



The Rule of Law in the Cayman Islands:

A Driving Force for Economic Development and the Key to

Sustaining Growth in Times of Uncertainty

One might be forgiven for thinking that the following narrative is an excerpt from the Brexit handbook. It begins with a Treaty named after a European capital city, turns on the capacity to recognise the credentials of a Danish national, and is transformed when a country eschews the prospect of closer union with its regional associates, embarking instead upon a previously uncharted path to economic success.

The now familiar features of the travails of the European Union are all there: a Treaty signed in Rome serving as the catalyst for new economic arrangements in which the ability of nationals from one country to move freely to another were at first a cornerstone, but which latterly, for the detractors at least, became more of a millstone, and which ultimately

contributed to the fundamental watershed that is Brexit. However, at least insofar as the United Kingdom's post-Brexit economic prospects are concerned, the final critical chapter of this saga remains unwritten and, as such, the parallels with the account that I have for you today are incomplete; for the conclusion of my story encompasses the realisation of a period of sustained economic growth – one of epic proportions, given the paucity of resources and the limited options that were available.

You may not be entirely surprised to hear that this narrative refers to the constitutional history of my homeland. My objective is to illustrate how the economic development of the Cayman Islands has enjoyed in recent years is rooted in constitutional foundations and, in particular, the notion of the rule of law; and to posit that this is likely to prove to be even more important in these uncertain times.

It was an international treaty named after the capital of Spain, rather than Italy, that contained the first legal reference to the Cayman Islands. In the 1670 Treaty of Madrid, Spain formally recognised English possessions in the Caribbean and agreed to permit English ships freedom of movement in the Caribbean. Amongst the English possessions acknowledged was

Jamaica, and along with this prized possession came the proximate but significantly less coveted Cayman Islands.

With the threat of Spanish reinvasion diminished, Jamaica quickly became an important part of the British Empire, riding the wave of the sugar boom of the 18th Century and reveling in its strategic significance for the purposes of naval supremacy in the region. The Cayman Islands on the other hand was largely ignored and came to be known as the “Islands Time Forgot”.

Growth in the Cayman Islands was painfully slow. There were land grants from the Crown in 1734 and 1741 but by 1773 the population was still estimated at only 400. The unhelpful nature of most of the land and the relatively small size of the Islands themselves meant that the Islands were not well suited to the plantocracy model deployed to exploit the other British colonies at the time. So, even by 1802, when the first census was carried out, the population had only risen to a meagre 933 souls and while 30 tons of cotton were reportedly exported from Grand Cayman that year – with cotton surpassing mahogany as the Cayman Islands’ principal export – the challenging conditions meant that the prospects for cotton and other cash crops would prove very short-lived.

It was expedient for the Cayman Islands to be administered through Jamaica but the attitude of British bureaucrats posted to Jamaica for the large part was out of sight, out of mind. This practice of benign neglect meant the inhabitants were forced to fend for themselves and thus developed a culture of self-reliance and independence, which has stood the Islands in good stead for generations. Despite the privations and the relative isolation, by the start of the 1830s, the population had grown to approximately 2,000. This proved to be enough to voice discontent with the prevailing administrative arrangements and sufficient in number to look to do something meaningful about it.

While the Cayman Islands was administered through Jamaica, there was no constitutional foundation for the arrangements, which was perhaps not surprising given the absence of any legislative recognition that the Cayman Islands even existed. However, undeterred by this minor failing or perhaps motivated by it, the people of the Cayman Islands resolved, in 1831, to form their own elected assembly to enact legislation more befitting the local needs and circumstances, rather than relying on English law, supplemented by edicts handed down from Jamaica, the relevance of which was not always clear. Following elections to compose the new

Cayman Islands Legislative Assembly of Vestry and Justices, the first local legislation was enacted on 31 December, 1831.

This was an entirely spontaneous local creation. The British Parliament did not give birth to it; it did not have the fiat of the Crown either directly or via the Governor of Jamaica; nor had the Jamaican Parliament sanctioned it. Thus having boldly established its own legislature, the Cayman Islands plainly was on a constitutional collision course, although it wasn't until 1863 that the matter came to a head. Folklore has it that it was only when a Danish diplomat was received in the Cayman Islands without reference to Jamaica or the United Kingdom that the Jamaican administrators started to pay attention to what was actually going on in the remote little outpost.

What started as an innocuous incident in the Cayman Islands had, ultimately, to be resolved in London with the passage of the Act of Government of the Cayman Islands in 1863. This Act recognised the local legislature and clarified which of the Islands' domestic affairs the local legislature would have responsibility for. It also introduced a process for validating previous Acts of the local legislature, while at the same time formally establishing the Cayman Islands as a dependency of Jamaica and thereby a British colony.

As a consequence of this new constitutional status, the Governor of Jamaica would exercise authority over the Cayman Islands as if it were a part of Jamaica; the Supreme Court of Jamaica would have jurisdiction to hear any cases that could not be tried in the Islands; and all laws that were valid in Jamaica at the time applied to the Cayman Islands. This regularisation would prove to be important, although it was not without some complications when the enterprising and ambitious Caymanian legislators exceeded their new remit on no fewer than 15 separate occasions, thus requiring further legislative intervention – this time by the Jamaican Parliament in the form of the Cayman Islands Government Law 1893. This new law accorded wider powers to the Cayman Islands Assembly to legislate for the peace, order and good government of the territory.

Thus the constitutional position of the Cayman Islands was put on firm foundations and the sources of Cayman Islands law clarified. However not much else changed as far as the day-to-day life and fortunes of the people were concerned. For all intents and purposes, the Cayman Islands was a colony of a colony and, for the most part, its sense of isolation and neglect continued. While Jamaica was in time able to secure further constitutional

advancement – the 1944 Jamaican Constitution, for example, provided for universal suffrage, a limited form of ministerial government and the recognition of political parties – none of this was applicable to the Cayman Islands.

These inequities and the relative disparities in development and wealth between the various English-speaking Caribbean jurisdictions would come to a head in the wake of the Second World War and in the context of the decolonization process that ensued. The preferred basis upon which the British possessions in the Caribbean were to be decolonized was for them to be granted independence as part of a newly minted federation and, to this end, the West Indies Federation was established in 1958.

Although the Cayman Islands was nervous and suspicious of the new Federation, it was not necessarily averse to strengthening ties with Jamaica and the other territories of the British Caribbean, subject to certain important considerations. In this regard, one commentator in 1956 summed up Cayman's position as follows: "we wish to restate, as clearly and as strongly as we can, three main aims. First, we wish to retain the right to control entry to our Islands. Secondly, we wish to retain our rights to decide

what taxes should be imposed upon us. Thirdly, we wish to retain our right to maintain our established channels of trade and employment overseas.”

The prospect of Jamaican independence in 1962, and the creation of the West Indies Federation necessitated a direct constitutional link between the Cayman Islands and the United Kingdom. This was established by the passage of the Cayman Islands and Turks and Caicos Islands Act 1958, which facilitated the first bespoke Cayman Constitution by way of Order in Council in 1959. But with the demise of the Federation, Cayman had a choice: stay with an independent Jamaica or become a Crown Colony. There was a sense that Cayman could only achieve greater self-government if it remained with Jamaica. There was, however, resistance to the Jamaican option and in the end the three Cayman Islands resolved to continue their association with the UK and to negotiate for further internal self- government.

What might be described, albeit with a touch of artistic license, as Cayman’s Brexit moment – the point at which regional integration fell apart and the Cayman Islands opted to forge a future that bucked the prevailing trend – was in fact therefore more of a “Br-entry” than a Brexit.

These new arrangements were crystalized in the new Cayman Islands Constitution Order of 1962, although this contained no major differences from its 1959 predecessor, the key features of which were: the appointment of an Administrator, the forerunner of the current Governor, who would possess all the powers formerly exercised by the Governor of Jamaica in respect of the Cayman Islands and who, like the Governors that have succeeded him, was appointed by the Government of the United Kingdom as the Crown's representative in the Cayman Islands; and a smaller legislative assembly of Justices and Vestrymen, comprised of 12 elected representatives, not less than two and not more than three official members and not less than two and not more than three nominated members, appointed by the Administrator on the advice of the Secretary of State.

Some further refinements were made to the constitutional arrangements of the Cayman Islands 10 years later in the Cayman Islands (Constitution) Order 1972, although these were relatively minor: the maximum life of the Assembly was increased to four years; nominated members were eliminated; the number of official members was set at three (a Chief Secretary, a Financial Secretary and the Attorney General); and, perhaps most significantly, it was established that four of the elected members of

the Assembly would be elected, by the elected members themselves, onto an executive body called the Executive Council. For the most part, these relatively basic constitutional arrangements remained in place through to a new 2009 Constitution, the importance of which I will turn to in short order.

From a constitutional standpoint, as various former colonies in the Caribbean gained independence – starting with Jamaica in 1962 – the Cayman Islands’ decision to become a Crown Colony was perceived as increasingly odd and counter-intuitive to the drive elsewhere across the region and the almost singular focus on taking total control of one’s destiny.

One key to understanding the peculiarities of the constitutional history of the Cayman Islands lies in an appreciation of the economic and developmental challenges we have had to face and overcome. Writing in the Sunday Times in April 1957, Ian Fleming summarised the extremely limited nature of the Cayman Islands economy thus:

“There is no industry in the Cayman Islands except banking the money, which the Caymanian seamen send back from all round the world.”

By further explanation, there was little or no telephone service in the Cayman Islands, electricity did not extend to all districts and there was no

piped water supply or sewerage system. Mosquitoes were so thick at certain times of the year they suffocated cattle. Many roads were unpaved, there were few restaurants and shops and just the beginnings of a tourism industry, geared mostly toward scuba divers. The Cayman Islands was a most unlikely place for the makings of a world-class financial centre.

So what brought about this amazing transformation? Like many of our Caribbean neighbours, Cayman initially looked to encourage tourism. But tourism is not what distinguishes the Cayman Islands from other Caribbean jurisdictions – this distinction belongs to our Financial Services Industry.

The origins of this industry lie, among other things, in the unravelling of the West Indies Federation and the search for an alternative path. The Cayman Islands began putting in place the foundations of the industry in 1961 with the passing of the Companies Law, the first piece of legislation to directly promote the Islands as a financial services centre. This Law made it possible for companies to register in the Cayman Islands without any reference to Jamaica, or indeed anywhere else, and the registration fees, along with revenues from pre-existing customs duties, proved sufficient to ensure the Islands were not financially dependent on the United Kingdom.

Other significant legislative advances in the development of Cayman's financial services sector came with the Banks and Trust Companies Regulation Law and the Exchange Control Regulation Law, both enacted in 1966.

The continuing link with the United Kingdom also provided confidence and a sense of stability. Key to the Cayman Islands' success was an integrated development plan, which recognised that the updating of public facilities, improvements to roads, the introduction of telecommunications and, most notably, mosquito control were not simply a means for improving the standard of life for Caymanians, but also a vehicle for driving economic growth by enhancing the visitor experience and attracting overseas professionals to work in the Financial Services Industry.

The tax-neutral nature of the Cayman Islands has established the jurisdiction as a hub for financial services expertise. There are no taxes on income, profits, wages or on profits and capital gains from investments. There are no sales taxes and no death or inheritance taxes. Instead, the Cayman Islands Government derives its revenue from customs duties, work permit fees, tourist accommodation tax and licensing fees imposed on the financial services sector.

Over the decades that followed, Cayman has continued to refine and improve its financial services products. More recent examples of cutting-edge legislation include provision for STAR trusts; exempted limited partnerships and limited liability companies. A capacity to respond to the market – often with the input and assistance of local experts – to specialise and, if necessary, reinvent itself - has stood the jurisdiction in good stead and served to differentiate the Cayman Islands from other international financial services centres.

The constitutional and economic history of the Cayman Islands is instructive and the close connection between the two evident. The importance of the constitutional underpinning for economic development was recognised at an early juncture by the pioneers of our Financial Services Industry, including former Financial Secretary, the late Sir Vassel Johnson, largely regarded as its chief architect, who sagely prophesied in 1959 that: “A constitution is very important to any country because it is the basis on which all future development, prosperity, peace and harmony will rest.”

Professor Andrew Morriss, Dean of Law at Texas A&M University, and Professor Tony Freyer of the University of Alabama, put it this way in their

2013 work entitled “Cayman as an Offshore Financial Center: Structure and Strategy Since 1960”:

“The Cayman Islands is one of the world’s leading offshore financial centers. Their development from a barter economy in 1960 to a leading offshore financial center for the location of hedge funds, captive insurance companies, yacht registrations, special purpose vehicles, and international banking today was the result of a collaborative policy making process that involved local leaders, expatriate professionals, and British officials. Over several decades, Cayman created a political system that enabled it to successfully compete in world financial markets for transactions, participate in major international efforts to control financial crimes, and avoid the political, economic, racial and social problems that plague many of its Caribbean neighbours.”

At the heart of this collaborative decision-making, according to Freyer and Morriss, was the constitutional structure, which established the platform via a combination of local political input through the elected representatives; local administrative vision in the form of the ex officio appointees; expatriate expertise, which in the absence of organised political parties, had more of a voice than it otherwise might; and a

balanced relationship with the United Kingdom in which the Cayman Islands was able to exercise sufficient autonomy and derive all the benefits that the connection with the United Kingdom brought, without the burdens of colonial exploitation from a former era.

The Cayman Islands is unusual in that its Government deliberately constructed a financial regulatory system that enabled the territory to achieve more economic development and diversification than its peers. Its success can be measured in per capita wealth, with the Cayman Islands enjoying the highest ranking in this regard in the Caribbean and, consequent upon the development of its financial services sector, putting it on par with Britain. Between 1960 and 1980, both legally and economically, the Cayman Islands went from being one of the least developed jurisdictions in a poorly developed region to surpassing the United Kingdom in GDP per capita terms and, during that same time, effecting a sophisticated body of financial law.

As a jurisdiction, Cayman has always ensured that it kept, and keeps, up-to-date with emerging trends, reacting swiftly to ensure that the legal framework evolves accordingly and institutional confidence is preserved and always operating based on ethical principles.

To these ends, the Cayman Islands has led the way with its adherence to relevant international standards, for our experience is that it is not the absence of regulation that has promoted business, but the introduction of sensible and balanced regulation as circumstances demanded that has generated good and indeed sustainable business. The Cayman Islands therefore seeks to operate based on proportionality in regulation, such that before a measure is introduced we like to be satisfied that is necessary; appropriate given the nature of the financial services business in the Cayman Islands; and proportional to the identified risks. In short, the regulatory impact and its benefits outweigh the costs.

This should not be taken to mean that we are reluctant to adopt international best practice; rather that where appropriate and with due sensitivity towards the right to privacy of personal financial information, we seek to be at the forefront of these developments. Hence the progressive reinforcement of our commitment to international cooperation, beginning with the US Mutual Legal Assistance Treaty 1986 and the continuing willingness of the Cayman Islands to negotiate additional agreements for cross-border cooperation and information exchange with key jurisdictions.

Our on-going legislative agility is further evidenced by the fact that in the final sitting of the Legislative Assembly prior to the forthcoming General Elections in May, which I have broken from to join you here today, there is a packed legislative schedule in which we have already passed legislative amendments that outline definitions of beneficial ownership and enable the creation of a searchable corporate ownership registry for access by law enforcement and tax authorities.

Throughout my presentation I have sought to demonstrate the symbiotic nature of our constitutional and economic development and the importance of the rule of law to Cayman's success as a country.

The evolution continues.

By 2001 it was plain that the Cayman Islands constitutional development had lagged behind the pace of economic and political development and that modernisation was necessary, including the critical need for a Bill of Rights. The constitutional arrangements had remained largely the same as those introduced in 1972, which had themselves not moved on significantly since the first Constitution in 1959 – but there was still a balance to be

struck and there would be danger, not least to the economic prosperity of the Islands, if the process resulted in uncertainty.

The 2009 Constitution created the office of Premier with the power to appoint ministers, increased the executive authority of the Cabinet with respect to policy making and established or gave constitutional standing to a range of institutions supporting democracy such as the Human Rights Commission, Commission for Standards in Public Life, Constitutional Commission, Advisory District Councils, the Office of the Complaints Commissioner, Register of Interests for public officials and a Freedom of Information office. It also enshrined the establishment of the Courts of Law and the independence of the Judiciary.

The new Constitution – with the expert assistance of Sir Jeffrey Jowell – managed to successfully balance increased local autonomy with greater powers accorded to the locally elected representatives and a parallel reduction in the role of the appointed Governor, with the necessity of maintaining a firm platform for the continued development of the financial services sector in the Cayman Islands. The uncertainty that oftentimes comes with constitutional advancement was avoided and the guiding light in realising this outcome was the further enhancement of the various

principles considered central to respect for the rule of law. These pervade the new Constitution at every turn and also informed a range of other contemporaneous legislative and administrative initiatives. Together they represent a concerted and strategic effort to place the Cayman Islands on the strongest possible footing.

In these times of uncertainty, I am both comforted by and confident in our new constitutional guarantees and our strong heritage and culture of adherence to the rule of law. These are, I believe, the best security any country can have and, if our past is any indicator of our future, the Cayman Islands will not only survive in this new and evolving world order, but indeed will continue to thrive.

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