<u>The Case For A Politically Accountable Judiciary</u>

(Delivered To The Nassau Institute, Wednesday, 27th May 2009)

Any discussion of the local judicial system and its institutional components - for example the courts and the legal profession, is more likely to be meaningful to someone whose interests concern in some way what the business of the judicial system is ultimately all about. As a preamble it should therefore be sufficient to show the relevant relationship between the individual and the system of government by which his or her personal freedom stands maximized or likely diminished by lack of deference shown by one of the other branches of government to the proprieties of the judicial branch.

The Constitution must, of course, be the starting point in any such discussion of the judicial System as a governmental institution and the form government in which it has a unique proprietary role. The truth is, *Chapter **VII*** of the Constitution which ordains its institutional structure, also establishes the Judicature's supremacy functionally through a system of superior courts that comprise the Supreme Court and a Court of Appeal.

That the Constitution intends the Judiciary to be an integral yet independent branch of government by assigning it to a separate sphere and endowing it with capacities to organize itself according to its unique role, might not be of immediate significance to laymen. This is understandable, but not a justifiable or safe state of reality.

I need not trouble you here with the answers to some equally insightful questions: for example, *what sort of thing is a Constitution*? *What are its principal functions*? *Does its meaning change over time? And how, and by whom, is it ultimately to be interpreted and applied?* Chief Justice John Marshall in ***McCulloch v. Maryland***[1] relating the first question to the post-revolutionary US Constitution, termed it "**a constituent act**", one that creates a new regime, not merely fresh offices but a different political system.

It is sufficient for present purposes to note one fundamental characteristic of a written constitution that applies equally to the US Constitution as it does to our Constitution. It is that it creates and demarcates the powers of particular organs of government, and specifies the processes by which government shall arrive at and carry out decisions.

In the broadest sense this discussion of judicial independence in the context of The Bahamas' Judiciary, under the ambitious topic of ***"The Case For A Politically Accountable Judiciary***", is about the nature and function of government in which the judicial branch is as much a contributor to the governmental process as are the legislative and executive branches.

The significance of the interrelationship between the branches is captured in a statement of Chief Justice Beverly McLachlin of the

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[1] (1819) 17 US (4 Wheat.) 316.

Supreme Court of Canada, in ***New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)***:[2]

> **"Our democratic government consists of several branches: the Crown, as represented by the Governor General....; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other."**

In a narrower sense my talk highlights the question and seeks to make the case for why it is, as regard the functions of the judicial branch of government, its utility as an objectively measured public good reflected in its prominence as a respected institutional force in the economic and political life of the community, as well as by the citizen's ability to reliably access the judicial system for resolution of disputes in a manner Courts alone are competent to do, requires the highest degree of public confidence in all of its components.

If for any reason the capacity of the judicial system to perform its designated role is less than at optimum, that is reason enough for concern that government is not performing with the public interest a priority, and so personal liberty and national commerce are at risk. Such a condition, seen from the perspective of the constitutional separation of functions (or powers) of the branches of government (an essential feature of which is an independent judiciary) reflects

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2 [1993] 100 D L R (4th) 212, p. **273**.

either misplaced priorities of the legislative and executive branches, or misplaced loyalties on the part of Judges whom the Constitution entrusts with the judicial power in the governance of the State.

This is particularly so of Judges at work adjudicating disputes whether between individual citizens or citizen and the government, whose independence and impartiality are absolute guarantees to litigants before them in each and every case, and without exception.

If, as evident from the Constitution's structure and text that our form of government is an ordained system in which political power is defused among separate and distinct organs of government, those who wield power are held accountable by the rule of law. The notion of accountability is of course inherent in the democratic process and, it seems to me, equally indispensable to establishing primacy in an institution such as the Judiciary, notwithstanding its legitimacy. Absent accountability much is left at risk.

Judges by virtue of the traditional functions and duties of office wield power. And despite frequent disclaimers of being influenced by political considerations, such disclaimers should be viewed with skepticism and in a very limited sense; indeed such disclaimers are but weak protestations in the face of the obvious. For this reason every precaution should be taken to guarantee quality control when making appointments to the office. It is a priority that is not evident when it comes to making judicial appointments in The Bahamas.

Regrettably, and historically this sense of responsibility to account as part of the institutional memory that is a characteristic feature of the English and other Judiciaries, is a missing safeguard from The Bahamas Judiciary, which claims as one of its casualties not only any sense of an institutionally borne responsibility for ensuring reliability of judge-made law, but also any chanced serious and sustained development of a tradition of rights adjudication. In the result residual concerns over the authenticity and lasting value of judge-made law is not a component of the institutional or individual consciousness of The Bahamas Judiciary. It therefore becomes a pertinent question: *what deprives The Bahamas Judiciary of this essential sense of responsibility to account so as to foreclose any institutional capacity for introspection*? The answer, I submit, is as simple as the remedy is apparently enigmatic.

At least one suggested cause of the deficiency may be directly traceable to the unaccountable process by which persons from diverse cultural and ethnic climes, having no politically defensible connection with The Bahamas, are recruited for appointment to offices in the higher Judiciary. With, what can best be described, turnstile regularity the recruitment and appointment processes are triggered by a desire, out of an apparent preference on the part of the Executive, to elsewhere (mainly if not usually from the Caribbean) engage retired judges and legally qualified professionals to man this vital institution serving the Bahamian community, for whatever slim number of years remaining in them before the Constitution mandates an end to the relationship. The constitutional prohibition[3] against them entering upon the duties of the office unless they have taken and subscribed the Oath of Allegiance and Judicial Oath occasions no cause in that process to pause.

The retiring transient status of judicial appointees upon whom must rest The Bahamas Judiciary, praying in aid of its moral certainty only the constitutional provisions formally establishing it, means that those institutional processes normally tending towards achieving permanence in the hearts and minds of a constituency are disrupted, if not effectively arrested. Therefore given any degree of impermanence reflecting in its institutional status and functioning, the Judiciary cannot really be expected to exhibit the consistency of an inherited tradition or be a dependable custodian of institutional values for which institutions of its kind are remarkable.

The existence of the Judicial Committee of the Privy Council, the final arbiter of the law and judicial policy within The Bahamas' legal hierarchy presents a clear contrast with the lower Courts. Ironically, it is often a defence by and on the part of those who would take flight against criticisms of foreigner dominance of the local Judiciary that the presence of the Privy Council is no less an anomaly or alien. The argument is, with respect, a convenient nonsense that is characteristically advanced by the uninformed.

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[3] *Articles 97* and *103* of The Bahamas Constitution.

The undeniable fact is that the Privy Council as an institution has throughout been an integral component and contributor to the texture of The Bahamas' political and constitutional history, from its origin as a colony of the United Kingdom. As an appellate (statutory) body of last resort, its current presence at the apex of The Bahamas' judicial hierarchy has been secured since its establishment under *The Judicial Committee Act 1833*.

Due diligence to the selection and appointment of judges is one activity of such important significance to the Community's economic and political well-being that, I dare say, the interaction of benevolent market forces cannot be expected to produce the best (optimum) mix.

Judicial independence not being a self-fulfilling truth, and being neither patently obvious nor a logical concept given that Judges are not born into office but rather are appointed, whilst recognizing that it is a Constitution itself that justifies it an indispensable criterion, *what, then, in real terms does judicial independence signify for the public at large? What are its essential ingredients? What, if any, are impediments to its realization as a constitutional norm in practice?*

Before exploring these questions, it is important to appreciate something of the Judiciary's historical province and pedigree and to note that the principle of judicial independence has become by more than mere chance a distinct feature of Western-styled Constitutions (in the vogue of The Bahamas Constitution) modeled as they all are in the spirit of the 18th Century French philosopher Montesquieu - like the United States Constitution where in design it is meant to import the fact, based on philosopher John Locke's idea, of an organic separation of powers in the structure of government.

In Chapter 6, Book XI, of his Treatise, *De l'Esprit Des Lois (1748),* Montesquieu, who was concerned with the preservation of political liberty, wrote:

> **"Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go.... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another.... When the legislative and executive powers are united in the same person or body... there can be no liberty.... Again, there is no liberty if the judicial power is not separated from the legislative and executive.... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers."**

Chief Justice Marshall later came to echo similar caution in one of the great early cases[4] of State challenge to the paramountcy of the Federal Constitution in the area of the government's exercise of the taxing power, by noting that "**the only security against the abuse of ... power is found in the structure of the government itself.**"

So one provincial justification for an independent Judiciary as a safeguard, is the promise of the protection of individual liberty.

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[4] McCulloch v. Maryland (1819) 17 US (4 Wheat.) 316.

As it has evolved in the proud tradition of Marbury v. Madison[5] the principle of separation of powers inherent in our constitutional system of government makes two most important considerations the exclusive province of the Courts: that of policing the Constitution, and of the exercise of judicial powers. Taken together the principle of separation of powers and its attributes are the true basis for the notion of the independence of the Judiciary as a necessary corollary.

In fixing the methods for appointment to high judicial office and providing for the security of tenure of the holders of such offices, the Constitution again by necessary implication, must be taken to have established the independence of the judiciary as an imperative, i.e., freedom from political, legislative, and executive control.

So the question is: *do the constitutional provisions regarding judicial tenure provide a sufficient buffer against undue influence of political or other considerations?* This question, logical as it appears, is not one often enough addressed; and when it is, objectivity seldom prevails.

If, as former Chief Justice of Australia, Sir Owen Dixon, points out that "***it is not a question whether the considerations are political, but whether they are compelling***", the next logical question must be: *compelling as against whom or what?*

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[5] (1803) 5 US (1 Cranch.) 137.

Is it more '***realistic***' and '***sophisticated***' to think that all issues giving rise to disputes, whether of constitutional import or not, will invariably be addressed on a legal plane and by legal means solely? This latter question, thankfully, does not require an answer here; suffices it to say that there can be no denial of the basic expectation in all of us as to the court's sole function to interpret and pronounce definitively and finally what the law is; equally, there can be no denying that close adherence to legal reasoning is the only way to maintain confidence in the legal system and the administration of justice.

It must be equally true then that any systemic or other form of considerations which have the potential to detract from the ability of judges (who, incidentally, represent and exercise individually all the powers of the Supreme Court) to be '***legalistic***' in their approach to their judicial duties, must over time take its toll on the impartiality and integrity of the judicial function and the administration of justice.

What must not be lost sight of is that judicial independence depends ultimately on how judges perceive and respond to their duty to repel any attempts against this independence, in whatever forms those attempts are disguised. Former Chief Justice Bhagwati of India, was most candid in his observation as to the susceptibility of Judges to manipulations through personal ambitions, saying "***that judges are more often bribed by their ambition and loyalty than by money***".

No doubt there are judges who would react to the implications of such a suggestion, not without engaging some degree of sympathy. Indeed even Judges in this country would first have it appreciated the amount and kinds of sacrifices they are expected to make upon taking office, not all of it by any means monetary.

But whilst such reaction is understandable, CJ Bhagwati's words must be taken as fair comment. The truth of the matter is that Judges in The Bahamas, albeit in the same spirit of sacrifice, are too often perceived as compliant and acquiescent in their own abuse, even to the point of tolerating in their midst some who are otherwise legally and morally unsuitable or lacking in requisite qualifications to shoulder responsibilities for the third branch of government, in particular the making of laws for a community as between which, and them, there is culturally and anthropologically a lack of affinity. Like Gods, non-indigenous Judges are able to make laws by which they and their kin are not ultimately to be governed.

As conscious as the others are of this clear moral and political incongruency they would rather soldier on without visible protest.

Such then is but one essence of the problem of accountability, at least in this country which has become a haven for disenchanted and adventurous Judges from other parts. It is a troubling reality defiant of the democratic ideal as it is mocking of the Oath of Allegiance and the Judicial Oath which by *Articles* 97 and *103* of the Constitution unless taken and subscribed a Justice of the Supreme Court[6] and a Justice of Appeal[7] are prohibited from entering upon the duties of their office.

The view that the democratic ideal is best served by governmental institutions like the judicial branch which at the apex ought symbolically reflect the nativity of the people for whom they exist, appears to be one that is important enough to warrant comment by Lord Steyn[8], a member of the House of Lords and the Judicial Committee of the Privy Council. His Lordship was anticipating a day in the not too distant future when the United Kingdom constitutionally adopts a new legal order within which an English Supreme Court sits at the apex of the judiciary's hierarchy, institutionally insulated from the presence of the legislative and executive branches of government by a strict separation of powers, as is constitutionally not now the case; where, in more than mere symbolic ways, the Lord Chancellor is an integral and primary functionary within all three branches. In that changed state, he frankly conceded so (no doubt referring to himself and fellow South African-born Law Lord, Lord Hoffmann).[9]

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6 Except for the Chief Justice, appointed by the Governor-General acting on the advice of the Judicial and Legal Service Commission pursuant to *Art. 94(2)* of the Constitution.

7 Appointed by the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.

8 In a lecture delivered to The Holdsworth Club, 30 November 2001, entitled *'Human Rights: The Legacy of Mrs. Roosevelt'*.

9 **"It would be impudent to suggest that in a Supreme Court there would be a place for emigré South African lawyers. But, given the massive contribution of past and present Scots Law**

Similar views were expressed by other jurists and responsibly informed persons, among them former Lord Chief Justice of England, Lord Taylor of Gosforth[10], defending his view referring trial by jury and rejecting plea bargaining, whilst underscoring the indispensability of an independent judiciary[11]: "***it is essential not only for justice to be done but for those concerned to have confidence in the process. We must have regard to our history, our culture and the perception of many that trial by jury is a fundamental right***". And in ***Andrews v. Law Society of British Columbia***[12] La Forest J. of the Supreme Court of Canada, concurring with the 4-2 majority in rejecting an appeal from a decision of the British Columbia Court of Appeal, declaring unconstitutional section 42 of *The Barristers and Solicitors Act 1979* which imposed a citizenship requirement for entry into the legal profession, nevertheless made this observation:[13]

> **"A requirement of citizenship would be acceptable if limited to Crown attorneys or lawyers directly employed by government and, therefore, involved in policy-making or administration, so that it**

Lords, it would be essential in any new constitutional arrangement to retain the presence of Scots lawyers."

10 In a speech opening the "*Criminal Justice After The Royal Commission*" Conference, reported in *The Times*, 28 July 1993.

11 For Lord Taylor this meant "**a judiciary free from executive or political influence, or influence by litigants or lobbyists. But it also means that individual judges exercise their own judgment and are independent of each other, both in the way they deal with cases before them and in their views on the development of the law and its institutions.**"

12 [1989] 56 D L R (4th) 1.

13 At p. **45**.

> **could be said that the lawyer was an architect or instrument of government policy."**

So it is that, integral to his (or her) responsibility for development of the law and its institutions (one not to be lightly assumed or irresponsibly assigned), a Judge might be required by circumstances to be patriotic and to reflect a certain amount of national pride (but not ever to abandon principle), even to the point of being protective of established traditions and marks of cultural identity, rooted in intimate firsthand knowledge of subject and the context in which the matter has arisen for consideration.[14] Indeed, as Lord Taylor mentioned in his speech[15] and undoubtedly recognized, it is inevitably a consequence of the process of rights adjudication that a Judge's value system, informed as it might be as much by experience as by cultural and historical influences, is called into duty.

No better example is there of informed nationalism being reliantly drawn on in the adjudicative process than in the approach of the late (and first) Bahamian Chief Justice, Sir Leonard Knowles, in ***Re Nassau Bank and Trust Co. Ltd.***[16] The learned Chief Justice held in denying a liquidator's application for permission to disclose to the United States Department of Justice certain information regarding

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[14] E. g., Wellcome Foundation Ltd. v. Commissioner of Patents [1983] NZLR 385, at pp. **386-7** (*per* Cooke J., as he then was); New Guinea (Export) Co. Pty Ltd. v. Basis Vedbaek [1980-84] L R C (Comm.) 115, at pp. **123-4** (*per* Bredmeyer, A. J.); Maeaniani v. Saemela [1980-84] LRC 339, at p. **343** (*per* Daly, C. J.).

[15] See footnote 10, *supra*.

[16] [1977-1978] L R B 1.

one of the Bank's customers the target of a grand jury investigation of alleged mail fraud, that, on a construction of *section 10 of The Banks and Trust Companies Regulation Act 1965*, and without having to resort to any constitutional arguments, although the provision did not specifically extend the protection of secrecy of the affairs of the Bank in question while it was in liquidation and after its licence had been revoked, it would be contrary to public policy to hold that the Legislature intended customers' accounts to be protected by the 'secrecy provisions' before and not during the liquidation of the Bank.

One needs only ask oneself the question as to what is the effect (if not the purpose) of *section 4* of *The Supreme Court Act, 1996*, regarding the qualifications to be a Judge of The Supreme Court, taking into consideration the provisions of *The Legal Profession Act, 1992*, regulating the qualification for admission to practice, if not to limit the field of persons as who are apt for appointment as judges. *Section 4* provides:

> ***"A person shall be qualified to be a judge of the Court -***
>
> ***(a)*** ***if such person is a counsel and attorney who is a member of the Bar of The Bahamas and has practised as such for a period of not less than ten years;***
>
> ***(b)*** ***if such person is a counsel who is a member of the Bar of a Commonwealth country membership of which is a qualification for admission to practice as counsel and attorney in The Bahamas and has practised as counsel for a period of not less than ten years."***

The words "***if such is a counsel and attorney.. a member of the Bar of The Bahamas and has practised thereat as such for a period of not less than ten years***" are meant to be more than descriptive, but discriminating as well, in a way that is permitted by the Constitution to prefer citizens, on whom alone the right of qualification for admission to practice is *prima facie* conferred.

What then are the non-legal considerations operating invisibly so as not to alert responsible persons, including Bar Council, to the necessity and enforcement of this clear law? One must then ask: *how is Constitutional change even to affect this attitude towards the law?*

Having conceded that the influence of non-legal considerations is, in the nature of things, inevitable, it seems to be, therefore, that the real challenge and commitment to the value inherent in the constitutional principle of judicial independence must be the minimization of potential for influences of non-legal considerations. But I would go further and suggest to you that any promise which the Judiciary holds for us as individual inheritors of, and successors to, this family of islands, can only be conditional upon the ability of Judges to carry out their functions, pursuant to their constitutional duties, with minimum affectations by non-legal considerations.

It is submitted, most respectfully, that by themselves the constitutional provisions regarding security of tenure of Judges cannot possibly afford them anything other than but an *opportunity* *to assert* independence. Unless such provisions are supplemented by a process which, as one of its principal objectives, insists upon the accountability of judges as to their moral, ethical, and intellectual propensities, then even the boundaries delimiting the province of the Judiciary will in time be blurred and will eventually vanish, possibly never again to be asserted.

There is always that danger; and the consequences thereof for our democratic form of government are such as will neither excuse nor afford anything other than strict vigilance against any such occurrence.

So that one is not left in doubt as to what is meant by 'accountability' in the context of this argument, let me preface this analysis by saying that the concern is not with that type or aspect of the judiciary's business and affairs for which it is expected and accepted that a report be made to Parliament by the Minister of Justice or some other designated person. The sense which the word is meant to reflect is that of *institutional identity*, equating with what I have on another occasion described as a "***'judicial self-portrait' that is commensurate with the courts' conception of their role in the political life of the state.***"

If one begins with the question posed by Prof. K. C. Wheare in his work, <u>*Modern Constitutions*</u>, "***why should judges be thought more trustworthy than legislators or administrators***", one invariably invites a reaction from those whose perceptions of judges and the Judiciary is that of a judicial caste, in the sense that judges are not meant, and should not be expected, to be representative of the society in which they function. For this and similarly reasoned excuses therefore, it is acceptable, if not the expectation, in some quarters that appointment of judges (which includes the selection for appointment process) not be scrutinized or canvassed publicly least they and the process be brought into public controversy.

Far from it being cynical of one to ask the question "***why should judges be thought more trustworthy than legislators or administrators***", or to reject any notion of Judges being of a particular sociological caste to be treated differentially, it would appear to be but the safe and constitutionally right thing to do, to require an accounting of them. And being of the conviction that prevention is better than cure, I would suggest that Judges be subjected to some process of scrutiny, not unlike that which is carried out in other countries; the United States, for example.

Why should close scrutiny of factors other than a candidate's legal qualification be a valid and critical consideration in the filling of judicial offices, one might ask? The answer, it is submitted, is clear: it has everything to do with the one characteristic that all potential office holders share in common, namely, being '*human*'. Indeed, in the observation of Mr. Justice Venkatasamiah of the

Indian Supreme Court in S. P. Gupte v. Union of India [1982] A I R 149:-

> **".....if the judiciary should be really independent something more is necessary and that we have to seek in the judge himself and not outside. A judge should be independent of himself. A judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and will, hatred and contempt and fear and recklessness. In order to be a successful judge these elements should be curbed and kept under restraint and this is possible only by education, training, continued practice and cultivation of a sense of humility and dedication to duty. These curbs can neither be bought in the market nor injected into the human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the constitution and the laws go, the independence of the judiciary will not suffer. But with all these measures being there, still a judge may not be independent. it is the inner strength of the judges alone that can save the judiciary."**

I would suggest to you that the source of a judge's inner strength has less to do with arrogant self-righteousness or being able to master the art of good manners, and more to do with his sense of himself within the context of his experiences as a member of the very community on whose behalf he might not otherwise be morally empowered to engage in the process of law and policy making. Much of who a judge is will undoubtedly be reflective of his personal experiences; but it cannot be denied also that a judge's approach in the discharge of his judicial duties will invariably be informed by morphemically acquired knowledge of historical and sociological sentiments the significance of which go to the very definition of a community's character and its aspirations.

Again, in my view, the process by which judges in this country come to be, fails to pay respect to what must of necessity be an essential requirement, namely, that they be otherwise than peripherally familiar with the community and its view of the world. For example, the belief that the increasing embarrassment of the executive and legislative authorities at their repeated dereliction over the years to indigenous the Bahamian judiciary is sufficiently expiated through a policy of converting the non-indigenee into an émigré by the gratuitous conferment of citizenship and permanent residency status, reflects either a defect in reasoning or loss of focus. Such tendencies, obviously informed by considerations other than the principles enshrined as international standards, demonstrate more than a lack of concern for such standards and a conscientious effort to subvert them.

As far as qualifications, selection and the training of judges are concerned, both the *UN Standards* and *The Montreal Universal Declaration On The Independence Of the Judiciary* (adopted by the World Conference On The Independence Of Judges held in Montreal, Canada, in June 1983) are emphatic on the requirement of an indigenized Judiciary, and clearly not only as an end in itself; but also as a means of realizing the more fundamental objective of the independence of the judiciary. For example, the Tenth Principle of the *UN Standards* provides:

> **"10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."**

Articles 2.11, *2.12*, *2.13*, and *2.14* of *The Montreal Declaration* provide, respectively:

> **"2.11: Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.**
>
> **2.12: In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.**
>
> **2.13: The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.**
>
> **2.14: a) There is no single proper method of judicial selection but the method chosen should provide safeguards against judicial appointments for improper motives;**
>
> **b) Participation in judicial appointments by the executive or legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and**

> **the legal profession or by a body in which members of the judiciary and the legal profession participate."**

I note here in passing that the apparent compulsion to seek validation through the values of things and persons foreign, however unjustifiably contrived at that, betrays the sincerity of any effort on our part to realize political independence psychologically, and as a cherished value. Moreover, it would now mean we should some thirty-six years after declaring our political independence be constrained to realize the stillborn state of our Constitution.

Frankly, it is my respectful opinion that the process by which judges in The Bahamas come to be, can logically only result in their independence as individuals becoming hostage to the Executive and the Judiciary as an institution becoming a ward of the other branches of government, or otherwise a colony of the sponsors of those non-indigenee occupants of the officers at any point in time.

Professor Keith Patchett, former Dean and Senior Lecturer of the law faculty at the University Of The West Indies, in an unpublished paper entitled "*Safeguards For Judicial Independence In Law And In Practice*", identifies a further dimension to the reality of judicial independence in the following observation:

> **"Judicial independence at its best therefore derives from the judge's own determination to be free to make up his own mind in the end. The purpose of such independence is to entrust to suitably equipped individuals in whom general confidence lies the resolution of conflicts, according to standards embodied in pre-existing rules of**

> **law. <u>Such confidence derives from the assurance that those individuals are not responsible to any of the parties interested in the outcome of the decision</u>."**

I venture to suggest that when objectively assessed, the process (or lack of one) by which judges are appointment in The Bahamas fails to provide assurances as to the independence of the Judiciary, whether on an institutional plane or on an individual basis; and hand in hand with such failure goes the public's confidence. The absence of a reliably transparent vetting procedure, in the vogue of, say, Quebec's *Regulation Respecting The Procedure For The Selecting Of Persons Apt for Appointment as Judges*, is stark; and it manifests a central weakness operating to promote, rather, the *dependence* of individual judges who, as non-indigenees without a constituency of their own to account for them, become wards of their own ambitions and prone to the Judiciary's institutional weakness.

Whether as symptom or as reward, public confidence is of inestimable value and is clearly to be served by an independent Judiciary. The point was cogently made by former Chief Justice Lamer of the Supreme Court of Canada in a leading judgment that is regarded as setting benchmark standards of judicial independence: ***<u>Re: Public Sector Pay Reduction Act (P.E.I) S. 10</u> [1997] 150 D L R 579,***

> **"One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial**

independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule."

These propositions find endorsement in another Canadian case, ***Grafton v. Canada (Judicial Council)*** ***(1994) 115 DLR (4th) 81, p. 91.*** For Justice Strayer, judicial independence, as are the protections created for judicial tenure, survives as a constitutional imperative "**not... for the benefit of the judges, but for the benefit of the judged.**"

It seems to me that the necessities of accountability, as a positive contribution to judicial independence, require openness of process and can only be enhanced and fortified by it, beginning initially with a mandated procedure for carrying out the selection of persons apt for appointment.

Again, what must not be lost sight of is that ultimately judicial independence depends on how judges perceive and respond to their duty to repel any attempts against their independence, however such attempts are disguised. They, like us, must be even mindful of the warning of former Chief Justice Bhagwati of India.

Finally, if I may be permitted to share my apprehension over what has been transpiring in the field of constitutional law as relate to government and the exercise of governmental powers. It is one by way of a caution given by Bradley J., for the Court in ***Boyd v. United States***[17]:"**illegitimate and unconstitutional practices get their first footing**

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[17] 116 U.S. at p. **635.**

... by silent approaches and slight deviations from legal modes of procedure."

Whilst my duty as a member of the Bar and a concerned citizen informs me that it cannot be futile to agitate to remedy the condition of the Judiciary; yet the weight of habit that has become a staple in the diets of the executive and legislative branches when it comes to the Judiciary and instinct counsel acceptance of its reality.