Opening of the Legal Year
14 January 2009

Remarks by the Chief Justice

The Honourable Sir Burton Hall

Daily our media publishes reports of the dire circumstances which have led to violence in our streets. The increase in crime is a clear indicator of the breakdown of our traditional family structures. As the strain of daily life takes its physical and emotional toll on our people, the resultant stress impacts negatively on their intimate family relationships. Many of our people, particularly those caught up in negative cycles such as children who daily witness high conflict family disputes, do not instinctively have the coping skills to assist themselves and those around them to deal with life and society's pressures. Violence learned in the family becomes violence enacted in the community. As family life, and its concomitant relationships, is the cornerstone of a wholesome society, drastic intervention is required.

My Lords, My Ladies
Mr Attorney
etc,

I have the pleasure and the duty to welcome and thank each of you for showing us the courtesy of taking the time to share this occasion as, once again, the calendar obliges me, as Head of the Judiciary, to take the bench with my brother and sister judges in ceremonial sitting.

I thank the Very Reverend Patrick Adderley, Dean of Christ Church Cathedral, for allowing use of the Cathedral for our annual official service, the Reverend Michael Gittens for having conducted the service, in the absence of the Dean (to whom we extend condolences on the death of his uncle, whose funeral coincides with today's ceremonies) and the Reverend James Moultrie for his sermon reminding us of our responsibility – institutional and personal – as salt of the earth

I thank the Most Reverend Patrick Pinder, Archbishop of the Catholic Archdiocese of Nassau, for his invitation to us to join in last Sunday's traditional "Red Mass", and I am certain that I speak for all here present when I declare that in the face of "criminality, injustice and widespread turmoil" that threaten to overwhelm us in The Bahamas and, indeed, the world beyond our national confines, we recognise and accept his reminder that "the pursuit of peace . . . is an obligation . . . a social as well as a legal contract . . . a bond from which [we], in honour, cannot draw back".

I thank the Commissioner of Police for the usual excellent presentation of the guard of honour by the Internal Security Division accompanied by the Force Band and for the facilitation of our procession by the Traffic Division.

Over the years that I have performed this duty, I, like my predecessors, have used it as an opportunity to inform the public of the work of the trial courts over the preceding year (a task made simpler by the preparation of a written report in more recent years) but, more importantly, to bring to the attention of the legislative and executive branches of government the enhancements which the experience of the judiciary has shown to be necessary for the more effective delivery of judicial services to the community. It is a matter of regret and frustration that most of these matters – including premises, civil procedure reform, the reorganisation of the Registry, a properly staffed IT department, a rationalised court security and court reporting systems, legal aid, restructuring of the subordinate court system – have, for the most part, not yielded the courtesy of an acknowledgement much less a response inviting a discussion of the merits – or demerits – of the suggestions mooted – and, on this eighth occasion, I do not intend to further agitate or aggravate myself or try your patience by regurgitating these unresolved issues. I simply invite those interested to visit the court's website where each of my past seven speeches is posted and to affirm that I will continue to make myself available to discuss them when the priorities of the other branches of government are such as incline them to address these concerns.

You would be relieved that this tact results in substantially abbreviated remarks by me today.

The Supreme Court

During the past year, we welcomed and bade farewell to Madam Justice Rubie Nottage whose brief tenure was spent in the Family Division. As I alerted you last year, Mr Justice Mohammed's term of office determined during the latter half of 2008.

I publicly thank them for their service and wish each of them well in their future activities.

Mr Elliot Lockhart, a counsel and attorney in private practice agreed to assist with the disposition of criminal matters for six months beginning on 1 April. Those six months have stretched into – now 11 – and, in thanking him for his service and sacrifice to so assist, I would understand if he is not anxious to so volunteer in the near future.

His Excellency, the Governor General, on the advice of the Judicial and Legal Service Commission (the "Commission") appointed Mrs Claire Hepburn, an attorney in private practice and, more recently, Her Majesty's Attorney General, as a Justice of this Court and Madam Justice Hepburn assumed office on 1 October.

Last year, I announced that Mrs Estelle Gray-Evans, Registrar of the Supreme Court, had been appointed to act as a justice with effect from 1 September 2007. She was appointed a Justice with effect from 1 November 2008 and continues her assignment as the permanent judge in the Northern Region.

I warmly welcome Justices Hepburn and Evans to the bench and have every confidence that each of them will thrive on the challenges which high judicial office brings.

The Registry

Consequent upon the appointment of Mrs Estelle Gray-Evans as Justice, Mrs Donna Newton has been appointed as Registrar and Mrs Marilyn Meeres, formerly Senior Stipendiary and Circuit Magistrate, has been confirmed as a Deputy Registrar as has Mrs Tabitha Cumberbatch, who has been promoted from the post of Assistant Registrar.

In the last quarter of the past year, Mrs Cumberbatch, who has the responsibility of managing the Probate Division, in preparation for the work that will be required of that Division in light of a new Probate Act and rules intended to modernise and simplify that work of the court arising out of the inevitable reality of human life, namely, death, led a team to London, England and I have made a copy of her report available to the Attorney General. It should, accordingly, come as no surprise to the Executive when we add to our list of outstanding concerns alluded to earlier the need for personnel and facilities to facilitate the new provisions. I commend Mrs Cumberbatch for the enthusiasm and energy that she has brought over the past nearly two years to this project which she has midwifed along with a small number of practitioners in this area and the Law Reform Commissioner in the person of Mrs Tina Demeritte-Roye.

New to the registry is Ms Koschina Marshall, formerly of the Office of the Attorney General, who has been appointed (initially in an acting capacity) as an Assistant Registrar and who has been assigned responsibility for dispute resolution conferences, a skill in which she has had the benefit of more formal training than any other judicial officer. When I welcomed her I warned her of the challenges she would face as a judicial officer, as such, requiring lawyers, and litigants in person, to do what they would prefer not to. Nine months into her appointment she has been able to contribute to the change in culture which judges and registrars have had to "force ripen" since this procedural step was introduced in 2004.

The Magistracy

At the end of December we welcomed to the magistracy Mrs Ancella Williams who we trust finds the rough work of dispensing justice at the level at which most persons make contact with the judicial system professionally rewarding.

Again, I thank the members of the private bar who have continued to assist by sitting as acting magistrates in the "Night Court", which hears traffic and civil matters and special mention must be made of Ms Renae Mackay and Mr Andrew Forbes whose acting assignments were performed during full time sittings, Ms Mackay in Nassau and Mr Forbes in Freeport.

Early in the year, the Commission will seek to ensure that all the vacancies in the magistracy are filled, a need especially acute for the Family Islands, where the challenges include the high costs associated with air transportation between the Capital and the Family Islands and accommodations and ground transportation within the Islands.

Among those matters on which I have not received the courtesy of a reply is the proposal to enhance the status of the top tier of magistrates by recreating the present "Stipendiary and Circuit Magistrates" as "District Judges". I am reduced to the ritual of repeating the promise to these judicial officers – who represent the face of justice to most persons who encounter the legal system – that I have made in previous years, that I have not abandoned their cause.

The Bar

During 2008, 47 persons were admitted as counsel and attorneys bringing the membership of the Bar to 933.

I would remind practitioners that the Office of the Judiciary's training days for 2008 are: 20 February, 22 May, 11 September and 4 December and, as usual, I invite the Bar to make use of these dates when the Registry will offer reduced service to the public for organised programmes of continuing legal education for its members.

General Observations

Last year, I pointed out that the continuous public questions about persons awaiting trial who were on bail wholly missed the point that should be so very obvious, namely, that the concern should be the number of persons charged with serious offences who have not yet been brought to trial, some of whom were on bail but some of whom remain in custody, and announced that I would issue a practice direction on the setting down of criminal cases, arraignments and reviving the procedures which had fallen away with the abolition of quarterly sessions when the new Supreme Court Act took effect in 1997. That Practice Direction took effect on 1 July and the first "criminal callovers" were conducted during December. I, along with Justices Jon Isaacs and Stephen Isaacs

conducted this exercise during which the court fixed trial dates and ordered stays of the prosecution of several persons who, despite having been committed to stand trial, in one case over five years earlier, not only had not been brought to trial but in respect of whom no information had yet been filed in the Supreme Court. This exercise will continue during June and December of each year and, with arraignments being fixed on four specified Fridays during the year, it is intended that each person who is charged with an offence before the Supreme Court will have a date certain fixed for his trial and, if the trial is not commenced on that date, the court will require an explanation from the Crown or defence counsel and, in the absence of an explanation sufficient to justify the Court's fixture of a new date, the trial will proceed, after consideration of any objections by the accused or his counsel or the prosecution will be stayed, having considered any objection by the Crown.

During my maiden remarks as Chief Justice in 2002, I had stated that:

> I join my predecessors in declaring that, in The Bahamas, the political directorate has never attempted to subvert or direct the judiciary in the exercise of their judicial functions. . .
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> Once we move beyond first principles, however, we arrive at the day-to-day problems that the judiciary finds as irritants which, like grains of sand in a machine, serve to make the administration of justice difficult. . . [T]hat phantom entity, "the bureaucracy", succeeds in frustrating the due administration of the system by an inadequate response, when there is a response, to the necessary ancillary needs of the system. . .
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> The reality that the Judicature is a separate and independent branch of Government, supported by its own administration under the direction of the Registrar who is responsible to the Chief Justice as head of that branch of government, tends to become obscured. . .
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> **There is a school of thought, which holds that the problems which the judiciary experiences with the bureaucracy would be solved by the Judicature having autonomy over its budget and personnel. While this proposition has a superficial attraction as a clear exhibition of the judiciary not standing as mendicants on the doorstep of the executive, I do not favour such a regime. My reasons are that all of the difficulties that we experience can be reduced to one of two issues: matters of money or of personnel. As regards money, if there is one incident of democracy which is more fundamental than the principle of independence of the judiciary is the principle of accountability: all public funds are the fruits of taxes and fees which the citizens are compelled to pay and all who have access to public funds must be held accountable to the citizens for whom those funds are held in trust. This accountability cannot be other than political and, in a small country such as The Bahamas, any change would serve to merely move the political control to another point in the process which is**

> **likely to be more intrusive into the judiciary than is the present system. As for personnel**, the supportive staff of the Judicature, beyond the level of those who hold legal qualifications, numbers approximately 220 distributed among the various premises which house the Supreme Court and its annexes in the capital and Freeport, the Court of Appeal and the magistrates' courts in New Providence and other Islands in the archipelago and it is necessary for each of these persons to be part of a structure competent to deal with their appointment promotion and discipline. Again, **the size of The Bahamas makes it wholly impractical to attempt to set up a parallel system to the public service in order to mange its staff and, while we have complained and will continue to do so about staff trained in the peculiar duties of the courts being moved out of the Judicature at the whim of other agencies (and, correspondingly, wholly unsuitable persons being visited upon us), we recognise that many of our support staff prefer for their own development and advancement to enjoy mobility within a public service broader than the courts.**
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> If, then, the ancillary aspects of an independent judiciary – finance and personnel – are subject to the vagaries of the normal civil service bureaucracy, how do we ensure that bureaucratic inertia and indifference do not eviscerate the principle of judicial independence? It seems to me that this will only be met by the creation and maintenance of a culture of mutual respect and goodwill as between the administrators of the Judicature and the officials throughout the several government departments through which we must necessarily operate, all with the goal of making the system work . . .

My own disillusionment with a, perhaps naïve, reliance solely on "mutual respect and goodwill" set in as the months passed and, a year later, I was persuaded, for the sake of avoiding controversy, to delete from my prepared remarks the following:

> I devoted a considerable portion of my remarks last year to the problems which the judiciary faced in maintaining its administrative independence from certain mid-level persons schooled exclusively in the civil service mode, notwithstanding the adherence to the notion of judicial independence at the ministerial [level] . . .
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> Regrettably, during the past year, the basic constitutional lesson that, while the Executive has the duty to supply resources of personnel and plant to the Judiciary it is the responsibility of the Judiciary to manage its resources is proving painfully slow in permeating those levels of the several ministries and departments with whom we must interact as a separate branch but of the one government and too much time of the Chief Justice and the Registrar has to be devoted to what I can only charitably describe as bureaucratic impertinence.
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> I repeat my plea for the creation and maintenance of a culture of mutual respect and goodwill as between the Administration and the Office of the Judiciary as we pursue the common goal of making the system work for the benefit of the people of The Bahamas whom we all serve.

Four years later, I was obliged to return to this issue when, having observed that the "independence of the judiciary" operates at several levels which mutually

support each other and may be viewed analogously as concentric circles, of adjudicative independence, administrative independence and institutional independence, the boundaries of which overlap and shade into each other, I stated that:

> Administrative independence is, perhaps, the most difficult aspect in practice because this is daily played out in the competing concerns by which public funds are disbursed and personnel on the public payroll are engaged and deployed and the difficulty flows from the fact that the judiciary is dependent on the political directorate for the means by which it is sustained and the political directorate – in the real world, under the guise of that modern "democratic" desideratum of "accountability", held hostage by the practical need to placate its public supporters and the contending demands for schools, hospitals, law enforcement and so forth — tends to be erratic in its response to the needs of the judiciary. This is a fact of life in every country, even those which have been engaged in the exercise of democratic governance for centuries. The skirmishes inherent in this struggle (which on behalf, of the judiciary is usually carried forward by the Chief Justice) with the political and bureaucratic machinery are ordinarily played out beyond of the public gaze.

I regret to report that these conflicts have, in reality become exacerbated and, despite the reservations articulated in 2002 which I still hold, in September of 2008, I was compelled to write to the Prime Minister as follows (anoymised to avoid embarrassment to the relevant officials in this public forum):

> Once again, I am obliged to take up the issue which should have been long settled in this country arising out of the inability or unwillingness of the certain public officers, even at the most senior levels, to appreciate that the Registrar of the Supreme Court is the administrative head of the constitutionally separate Office of the Judiciary and, as such, is responsible to the Chief Justice as Head of the Judiciary, not the Permanent Secretary in [any Office or Ministry].
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> The latest instances of this bureaucratic unawareness are to be found in a memorandum of 15 September to the Registrar . . . advising that "Cabinet and Department of Public Service approvals are required" for the travel of members of the administrative staff to participate in a training course (notwithstanding that the Registrar had secured "financial clearance") and a direction to the Director of Court Services . . . that . . . the approval of the Attorney General for magistrates to travel to the Family Islands on circuit [was required]
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> **I have become convinced that this matter will only be resolved by an Act of Parliament instituting the Office of the Judiciary as an autonomous entity**.

The latest salvo in this conflict anises out of the decisions taken by the Office of the Judiciary to furnish the several rental premises which had to be converted into Supreme Court Annexes at short notice between September and October. Late yesterday, 13 January, correspondence was brought to my attention accusing "the Judiciary Department [of doing] as they wish with no regard for law

or policy under the guise of independence" and threatening the Registrar with sanctions "with regards to any further infractions".

The failure to resolve these issues will eventually and inevitably precipitate a constitutional crisis which this country can ill afford and agencies of the executive branch of government should harbour no doubts as to the resolve of this Bench to defend against any unwarranted and unconstitutional intrusion into the management of its affairs.

I, accordingly, welcome the announcement of the Attorney General that a policy decision has been taken to address this crisis. (For the record, I take issue with the accuracy of the assertion published online at ***bahammasuncensored.com*** on Sunday past that this proposal: "was offered to the Chief Justice during the [last administration but], the head of the Judiciary Sir Burton Hall did not want such arrangement").

I caution, however, that the resolution of this problem is not simply a matter of reclassifying an item in the national budget. It is inextricably bound up with other matters raised over the years including those addressed in the Strachan report on the Registry in respect of which, as I pointed out last year, no action had been taken since its delivery to the Attorney General in December of 2005.

During her period of service, now retired Justice Nottage accepted my invitation to chair a committee – whose membership included, the Family Division Registrar, the Chief Magistrate, an attorney nominated by the Bar, a draftsman from the Office of the Attorney General and one of the listing officers – to consider and make recommendation for enhancing the services which the courts are obliged to provide for families. That Committee reported at the end of August and I directed its publication on the Court's website and circulated it to every media outlet inviting public comment by 30 November intending that, beginning early in 2009, the recommendations will be implemented as resources allow.

I was disappointed, that only one news outlet saw fit to make use of the report and then only to publish a sensational story about the number of divorces and few public comments have been received.

I began my remarks with the penultimate paragraph of that report which concludes:

> Our Committee believes that, faced with these stark realities in our society, one of the first steps in the right direction must be the improvement of the family court legal system. A Family Court system must be designed for our Bahamian context - one which makes access to a justice that is holistic in nature and curative in effect. It must be one that is more user-friendly than present and one in which the whole community is involved in taking our judicial system to another

> level. It is in this light that we humbly place the proposals set out herein for your urgent consideration and implementation. Hopefully, it will begin the process of providing, through a hybrid family court system, not only a normative, institutionalized and coercive legal system but also an integrated psycho-social healing that is deliverable at a personal, familial and community level.

Without losing sight of the work of the other divisions of the court, my administrative focus for the first half of the New Year will, therefore, be on the family courts, both at the Supreme Court and magistrates' court levels and I hope to incorporate into this work the pilot community court for juvenile matters, an initiative in which the Eugene Dupuch Law School has taken an enthusiastic interest.

I plan in the latter half of the year to turn my attention to the Commercial Division. In 2002 I had noted that:

> I begin by re-affirming two bedrock principles. First, the bench in The Bahamas is too small for there to be specialist judges. While, as in any other area of life, individual judges may have particular preferences or greater skills in specific areas of the law, each judge must be a generalist and able to take the bench in any division of the Court. Secondly, the principle of equal access to the courts means that no aspect of the court's work can ever be seen as less important than any other area: those accused of criminal offences, those involved in contractual disputes, parties in divorce actions, those with claims in land law, etc., all have a legitimate expectation for the timely resolution of their matters. However, that having been affirmed, the practicality is that, The Bahamas having chosen the provision of financial services as one of the pillars of its economy (and, consequently, a source of revenue necessary to fund other court services), the commercial business of the court is work which affects parties from every corner of the planet and, as we are then participants on a stage not confined by our national borders, international litigants who fail to obtain access to our courts for the fair, efficient and speedy resolution of their disputes, have the ability disproportionate to their numbers as litigants to ruin our reputation around the globe.

and, in 2005 I had advised that:

> One [courtroom in Nassau] will be dedicated to commercial matters, a step in the direction of making particular provision for the hearing of commercial matters as is required for The Bahamas as a financial centre. Apropos the last mentioned point, representatives of the Bar in Nassau and Freeport have been apprised of the intention that, as soon as administrative convenience allows, all major commercial matters which involve a large number of counsel from abroad . . . will be heard in the Supreme Court at Freeport. The Court will, therefore, have a choice of facilities – in Nassau or Freeport – dedicated to its "Commercial Division".

I intend shortly to appoint a working group to make recommendations on the way forward for The Bahamas in this sphere where it finds itself in keen competition

with regional players such as the Cayman Islands and the British Virgin Islands. As soon as I have identified a judge to lead this group I will request Bar Council to nominate two practitioners from the commercial bar to assist and seek a report by mid-year.

Conclusion

I now formally declare the legal year 2009 opened and I invite you to share refreshments, as guests of both the Bench and the Bar, in the gardens of the Ministry of Foreign Affairs on East Hill Street. I thank the Minister of Foreign Affairs and the Permanent Secretary for making their premises available to us. Those of you who would have attended these ceremonies in recent ears will readily appreciate that we have long outgrown court facilities able to host this event. The Director of Court Services and the Honorary Secretary of the Bar Council will be your hosts until the Justices and Registrars are able to divest themselves of their costumes and join the reception in progress.

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