and is a flexible instrument for modern times.

⁹ The original Human Rights Act 1981 was based on the Universal Declaration of Human Rights as proclaimed by the United Nations.

¹⁰ Due to a population of only about 65,000 persons together with a need to service a sophisticated economy Bermuda recruits a sizeable amount of expertise from English speaking countries in the region, as well as elsewhere, with knock on effects in terms of experience the experts provide.