ADDRESS OF
THE HONOURABLE CHIEF JUSTICE MICHAEL DE LA BASTIDE
DELIVERED ON THURSDAY, 16TH SEPTEMBER, 1999
ON THE OCCASION OF
THE OPENING OF THE 1999-2000 LAW TERM

This year the Judiciary has published a printed report of its operations over the last law year. Hopefully all who are present here today received copies of this report on entering the Convocation Hall. Copies will be made available to the media, to attorneys and all other individuals and organisations who are interested in the administration of justice. If you want to know how our court system is performing, I urge you to read it. It provides in some detail information both factual and statistical about the work of the Judiciary during the last year. The report has been produced by the Department of Court Administration under my supervision and editorship. Any credit goes to them – the blame (if any) is mine.

JUDICIAL INDEPENDENCE

The publication of this report enables me to focus in my address on an issue which has assumed the gravest importance for the Judiciary and indeed for the whole society. I refer to the independence of the Judiciary. I would urge you not to think of judicial independence as an abstract concept which has such universal acceptance in Trinidad and Tobago that it hardly deserves attention. Judicial independence is rarely the subject of frontal attack: more often it is eroded by persons who pay lip service to it and who may not even appreciate fully the long-term effect of the actions which they take in search of a short-term goal. The danger is that the erosion can take place without most people being aware of it until it is too late. It cannot take place unless a complacent society allows it to.

There are many facets of judicial independence. The one that I am concerned with today is independence from the influence of the Executive. This is such an important aspect of judicial independence that it receives protection from the Constitution.

There are two points I would like to emphasize about judicial independence. The first is that it serves a very specific purpose, that is, to preserve the impartiality of the judge. That is the only justification for it, but it is a powerful one, as impartiality is recognised as the supreme judicial virtue.

The litmus test therefore is: does a particular measure or action tend to create an incentive for judges when they are deciding cases to seek to please the Executive? If it does, then it derogates from the judicial independence of the Judiciary.

The second point is that the primary beneficiary of judicial independence is not the judges, but the public; the society as a whole.

What does judicial independence imply? There is a dangerous doctrine being put about that those who wield political power satisfy their obligation to maintain judicial independence by simply not telling judges how to decide cases, and not interfering with their decisions once made. Few, I hope, would be naïve enough to accept that. Any school-child will tell you that there are more ways than one to skin a cat.

In practical terms this means that by controlling the Judiciary's access to the funds voted to it by Parliament, and by assuming control of the services and staff on which the Judiciary depends, i.e. the administration of the Judiciary, the Executive can in effect operate a system of reward and punishment that will make the judges think twice before they make decisions which they know will antagonise the Executive. Once a regime is introduced which enables such a system to be operated, judicial independence has been severely compromised. It is immaterial whether you introduce or operate the regime for that purpose. It is also immaterial that the judges do not in fact allow their judgments to be affected by the prospect of reward or punishment. The fact is the risk has been created that the judge may not be strong enough to resist the pressure and as a result public confidence in his impartiality has been diminished.

Perhaps I should give some concrete examples of such a system in the making. Suppose the ability of a judge to go abroad to attend an important legal conference depended not on the availability of funds or the approval of the Chief Justice but on the whim of the Attorney-General. Suppose again that the power of the Judiciary to hire staff was subject to approval by the Attorney-General, so that he could prevent them filling posts which had been created with Cabinet approval and for which funds had been voted and were available. Suppose further that the Attorney-General was given power to decide who among staff of the Judiciary, whether holding judicial office, legal office or public office, should go abroad for training and when and for what kind of training. One consequence of giving an Attorney-General powers of this kind is that he would be able to frustrate the plans for development and reform made by the Chief Justice. Moreover, he would have a powerful leverage which he could use to extract an ever-increasing degree of administrative submissiveness from the Judiciary

Suppose that in addition to all those already mentioned, the Attorney-General assumed the following powers:

(a) the power to decide whether or not he would take any request or recommendation from the Chief Justice to the Cabinet or in what form and subject to what conditions he would do so;

(b) the power to require that the Chief Justice and/or the Department of Court Administration report to him at any time on any matter concerning the operation of the Courts or their administration.

(c) the power to investigate complaints by members of the staff of the Judiciary who are dissatisfied with some intra-departmental decision affecting them.

If these powers were exercisable by the Attorney-General then there would be very little to distinguish the Judiciary from any of those departments such as the Solicitor General or Legislative Drafting which form part of the Attorney-General's Ministry. These are powers moreover which, as far as I am aware, no Attorney-General since Independence at least, has ever sought to exercise.

It will be obvious that I have not raised the question of the propriety of these powers being vested in the Attorney-General as a purely academic exercise. The question is not purely hypothetical. Some of the powers mentioned have been delegated by Cabinet from time to time to Ministers in respect of their own Ministries. In this context the Attorney-General was never before regarded as the repository of such powers in relation to the Judiciary.

The Attorney-General is more often before the courts than any other litigant as he represents the State. Anyone who brings a constitutional motion or applies for judicial review of some official's action or decision, will almost certainly face him as their opponent in court. For that very reason, the Attorney-General is the last person who should be put in a position of authority over the Judiciary. Chief Justice Dickson, a former Chief Justice of Canada said:

"The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system."

The Attorney-General is a major participant in the justice system. To vest in him powers of this kind would be not only a departure from what has obtained in the past but, a most dangerous and unwarranted derogation from the independence which the Judiciary of Trinidad and Tobago has up to now enjoyed.

What is involved here is what is called the institutional or administrative independence of the Judiciary. Throughout the Commonwealth, this aspect of judicial independence has been recognised and strengthened. Administrative autonomy is different from financial autonomy. Our Judiciary has never enjoyed financial autonomy. Every year the Judiciary has to submit to the Ministry of Finance detailed budget proposals for the next financial year which it must defend with facts, figures and argument in order to avoid the sharp axe of the Minister of Finance. Funds are then voted by Parliament to the Judiciary under specific heads. Even after these funds are voted, before money can be spent, application must be made both to the Director of Budgets and to the Treasury for authorisation. The difficulties which we have experienced at times in securing authorisations from the Director of Budgets are well documented. This often involves persuading the relevant authorities not only that the monies are needed but that they are needed urgently. Finally, there must be strict accounting by the Judiciary for the monies which it has spent, to the Auditor-General, the holder of an independent office established by the Constitution. This represents a very high degree of financial

accountability. I fail to see how it can be suggested that the existing system does not make the Judiciary sufficiently accountable for the funds which it spends, or how that can be used to justify the imposition of some further control by the Executive.

On the other hand, the Judiciary of Trinidad and Tobago has always enjoyed a relatively high degree of administrative autonomy. In the Commonwealth, the tide is flowing strongly towards increasing the administrative independence of the Judiciary. Back in 1994, the then Chief Justice of Australia, Sir Anthony Mason, in his State of the Judicature address described the situation in Australia in this way:

"The trend towards judicial autonomy in the area of Court Administration has continued. In South Australia, the courts have recently gained control of their own administration, thus joining the High Court, the Federal Court and the Family Court."

The position in Canada was summed up by the current Australian Chief Justice, Sir Gerard Brennan, in his 1997 State of the Judicature address in this way:

"In Canada, judicial independence has been held to require what the Supreme Court has called "institutional independence", that is "the institutional independence of the court or tribunal over which [a judge] presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."

In the "Annual report of the New Zealand Judiciary 1998" the now retired Chief Justice, Sir Thomas Eichelbaum, described the position in New Zealand in this way:

"The decade has seen a notable movement in the greater involvement of the judiciary in administration and management. Not only are the modern Judges and Masters committed to case management, … they are required to contribute to an ever growing list of administrative functions and committee memberships. …This movement enhances judicial independence, that is, the ability of judges to decide matters according to law free of any inappropriate pressures of any kind."

The trend is not limited to the Commonwealth, it is global. The heads of Judiciary of twenty countries of Asia and the Pacific, (including not only Australia, New Zealand and India, but also the People's Republic of China and Vietnam) signed and issued a document known as the Beijing Statement of Principles of the Independence of the Judiciary. The following were two of the principles contained in that statement.

"(36) The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role. (emphasis added)

(37) The budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of the independence of the Judiciary and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload."

Probably the most impressive collective statement by countries of the Commonwealth on Judicial independence is contained in the Latimer House Guidelines which were issued in June 1998 at the end of a conference in London of representatives of four Commonwealth bodies comprising judges, parliamentarians, practising lawyers and legal educators. One of the signatories to these guidelines was our own Minister of Legal Affairs, the Honourable Kamla Persad-Bissessar. The guidelines are intended to regulate the relations between the Executive, Parliament and the Judiciary. Their purpose is to promote good government, the rule of law and human rights. In the section headed "Preserving judicial independence" the following are the guidelines dealing with funding.

"Sufficient funding to enable the judiciary to perform its functions to the highest standards should be provided. Appropriate salaries, supporting staff, resources and equipment are essential to the proper functioning of the Judiciary. As a matter of principle, judicial salaries and benefits should be set by an independent commission and should be maintained. The administration of moneys allocated to the Judiciary should be under the control of the Judiciary" (emphasis added).

The guidelines were submitted for consideration by the Commonwealth Law Ministers at their meeting held in Port of Spain in May, 1999, with a view to their consideration by the Commonwealth Heads of Government at their meeting in November, 1999. Colin Nicholls Q.C., an official of the Commonwealth Lawyers' Association, who was an observer at the Ministers' meeting in Port of Spain, reported to his organisation as follows:

"The initiative of the Colloquium [i.e. at Latimer House] was welcomed and the Guidelines were warmly received. The consensus of the meeting was that Ministers should take note of the recommendations and that Senior Officials should consider the Guidelines at their next meeting and report to the next Law Officers meeting".

He also reported that the Attorney-General of Barbados, who was one of four Ministers to speak, said he considered the Guidelines worthy for submission to the Heads of Government and recommended that they be given the widest circulation. Mr. Nicholls further reported on the basis of discussions held with Ministers outside the meeting, that delegates from Africa and the Caribbean appeared keen to have the Guidelines adopted more quickly than those from some of the older Commonwealth countries. His report does not contain any indication of whether our Attorney-General expressed any, and if so, what view on the matter.

On the subject of budgetary control, instead of moving forward towards the position recommended by the Latimer House Guidelines, we seem to be moving in the opposite direction. There is already interposed between the Judiciary and the funds voted to it by Parliament a discretion by authorities within the Ministry of Finance, to refuse or allow releases. The exercise of this discretion is presumably informed by the availability of funds. Efforts are now being made to make the Judiciary's access to the funds voted to it by Parliament subject to the approval or disapproval of the Attorney-General, even when the funds are required for such a mundane purpose as the payment of long outstanding bills from contractors who have been contracted by the Magistracy to transport dead bodies! If an Attorney-General can control the flow of funds to the Judiciary, he will have a stranglehold on the Judiciary.

In a paper delivered to the Latimer House conference, Chief Justice Anthony Gubbay of Zimbabwe pointed out that the Executive by control of funds can twist the arm of the Judiciary if it does not behave to its liking. He went on to say:

"There is need for budgetary independence: that is, the ability of the Judiciary to exercise control over its own funds and apply these funds in accordance with its own priorities for a better administration of justice.

Much planning goes into an efficient justice delivery system. The Judiciary is best left to direct such planning. It is the best agency to determine the priorities. Without budgetary independence, all that the Judiciary can do is to make the request for funds while the dispensing authority decides, according to its own priorities, what the Judiciary gets: and thus, indirectly, in what direction the Judiciary develops its operations and machinery … There are further pressures and obstacles which are not as apparent. One of them is preventing a Judge from travelling outside the country to attend conferences or seminars by a professed lack of funding to meet the cost of travel and subsistence".

The creation of a new jurisdiction by the Attorney-General to grant or withhold permission for the Judiciary to access funds is totally unacceptable. So far as the discretion over releases exercised by the Minister of Finance and the Director of Budgets is concerned, I would like to draw their attention to article 42 of the Beijing Statement. This prescribes that:

"Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of Human rights nevertheless require that the needs of the Judiciary and the court system be accorded a high level of priority in the allocation of resources".

Given the widespread international recognition of the need for administrative independence of the Judiciary and the recent attacks on it, it is disappointing and

alarming to find the President of the Law Association expressing the view to the Attorney-General and to the public via a full-page notice in the press that the principle of judicial independence should be strictly limited to purely judicial functions and should not extend to "administrative arrangements supporting the judicial function". The President of the Law Association finds it "highly undesirable to put administrative matters in the hands of judges who decide cases". What is frightening about this is that it would leave outside the pale of judicial independence such matters as the allocation of judges to courts and cases, the fixing of court lists and court sittings, the giving of permission to judges to go abroad, and the direction of court staff. These are all part of the "administrative arrangements supporting the judicial function". What is puzzling about it is that Mr. Hudson-Phillips goes on to use this distinction between administrative and judicial functions as the basis for his argument for the appointment of a Chancellor, another high judicial officer who will be in charge of the administrative side of the Judiciary but who he recommends may also be given some judicial function. So that we will be back where we started, except of course that the Chief Justice will have been stripped of all his functions and authority except for sitting in Court. It is not clear incidentally whether or to what extent the proposed Chancellor would be subject to control by the Executive. Certainly if Mr. Hudson-Phillips' underlying argument were sound, the Chancellor would be subject to, or possibly part of, the Executive.

Mr. Hudson-Phillips' attempt to justify separation of the judicial and administrative functions of the Judiciary echoes an argument which has been advanced from another quarter to justify, not the appointment of a Chancellor, but the assumption by the Attorney-General of all those powers over the Judiciary to which I have referred and which are so repugnant to the whole concept of judicial independence.

It is also strange that Mr. Hudson-Phillips' claims that this distinction between questions of administration and the judicial function has been recognised in Guyana, Jamaica and the United Kingdom. In all three of these countries there is a high judicial officer who performs both judicial and administrative functions. In Guyana he is called the Chancellor, in Jamaica he is the Chief Justice and in the United Kingdom he is the Lord Chancellor. In fact the Lord Chancellor wears three hats, he is the head of the Judiciary and sits as a judge in the House of Lords and the Privy Council; he is a member of Cabinet and so part of the Executive; and he is also the Speaker of the House of Lords, and therefore, a member of Parliament. The Lord Chancellor's office is a huge anomaly with its roots deep in English history. Other countries copy it at their peril. In fact, there is a strong body of opinion in the United Kingdom which favours abolishing it.

Another argument which has come more predictably from another quarter is based on accountability. Firstly, it has been represented that the Attorney-General is accountable for the Judiciary both to Cabinet and to Parliament. That is simply not true. The Attorney-General may well be the medium by which the Chief Justice communicates with Cabinet and when necessary, with Parliament. In both those fora the Attorney-General is expected to defend the Judiciary when it is wrongly attacked but is entitled to criticise it on those occasions, hopefully rare, when he considers it necessary to do so. There will no doubt be differences of opinion between himself and the Chief Justice, but

hopefully they will work together co-operatively and productively most of the time. Indeed my previous Opening of Term addresses will provide evidence that that in fact was my experience during the periods which were then under review. But to state that the Attorney- General is 'accountable' for the Judiciary is a dangerous misstatement for with accountability must go control. I challenge anyone to find anywhere in the letters patent issued to this or any previous Attorney-General since Independence, any suggestion that they have been given responsibility for the Judiciary.

Secondly, it is said that the Judiciary must be accountable and that accountability is not inconsistent with judicial independence. I agree whole-heartedly with both propositions. Some people say there must be a balance between judicial independence and judicial accountability. I do not agree. I prefer the approach of those who argue that accountability in fact complements and reinforces judicial independence by creating the public confidence on which judicial independence ultimately depends. The question of course is: accountable to whom and for what? I have already dealt with the financial accountability of the Judiciary. The point is sometimes made that in relation to their judicial functions judges are subject to a higher degree of accountability and transparency than any other public officer - or indeed any holder of political office. The judges do their work in public: they must give reasons for their decisions and these are examined and analysed by appellate courts. Moreover, their decisions and conduct in court are subject to public scrutiny and to criticism in the press and other media. Judges are also subject to removal from office, admittedly by a cumbersome process, for misbehaviour or incapacity. At the opening of every Law Term, the Chief Justice gives the public an account of his stewardship. The record of how the courts have performed is disclosed, as well as the steps taken and the measures planned for improving the court system. By introducing the Annual Report of the Judiciary, I have sought to make the disclosure more complete, more detailed and more meaningful. I am prepared to consider any reasonable suggestion for improving or adding to the mechanisms by which the Judiciary is accountable to the public which it serves. One form of accountability which is unacceptable is accountability to the Executive. When accountability of that kind comes in the door, judicial independence flies out the window. The question has been raised whether there should be accountability to Parliament. In principle that is less obnoxious. It is not appropriate in Trinidad and Tobago, however, for two reasons. One is that because of the small size of our Parliament and the very close control which the Executive exercises over it, the difference between Parliament and the Executive, is to quote Sir Ellis Clarke, "almost imperceptible". The second reason is that unlike the United Kingdom, we do not recognise the supremacy of Parliament. Under our Constitution, it is the Constitution itself, and not Parliament, which is supreme. The supremacy of the Constitution over Parliament has to be enforced by the Courts. It may be the Courts' duty to strike down Acts of Parliament in defence of it. In these circumstances, one must be careful about giving Parliament any form of supervisory control over the Judiciary.

Accountability is such an attractive concept that politicians sometimes use it to cloak what is in essence an attack on judicial independence. Chief Justice Brennan in the same address to which I have already referred had this to say about judicial accountability:

"Sometimes judges are reproached for exercising power without having been elected to do so. The suggestion is that judges should be accountable to the electorate as politicians are accountable. The duties of the Judiciary are not owed to the electorate; they are owed to the law, which is there for the peace, order and good Government of all the community. Change that view of judicial duty and you have destroyed your own security".

In Australia Judge Frank McGrath, on the occasion of his retirement after 27 years as Chief Judge of the New South Wales Compensation Court, had this to say about judicial independence and accountability (Volume 68 of the Australian Law Journal at page 232):

"There have been a number of glaring examples in both politics and in the press which demonstrate the desires of some very strong influences in the community to destroy independence under the banner of alleged judicial accountability …

"I believe that there is more to judicial independence than these two matters [i.e. security of tenure and security of salary]. In my view the judges of the various courts must have control of, and responsibility for, the administration of their own registries. The various courts should have control of, and responsibility for, their own day to day budgets, subject only to the overall supervision of the Auditor-General."

Based on what I have said earlier about the purpose of judicial independence the matter can be tested in this way. If the mechanism proposed for making judges more accountable, tends to create a risk of partiality in the making of judicial decisions, that mechanism should be rejected as inconsistent with judicial independence.

It will, I think, be clear from what I have said so far that there do exist serious differences between the Honourable Attorney-General and myself, as to the scope and application of the principle of judicial independence. The matters in issue are of such importance that I have thought it my duty to disclose publicly the existence and, in broad terms, the nature, of these differences. I have sought to do so as impersonally and inoffensively as I can, without going into details of specific cases and situations or revealing, except in a very general way, what has passed between us. I have adopted this approach mainly because I am still hopeful that these differences may be resolved amicably and that the Attorney-General and I will be able to resume the co-operative and productive relationship which we previously enjoyed. I am not blind to the fact that the position which the Attorney-General has now adopted with regard to the new rules of court means that on another important issue, there is a sharp difference of opinion between us. Nevertheless, I remain hopeful that the Attorney-General will out of deference to the rule of law accept the decision of the Rules Committee even though he disagrees with it, since the Rules Committee is the body in which Parliament has vested the power to make that decision. If he adopts that position, then our difference over the Rules (which I might add will almost certainly be resolved in time if the new rules are closely monitored) ought not to be an obstacle to the resumption of that relationship of which I have spoken.

SEPARATION OF POWERS

There is another little noticed corollary of the doctrine of separation of powers to which I would like to call attention at this time. It is that Parliament is not permitted to encroach into the sphere of the Judiciary and pass legislation which either itself performs a function which properly belongs to a court, or takes away part of the jurisdiction of the Courts that are recognised and protected by the Constitution, and transfers it to some new specially created tribunal. Where, as in the United Kingdom, Parliament is supreme, there is no such restriction on the legislative power of Parliament. It does exist, however, in Trinidad and Tobago where the Constitution is supreme and the right to a fair hearing is guaranteed by the Constitution. It is true that the application of this rule has so far been usually in the context of the Courts' criminal jurisdiction, as it was when the Privy Council in the case of Hinds struck down part of the legislation establishing the Gun Court in Jamaica. But the statements of principle in the decided cases are not restricted to the criminal sphere.

Some cases of these were cited by Lord Slynn in a recent judgment of the Privy Council in a case from Mauritius (see Ahanee v. D.P.P. (1999) 2 W.L.R. 1305. Lord Slynn deduced from the provisions of the Constitution of Mauritius (which are quite similar to ours) the following propositions (at page 1312):

"First, Mauritius is a democratic State, constitutionally based on the rule of law. Secondly, subject to its specific provisions the Constitution entrenches the principle of the separation of powers between the legislature, the Executive and the Judiciary. Under the Constitution, one branch of Government may not trespass upon the province of the other."

Judicial independence which as I have pointed out is intended to be for the benefit of the whole society, loses its value to the extent that the adjudication of disputes between citizens or between a citizen and the State, is taken from the judges whose independence is buttressed by the Constitution, and given to persons who are not similarly protected. I have thought it my duty to call attention to this constitutional principle just as one might call attention to a road sign indicating that there is some danger ahead.

INDEPENDENCE OF THE LEGAL PROFESSION

Having spoken at some length about judicial independence, I think it is appropriate at this time also to say something about the independence of the bar. May I make it clear that I use the term 'bar' loosely to refer to all attorneys and not only to those who perform the functions previously performed by barristers.

I think it is extremely important that we cherish and preserve the independence of attorneys, both individually and collectively. I prized that independence when I was at the bar and I still do, for an independent bar is essential for an independent bench. At the Latimer House conference Cyrus Dass, a Malaysian lawyer said: "In less developed

countries the bar plays the role of the guardian of the Judiciary and civil rights." Of what use is a guardian who is not independent?

I take this opportunity to put to rest a slander which was put out about me. At no time have I ever suggested either on or off the bench that attorneys should not accept cases that were unpopular or unlikely to succeed. What I have challenged is the right of attorneys to argue nonsense. But, happily that is a very rare occurrence. In fact, I have nothing but admiration for the small group of attorneys who have repeatedly appeared to make constitutional challenges of the death penalty. I suspect that their work is often unpaid: they certainly undertake it in the face of largely hostile public opinion. They may not have had notable success to date, but I have never heard any of this group argue nonsense. They have too much respect for their reputations and for the Court to invoke the Court's process when there is nothing sensible left to argue. Younger attorneys would do well to take their cue from them. I congratulate them on maintaining the finest traditions of the bar and on playing an important though unpopular role in preserving the rule of law.

But the bar has a collective role to play as well, and it is equally important that in doing so it should not lose its independence. The collective identity of the legal profession is the Law Association and the spokesman for the profession is the President of the Law Association. He, therefore, has a solemn duty to be, and manifestly be seen to be, free from the influence or control of the holder of any office - judicial or political.

As a former President of the Association, I venture to suggest further, that it is unprecedented and inappropriate for the President to report to the holder of any such office. As I have said, the Judiciary has an interest in the collective independence of the Bar. As an advocate of that independence, I accept the slings and arrows which a bar that is manifestly independent of the Judiciary aims in my direction. At the same time, when there is a threat from the Executive to judicial independence, I expect that a bar which is equally independent of the Executive, will rally around the Judiciary, and not join in the attack on it.

THE NEW RULES

I turn now to the new rules. First I would like to give an update of what has occurred since my address at the beginning of the last Law Term. You will recall that on that occasion I announced that the Rules Committee had amended both sets of rules so as to alter their commencement date from the lst January, 1999, to a date in 1999 to be fixed by the Committee and I invited all members of the legal profession to give the Rules Committee the benefit of their views and recommendations on the new rules without being subject to the constraint imposed by a fixed commencement date. A similar invitation was given to the Law Association by the Rules Committee and in response the Association submitted the reports of a number of workshops which it organised for its members.

In January 1999, there was passed at a Law Association meeting a resolution calling on the Rules Committee in effect to scrap the new rules and begin afresh the exercise of reforming the rules. The Rules Committee did not feel able to accept this suggestion. In January the Rules Committee met with a group of "concerned lawyers" on the new rules. I explained to the group at this meeting that the new rules not having yet come into force, could be freely amended and that for all practical purposes they could be treated as draft rules. The group seemed to find that an acceptable position. The Rules Committee in response to a request by petition from a large number of attorneys, agreed that the target date for the submission of comments which had already been put back from the 31st October, to 31st December should be further put back to the 31st March, 1999.

In April the Rules Committee met with two representatives of the Criminal Bar Association who made proposals for the revision of the new rule dealing with bail applications. In response the Committee re-drafted the rule so as to accommodate the points they had made and sent the re-drafted rule to the Association on May 25, 1999. To date there has been no further word from this group so the Committee assumes that the re-draft is acceptable to them.

In May the Rules Committee obtained a copy of a draft document prepared for the Law Association entitled "An Overview of the Civil Proceedings Rules" and considered its contents in detail. Subsequently I received from the President of the Law Association on the 9th July, 1999, a diskette containing an expanded version of this document. The Committee also received from the judges a number of proposals for amendment of the new rules. These were the product of several weekly sessions which the judges devoted to the study of the new rules.

The Rules Committee went through all the materials submitted to it and agreed on a number of amendments of the Rules. These amendments were submitted to the Chief Parliamentary Counsel on the 26th May, 1999, so that she might prepare the necessary instrument to give effect to these amendments. A copy of the amendments was also sent to the Law Association on 1st June, 1999. The instrument was received back from the Chief Parliamentary Counsel on the 30th August, 1999. It contained what appeared to be some computer generated errors and these had to be identified and corrected. This has now been done and copies of the amendments are available free of charge at the Hall of Justice in Port-of-Spain and at the sub-registries in San Fernando and Tobago. The Committee has also prepared several new pages in which the more extensive amendments have been incorporated in the text of the new rules as originally published.

On the 12th July, 1999, the Rules Committee fixed the 31st December, 1999, as the date for the commencement of the Civil Proceedings Rules. It is anticipated that the instrument effecting the amendments will very shortly be signed and sent to the Attorney-General for laying in both Houses of Parliament.

One significant change which has been agreed is that the new rules will only apply in the first instance to fresh actions filed after the commencement date. They will not apply to existing actions except at the option of one of the parties or in the discretion of the Court

after a prolonged period of inactivity. As a result, the initial operation of the new rules will have some of the characteristics of a pilot scheme.

In a letter dated the 21st July, 1999, which I wrote to the President of the Law Association, I invited the co-operation of the Council of the Law Association in putting into place a system for closely monitoring the operation of the new rules and the results which they produce. So far I have had no reply.

At the meeting of the Rules Committee held on the 12th July, 1999, the Honourable Attorney-General informed the Rules Committee for the first time that he was no longer supporting the implementation of the new rules, but was opposing it. He read and submitted to the Committee a paper in which he gave reasons for his opposition and proposed the setting up of a task force to examine once again the new rules, consult interested parties and make recommendations to the Rules Committee. I should mention that the flow of comments, criticisms and suggestions from the legal profession, appeared by then to have dried up. The Committee gave careful consideration to the Attorney-General's paper, but while regretting the withdrawal of his support for the new rules, felt strongly that no useful purpose would be served by delaying their implementation beyond the end of this year.

The Committee also considered a letter dated the 9th July, 1999, which I received from the President of the Law Association. In that letter Mr. Hudson-Phillips made his own assessment of the current attitude of the legal profession towards the new rules. He wrote:

"The proposed new rules continue to generate considerable discussion in the profession which is by no means unanimous in its views about them. The positions taken range from outright rejection at this stage to qualified acceptance".

I do not with respect believe that Mr. Mr. Hudson-Phillips' assessment is altogether accurate, as it does not take account of those attorneys who have expressed positive support for the new rules. My information by the way is that many, if not most, of the Law School students who were given the choice of studying and being examined either on the existing rules or the new rules, chose the new rules because they are so much simpler.

In his letter, Mr. Hudson-Phillips set out again the familiar arguments that have been repeatedly advanced in opposition to the new rules, namely that they will drive sole practitioners out of business, that they will make litigation more expensive and that the front-end loading of expenses will make it difficult if not impossible for poor people to litigate. He ended by recommending that the new rules "should not be introduced in the foreseeable future if at all". I replied to his letter setting out again the flaws in these arguments which have led the Rules Committee to reject them.

The President has recently returned to the attack in the full-page newspaper notice to which I have already referred. In this notice the President tells of what transpired at a

meeting he held with the Attorney-General. The purpose of the meeting was for the President of the Law Association to 'report' to the Attorney-General in the latter's capacity as the 'leader of the Bar'. May I say in parentheses that the title "leader of the bar" is an honorific one traditionally given to the Attorney-General in the United Kingdom. It carries with it no responsibilities, no powers and no functions. Whatever relevance or validity that title may have had in Trinidad and Tobago did not survive the Legal Profession Act which amalgamated both branches of the legal profession and established a management structure for the unified profession in which the Attorney-General has no place.

It appears that in the course of their meeting the President and the Attorney-General repeated to each other what I have described as the familiar arguments of those who are opposed to the new rules. There were, however, one or two new twists and the recently declared opposition of the Attorney-General to the new rules provided the President with some fresh ammunition. Thus the President thought it 'inconceivable' that the new rules should be brought into effect when "the profession and the Executive are not in favour".

Even according to Mr. Hudson-Phillips, as we have seen from his letter to me, the legal profession is divided on the new rules. Nevertheless, I am prepared to accept that the President of the Law Association with the backing presumably of a majority at any rate of its Council, is entitled to claim to speak on behalf of the legal profession. Presumably, Mr. Hudson-Phillips would not deny the same right to his immediate predecessor and her Council. Memories are sometimes conveniently short, but may I remind him that on the 30th June, 1998, these very same rules were made by the Attorney-General and two nominees of the Law Association acting in concert with the rest of the Rules Committee. They all voted for the new rules and signed the instrument which gave them legal effect. At that time the Attorney-General told me that he had examined the new rules and had found nothing objectionable in them. The rules have not changed, but apparently his opinion of them has.

The two nominees of the Law Association were the then Vice President of the Association and the immediate past Vice President, both of whom were members of the Council. The President of the Law Association herself sat together with one of the Association's nominees on the Rules Committee, on the ad hoc committee which guided Mr. Greenslade in shaping the rules to suit local conditions. The Council of the Law Association obviously knew and approved of what was being done by their President and their nominees on the Rules Committee. The only reason why the rules did not come into force at the beginning of 1999, was because the Rules Committee bowed to the demand made by a substantial number of attorneys for further consultation.

The Attorney-General is perfectly entitled to change his mind even after the lapse of one year. It was not until July 12, 1999, that he disclosed to the Rules Committee that he had changed from proponent to opponent of the new rules.

On March 12, 1998, I wrote to the Attorney-General that the Rules Committee was minded to fix the commencement date for the new rules at September 16, 1999, and that

it was important for the Committee to hear his views on this as soon as possible. I offered to arrange a meeting of the Committee to suit his convenience. I received no reply but the Attorney-General did not attend any of the 17 meetings the Committee held between February 18, 1999 and July 12, 1999.

Appended to the Attorney-General's statement to the Rules Committee was part of an opinion on the new rules by an academic lawyer in England, Professor Zander, who is a well-known but almost solitary opponent of the Woolf Rules in England which use the same case management approach as our new rules. The Professor on his own admission performed his task in 'well under a week' and never set foot in Trinidad and Tobago. Although the opinion was commenced in December, 1998, and received in January 1999, its existence was not disclosed to the Rules Committee by the Attorney-General until the 12th July, 1999. Even up to now, the Committee has not seen the whole opinion, as the Attorney-General has declined to make it available to us.

The Law Association too is perfectly entitled to change its collective mind, although I would point out that both nominees of the Law Association who voted for and signed the new rules, were re-nominated by the Law Association on the 18th November, 1998, after their terms had expired. In the circumstances, I do not understand why the fact that the other members of the Rules Committee have not changed their minds, should provoke such indignation on the part of the President of the Law Association.

In his notice in the press the President went on to refer to an 'outstanding negative resolution' filed in the Parliament by a Member of the Opposition with a view to annulling the new rules. He says there is some 'uncertainty' as to the status of this resolution and suggests that the implementation of the new rules in those circumstances is disrespectful both of the mover of the resolution and of the Parliament itself.

These rules were laid in the House of Representatives by the Attorney-General in July, 1998, some fourteen months ago. In his written statement to the Rules Committee, the Attorney-General stated quite unambiguously that the motion for the negative resolution had lapsed without being debated at the end of the Session. Mr. Hudson-Phillips' uncertainty is therefore puzzling. I would point out that the Attorney-General as the Leader of Government business in the House, was the one to determine the priority (or lack of it) given to the motion. The allegation of disrespect is unwarranted but if made, it should not be directed at the Rules Committee.

I think it is quite understandable that lawyers should have reservations about the new rules. These rules apart from being still unfamiliar to most lawyers, do make important changes in our procedure and while rules of this kind have worked well in other countries, obviously not everyone will feel absolutely sure that they will do so here. It will clearly be important to monitor them closely after they have come into force. I practised extensively in the courts of this country for over 30 years. My experience of local conditions and practices tells me that the new rules will make a vast improvement in our civil system, cutting down costs and delays for everyone who has to use that system.

The members of the Rules Committee were all firmly of that opinion in June, 1998. The majority of us still are.

I do not think it can seriously be contended that the new rules will not reduce delays in determining cases. Indeed, the fact that they will, provides the whole basis for the argument that the new rules will prevent poor people from litigating. On the question of costs, it is impossible to demonstrate empirically in advance that the new rules will reduce these, but there is every reason to believe that they will – certainly in the vast majority of cases. I say so because the new rules will reduce the number of interlocutory applications and more importantly, will shorten trials or in many cases, eliminate the need for them by promoting earlier settlements. The major cost item in any litigation is the attorney's fee on brief, that is, his initial fee for the trial. Once the trial brief is 'delivered', this fee is considered to have been earned. So it is of great importance to the client that if there is to be a settlement, that should occur before the trial brief is delivered. The new rules will require lawyers to do what they should always have done, but very rarely do at present – that is, prepare their cases fully by investigating the facts, the documents and the law at an early stage. By doing so they will often save their clients from throwing good money after bad and will certainly shorten the time to final disposition. The new rules will not require the lawyers to do any additional work, only to do their work earlier. That necessarily means that they will earn their fees earlier – 'upfront' if you like. Of course, whether they insist on upfront payment of those fees, is a different matter entirely, one which is for them to decide.

This brings me to the argument that the new rules will prevent poor people from litigating. This argument of course is expected to have a popular appeal as very few people can readily afford the cost of litigation, and at present there is virtually no legal aid provided in civil cases. All too often, if you are not poor when you start to litigate, you are by the time the case is finished. What is unfortunately not being made clear to the public is that in this matter the interest of the attorneys does not coincide with theirs. The public's interest is in having their cases determined quickly. The lawyer's interest is in being paid quickly. Lawyers must be the only group of people who insist on being paid before rather than after they have worked. The argument which is advanced against the new rules goes like this: the new rules will result in cases being disposed of in a shorter time. But poor people need a long time to pay their lawyers, therefore, they will not be able to litigate under the new rules. The implicit but unspoken premise of this argument is that lawyers cannot or will not give their clients time to pay. The justification for requiring payment in advance used to be that barristers could not sue for their fees. Well, we no longer have barristers, we have attorneys and I have not heard it suggested that they cannot sue for their fees. There is no rule of law or ethics which prevents an attorney from agreeing to be paid at the end of a case. In other jurisdictions (which now include England), lawyers charge on a contingency basis, that is, they are paid if they win out of the proceeds of the judgment. That may not be practical under the existing rules when cases take an average of seven years to trial, and sometimes a good deal longer, but it would be much more feasible under the new rules which will shorten this time drastically. But even under the existing rules there are lawyers who do not require payment up front, just as there have been lawyers who have caused their clients to

sell their houses to pay their fees. There will always be lawyers of both kinds, whatever rules we have.

If attorneys prefer to retain the old rules and thereby condemn everyone to continue to wait years for their cases to be determined, then they should make it clear that their concern is not for the public, but for themselves.

Another argument which is flavoured with not so subtle allusions to racial prejudice calculated to rekindle old resentments, is that the new rules will drive the sole practitioner out of practice. I have repeatedly asked the proponents of this argument what exactly is it in the new rules that will drive the sole practitioner out of practice. I have never had an answer to this question. What do the new rules require of an attorney that cannot be efficiently and effectively done by a sole practitioner with the aid of a typist, a messenger and a diary?

The closest thing to an answer that I have seen appeared in the recent press notice from the President of the Law Association. In that notice the President reported himself as having expressed to the Attorney-General the view that "the proposed introduction of stringent and complex requirements for the commencement of proceedings" would have an effect on single practitioners and small firms as well as making it more difficult for the poor litigant to access civil justice at the High Court level.

What exactly are these 'stringent and complex requirements for commencing proceedings?' The basic requirement is the filing of a claim form and Statement of Case. These correspond to the Writ and Statement of Claim required under the existing rules. One change is that the Statement of Case must be issued and served together with the claim form but this requirement may be waived in cases of urgency. The new rules in fact simplify the procedure for commencing an action by permitting the same kind of document – the claim form – to be used in every case, while under the existing rules proceedings have to be started sometimes by writ, sometimes by originating motion, sometimes by originating summons and at other times by petition.

All that is new is that there are two certificates which must be signed by the claimant or his attorney. One certificate, which is put on the claim form, certifies that the person signing believes the contents of the document to be true and that the claimant is entitled to the remedy claimed. The other certificate is only needed if the claim is for damages of an unspecified amount. It is to certify that the damages claimed exceed or are likely to exceed $15,000.00 or to show otherwise why the High Court has jurisdiction. Will an attorney need the support of a large firm in order to sign or to get his client to sign these certificates? Is this what is meant by 'stringent and complex requirements?'

It is difficult to believe that this sort of argument could underpin an opposition to the new rules so intense and so implacable as to lead the President of the Law Association (with what support from its members I do not know) to do the following:

(a) to present to the Attorney-General and to the public an argument for the attenuation of judicial independence;

(b) to propose that the Constitution be amended to strip the Chief Justice of his administrative functions and transfer them to a new super judge to be known as a Chancellor;

(c) to recommend the passage of an Act (for which he already has a name) not only to re-structure the Rules Committee but to deny the rules made by that restructured body any legal effect until and unless an affirmative resolution has been passed in both Houses of Parliament approving them.

(d) to recommend that this Act should have retroactive effect so as to reverse what has been lawfully done by the unanimous decision of a statutory body of which the Attorney-General was a member and on which the Law Association was represented by two nominees of its choosing.

It would be foolish of me not to recognise, and cowardly not to acknowledge, that I am the target of much, if not all, of this. I assure you it is not a comfortable position, to be the target of a combination of such powerful forces. But I give you this assurance that I will not turn and run. My only regret is that those who wish to destroy me seem to be prepared to destroy, or at least damage, the institution of the Judiciary in the process. And who knows - they may succeed, but only if people, and lawyers in particular, let them. The Judiciary by itself is powerless to stop them. I have seriously considered whether I ought not to bow out in the interest of preserving the integrity of the institution. But I realise that by doing so, I may actually weaken it and make it more vulnerable to attack in the future. Once a thing has been done once, it becomes easier to do it again - the 'thing' in this case being to drive out of office a Chief Justice whom you do not like. My resolve is considerably stiffened by the support of my brothers and sisters on the bench, for which I am extremely grateful. Some of them may like me, others may not, but their support is not based on liking or not liking me, it is based on their knowledge of what I stand for, particularly in relation to the Judiciary. What I stand for is a Judiciary that is independent; one that is impartial; one that is efficient and competent; one that is well paid and well housed; and one that is united. These are not just my policies, they are my principles and I will descend into the arena with anyone who attacks them.

I do not propose to deal in any detail on this occasion with Mr. Hudson-Phillips' proposals (to which the Attorney-General has promised to give "active consideration") to amend the Constitution and the Supreme Court of Judicature Act. It should be noted that Mr. Hudson-Phillips has not seen fit to discuss any of his proposals with me. I wish merely to say one or two things. Firstly with regard to the Chancellor and the reference to Guyana and Jamaica. In Guyana there is a Chancellor and a Chief Justice. The head of the Judiciary is the Chancellor. The Chief Justice is the chief judge of the High Court, but has very limited powers and authority. In Jamaica there is a Chief Justice and a President of the Court of Appeal. The head of the Judiciary is the Chief Justice and he

exercises administrative authority over the Judiciary except in relation to the Court of Appeal. He sits in the Court of Appeal only on the invitation of the President of that Court, and such an invitation has never been extended. In both countries both offices were created by their Constitutions at the time of Independence. I have been told that in both countries the establishment of the dual posts had more to do with personal than with constitutional considerations. Be that as it may, my information gained at first hand from different persons who have operated the system in both countries, is that it has not worked particularly well and they would not recommend it to any other Caribbean country. But I do not rely on this anecdotal evidence. My opposition to the suggestion of a Chancellor is of long standing – it predates my assumption of office – and is well-known to the Attorney-General. To create a second head of our Judiciary is a recipe for divisiveness and disunity. To take administrative authority from one high judicial officer and give it to another simply makes no sense. One purpose that it would undoubtedly serve is to neutralise the Chief Justice by taking away both his administrative functions and authority and his status. I suppose it is not a new strategy – if you can't remove the man destroy his office. In fact the suggestion of a Chancellor first reared its head when a previous regime was unhappy with the then Chief Justice. The proposal also would make sense in pursuance of another well-known strategy - divide and rule.

With regard to the proposal for legislation aimed at the Rules Committee and the new rules, I would merely like to quote at this stage from an address given by Justice Stephen Breyer, an Associate Justice of the Supreme Court of the United States. He explained the rule-making process in the United States. At the end of that process new rules are submitted to the Supreme Court and if approved by the Supreme Court they are sent to Congress. They become effective unless Congress rejects them within a prescribed period. In other words they are subject to a negative resolution by Congress. I wish to quote the following sentence from Justice Breyer's address:

"The power over the procedural environment in which cases are heard and decisions are tendered is probably the power that is nearest the core of institutional judicial independence."

The Act which Mr. Hudson-Phillips proposes, therefore, would be another blow at the heart of the institutional independence of our Judiciary.

THE MAGISTRATES

I would like to pay special tribute today to the Magistrates. I was very pleased to see in the press a couple of days ago the President of the Criminal Bar Association, Mr. Theodora Guerra, S.C., praise the magistrates for their hard work and devotion to duty. I would like to endorse what he said and point out that not only do they have to cope with over-long lists but often work in extreme discomfort as a result of the heat and smells which they have to endure in their court-rooms. In this context may I appeal to politicians on both sides of the Parliamentary fence to show their goodwill to, and appreciation of, the magistrates who stand in the front line of the criminal justice system, by finding a way to enable the recommendations of the Salary Review Commission in

their regard to be implemented without political disadvantage to anyone. Hopefully, the opportunity will be taken to also implement at the same time the Commission's recommendations in respect of Judges, Masters and Registrars.

THE DEPARTMENT OF COURT ADMINISTRATION

Before I close, I want to say a word also about the staff of the Judiciary. I refer here in particular to the Department of Court Administration which includes the Registry and the Magistracy staff. This department has been the butt of what seems to be almost a campaign of misinformation. It has been said for instance that the head of that department gives instructions to judges. This is totally untrue. Even the legality of its existence has been questioned. From the time I took office I have maintained that in discharging his responsibility for court administration, the Chief Justice should have the assistance of professional administrators with the requisite training, experience and skills as court administration is a field which encompasses many specialties. Because of obstacles placed in our way, many of the posts in this department which Cabinet agreed to create and which should have been filled by now, are still vacant. Despite this handicap, the Department can be very proud of its record of achievements. I strongly recommend that if you wish to know more about them, you read the Annual Report. I venture to suggest that they are now one of the most progressive and efficient departments in the public service and I want to congratulate them on their success and to thank them for their support. I am talking not only about the senior officers, but the whole staff of the Department including those who are less visible.

CONCLUSION

The Judiciary is going through a very difficult period at present. Its independence is under serious threat. Whether it comes out of it unscathed, will depend to a large extent on whether responsible members of the legal profession and of the general public can be motivated to raise their voices in its support. I hope and pray, come this time next year, I will be able to report that the ship of the Judiciary has sailed safely through the storm.

M. A. de la Bastide
Chief Justice

16th September, 1999.