SPEAKING NOTES

BY

SENATOR, THE HONOURABLE ALLYSON MAYNARD GIBSON

ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS

COMMONWEALTH OF THE BAHAMAS

BEFORE

THE CONSTITUTIONAL COMMISSION

SHERATON BRITISH COLONIAL HILTON

MONDAY 10 JUNE, 2013

Mr. Sean McWeeney, QC, Chairman of the Constitutional Commission

Distinguished Members

The Hon. Damian Gomez, Minister of State in the Office of the Attorney-General

Directors of Legal Affairs Public Prosecution

Mr. Archie Nairn, Permanent Secretary in the Office of the Attorney-General

And Ministry of Legal Affairs

Media Representatives

Ladies and Gentlemen,

Good Morning

Introduction

I wish to preface my remarks to you this morning with the enduring wisdom of the Greek philosopher Aristotle, who is recorded as saying in his treatise on politics:

"…[O]ne citizen differs from another, but the salvation of the community is the common business of them all. This community is the Constitution; the virtue of the citizen must therefore be relative to the Constitution of which he is a member."[1]

Against that backdrop, I am deeply honoured to have been invited to address you concerning the matter of Constitutional Reform, under your broad mandate to "conduct a comprehensive review of the Constitution of the Bahamas and to recommend changes to the Constitution in advance of the 40th anniversary of Independence."

I add my voice to the chorus of others in thanking the Rt. Hon. Prime Minister for his vision and leadership in appointing this Commission. This review process, coming as it does on the cusp of our 40th anniversary of independence, is very timely and allows us to conduct a national self-examination and introspection of the last 40 years of constitutional and political experience, with an eye to reforms for the future good governance of our people.

May I also commend the members of the Commission for the unselfish service that each of you have agreed to give in accepting your appointments. I also acknowledge at the outset the great work you have done thus far by your campaign to engage in a national dialogue with the wider Bahamian public, as you attempt to educate them about our Constitutional arrangements and obtain feedback on matters relating to Constitutional reform.

[1] Aristotle, Politics, Book III, Chapter IV.

That is why I begin as I did with the reference to Aristotle; for your efforts to involve the populace in constitutional change gives life to the sentiment he expressed that democracy is best attained when all persons alike share in the government.

My contribution to this conversation on constitutional reform originates not only in my role as a member of the political Executive, but in the dual (and sometimes opposable) roles imposed on an Attorney-General under the Westminster system, as both guardian of the Constitution and chief law minister of the Crown. It is within the rubric of my constitutional persona that I propose to situate the majority of my remarks.

I therefore intend to primarily focus and touch on several matters that impact the administration of justice. In particular, I wish to briefly look at issues relating to the following: (i) fundamental rights, in particular the issue of gender discrimination; (ii) the question of granting constitutional and operational autonomy to the Office of the DPP; and (iii) miscellaneous matters relating to the functioning of the Judiciary and the Legal System. I do so, also, with the knowledge that the Rt. Hon. Prime Minister will be addressing you later this week, and it is his place rightfully to speak to the broader issues of constitutional reform on behalf of the Executive.

Fundamental Rights and Freedoms

In this area, it is reassuring that a part of the specific mandate of the Commission is to "**pay particular attention to the need to strengthen the fundamental rights and freedoms of the**

individual, including the need to end gender-based discrimination against women consistent with the United Nations Conventions and more enlightened views that have developed globally since the attainment of our Independence."

I single this out because, just six days ago (Thursday, 6th June), I had the honour to stand in the halls of the Peace Place, in Geneva Switzerland, and commend this vision in an address to the United Nations Human Rights Council, during the second round of that body's Universal Periodic Review of the human rights record of The Bahamas. This was a culmination of a process that began in January of this year with a report to that body on the progress of the attainment of human rights and our adherence to international norms.

One of the stark realizations to emerge out of my role as interlocutor of The Bahamas' human rights record on the international plane over the past few months, is the degree to which human rights bodies and the international legal community is invested in the attainment of human rights in the Bahamas—as they are in all the countries of the world.

Thus, while it is important that the impetus for Constitutional review and reform has come from within, we cannot be oblivious or insensitive to our international obligations and the expectations of the international community. As a responsible member of the international community, there are legal obligations which originate from that sphere which are binding on the state, and are intended for the benefit of its citizens and other persons within its territorial borders. The challenge for us is to ensure that our commitments to those obligations become more than international platitudes.

Unfortunately, our approach to the acceptance of such obligations, particularly relating to the requirement to prohibit discrimination on the grounds of sex, has been inconsistent and may have put us in the position of a conflict between international obligations and our domestic legal position.

A striking example is the approach to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which is sometimes called the Bill of Rights for Women. The Bahamas acceded to the Convention on 6 October, 1993, becoming the last country in the Caribbean to do so[2]. In doing so, it entered reservations to those provisions of the Convention which required states to amend their Constitutions and laws to grant women formal equality with men, including in areas such as the conferment of citizenship upon children.

Those reservations, which some argued were in any event incompatible with the objects and purposes of the Convention, at least provided formal protection against any allegations that we were not in compliance with our international obligations.

However, since then, the Bahamas signed and ratified the International Covenant on Civil and Political Rights in December 2008 and ratified it on 7th May 2009.[3] Article 26 of that Convention also provides for equal protection of the law and prohibits discrimination on the grounds of sex. It is notable that the Bahamas did not enter any reservations to that article.

[2] Commonwealth Caribbean countries have ratified or acceded to the Convention as follows: Antigua and Barbuda, 1989; Barbados, 1980; Belize, 1990; Dominica, 1980; Guyana, 1980; Jamaica, 1984; Saint Kitts and Nevis, 1985; Saint Lucia, 1982; Saint Vincent and the Grenadines, 1981; Trinidad and Tobago, 1985; British Virgin Islands and Turks and Caicos, 1981 (signed by the UK on their behalf).

[3]The Bahamas also signed and ratified the International Covenant on Economic, Social and Cultural Rights (IESCR), and Article 3 of the IESCR also underline a commitment to sexual equality in the enjoyment of all civil and political rights, as well as economic, social and cultural rights.

Thus, we must take the necessary steps to remove from our Constitution all provisions which must be considered as legislative patriarchy, align ourselves with the new concepts and standards of human rights, and honour our international obligations. This includes amending all the provisions of the Constitution which treat men and women differently in terms of their ability to acquire citizenship and confer citizenship on their spouses and children.

In this regard, I would also support the expansion of the grounds in Article 26 to include"sex" as one of the prohibited grounds of discrimination, which would have an immediate ameliorative effect on provisions in the Constitution and other laws which directly or in their effect discriminate against women. This would also address, what I would describe as the 'rights anomaly' or 'dissonance' between **Article 15**, which purports to declare the existence of fundamental rights, without regard to sex, and **Article 26**, which omits "sex" from the enumerated and hence specifically justiciable rights.

This is also a convenient place to mention two other matters relating to fundamental rights.

Persons with Disability

The Government has indicated its intention to accede to the Convention on the Rights of Persons with Disabilities and to enact the *Disabilities Act* before the end of 2013. I therefore think that adequate protection for such persons can be accomplished through this Act, and therefore the Fundamental Rights provisions need not be amended in this regard.

Discrimination on the Basis of Sexual Orientation Sexual Orientation

With regard to the issue of sexual orientation, I was able to report to the UN Human Rights Commission last week that there have been no reported cases where anyone has alleged discrimination on the basis of sexual orientation.

Also, there are no provisions in the *Sexual Offences and Domestic Violence Act* which in any way might be perceived as positively discriminating against persons on the basis of sexual orientation. It should be observed that persons who are in a same sex relationship are able to avail themselves of the regular protection and remedies available under the Law in respect of violence or assault or property rights.

I wish to emphasize that in The Bahamas marriage can only take place between a man and a woman. Contrary to reports otherwise, the Registrar General has assured me that there are no recorded "marriages" between any persons of the same sex.

Constitutional Autonomy of the DPP

The Bahamas remains one of the few countries in the Commonwealth Caribbean where an Attorney-General, as a member of the executive, is also the person constitutionally vested with the prosecutorial functions of the state. This does not necessarily of itself create any issues of independence, as by virtue of Article 78(4) the exercise of these functions by the AG is stated not to be subject to the

direction or control of anyone," which has been described by the Privy Council as a "constitutional guarantee of independence".[4]

In fact, part of the traditional rationale for the establishment of a constitutional DPP, is that the powers of the AG to enter a *nolle prosequi* under the prerogative power might not have been susceptible to review, as opposed to the constitutional powers of the DPP. However, the recent jurisprudence on the point indicate that the exercise of such functions, whether by the DPP or AG, are equally subject to review and scrutiny by the Courts, in the absence of compelling reasons to the contrary.[5]

However, as we seek to deepen our democracy and strengthen the separation of powers, there is much to commend the call for the Office of the Director of Public Prosecution to have Constitutional and operational autonomy. As was explained by Professor de S.A. DeSmith in a 1964 Constitutional Commission report, part of the rational for this was to "…segregate the process of prosecution entirely from general political considerations".

While I fully support this change, it is important in our particular context that we do not move too hastily in seeking to transition to a constitutionally independent DPP without first a concerted effort by the executive to remedy the institutional deficiencies in the justice system and improve the delivery of justice. In fact, in the 1981 case of the *AG of Fiji v DPP*, the PC underscored the point that placing certain administrative and other matters under the "general direction and control" of the AG did not erode the independence of a constitutionally appointed DPP.

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[4]The *Attorney-General of Fiji v The Director of Public Prosecution* (Privy Council Appeal No. 37 of 1981), per Lord Fraser of Tulleybelton.

[5] See, for example, *Mohit v The Director of Public Prosecutions* [2006] UKPC 20 (25 April 2006).

Functioning of the Judicial System

I have listened with interest to the presentations before your Commission, critically discussing and making recommendations in respect several seminal areas relating to the judiciary and functioning of the courts, in particular (i) proposals to correct the anomaly in the nomenclature of the Supreme Court and the restructuring of the Courts; (ii) proposals for the extensions of the serving ages of judges; (iii) abolition of appeals to the Judicial Committee of the Privy Council; (iv) the removal of the role of the executive in the appointment and extension of tenure of all judges, and reposing such functions in the JLSC; and (v) proposals for reducing the reliance on trial by jury, and or removing the constitutional right to trial by jury on information.

I support many of the recommendations made in this regard, but only wish to illuminate a few. In particular, I wish to give my support to the recommendations made by a former Chief Justice, Sir Burton Hall,[6] now a member of the International Criminal Tribunal for the Former Yugoslavia, advocating a fundamental change in our system of criminal law to reduce reliance on jury trials in criminal matters.

Trial by Jury

[6]These recommendations were originally presented in an address to the Eugene Dupuch Law School on 6 January 2012 in a paper entitled "A Way Forward in Criminal Justice for The Bahamas: a Perspective from Abroad", a modified version of which was presented to the Constitutional Commission.

Our Constitution, almost uniquely among the Constitutions of the Commonwealth Caribbean, guarantees the right to trial by jury "when charged on information in the Supreme Court" (article 20 (2) (g)).[7]Sir Burton described this process of jury trial in 2012 as "…inefficient, prodigal of resources, and ultimately, unfair." With these remarks I respectfully agree, although I would add a few observations of my own.

Analysis of empirical data by the Office of the Attorney General on the various factors determining the efficiency of the conduct of criminal trials over periods has indicated that there are inherent deficiencies associated with the administration of the jury system. These include the peculiar problems associated with small jurisdictions, where members of the jury pool may have to recuse themselves from matters where they know or are known to defendants, and the increase of insidious acts such as attempts to improperly influence (jury tampering) or intimidate members of the jury. All told, these have had a deleterious impact on the efficient administration of justice.

In this regard, it is instructive to note how other countries in the region have approached this matter. In Belize, for example, amendments to the relevant legislation provide for the prosecution to apply to the court for an indictable matter to be tried before a Judge without a jury on the following grounds:[8]

[7] The Constitution of Bermuda (1968) seems to be the only other Commonwealth Caribbean Constitution that guarantees a right to trial by jury when charged on information or indictment in the Supreme Court (section 6(2)(g)).
[8]*The Indictable Procedure (Amendment) Act* and the *Juries (Amendment) Act*, Belize. See, for example, "Trial Without Jury—The Belizean Experience", in the July/August 2012 (Issue 1, No. 1) Edition of the *Caribbean Association of Judicial Officers* (CAJO) Newsletter.

(a) That in view of the nature and circumstances of the case, there is a danger of jury tampering of jurors or witnesses

(b) That a material witness is afraid or unwilling to give evidence before a jury: or

(c) That the case involves a criminal gang element and would be properly tried without a jury: or

(d) That the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the jury that the interests of justice require that the trial should be concluded without a jury.

Similar provisions pertain in Australia[9] and the UK[10]. In fact, the once hallowed role of the jury in criminal trials is steadily on the wane, and many countries have either abolished it or given a discretion to the judge to order a non-jury trial. In the Commonwealth, some 22 countries have abolished jury trials, including the Turks and Caicos.

In the Bahamas, *The Juries Act* was amended in 2007 to reduce the number of jurors required in non-capital cases (i.e., not murder and treason) from twelve to nine. This was done with the view of assisting the court in expediting matters, believing that smaller panels would deliberate more swiftly. It is doubtful whether those objectives have been achieved.

[9] 6-1-2011 "Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia" by Jodie O'Leary of Bond University (Attached).
[10] Put the name of the law here.

It is my humble view that our criminal justice system would be better served by Constitutional provision for clearly defined circumstances where criminal matters may be tried by Judges alone. However, as the right to jury trial is enshrined in the Constitution and entrenched, it will require a constitutional amendment and referendum.

Public Defenders

Article 20 of the Constitution makes provisions for the protection of the law, and in particular provides for persons charged with serious offences to be provided with counsel. Needless to say, this very important right is rendered empty if a person who is charged with a serious offence and is unable to afford counsel of their own choosing, is thereby denied the right to legal counsel.

An attempt has been made over the years to meet the exingencies of such cases by assigning "Crown Briefs" to counsel at the private bar, but this system has proved inadequate to meet the demand and has caused administrative delays and in a system that is already back-logged. In this regard, I would like to join with the others who have advocated the implementation of a system of public defenders—in particular the Hon. President of the Court of Appeal, who has perhaps been the most ardent proponent for public defenders. We are still working out the modalities of the system and determining how to nest such provisions in the proper legislative context, but the Government will be making an announcement in this regard very soon.

Protection of Victims' Rights

Continuing on the trend of the protection of the law, it is also notable that while Article 20 is replete with specific provisions to secure the protection of the law for persons who are charged with criminal offences, it passes over in silence the rights of victims of crime and abuse of power. I believe that the time has come for a constitutional acknowledgment of the principle that victims are also entitled to rights, along the lines of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in Resolution 4034, 29 November 1985.

The Death Penalty

The question of the death penalty has significance for the administration of justice, and important human rights and Constitutional implications. Although the imposition of the death penalty is not prescribed in the Constitution—it is a matter dealt with in the Penal Code—it rises to constitutional status because of the large body of jurisprudence, mainly emanating from the Privy Council, which has interpreted the legality of the death penalty under the rubric of what constitutes cruel and inhuman punishment under the Constitution.

Most Bahamians would be aware that in a recent case from this jurisdiction, the Privy Council ruled that the imposition of the mandatory death penalty was unconstitutional.[11] Any margin to impose the penalty was further attenuated in a later case, in which the Court said that it was only appropriate to

[11] Bowe and Another v. The Queen [2006] 1 WLR 1623.

impose the death penalty in circumstances which represented the "worst of the worst" or "rarest of the rare".[12]

The retention of the death penalty by the Bahamas, even in this diminished form, has also put us on a collision course with the international pressure and ideological disposition to either impose a moratorium and/or abolish the death penalty. In my recent address to the Human Rights Council, I had occasion to defend the Bahamian stance to retain the Death Penalty, and in this regard I had to remind that distinguished Assembly of the following:

- The imposition of the death penalty on a discretionary basis continues to be recognized as lawful, subject to the principles laid down by the country's highest court (Judicial Committee of the Privy Council), as a punishment for the crimes of murder and treason;
- there is no international consensus on the abolition of the death penalty;
- even in the absence of a formal moratorium, the last execution in The Bahamas took place twelve years ago; and
- the fact that every State has an inalienable right to choose its political, legal, economic, social and cultural systems, and has prescriptive jurisdiction to make and enforce laws which are not in violation of peremptory norms of international law.

I know, however, that this issue is also agitating the minds of Commissioners and the general public, and I invite the Commission to give consideration as to whether a suitable amendment needs to be made to the

[12] Tido v The Queen [2011] 1 WLR 115.

Constitution to protect the right to impose the death penalty in the appropriate circumstances (as has been done or attempted by several of our Caribbean states).[13]

The Judiciary

I turn now to look at the Judiciary. It is important to understand that attempts to attain the efficient administration of justice by each Branch of Government and the right of the public to expect such efficiencies does not violate the concept of judicial independence. The United Kingdom in its recent review and revamping of its Judicial System, and in promoting what it called "Sure Swift Justice" instituted, among other things, judicial targets and reporting

mechanisms for the Judiciary. Many articles have been written supporting the view that administrative efficiency promotes judicial independence. Discussion about administration is materially different from suggesting to a Judge how he or she should rule on any particular facts or circumstances.

The framers of the Constitution recognized the need to make provisions for Judges to continue to sit, even after the compulsory age for retirement and extension, so as to enable them to deliver outstanding Judgments. Given the current circumstance of the civil backlog, in some cases with Judgments being outstanding for more than two (2) years, the time may have come for evaluation to be made as to whether such delays in rendering judgments should constitute some form of "judicial misconduct" for which judges should be accountable. For example, in several Latin American countries (Ecuador is an example) and at least one country within the Commonwealth Caribbean—namely Guyana—have made such provisions. Article 197 (3) of the Guyana Constitution includes among the

[13] For example, Barbados, and also attempted by Trinidad &Tobago, although the attempted amendment failed to obtain the requisite Parliamentary majority.

grounds for the removal of a Judge from office, that of "persistently not writing decisions or for continuously failing to give decisions and reasons therefore within such time as may be specified by Parliament."

Allied to this is the consideration of whether judicial training should be mandatory prior to the assumption of judicial office, and continue as a sitting Judge. These considerations are important as in today's world a Judge is more than a Judicial Officer. Other democracies have recognized that a Judge is also an administrator, and Judges must be accountable to objective measurement of the efficient use of judicial time.

There has also been much discussion about whether the Privy Council should be removed as the final Court of Appeal for The Bahamas. In my view, given that the majority of matters do not proceed to the costly appeals process, and that there are no complaints about the efficiency of the appeals process, the pressing mandate is to make provisions for the efficient, swift, fair and effective administration of justice at the Supreme Court level.

Conclusion

Mr. Chairman, Members of the Commission,

Time constraints have only allowed to me sketch some of the proposals I would wish this Commission to take onboard in its considerations. I remain available to further clarify and elucidate any of the positions which are covered or raised by my presentation.

As I conclude, however, I wish to flag several broad themes for the consideration of the Commission. The first is that, having regard to the entrenchment devices in our Constitution, which rightly subject the vast majority of constitutional changes to the final ratification of the electorate, the Commission would do well, in its approach to suggesting reforms, to bear in mind the lessons learnt from the failed Constitutional referendum of 2002. Without the support of the populace, there is little chance of implementing any reforms, or realizing the fruits of the labour of the Commission.

This is not to say that the process of maintaining a vibrant, participatory democracy is without its struggles and challenges. For example, the noted Bahamian historian Dr. Gail Saunders has memorialized this point in her writings[14], and none other than the father of this nation, the late Sir Lyden Oscar Pindling reminded us of this in a notable speech when he said:

> **"We Bahamians have a responsibility of our country not to let our new found sense of pride go to our heads. Instead, we should always use our heads to make the most of our pride of being. Independence will mean work for us all, self-reliance for is all,**

[14]See, for example, "Conflict, Controversy and Control: Constitutional and Parliamentary Issues in the Eighteenth and Nineteenth Century Bahamas", by Gail Saunders and Patrice M. Williams.

dignity for us all, and reward for us all; but the mere fact of Independence will not promise us a rose garden."[15]

In other words, he was indicating that the attainment of independence was just the beginning of a long and continuing struggle for participatory democracy and the full realization of human rights.

Secondly, as is evident from my approach, while the remit for review is wide, at the end of the day reforms should match function, and should be calculated to improve the functioning of our constitutional and political system, not just cater to symbolism and form.

Finally, I believe the Preamble, which was created by our founding fathers as the moral beacon and guiding philosophical principles on which to order our nation and predicate our laws should remain intact.

Ladies and Gentlemen, I submit these recommendations to this Honorable Commission for your review and consideration, and I thank you for your time and attention.

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[15] Delivered 12th April, 1972 and taken from "The Vision of Sir Lynden Pindling: In His Own Words" compiled and edited by Patricia Beardsley Roker.