ADDRESS BY CHIEF JUSTICE SIR HARTMAN G. LONGLEY AT THE OPENING OF THE LEGAL YEAR ON WEDNESDAY 13TH JANUARY, 2016

Laying The Foundation of A Modern Bahamian Judiciary

LADIES AND GENTLEMAN,

Today marks the first occasion I get as CHIEF JUSTICE to address the Opening of the legal Year, having been appointed to the post on 1st February last year.

And so I begin by first giving thanks to God and to the Government and people of the Bahamas, my beloved country for this opportunity to serve her as Chief Justice. I especially wish to publicly acknowledge and thank the many people, friends and family, who have supported me and who have prayed for me this past year. This could not have happened without your support and more importantly it could not have happened without your prayerful support. To all present here today, I tell you this is a testimony of the existence of and reason for the belief in an all-powerful but merciful God.

And it is against that backdrop and with a deep sense of humility that I accept the charge of my beloved Bahamian people of this great Commonwealth to lead the Judiciary of this country as Chief Justice.

Let me however hasten to add that I accept this high office in the full recognition that it is an awesome responsibility and that it will take the full cooperation of all stake holders to ensure that the job gets done properly and efficiently.

Perhaps more that anyone here I recognize as Dame Joan so often said, “Justice is a cooperative exercise. It takes the demanding effort of all persons involved in the administration of justice to get the job done properly”.

And so I turn to my colleagues on the Supreme Court, the Court of Appeal, the Industrial Tribunal and the Magistracy, as well as the members of the Public and private bar to work with me in that spirit of co-operation to make the judiciary of this country a first class, first world efficient and professional judiciary second to none anywhere.

And so I thank all of you for your support this past year and do look forward to working with you for the remainder of my term.

At the outset, I wish to acknowledge the presence of and recognize the following persons:

I especially wish to thank the very reverend Patrick Adderley the Dean of Christ Church Cathedral for hosting the annual service to mark the Opening of the Legal Year. As usual his sermon provides spiritual food for thought and guidance as we begin the awe inspiring task of doing justice between man and man. This Morning he reminded us that it is God that we look in order to solve the myriad of problems that beset us and he asked judges responsible who are for the administration of justice to be true in their calling.

I also wish to thank the Archbishop Patrick Pinder for hosting the annual Red Mass at Saint Francis Cathedral. In his usual insightful manner he has provoked us to action so as to let justice roll down like a mighty stream. His thoughts and reflections on mercy in this Jubilee Year of Mercy declared by Pope Francis are particularly reinforcing and instructive. As judges we must see that mercy and justice are two sides of the same coin, a correlation that has existed from the beginning of time.

I also recognize Dame Anita and my colleagues from the Court of Appeal. It is my hope that one day we will have a judicial edifice that would allow for members of the Court of Appeal to sit alongside the members of the Supreme Court. There is only one judiciary and there is only one Opening of the Legal Year and unfortunately, the unity that is the judiciary should be reflected at this statutorily mandated opening.

I take this opportunity to recognize Justice Roy Jones who left us at the end of the last year for greener pastures in the Court Of Appeal. Justice Jones gave stellar service to the Judiciary. I think as all of you can attest, principally as a judge of the criminal side, we thank him for his service and wish him well in his new post.

I also recognize present Lisa Johnson of the US Embassy. I especially want to thank her, the us embassy, the National Center for States Courts for the very generous contribution made to the College of the Bahamas for helping us to host our recently concluded workshop on improving Written and Oral Judgments.

I also wish to take this opportunity to recognize one who should actually be sitting where I am. Sir Michael Barnett, my immediate predecessor. Sir

Michael, who is a very good friend, a gifted jurist who has served his country with distinction. His service as Chief Justice was just too short. My fervent hope is that he will soon find another place in the judiciary to demonstrate his immense Judicial skills.

I particularly want to thank him for his help over the last five years and most important, the seamless transition and for his continued support and cherished wisdom. Sir Michael you are missed. I continue to wish him and Lady Barnett well.

I told Sir Michael the joke about a bystander who saw a man who was wailing at a grave site in the grave yard. The man was crying out' Why did you die? Oh why did you die?' Finally he got the courage to ask the man about the person in the grave wanting to know if it was a very close relative. Curiosity having got the better of the bystander he asked the man if it was a wife or close relative. The man said no, it was my wife's first husband. It was his death that got me into this mess. It was Sir Michael retirement that got me into this.

Ladies and gentleman,

The task at hand is to begin to build a Judiciary that is far more responsive to the cries of the litigant than it has been to date so that justice might roll down like a mighty stream. In short we must build a modern Judiciary.

Roughly eight hundred years ago, (the year 1215) men and women in search of justice gathered at Runnymead meadow in England ready to do battle with the despotic King John. History records that the opposing parties avoided blood shed that day as they reached an accord that has come to be known today as the Great Charter or Magna Carta.

That Historic document has been hailed down the ages by many – including some in our own jurisdiction- as one of the most revolutionary bill of right ever produced by man. No less a person than Lord Denning is alleged to have referred to it as "The greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the Despot"

Two clauses in particular – clauses 39 and 40- have stood out and have been hailed as the foundation of Democracy.

Clause 39 provides:(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

And clause 40 provides:

(40) To no one will we sell, to no one deny or delay right or justice

These two clauses appear to speak to different rights but they are in fact part and parcel of the same right and are inextricably bound. The common thread is -The law must serve as an instrument for the protection and enforcement of right and justice, not as an instrument for the denial or delay of rights and justice. Delay which has the effect of depriving one of rights, whether or not there has been a trial, is unjust and is to be abhorred. It is small wonder that these two clauses follow consecutively in the Charter.

Trial by jury and swift trial or justice without delay was two of the major planks of that historic search for freedom and justice for all.

Unfortunately, 800 years later we in the Bahamas find ourselves confronted with the very vexing and pervasive problem of delay and a denial of justice that Magna Carta tried to address in order to avoid civil war in England. And the sscale raises serious questions.

I cite as an example a recently encountered but particularly telling case: I had to deal with an application for leave to appeal out of time against a term of imprisonment of a young boy, a juvenile, which application was made in 2008. A 6 month term of imprisonment at the Industrial school had been imposed upon that juvenile by a Magistrate for one who did not have any prior convictions. The Juvenile had to be legally aided and by the time the application was filed in 2008 the time for appealing had passed, therefore leave to appeal out of time was sought .

The application which was made and filed in the Registry of the Supreme court in 2008 and was not set down for hearing and did not come on for hearing before me until November 23rd 2015, more than seven (7) years later. By then the juvenile had served his time and no doubt was no longer a juvenile. Faced with those circumstances Counsel from the Legal Aid Clinic had no choice but to with draw the application.

By any yardstick this was a denial of justice brought about by delay for whether or not the appeal would have succeeded, and it might have having regard to the antecedents,, there can be no doubt that the applicant was entitled to be heard within a reasonable time. He was not.

We can all ear the words of Magna Carta in echo; (40)To no one will we ……..deny or delay right or justice.

In this case we have failed.

One case of injustice due to delay is one case too much

But that is just the opening volley.

What has been uncovered in the last few months is even more mind boggling. An almost casual search of the Appeal's Registry of the Supreme Court in Nassau has revealed that just for the period 2008 to 2015 there are more than 200 Magistrate Civil Appeals and roughly 100 criminal appeals that have not been heard. The number of these cases in Freeport appears to be even greater.

These are matters that have just sat untouched in the registries of Freeport and Nassau for years in someone's drawer with no sense of accountability or responsibility. They simply have not been set down or followed up and there was a complete breakdown in supervisory oversight. In many cases those responsible have not been as diligent as they should have been in seeing to it that the records have been prepared for onward transmission to the Supreme Court and the absence of Court reporters has not helped the process. Indeed it has hampered it.

The lists are actually much longer but we have stopped at 2008 in order to begin the process (which has already begun) of having these matters set down for hearing so that justice might at last come to those who came to the Court of the land in search of it.

These are particularly telling statistics because the full implication of them must be realized if we are to be spurred to action and to ensure that this does not happen again.

Persons go to Magistrate Court seeking justice. They get a judgment, then the other side appeals. That very act when done in time has the effect of staying or suspending the execution of the decision made by the Magistrate until the appeal has been heard. So, for example, a mother who comes to Court for child support gets judgment, the Father appeals. The judgment is stayed until the appeal has been heard in the Supreme Court. So there is no money for the child until that father's appeal has been heard and determined. Or a landlord comes to court for rent for eviction. Whatever the claim, the judgment is stayed, until the appeal shall have been heard.

Naturally one would expect that the courts would move expeditiously to get these matters heard.

THAT HAS NOT BEEN THE CASE. PEOPLE HAVE LITERALLY BEEN SLEEPING ON THE JOB WITH NO EFFECTIVE SUPERVISION OR FOLLOW UP AND THE BUCK IS PASSED FROM ONE TO ANOTHER.

This is obviously unacceptable. But the legal profession, public and private has a responsibility in the matter as well. In all my search of the first three hundred (300) matters that were pulled up, civil and criminal involving both the public and private bar, I believe I may have found only about five (5) letters, which went unanswered, from lawyers asking for their matters to be set down for hearing.

And so it seems the appeal in many cases was filed as a get out of jail free card.

For if the appeal is not set down for hearing, the victor , in the court below, would be deprived of the fruits of victory – not with a gun or a knife or any weapon- but by delay which was spawned in most cases by neglect .

But that still does not tell the full story. One phenomenon that is frequently occurring particularly at the Magistrate's Court level is outstanding warrants in part heard cases.

While the numbers are still being compiled, it is fair to say from what we know already, that thousands of people who were charged with criminal offences in the Magistrate's Courts are on the loose with very little chance of them ever being brought to trial.

The police are not executing the warrants and the bails are not being enforced.

The administration of justice is being abused with impunity.

What is happening is that a trial comes on in the Magistrates' Court, after taking the evidence of maybe one or two witnesses the matter is adjourned, sometime repeatedly before it gets back on for trial. By then the Defendant and sometime the virtual complainant have all lost interest. The Defendant fails to show and a warrant is issued for his arrest. The trial goes cold. It is adjourned sine die or to a date while the Magistrate awaits the execution of the warrant of arrest assuming the warrant has been typed. In some cases Magistrates have not had the warrants typed. In one Court there was almost 6000 un-typed traffic warrants.

The number of these matters- several hundred criminal matter and several thousand traffic warrants just in the last five (5) years. Imagine the impact of that. I am told that the vast majority of these warrants are never executed. I had a cursory look at one list and saw a name of a person who had been walking around town with impunity.

These cases are never heard again. Justice is not only delayed but denied. This abuse needs to be addressed as a matter of urgency because it gives rise to serious concerns. There is a significant number on the Civil side as well.

Clearly, there needs to be reform in this area. First of all we need a much more effective warrant execution unit of the Police force to carry out the arrest, which is a matter for the Cop. I shall hope to meet with the Commissioner of Police in coming weeks to see how we may address this matter.

We also need to reform the way trial are conducted. A trial should not be put off because a defendant absconds. The trial should continue in his absence and so when he is arrested a warrant for commitment is issued if he has been found guilty. Imagine an arrest taking place three (3) or four (4) years later. How would the trial then proceed?

Magistrates are therefore being encouraged to examine these situations carefully and to proceed in the absence of Defendants where appropriate.

Also we need to revise the bail surety provisions to ensure greater accountability of suretors in these matters and make certain they are called upon in a timely manner to answer for the absence or non-appearance of the Defendant.

This is not a state of affairs that we can allow to continue. No doubt it is going to take substantial resources to deal with this problem, including the detailing of a more effective unit of an already burdened police force dedicated to bringing in these Defendants.

On the Civil side of the Supreme Court we have a number of judge made issues as well as systemic problems that have contributed to delay.

Some progress is being made in the delivery of outstanding judgments, some of which have been outstanding for more than three years. This has been a painstaking process.

I have implemented new time frames for delivery of judgments- three months for trials and one month for interlocutory matters. My hope is that judges and other judicial officers will work diligently to meet these new time frames.

The excessive delay in the delivery of judgments has called into question the selection process for judges and questions whether the screening process should be revamped and improved.

However, it also brings into focus the need for continued training and education of judges and other judicial officers and the need for performance Standards so as to weed out those who fall short.

We have just completed a Judgment Writing course which I made reference a little earlier to, which was sponsored by the National Center for States Courts (NCSC) and the US Embassy, The objective of which was the improvement of written and oral judgments. New techniques were imparted and I am happy to say all judicial officers save one (for medical

reasons) attended the two day workshop. It is hoped that this is one of those areas of education that will produce tangible results to the benefit of all in short order and help to achieve the new time frames. In particular with improved writing and oral skills there will be more timely delivery of judgments- both written and oral- thus cutting down this area of delay that impact the quality of justice

And in that regard I wish to thank the NCSC and in particular Kristin Gilmore of the US Embassy and Joanne Richardson of the National Centre for State Courts. We do look forward to working with you in the future.

Also in this regard, I should say that the President of the Court of Appeal, Dame Anita and I intend to meet shortly with the Attorney General to try to statutorily advance the Judicial Education Institute. Draft Bills (one of which was drafted by the President) have sat dormant for years. Now is the time to bring them to the fore so as to give statutory structure to and ongoing training and education program for judges, magistrates and other judicial officers.

My hope is that the Government of The Bahamas will embrace this much needed measure and provide the necessary funding to ensure its success.

So far we have been able to draw on foreign sources of funding for some training and no doubt we will have to continue to rely on external sources of funding where possible.

But we do so with the clear intent of ensuring that all judicial officers receive the necessary training and education to do their jobs competently. Continuing judicial education and training must be a major plank on our agenda in advancing and modernizing the judiciary.

Also, there has been progress in the timely hearing of civil litigation as the wider spread of civil matters , particularly interlocutory , are being heard by a wider pool of judges. This is part of an effort to make the judiciary not only more versatile but more responsive to the needs of the public. In this regard, as of 1st March the civil side should be strengthened by the additions of Justices Charles and Winder, who will move from crime to civil, and Justices Milton Evans and Fraser will move to crime. Justice Evans has experience in this area of crime as does Justice Fraser, although to a much lesser extent, and the hope is that as we move forward we will start to build a far more versatile judiciary to respond speedily to the needs of the public.

And to facilitate this transition, we hope to host an in house orientation and training program during the first week of February for the judges moving to crime.

As regards performance standards, there can be no doubt that these need to be ushered in as soon as possible because complaints are being made. One problem that I have encountered is that there is more of a whisper campaign by members of the profession rather than documented complaints.

The only way to truly deal with failing judicial officers who bring the administration of Justice into disrepute is by ensuring that those who have genuine complaints document them in a timely manner so that they can be dealt with effectively. No one should fear repercussions from a judicial officer and if there are then these should immediately be made the subject of an official complaint.

In this regard the profession has to be more vigilant and more responsive

Family Matters still constitute the bulk of the civil work in the Supreme Court and to some extent in the Magistrates Court. We need to simplify the process of divorce and family matters. Hearings should take place on paper alone as happens in some jurisdictions. All in all a more summary process should be employed for disposing quickly of family matters.

I hope that in time the Family Court will become operational soon

But there are indeed in my judgment other very serious issues on the civil side of the Supreme Court that needs to be addressed. Although I applaud the efforts of my predecessor to change the civil rules of procedure (which I hope to revisit during the course of this year) I believe that to deal with the growing volume of civil litigation and with the delay associated with that must involve addressing the question of cost. My colleagues and I are convinced that too much of civil litigation is costs driven. A case that may take a day or even half day may wind up taking two or three days just as much time or more before the Registrar on a taxation of those costs.

Registrars complain daily of having to spend sometimes two or three days taxing a bill of costs in matters that have taken less than a d ay to be heard That cannot be right. Something is fundamentally wrong with that picture. It needs to be addressed in my view.

Very often the costs in an undefended divorce petition can exceed the amount it would take to pay a crown brief for a murder case. Something just seems out of sync. We cannot continue to stay the same course and say business as usual. If a lawyer knows that the case last 10 days or 10 weeks he will only get 1000 dollars I am sure he will act with expedition to

complete it in the shortest possible time. Most reasonable lawyers will respond to a cap in fees.

I had occasion the other day to pick up a divorce file in Freeport. The proceedings were listed as a contested divorce but it was clear that the husband who was not represented at trial did not put up much resistance and the grant of the divorce was for the most part a forgone conclusion. The ancillary matters involved two children of secondary school age and a house valued at less than one hundred thousand dollars ($100,000.00) with the usual mortgage to the hilt. The spouses earned in the case of the wife less than two thousand dollars a month and the husband earned just over two thousand dollars a month. The bill of cost was taxed at roughly thirty seven thousand dollars ($37,000.00).

Now stop and think for a moment: what Bahamian woman coming from that socioeconomic background would walk into a lawyer's office and agree beforehand to pay him thirty seven thousand dollars ($37,000) dollars to divorce her husband and collect maintenance out of two thousand dollars ($2,000.00) a month when she probably by other means get rid of him for less.

Registrars are saddled with the taxation of those costs and the Lawyer is coming to Court to try to enforce the payment by any means possible including contempt.

Ladies and Gentlemen,

Consideration has to be given to a cap somewhere if we truly believe in **access to justice for all,** and this is not uncommon.

Another case of some note is one in which a preliminary point – an order 11 application for service out of the jurisdiction. The order was made exparte but was later set aside on an interpartes hearing. The bill of costs was submitted for three hundred and fifty thousand dollars ($350,000.00) There was only one appearance before the Court and it was not a trial……bill of costs was taxed eighty eight thousand dollars ($88,000.00).

While in a free enterprise system one cannot or should not curtail what the market would bear so that a litigant may go freely into the office of the lawyer of his or her choices and SUBJECT TO RULES pay whatever the lawyer charges if she wants to. But no one should expect the other side hat is genuinely and reasonably defending himself to pay those costs. This is where I think we need fundamental reform

I cannot see why there should not be a cap on what a paying party has to pay costs except perhaps in certain cases like breach of trust, fraudulent and dishonest claims and defences

The growing volume of civil litigation must spur us to reform. I know this is a controversial area to reform. In England it met with considerable resistance from the profession. But something radical needs to be done.

I shall ask the Rules Committee to give consideration to this which I recognize is a difficult issue and even in England reform on costs resulted in a controversial report.

Turning now to the criminal side

Criminal cases for the most part are being adjourned three years and that is somewhat misleading because quite a number of cases are double parked on the court's calendar as back up cases. If each case was given a separate date the true date would probably be 2020 and beyond. Because in addition to those which have been listed there are still quite a large number of cases which have not yet been brought into the calendar. An audit is underway to try to determine the exact number, a number which at the moment is elusive.

With the spike in criminal activity it cannot be gainsaid that criminal cases are coming into the system at all levels at a rate exponentially faster than they are being or can be completed.

Backlog accretion is an ever present feature of the inventory of the judiciary. It is particularly poignant on the criminal side.

The number of Criminal Courts hearing criminal cases has been increased to ten. The reality, however, is that we probably needed ten courts on the criminal side ten years ago. And if we are to tackle the backlog more aggressively, additional courts may be necessary.

There is a very large number of criminal cases in the Supreme Court that predates 2000.

Ridding ourselves of this back log is a must if the speed at which trial on the criminal side can be advanced. Some hard decisions may have to be made since it is not realistic to think that all these cases can be tried within a reasonable unless resources are increased considerably.

It is axiomatic when I say we did not get here overnight and some tough decisions may have to be made if we are indeed to move the process forward to reduce if not eliminate the delay that has produced the backlog.

Indeed some very serious considerations may have to be given to nolle a considerable number of these matters.

In this regard, let me just say something about the Governments Swift Justice program which is directed primarily at the delay in the Criminal Justice system.

Let me say that I support the concept of swift justice. The Constitution provides that trial whether on the civil or criminal side of the court must take place within a reasonable time. However what should be noted is that the reasonable time guaranteed of the constitution is the outer boundary and it is not a clearly drawn line. There is no clear line of demarcation that constitutes the reasonable time boundary. One has to consider the circumstances. But traverse or transgress that boundary and immediately the right is violated and the litigant is entitled to constitutional redress. It is therefore incumbent on the administration of justice to move with expedition and speed to ensure that even the potential for violation of the right is not contemplated. And so within the time frame of the initiation of proceedings and the reasonable time boundary, it is encumbent on us all to move swiftly or with speed to complete matters that are brought to Court. We should not be resting on our laurels and saying I still have time to go. Justice should demand that we move expeditiously. Justice delayed is justice denied is not an empty slogan. It is a fact. And so I have no difficulty embracing the concept of swift justice or justice with speed and expedition, however

adjective. In fact, I welcome it. However, let me hasten to add that swift justice cannot be imposed from the outside.

Quite apart from the fact that the judiciary is not a department of the Office of the Attorney General, but is an Independent branch of Government headed by the Chief Justice, a fact which seems to escape some in the administration at times, unless a Judge or Magistrate appreciates the need for speed in the process and buys into the concept from the day he or she is sworn in, all the technology and money in the world and talk of swift justice will not produce the desired result of the objective of swift justice. As Judges we must appreciate what Martin Luther King Jr. described as the 'fierce urgency of now'. That has to be the mantra of the Judicial officer and of the Justice system. Otherwise the litigant is lost in delay and Justice is denied and no program no matter how well designed or well intentioned will succeed without it.

I like the way the advocate judge put it in mutiny on the bounty , one of my favourites when commenting on the excessive zeal of Captain Blye‘s use of force to discipline his men that led to the mutiny on board his Majesty ship’s bounty. The Court martial Judge said: ‘No code can cover all contingencies. We cannot put justice aboard our ships in books. Justice and decency are carried in the heart of the captain, or they be not aboard.’

Justice, however adjective, must be carried in the heart of the captain of the judicial ship or it be not aboard. This quality must be carried in the heart and mind of the judge or they be not in the Court room.

If we are truly to make swift justice a reality, we must all buy into this concept if we are to improve the judicial product and become the judiciary we can all be justly proud of.

There is in my view the need for a conference on criminal law to review and make substantial changes to both practice procedure and evidence.

However, I would proffer now for consideration the following:

First, the abolition of the voir dire for determining admissibility of an alleged involuntary confession. This would undoubtedly go a long way to speeding up trials. And since the decision in **Regina v Mushtaq** there really is no logical reason for its continuation. The reality is that, it is really now a proper consideration for juries whether the statement was made voluntarily.

If that is a proper consideration for juries, and there is no reason why it should not be, then there is no rational need for that issue to be considered twice in one trial since in a jury trial the jurors are properly the triers of fact.

I also recommend for immediate implementation the abolition of preliminary Inquiries. And along with this should come direct charging in the Supreme Court of Indictable offences per se.

While there has been a reduction in time taken to produce a VBI, the fact is that , we must eventually strive to provide for direct charging in the Supreme Court of indictable offences. This is a suggestion made some years ago by Sir Burton. Obviously the difficulty with such a proposal at this stage is that it makes very little sense to implement it until the back log has been dealt with effectively because to bring into the system a new batch of criminal case at the Supreme Court level would send the trial dates off the

charts. This notwithstanding, the goal should be clear if we truly want swift justice.

It would save time and expedite the trial process.

It is my considered view however, that if we are truly to move the trial process in criminal matters swiftly, in addition to weeding out a large number of cases by Nolle or otherwise because of any number of reasons, in my judgment more fundamental reform needs to occur.

I turn now to the issue of Jury disentrenchment.

Jury Disentrenchment

This is one of the recommendations of the Constitutional Commission I support. As we try to speed up trial we must recognize that a jury trial is a cumbersome process that has for the most part outlived their usefulness. It goes without saying the vast majority of cases in our jurisdiction are tried by judge alone. What the entire Supreme Court is able to complete in one year through jury trials a single Judge or Magistrate can produce in fairly short order. There simply is no comparison. Nor is there the level of certainty of predictability. We either abolish it or limit its application to cases in which the death penalty may be sought.

Under the present system jury trial for most of our serious criminal cases is a must. Unlike trials by judge a lone, the CPC provides -section 162(2) that once a case is started it must proceed continuously to completion, for that reason there can be no lengthy or excessive adjournment of jury trials without attracting the ire of the Court of appeal, which would manifest itself

in a quashed verdict. Trial by Magistrate or Judge alone is not subject to the same stricture.

It is for this reason that some criminal cases in the Supreme Court are not commenced because a vital witness may be missing or away on vacation or engaged in some other matter which makes it impossible to begin the trial. If the trial was by Judge alone then the trial could commence by the hearing of the witnesses who are present and then be adjourned to a date when the other witnesses return to the jurisdiction or are available.

Additionally, the present jury system it is the only system in the world I know where in order to determine if the students (jury) have learned the lesson taught by the teacher (judge) is not to test the students but to test the judge. No one who has ever been convicted or acquitted by a jury from time began knows or can legitimately know the reason why he or she was acquitted or convicted. There simply is no accountability. And while one can argue reasonably that if the teacher taught the wrong lesson (i.e. gave an erroneous summation to the jury) the jury was bound to get it wrong, the converse is not true. Even if the judge gets it right there is simply no way of knowing if the jury truly understood the instructions and indeed did get it right. It is only an assumption. And with national grade averages at the hush-hush level of D, the presumption that barely literate folks got right what it sometimes takes judges lots of time to get it right seems foolhardy to me.

I attended a book launch for preschool reading and it was just frightening to hear teachers speak of teaching phonics and basic stuff to 10th and 11th graders that are generally thought to first graders. These are shortly to be our next level of jurors, a most frightening thought.

And given the impact of social media and television generally, one simply cannot be sure what influences a juries' decision, given the lack of accountability. It is all based on a presumption that they got it right.

In the last several years there have been a significant number of changes made to the Juries act. The changes range from the number of jurors, the addition of alternates, the number of votes necessary for a verdict and recently the number of challenges and the addition of family island voters to the jury list and the reduction of time to serve from three months to two months.

There can be no doubt that this slew of legislative changes made between the year 2008 and 2014 all serve to demonstrate what most observer have known for a long time that the jury system is to say the least , broken and has perhaps outlived its usefulness. The legislative changes made, which were all reactionary in nature, were made in most part to address a myriad of problems as they arose with the system.

And it would probably be braggadocios folly to suggest that they have made the system any better. Most Judges today still have a problem with the two month time frame since many cases take almost that time and to those who have to serve jurors. And many on the other side of the fence still are troubled by the reduction in the number of challenges.

Make as many changes as we are able to, however, no legislative change can address what has become the most significant and a real problem with the system and that is the number of skewed verdicts that have emanated from jury trials. In fact, it is for this reason that jury trials have been

abolished in many countries , including the largest democracy in the world, India. The jury system was and has since Magna Carta held a special place. But even the English now have responded to modern needs and the strictures of jury trials is now being relaxed in circumstances that are deemed appropriate and is not as sacrosanct as it once was.

Furthermore there can be no doubt that cases such as skip Patrick Davis which followed Hinds were all attempts made to get rid of jury trials in cases involving dangerous drugs and firearms and ammunition.

Indeed in the last 40 years no Attorney General, present company included has made it a necessary part of prosecution policy that persons charged with dangerous drugs and firearms where the amounts involved were substantial should be tried on indictment in the Supreme Court. Notwithstanding the public clamour for increased penalties for these particular offences.

The reason though unstated is clear. No one trusts the jury system in these matters. The result is that the man found with a cigarette is tried in the same court as the man found with a boat or plane load of dangerous drugs or a cache of very serious firearms and ammunition.

And so even though we have in this Court perhaps the foremost jurist in this area of the law, Justice Carolita Bethel , she will not get a chance to use her considerable experience in this area in the Supreme Court unless the law is changed or there is a change in policy which is unlikely.

One argument that is usually advanced for the retention of the system is that the more serious crimes should be tried in the Supreme Court. And the reality is that all offences except murder or manslaughter are tried in the

Magistrate's Court in one form or another. Take the offences of Zburglary and house breaking for example. The difference between the two offences is that Burglary is house-breaking by night which being at 7pm. House breaking occurs during the day. A Magistrate may try house-breaking but not burglary. No one would suggest that a Magistrate cannot tell the difference between night and day. Or take robbery and armed robbery. Technically robbery is stealing with violence. Armed robbery is stealing with a gun or other weapon. Again Magistrates try all the gun offences and weapons charges. So what is the logic for saying the jury system need to be retained. We can say the penalty is stiffer in the Supreme Court. That is true. But if you check the changes to sentencing laws over the years you will find that sentences which were once preserved for the Supreme Court are now being imposed by the Magistrates' Court. The severity of the penalty is really an accident of history more than anything else and it was cases like skip Patrick Davis that forced a cut back or reduction for Magistrates Courts. And in any event what is not well known is that after a Magistrate has convicted a person for say house-breaking or any indictable offence instead of dealing with that person under the limited sentencing powers of the Magistrates Court he or she may refer the matter to the Supreme Court for sentencing. This used to be done years ago but it is a practice that has now ceased. And even though murder and manslaughter are not tried by Magistrates, all coroner's inquests which involves summation to a jury and a finding of homicide or otherwise are presided over by Magistrates.

I recognize the controversy that accompanies this reformative measure. Some say it violates the basic premise of Magna Carta.

However, what is often forgotten about Magna Carta is that the reverence we hold for it today was short-lived in 1215. Not long after it's signing the king reneged on it and claimed he was forced to sign it under duress by disloyal subjects, a position which the pope endorsed and thereafter Magna Carta was annulled. Yes it was subsequently revived but it has taken history and the passage of considerable time to elevate Magna Carta to the high and lofty ideal we hold it to be today.

And while many point to clauses 39 and 40 as examples of high judicial principles it must be remembered that in respect of trial by peers there were two provisions. one for true peers of the land i.e the barons etc, who were instrumental in forcing the king in not signing Magna Carta and who became the security force to enforce Magna Carta; and another trial by peers for others but who could also be tried according to law. Jury trial or trial by their peers was not an automatic right that Magna Carta protected.

And even those who hold to the view that trial by jury is a must because it represents the best guarantee for justice, it must be remembered that the evil Magna Carta intended to address was despotism, that despotism that resulted in the liberty and freedom of citizens being taken away by a despotic monarch' word alone nothing else. So not even trial was guaranteed. And it was into this state of affairs that Magna Carta came to be.

Nothing that represents that scenario existing in 1215 England, can be found in The Bahamas today. We already have constitutional government that guarantees to all trial within a reasonable time for those accused of crime. And there can be no doubt that the vast majority of cases are tried

by judge alone and only a small minority of cases are tried by jury. Jury trial on the civil side is virtually nonexistent.

So the Magna Carta justification for continuing jury trial in my view is misplaced. We can today guarantee trial in accordance with the highest constitutional principles without any dilution or diminution in the equality of justice.

IT IS NO DEROGATION OF JUSTICE TO SAY IT IS BY JUDGE ALONE.

And it is beyond peradventure that jury trial universally is being restricted or eliminated.

We in the Bahamas have every reason to visit this position.

It has become a cumbersome system and untrustworthy system to maintain.

All the attempts to tinker with it speak to the challenges with the system. The reality is that most Bahamians do not wish to serve on the jury and they look for any excuse, reasonable or otherwise, to get out of serving. And I am told that one drawback in trying to contact potential jurors by telephone is that once they recognize the call emanates for the Supreme Court they do not answer it.

It's abolition will do away with hung jury, reduce the number of retrials, and bring greater certainty and predictability to a large extent to the trial process and above all speed up the trial process.

Further it would allow a judge sitting alone to go to the various districts to

try the case there avoiding and saving the considerable costs involved in bringing witnesses from their local communities such as Abaco to attend Court in Nassau or Freeport. The result of which is the disruption of the police services and other community needs. Time costs and resources would be saved. The Bahamas is an Archipelago and every community has a right to have their cases heard in their communities unless it is impossible to do so. That would be bringing justice to the people.

Ladies and gentlemen, I strongly recommend that Parliament raise to the highest level of priority and move with expedition to implement the recommendation of the commission in this regard. Trials are now becoming far more complex. We should with haste dis-entrench the jury system and either abolish or restrict to those cases where the death penalty might be sought.

Before leaving this question of Constitutional Change, I wish to address certain other changes I endorse for the good of the Country and more particularly for the good of the Judiciary.

I therefore believe the time is now for the government to move with due speed and expedition to implement the recommendations of the constitutional commission with regard to other judicial reform.

In particular, the provision with respect to the increase in the ages of Judges and provision for the direct entry to the Court of Appeal by senior lawyer at the top of their profession. These two changes alone will in my judgment have a salutary effect upon the judiciary and make for further development along the right lines.

I should also support the restructure of the judiciary that would allow the President of the Court of Appeal to become Chief Justice. Next year I turn 65 and perhaps that would be a good time to have legislation in place to allow the President of the Court of Appeal to become Chief Justice.

Additionally, we should strive to constitutionally bring the Court of Appeal, Supreme Court, Industrial Tribunal and Magistrates Court under one umbrella, which I think would make for a more efficiently, run judiciary.

So far as the death penalty is concerned, The reality is, having regard to the prevailing jurisprudence, that the death penalty is virtually dead. I share the view expressed by the President of the Court of Appeal.

Unless we have the experience of a Charlie Hebdoe, or San Bernardino, the chances of ever imposing the death penalty under the present regime are virtually nil.

The question we have to ask ourselves is do we wish to retain the death penalty,

And so if this is to become a reality, my view is that a constitutional amendment would be necessary, and not by some omnibus clause. This must be very specific because the same thinking that lead to and ushered in the present judicial thinking will review it with a jaundiced eye.

I would therefore highly recommend the adoption of the recommendations for judicial reform made by the Constitutional Commission.

I turn now to Physical inventory

Physical Inventory.

Delay in the Supreme Court and to a lesser extent in the magistrates court has occurred because of issues with our physical inventory and with budgetary issues

Physical issues:

So far as physical issues are concerned the Court buildings have been a natural disaster.

(1) The Nassau Street Magistrates' Court has had a slew of plumbing and sewer problems-that have affected the running of the Courts. I am hoping they are behind us now. There are still; elevator problems in Nassau Street.

(2) The Freeport Magistrates Court had for quite a long time air-condition problems that made it almost impossible to function. Staff was only able to work for short period of time and they literally had to strip down to do that. We were only able to solve the air-condition problems late last year and then only with the generous help of the supplier whose fees are still outstanding, which was done at instance of goodwill of judicial personnel.

(3) The country should be grateful to these judicial officers and staff who stayed the course notwithstanding the difficult conditions and toiled to keep the administration of Justice in Freeport functioning.

A similar story exist for this Main Supreme Court in Nassau. We have been having unresolved air-condition problems all last year. And unlike the Magistrates Court in Freeport, not only is there staff in this building but we have had to accommodate jury trials in this building. On many occasions due to air-condition problems trials had to be adjourned. Every time justice Carolita Bethel number showed up I could hear the plea for help.

(4) Main Supreme Court Nassau- . Indeed a stop-gap measure had to be employed to allow for this sitting. Otherwise the heat would have been unbearable. There has been loss of many trial days due to lack of air-condition.

(5) The popularly known swift justice courts tell a similar story: Ansbacher House is a total embarrassment. We are still beset by air-condition problems and loss of water. There is a Leak that is still undetected. The main foyer still torn up notwithstanding recent renovations.

Relying on Ministry of Works or on a quick response from Ministry of Finance to address these problems on an urgent basis has been extremely disappointing and frustrating. On one occasion I had to dig into my personal funds to try and expedite the situation so that some comfort might come to the staff.

These are all issues that have contributed to delay in trials and given the age of the inventory and the ongoing problem the likelihood is that these will continue to be problems for us going forward.

The result has been the loss and waste of precious judicial time due to state of buildings and lack of resources to respond on timely basis suggest that there is a need for a new all-purpose judicial edifice.

(6) There are other physical issues that do not necessarily result in delay but that do affect the smooth running of the judiciary. There is an undoubted need for space for Criminal Registry and Civil Registry of the Supreme Court. There was never any intention to keep the Civil Registry housed at British American. For any number of reasons it should be housed closer to the Main Supreme Court complex . The only reason the

Registry is still at British American Building is because there was a serious miscalculation when Ansbacher was designed. No explanation has yet been forthcoming for this unsatisfactory state of affairs. There have been conflicting signals from the executive on the issue of acquiring other premises to house the Civil Registry leaving the judiciary in a state of limbo.

These very pressing issues highlight the need for more substantial commitment of public resources to fund judiciary and the necessity the government to be more responsive to the needs of the Judiciary. The fact that the Judiciary is the third branch of government and independent of the others has particular constitutional significance.

It cannot be gainsaid that the Government has a constitutional duty to provide adequate resourced to fund the judiciary. Otherwise independence of the judiciary would be a fiction and we would only be paying lip service to that principle.

The Latimer House guidelines make clear the duty of the government to make adequate resources available to the judiciary as an incidence of judicial independence. I think it is fair to say that both the Current Prime Minister and Attorney General attended the Commonwealth Heads of Government Conference in Abuja Nigeria when these principles were adopted by Commonwealth Heads of Government and I am certain that the Prime Minister and Attorney General no doubt are familiar with them and appreciate their significance. We need now to pay more than lip service to these important principles of constitution and democratic government

Indeed at the Commonwealth Magistrate's and Judges' Association (CMJA) meeting in Wellington this year, the CMJA passed a resolution raising that

obligation to a constitutional level demonstrating how concerned it was that governments were only paying lip service to the principle and were not adequately funding the judiciary so as to buttress the independence.

The resolution, and I shall read it because it is instructive, reads as follows;

RESOLUTION ON THE LACK OF SUFFICIENT RESOURCES PROVIDED TO THE COURTS

Noting that jurisprudence and international conventions recognise that institutional independence is one of the fundamental pillars of judicial independence.

1. Noting that in every Commonwealth country there are pressures to reduce the cost of providing justice,
2. Noting that courts are expected to deliver results faster and with fewer resources, and
3. Noting that there is an ever increasing tension between governments who have the responsibility to fund the administration of justice and the courts that have the obligation to deliver justice,
4. Whereas, Paragraph IV of the Commonwealth (Latimer House) Principles on the Three Branches of Government states that adequate resources should be provided for the judicial system to operate.
5. The Commonwealth Magistrates' and Judges' Association notes with concern the continued lack of sufficient resources provided to the courts in many Commonwealth countries.
6. Therefore, the General Assembly of the Commonwealth Magistrates' and Judges' Association records that the provision of

sufficient resources to the courts is a fundamental constitutional obligation of the Executive Branch of Government.
Commonwealth Magistrates' and Judges' Association18th September 2015.

I cannot overstate the importance of this principle because many seem to believe the judiciary is some back door Office of the Attorney General Office.

In recognition of this duty I make the following proposal;

I propose that in addition to normal budgetary outlay a Judicial administration fund be statutorily provided for to address contingent, emergency and imprest issues to be chaired by the Chief Justice in consultation with the president of the Court of Appeal, Industrial Tribunal and Chief Magistrates and the Registrars of the Court of Appeal and the Supreme Court. The Chief Justice will report, annually, to the Public accounts committee of the House of Assembly. There are a vast number of issues that require immediate financial redress that are negatively impacted because of the normal bureaucratic impediments and a belief that there is a need to control the Judiciary.

Depending on Ministry of Works to get things done speedily or on Ministry of Finance for speedy financial clearance from officials is a time consuming and frustrating process. And so a fund needs to be put at the disposal of the Chief Justice who will answer to the Public Accounts Committee of the House of Assembly for the expenditure.

Modern thinking executives ought to be able to see the wisdom of such a proposal. I suggest an initial fund of two million dollars ($2,000,000.00).

Having to go cap in hand to civil servants for outlays and approval for normal judicial expenditure like Oliver to Mr. Bumble saying 'Please sir may I have some more' only to hear Mr. Bumble roar back with indignation 'More' while he and others share the fatted calf - is not what the Constitution envisaged or contemplated. We need to give true meaning to the constitutional principle that the Judiciary is the third branch of government and independent of the Executive. My predecessor had a different proposal, but logistically they accomplish the same thing. True independence for the Judiciary from the hands of the Executive is in the execution of its mandate.

All aspects of funding must be brought under the effective control of the Judiciary.

This is not a radical concept. It embraces principles espoused in the Latimer House guide lines for good government which The Bahamas is a part.

My predecessor advanced such a proposal and unfortunately it was not embraced as it should have been but now the time has come.

This would in a tangible and very substantial way demonstrate to the world The Bahamas Government's commitment not only to the rule of law but especially the independence of the Judiciary and create a model that the world would emulate.

I am firmly of the view that as we begin to lay the foundation for a modern judiciary, this is one step we must be prepare to take not only to demonstrate our maturity as a nation devoted to the constitutional principles enshrined in our Constitution but to demonstrate to the world our commitment to these principles.

While I have only a rudimentary understanding of the Bismarckian Principle that politics is the art of the possible, I am firmly of the view that these reformative measures should be raised to the highest level of priority and be put on the Parliamentary Legislative Agenda.

I call on my colleagues and the members of the bar and the general public to support these and other changes and to work diligently to effect this change, which should be non- controversial apolitical and for the good of the nation.

I turn now to a matter of public Interest

In my capacity as Chief justice I consider I have obligation to make comment on a matter of public importance without descending into the partisan political arena.

There is presently afoot nationally an effort to constitutionally bring equality to Bahamian Women.

Let me say that I unequivocally support the efforts being made to provide legislatively for the equality of men and women before the law. Equality, equal treatment and protection before the law should be a given.

As I listen to the public discourse on the issues, I think it is unfair, for the reasons being given, that Bahamian women and those who support them are finding opposition to legislation which is primarily intended to level the playing field and correct an historical anomaly.

I say it is unfair because it appears that Bahamian women and those who support them are being asked, in some cases, by their opponents to either guarantee or prove beyond reasonable doubt that the proposed constitutional changes would not lead to the recognition or validation of same sex marriages before they support the bills. No one can give that assurance or guarantee.

Anyone who has traversed constitutional law would know that the legal landscape is littered with examples of language in a constitution when construed broadly and purposively as constitutions are construed, leading to unintended consequences becoming the law, although it may not necessarily lead to them.

We have a number of examples to draw on. What may have been the thinking at inception may well differ when it falls to be considered later on. And sometimes unintended and unforeseen consequences become the law.

Two examples would suffice to make the point and they relate to two common occurrences: bail and mandatory minimum sentences.

I turn first to the example of bail. Most countries try to place some restrictions on the grant of bail by judges and magistrates. This is a quite common occurrence in democracies around the world. The Bahamas is no exception and the debate on bail has raged here for several decades now.

What no one could have imagined in 1973 when the constitution came into being was that Article 2 would have a significant bearing on this question. That Article provides that The Bahamas shall be a sovereign democratic country.

Even had the officious bystander been asked in 1973 what the word democratic meant in that context he probably would have replied that it was put there to contrast the government of the Bahamas with other autocratic or dictatorial forms of government and that it was intended to be a government of the people for the people and by the people. Nothing more, he probably would not have seen a connection with bail particularly given that article 19 of the Constitution deals specifically with the question of bail.

However, in 2005 in the case of **Khyoratti,** the privy Council latched on the word 'democratic' appearing in the Mauritius constitution in an article of that constitution that is identical to Article 2 of The Bahamas' Constitution to hold that the attempt by the government of Mauritius to restrict the grant of bail in drug cases was unconstitutional and contrary to Artilcle 2 of their constitution because in a democratic country the grant of bail was a decision that was intrinsically within the domain of the judiciary. In other words it was a judicial function and the executive could not deprive the judiciary of that function in a democratic country without properly amending the constitution.

The Privy Council therefore gave the word 'democratic' appearing in the identical provision of the Mauritius constitution a broad and purposive construction which was probably not in the contemplation of the drafters of

the constitution at the time. Few people would have seen a connection between bail and Article 2 as drafted.

To this day therefore, any attempt to restrict the grant of bail collides with this principle.

The second occurrence is the imposition of mandatory minimum sentences. Again because of the disparity that occurs in sentencing especially for serious offences such as drugs and firearm attempts are made to bring a degree of certainty and uniformity to the process by legislating mandatory minimum sentences.

Article 17 of the constitution contains a prohibition against cruel and unusual punishment. Would anyone in 1973 have construed this provision as a hurdle for mandatory minimum sentences? Probably not. But that is what happened in Mauritius in the case of **Aubeeluck v Mauritius.**

The Privy Council said in 22 a literal reading of Section 7 of the Constitution does not immediately suggest that that is the correct approach to it. The prohibition against subjection “to torture or to inhuman or degrading punishment or other such treatment” might be read to refer to something much more severe than the three years penal servitude in the present case. However, the DPP accepts, in their Lordships' opinion correctly, that the effect of Section 7 is to outlaw wholly disproportionate penalties.

The end result of this is that all mandatory minimum sentences now must pass a proportionality test before they can apply. Did anyone think that a three year or four year sentence for drugs and firearms would qualify as cruel and unusual punishment for the purposes ofAarticle 17 of the constitution? Was this within the contemplation of the drafters of the constitution in 1973? I think not.

There are other examples to draw on.

Because constitutions are construed broadly and purposively, one may have difficulty guaranteeing a particular constitutional result no matter the force of the opinion.

Would the proposed language lead to the result the opponents contend for? I would not venture an opinion at this stage.

However, I would say that in any event, judicial decisions are sometimes reversed by later statutory or legislative interventions.

For this reason, it seems to me to be unfair to delay the efforts to achieve constitutionally equality and equal rights for women .

It is to the law that we must all look for protection and equal treatment. That is the true lesson of Magna Carta. Despotism may arise in many forms.

I unequivocally support the efforts to achieve equality for Bahamian women who have made tremendous contributions to the building of the nation.

Ladies and gentleman,

It is said that the past is prologue. We cannot however forget the lessons of our history but we must learn from them.

Conclusion

There are a number of other matters I have not touched on and I must leave for another time and place.

As a Judiciary we come under great public scrutiny and criticism. Public criticism has been warranted in some case and in others it has not been.

Public criticism usually springs from decisions on bail and disparity in

sentencing, particularly in drug and firearm cases, BUT ALSO FROM THE DELAY. Many, concerned citizens, express dissatisfaction with our decisions in these areas and with the general lethargy in the justice system.

The system of justice we administer is , however, open for all to see. There must be and there is accountability for the decision we make as judges and Magistrates, Registrars and other judicial officers. **We do not fear public criticism.** Criticism by members of the public whether it be a newspaper columnist, a pastor, or a victim of crime is part of the free speech guaranteed to all. We are indeed sworn to uphold that right.

Where one is aggrieved by a decision on bail or a disparity in sentencing, or by delay the aggrieved party usually has a right of appeal which is the proper avenue to question the decision of a Judge or Magistrate. There it can be and is ventilated publicly for all the world to see. There is no need to resort to vile and scurrilous attacks upon members of the judiciary simply because they may have made a mistake or one disagrees with the decision. To err is human. Indeed it is irresponsible and in some cases a dangerous precedent to set particularly when Judges, Magistrates and other hard working judicial officers are falsely accused of being the cause of crime. It should always be remembered that the greatest danger to our democracy comes from those who try to control our decisions.

Where there are deficiencies then they need to be addressed frontally. That is why I support an aggressive program of training and continuing education for Judges and Magistrates and all Judicial Officers.

It must be remembered that in our system Judges and other judicial officers do not go to public platforms to defend themselves against unfair attacks. That is generally left to the Attorney General and other right thinking members of the society.

I however, call upon you to support the work of the Judiciary. It is only by working together that we will achieve the goal of timely justice for all, not by pulling against one another and trying to tear down.

Colleagues, as I close, I acknowledge that the job you do is often a very difficult one, and I know that many of you work hard to the job as efficiently and as effectively as possible, and sometimes you have to work in difficult conditions and seemingly without appreciation of the job you are doing in order to get the job done. Do not despair.

At the same time we must all recognize and acknowledge that we have serious problems that affect the smooth running of the Judiciary.

And so I say to you and all members of the judiciary whatever position you may hold, whether you are the Judge or the Janitor , the Registry clerk or the Registrar, Secretary or Magistrate, if we are to seriously address the problems of delay and its off shoots and make the Administration of Justice far more efficient that it has been, we have to get back to basics and do those things we are being paid to do. All hands must be on deck and everyone must do the job he or she is being paid to do.

Getting back to basics is a must. It does not require much except an honest assessment of what we are required to do and getting it done.

When we fail to respond in a timely manner to persons in search of justice, people lose faith in the justice system and resort to self-help means to the detriment of the society. We must realize that the search and thirst for justice is one of man's most unquenchable thirsts. It drives him like no other thirst.

Indeed it was this same thirst for justice that brought England to the brink of civil war 800 years ago.

So we need to be far more vigilant than we have been in the past and far more responsive to the needs of the litigant.

It cannot be business as usual.

As we look to the future, the first thing we have to realize is that we did not get into this problem overnight and it is certain that we are not going to get out of it overnight. And it will take planning, taking stock of where we are commitment and a substantial government investment in the judiciary.

I therefore ask for your support and call upon you to redouble your efforts to achieve these goals.

Thank you for listening.

It now gives me pleasure to declare the Legal Year 2016 Open.

I hope to take photographs of everyone including the membership of the Bar present.

There is a reception in the Ministry of Works.

These Proceedings have come to an end.