SPEECH BY THE CHIEF JUSTICE TO NATIONAL JUDICIAL COUNCIL OF THE NATIONAL BAR ASSOCIATION FRIDAY, 15TH FEBRUARY, A.D. 2013 AT SHERATON RESORT, CABLE BEACH.

Thank you for affording me this opportunity to speak to members of the National Judicial Council of the National Bar Association.

It was many years ago, when I served as President of the Bahamas Bar Association, that I had the opportunity to speak to members of the National Bar Association, when they met here in The Bahamas. It is good to renew my ties to the Association, albeit in a different capacity.

I thought I would use this opportunity to speak about the judicial system in The Bahamas and to draw to your attention the ever developing ties between the jurisprudence of our respective countries.

Like the United States of America, The Bahamas is a former colony of the United Kingdom. Alas, however, we only achieved independent status on 10th July, 1973. It is a constitutional democracy with a written constitution that incorporates the fundamental rights and freedoms found in the United Nations Universal Declaration of Human Rights.

The judiciary is protected by constitutional security of tenure until specified ages. There is no lifetime appointment.

There is a high court of unlimited jurisdiction. It is called the Supreme Court. The name is a misnomer as there are two other courts of higher jurisdiction. This court is presently made up of twelve justices, seven males and five females. The statutory complement is fourteen and there are two vacancies which I expect will be filled shortly.

There is a resident Court of Appeal made up of five justices. The President is a woman and the four other justices are men.

The final court of appeal is the Judicial Committee of the Privy Council which sits in the United Kingdom. Strictly speaking an appeal to the Privy Council is an appeal to the sovereign, who acts on the advice of the Privy Council. This is relic of our colonial past and I suspect (and perhaps pray) that Parliament will soon find the wisdom and courage to change the final court of appeal to a

different court, whether it be the Caribbean Court of Justice or some other court.

By section 2 of the Declaratory Act, 1799

> **The common law of England, in all cases where the same hath not been altered by any of the Acts or Statutes …… is, and of right ought to be, in full force within The Bahamas, as the same now is in that part of Great Britain called England.**

History will show that early on in our development the courts of The Bahamas only look to decisions of the English courts for discerning the common law. This is perhaps not surprising as the judges of our courts were primarily Englishmen and the final appellate court being an English court constituted primarily of English judges.

Over the more recent years and certainly since Independence the judges of The Bahamas (like justices of other common law jurisdictions) look to decisions of the courts of countries other than the United Kingdom for the exposition and development of the common law. Of course this has been made easier with the internet and the increased accessibility to cases decided in other jurisdictions,

Decisions from the Courts of Australia, Canada, Hong Kong, Singapore and other CARICOM countries are more frequently cited in decisions of our courts. For example, the decision of the Court of Final Appeal of Hong Kong in DD v LKW is frequently cited as the leading decision summarizing the jurisprudence as the approach of the courts in the division of matrimonial assets consequent on a the dissolution of a marriage. In a commercial case, a decision of the Court of Appeal of Hong Kong was also relied upon as setting out the law as to when a breach of a payment clause

in a construction contract may amount to a repudiation of a contract. Decisions from CARICOM countries are also referred to on matters involving the criminal law.

More frequently however, the judges in The Bahamas have been more receptive to looking at decisions of the courts of the United States for assistance in how to approach issues that come before them for consideration.

This is particularly so in constitutional cases involving human rights. You will recall that the UK has no written constitution and decisions of the UK courts are not always useful in determining issues that come before us for consideration. Indeed, more recent decisions of United Kingdom courts on human rights issues have been greatly influenced by its membership in the European Union and the European Court of Human Rights.

In our courts, the decision of Justice Lewis Powell in Barker v Wingo is often cited in cases involving our Article 20 of our Constitution and the right a fair hearing within a reasonable time.

With respect to sentencing, the decisions of the United States Supreme Court in Woodson v North Carolina and Lockett v Ohio have been taken into account in the development of the jurisprudence with respect to sentencing in homicide cases. The United States Supreme Court decision in Furman v Georgia was frequently cited in our courts during the successful challenge to the mandatory nature of the death penalty.

Of course, in The Bahamas contractors frequently use the standard contracts of American Institute of Architects and our judges look to

decisions of the American courts in deciding issues that arise under those contracts.

Even in the development of our law of tort, we have cited decisions in the USA on the different duty of care cases. For example, I recall while as an advocate at the Bar I had to defend a pharmacist who had negligently filled a prescription for birth control pills and the woman got pregnant and sued the pharmacist for negligence. She sought to recover as damages not only the expenses of the pregnancy but the costs of raising her unplanned child. This case was unusual to the common law and there were very few decisions of the UK courts on the issue of damages that flow from the negligent act that resulted in the birth of a healthy child. Important policy issues on the issue of damages had to be considered. I had to rely on decisions from different courts of various states of the USA on the issue. At that time those decisions were not consistent and I recall founding a powerful dissenting judgment from a judge of the Supreme Court of

Minnesota which was against the interest of my client. These cases were all cited to the court. Fortunately for me the case was decided on an issue of causation and the court did not go on to decide the issue of the quantum of damages.

You will also find that in the tort of defamation, slowly but surely, our common law development is moving more towards the United States approach on the defence of privilege.

In the matrimonial law, you may be aware that English authorities were not enamored with pre and nuptial agreements. They regarded them as unenforceable for public policy reasons. With the decision of the UK Supreme Court in Radmacher v Grantino that public policy objection was done cast away to the relics of history. Shortly after the decision in Radmacher, I had to consider the enforceability of a prenuptial agreement where the wife sought to escape the provisions of the agreement on the ground that it was not

signed voluntarily as she was pregnant at the time and her husband told her that he would not marry her unless she signed the agreement. There were very few English authorities on the issue and I sought assistance from decisions of state courts of the United States on how to approach this sensitive issue.

In Child Abduction cases in which The Bahamas courts seek to give effect to the Hague Convention on Child Abduction, to ensure consistency in the law, we look to decisions of the US and the court of other countries for assistance in how to approach problems common to all of our communities.

I have no doubt that it is only a matter of time when the courts of The Bahamas will address the issue of same sex marriage. I also have no doubt that in deciding the issue we will have respect for the decisions that emanate not only from Commonwealth countries like

Canada and Australia, but also to the decision of the courts of the United States of America.

Our references to the views of justices of the United States are not limited to referring to those decisions in our own judgments.

Just last year, I quoted extensively from a speech by Judge Zarella of the Supreme Court of Connecticut on the role of lawyers in the administration of justice and the need for greater collegiality in the legal profession. Last month at a special sitting of the Bahamas Court of Appeal, President Anita Allen in calling for a statutory legal aid scheme quoted extensively from a judgment of Justice Hugo Black in Gideon v Wainwright on the need for experienced counsel in the defence of persons charged with criminal offences.

Because of its proximity to the USA, commerce, trade and tourism link our respective economies. More and more the citizens of both our countries will find it necessary to resort to the courts of our countries to resolve the disputes that will inevitably arise. Ours is an ever shrinking global village. The problems that affect the lives of our citizens and the residents of our respective countries have more in common than there are differences. Our respective countries both have written constitutions that guarantee certain fundamental rights. Our citizens and the persons who visit or reside on our shores look to us the justices of the court to protect these rights. Very little purpose is achieved by reinventing the wheel. Our task as justices is helped by looking to our colleagues in different countries to see how they have considered and dealt with the problems. Fortunately with the increased use of the internet and easier access to decisions of courts of other jurisdictions and more convenient research engines, this is easier to achieve than it was when most of us were admitted to the Bar as counsel and attorneys. It must enhance the confidence that our citizens have in our courts when they realize that we look

and speak to each other in our judgments and that the jurisprudence that affect the resolution of their problems is not radically different in the forum that adjudicate on their disputes.

As to continue your deliberations in your conference I invite you to use the opportunity to meet as many of your Bahamian colleagues as possible. I am sure that you are aware, being a judge can be a lonely exercise. It is always good when we can find someone to share fellowship with as we discharge our obligations without fear or favour malice or ill will. As I said, as judges, we speak to each other in our judgments. Let us use this opportunity to speak to each other in person.

With these remarks, I welcome you to The Bahamas and this capital city of Nassau. I hasten to remind you that Nassau and New Providence is not The Bahamas. We have many other islands that make up our archipelago. They have kaleidoscopic waters; sandy

beaches; quaint villages with even warmer hospitality. In our jobs we must learn the art of relaxing. We must learn to take time to rejuvenate our bodies. I know that this conference will demand a lot of your time; but I invite you to take time during your stay to relax and to rejuvenate.

May you continue to have a productive conference.