



**ADDRESS**

OF THE

**THE HONOURABLE THE CHIEF JUSTICE**

**MR. JUSTICE IVOR ARCHIE**

AT THE

**Opening of the  
2009/2010 Law Term**

IN THE

**CONVOCATION HALL**

**SUPREME COURT**

AT THE

**HALL OF JUSTICE**

**KNOX STREET, PORT OF SPAIN**

ON

**WEDNESDAY 16<sup>TH</sup> SEPTEMBER 2009**

## **Address for Opening of the 2009/2010 Law Term**

Right Honourable Mr. Justice Michael de la Bastide, President of the Caribbean Court of Justice and Privy Councilor, and Mrs. de la Bastide; Honourable Judges of the Caribbean Court of Justice; Cabinet Ministers, Members of the Diplomatic Corps, Members of the Judiciary of Trinidad and Tobago, Members of the Industrial Court, Members of the Tax Appeal Board, Members of the Environmental Commission, Members of the Legal Fraternity, President of the Law Association, other Dignitaries, Ladies and Gentlemen:

Because of the particular focus that I want to adopt for this year's opening address I will take the unconventional step of acknowledging at the beginning, rather than at the end, those persons who have retired during the past year and whose contributions will endure and leave an indelible mark on this institution, its administration our jurisprudence and most of all on the lives of those with whom they have come into contact.

After 22 years of distinguished service, Justice of Appeal Roger Hamel-Smith has retired from the bench. Admitted to practice as a Solicitor in 1969, he has followed in the tradition of excellence set by many members

of his family including his grandfather who founded the family firm a century ago. He has made an enormous contribution to local jurisprudence and continues to contribute to the profession in a private capacity. We thank him for his contribution and for his leadership in difficult times and wish him a long and productive retirement.

Justice of Appeal, Madame Justice Margot Warner has been described as a 'first class human being'. That was perhaps her most important qualification to be a judge. Generous, compassionate and fiercely independent, she served the judiciary for 18 years, with distinction. She authored many important judgments, including the now famous 'hijab' case and was the first woman to ever act as Chief Justice. She now has a little more time to pursue her other passions as an artist and musician. We shall miss her.

The retirement of these two distinguished jurists represents the passing of an era. They have left us younger judges enormous shoes to fill but they have also provided us a firm foundation. We salute them!

We also bid farewell to Justice of Appeal Stanley John who chose to depart well before his retirement age to pursue a career in the Bahamas. We wish him well in his future endeavours.

My tributes would not be complete without mention of Mr. Gary Kelly who has served the judiciary loyally and tirelessly for 18 years in the key positions of Administrative Secretary to the Chief Justice and latterly the

Court Executive Administrator. Mr. Kelly had many options upon entering the legal profession, including remaining at his father's law firm. He chose instead to devote his life to public service, at great sacrifice to his health, family and finances. He has helped to see us through several significant transformations and thanks can never adequately mark the value of his contribution. We wish him a long retirement in good health.

There are others who have left us this year and some are acknowledged in the Annual Report. Time does not permit me to mention all of them but it does not mean that our gratitude is in any way diminished.

My personal thanks go out as well to all the members of the judiciary staff, at every level, who have continued to provide unstinting support and service during the past year. I would also like to express our appreciation for the work of the MTS staff throughout the year and especially for the effort put out in preparing the premises for today's activities. My special thanks to the Court Administration Department and all who have organized and executed today's opening ceremony and other events. In that regard, special thanks go out to the Lydian singers and Dr. West for his thought provoking and very pointed message. We could not do it without you! Last but by no means least, I must thank Canon Sampson of the cathedral church of the Holy Trinity for graciously hosting this morning's service once again.

And of course I would like to extend congratulations and welcome to Justices Stollmeyer, Narine and Smith who have been elevated to the Court of Appeal and to Justices Boodosingh, Mon Desir and Browne-Antoine who will replace them as permanent appointees to the High Court Bench

Fellow citizens:

The opening of the law term presents a rare occasion for the Chief Justice to address the national community and, where there are important matters to be discussed, it is an opportunity that cannot be squandered. I have therefore thought long and hard about the content of this speech. I have agonized about its tone and content, but there has never been any doubt in my mind that there are some things that I must say, things that I want us all to think about and things that must not be lost in a welter of statistical information.

The occasion of the Chief Justice's speech at the beginning of the new law term has come to assume something of a traditional format. Last year I took some trouble to set out the vision and plans that would guide us during 2008-2009 and succeeding years. I understand, therefore that you may be expecting a detailed account of my stewardship and the progress that we have made towards the fulfilment of our goals. Well, despite the loss of nearly \$100 million from our budget last year owing to changed economic circumstances, we have made progress. But I do not

want to dwell too long on that because much of it is recounted in the annual report, which you can read. I shall refer only briefly to our accomplishments because I really want to have a different conversation with the nation this year.

I could point out that some of our objectives have not yet been achieved because we have had to focus, as was intimated last year, on the difficult task of establishing the right human resource base to take us forward. Finding and recruiting the right people for key positions has been difficult. However, some key positions such as the Director of Planning, the Director of Human Resources and The Security Manager have been filled and we are in the process of populating a restructured Court Administration Department. We hope to begin that process soon for the Human Resources Departments. We are therefore now better poised to move forward, but I suspect that most people really want to hear about results, not explanations.

I could trumpet the fact that despite all the human and material resource constraints we determined 79,226 magisterial, 101 Indictments 4968 High Court civil, and 430 Appellate matters last year but if your matter before the Court was not completed those figures will probably fail to impress you.

I could leap to the defence of the magistrates who, like all of us are not perfect but nevertheless only had 258 or 0.3% of the 79,226 matters

disposed of appealed and of those only 49 or 19% overturned and say that criticisms of their performance are therefore exaggerated. These are published statistics and similar to those published last year, but facts are inconvenient things for those with an unbalanced agenda.

I could say that, of those jurisdictions that still cling desperately to the Privy Council, the percentage of the decisions of our Court of Appeal that are upheld is slightly better than the average but you can check the Privy Council website for yourself.

I could spend a considerable time listing the things we have managed to accomplish if that would give some reassurance, but I propose only to take a brief detour to outline some of the significant ones:

- Phase 2 of the Point Fortin Magistrates' Court refurbishment is now complete;
- Construction service providers have been engaged and mobilized for the provision of modern facilities at Couva, Rio Claro and Siparia Magistrates' Courts. Couva and Rio Claro will be completed before the end of this term and Siparia nearer the end of 2010;
- Cabinet approval has been obtained for the acquisition of lands for the construction of the Chaguanas Magistrates' Court Complex. The building originally earmarked to house the Court temporarily

will now be used to accommodate a centralized Coroners' court with minimal renovation and significant cost saving;

- Several new positions of Coroner have been created and will be filled as soon as the infrastructure is in place;
- The new training labs on Frederick Street are complete and provide a training environment that accurately simulates the courtrooms and registries in respect of processes and technology;
- After sensitization and consultation sessions with all stakeholders to refine the protocols, the videoconferencing equipment for the remand hearings has been successfully installed and tested at selected courtrooms in Scarborough, St. George West, and San Fernando Magistrates' Courts and the Tobago and Frederick Street Prisons and the Arouca Remand Yard. The Tobago pilot goes live next month and is expected to facilitate remote visitation as well as remands. Videoconferencing is expected to have major impact on transportation and security costs and risks, as well as saving transit time and relieving crowded magistrates' court lists;
- The promised recruitment, orientation and training of Customer Service Representatives has been completed;

- Electronic screening and surveillance systems have been installed at the Scarborough High and Magistrates' Courts and at Point Fortin;
- Cabinet has also approved the acquisition of the St. Joseph's Convent building for customization to deliver Family Court services in San Fernando;
- There are now no more matters to be assigned from the Civil 'Old Rules' backlog.

Unfortunately the fact that capital allocations in this year's budget have been further reduced will have a crippling effect on our development plans. We requested \$393 million for the development program for 2009/2010. Our budget allocation was \$42.5 million That means there will be no Family Court roll out this year without a significant supplementary appropriation and our ability to deliver on the refurbishment of physical facilities especially in the magistrates' courts is severely restricted. But we never cry over spilt milk, we will just do the best we can, as always.

These are only some of the several accomplishments that we can recount, but today I don't really want to spend too much time on that, there is a more urgent priority. Today I want to talk about Constitutional Reform. That discourse is both necessary and in keeping with this year's theme of "Access to Justice", which is a concept that goes beyond the

mere provision of a forum for the settlement for disputes and is really the nucleus around which any just and humane first world society is fashioned.

Last year, when I spoke about the issue of constitutional reform, I sought to flag certain key concerns but at the time and, in the absence of the current published draft constitution, my remarks were somewhat devoid of context. Some of them bear repeating and I implore you to listen carefully.

I did express approval of the fact that the executive had undertaken to put the proposed draft constitution into the public domain for consultation and debate.

That has since been done and I thought it prudent, given the nature of exercise the nation is supposed to be embarking upon, to wait a while and listen to what the people were saying. So far, the response has been muted. The judiciary is working on a full written commentary but there are some aspects of the draft constitution that I wish to address as sources of concern, mindful of the fact that it is said to be a work in progress.

First, however, I would like to provide some context for my remarks in the hope that the intent will not be misunderstood. The proposed constitution represents something far more fundamental than an amendment or revision of the existing constitutional arrangements. It is

a complete rewrite of the social contract that is to govern the way in which our institutions function and interrelate. Presumably it is premised on the assumption that there are several aspects of the existing constitutional arrangements that are not working satisfactorily. Presumably also, the proposed arrangements have specific objectives in mind and are perceived to be superior in achieving those objectives. The discussion would have been better informed if both the shortcomings and the objectives had been articulated in writing with some specificity along with the draft.

Be that as it may, I trust that as a nation, we are moving forward on the basis of certain fundamental principles to which we all adhere. These include the paramountcy of the rule of law, the separation of powers and the independence of the judiciary. I make this assumption because I have listened very carefully to what the Honourable Prime Minister has said during the current series of public meetings and he has articulated those principles as the basis for constitutional reform, including the importance of institutional independence as well as individual judicial independence in the adjudication of matters before the courts. What I have to say, therefore, is by way of reinforcement of those principles but in the context of the draft that has been put out for public comment. It is a critique of the draft only, and not of any person. Permit me now to explore for a moment the relationship between those concepts.

In our nation's Constitution, we have asserted our belief in *“a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority;”*

Governments have no other justification for their existence! The Americans put it so eloquently in their Declaration of Independence, where we find these words:

*“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —“*

Thus the extent to which our national institutions facilitate the development of the type of society just described is the only true measure of their legitimacy. It is the standard of accountability to which all citizens are entitled to hold their leaders and state organs. And ultimately, every organ of the state, including the judiciary is accountable to the citizens and to no one else, in respect of those areas for which it is responsible.

The rule of Law is unsustainable without scrupulous adherence to the principle of separation of powers. It is for good reason that we refer to the

separation of powers and not the separation of responsibilities. The separation of powers is not a provision of the Constitution. It is the philosophy underlying the Constitution and the framework upon which government is structured so as to harness individual human nature (in the sense of providing both focus and restraint) to serve society at large. In that context, Judicial Independence is a device, a set of structural arrangements, to get something done – to implement the Separation of Powers. George Washington, after the Constitutional debates in America said **“the true administration of justice is the firmest pillar of good government”?** He understood that courts are important, not simply because they are a major forum to resolve disputes – other mechanisms are available to resolve disputes – courts are important because they are expected to resolve disputes impartially, fairly and according to law. The American founding fathers held the common conviction that the Separation of Powers was an essential barrier to tyranny, to holding government in check and the prevention of arbitrary policymaking. But Judicial Independence is not achieved simply by a provision written in the Constitution. As Madison said “while these paper provisions are necessary the security of real separation of power – **consists in giving those who administer each department the necessary means to resist encroachment of the others**”

The “necessary means” that are woven into the fabric of our Constitution and that are also meant to be observed as a matter of

convention are called “checks and balances.” In the case of the judiciary, independent Court Administration is one of the necessary checks. Separation of Powers is merely a concept without effective checks and balances. There must be checks and balances on each branch of the government– including the judiciary. The Judicial Branch of government is an equal – not superior—branch of government

The Judicial arm of the state embraces the principle of Separation of Powers based on appropriate checks and balances which in our case include:

1. Open courts (access to records)
2. Public fact-finding (justices)
3. Transparent proceedings (transcripts)
4. Automatic review by the appellate process
5. Reasons for decisions – public pronouncements & written opinions.
6. Submission to Finance and Audit Laws (Accountable to the Law)
7. Public Accounts Committee (Accountability to Parliament)
8. Annual Report (Accountable to the Public)
9. Adversarial fora

10. Media scrutiny

11. Independent Constitutional Commissions

Our philosophy is incorporated in our vision statement of which this may be a convenient time to remind you. It is:

*“.. to provide an accountable court system in which timeliness and efficiency are the hallmarks, while still protecting integrity, equality and **accessibility** and attracting public trust and confidence”*

We accept our responsibility and are putting our house in order. At the last meeting of judges held in July we adopted a 120-day time limit for the delivery of reserved judgments. The code of judicial conduct is now substantially complete and will be formally adopted and circulated for public information before the end of the year. This is the standard to which we will publicly agree to hold ourselves accountable and which you are entitled to expect and demand of us.

But we need independent and effective court administration to make the Separation of Powers and Judicial Independence a reality. Effective Court Administration provides the judiciary with the necessary device to protect Judicial Independence.

Effective and independent court administration promotes public accountability and public trust and confidence. Promoting the courts' accountability in the proper sense (effective administration) helps to “repel [the] improper threats to independence” that concerned the

American Founding Fathers. It is my hope that as we contemplate constitutional reform, it will be clearly understood that the only way forward is to devise mechanisms that promote institutional strengthening in those areas for which each institution is responsible, and therefore accountable. It goes without saying that there can be no effective and accountable discharge of responsibility without the power to control the relevant processes and the deployment of the available resources that fuel them. And what is the judiciary's responsibility? The current Lord Chief Justice of England, Mr. Justice Igor Judge has put it this way:

*“In a democratic country, all power, however exercised in the community, must be founded on the rule of law. Therefore each and every exercise of political power must be accountable not only to the electorate at the ballot box, when elections take place, but also and at all times to the rule of law. Independent professions protect it. Independent press and media protect it. Ultimately, however, it is the judges who are guardians of the rule of law. That is their prime responsibility. They have a particular responsibility to protect the constitutional rights of each citizen, as well as the integrity of the constitution by which those rights exist”*

It is against that background and understanding that I must confess to some concern when I read some of the provisions of the draft constitution that refer to the judiciary. They do not meet the objectives

that have been otherwise publicly articulated and, in fact would, if passed, take us in the opposite direction. In my respectful view they stem from a fundamental misunderstanding of our role and function and have disturbing implications for judicial independence. I refer in particular to clauses 121 to 125, 136 and 142. The misunderstanding lies in the assumption of a false dichotomy between the judiciary's judicial and administrative functions and the assumption that one can be independently exercised without the other. The danger lies in the potential to gradually and systematically strip the judiciary of its independence and the citizens of their protection through ordinary or subordinate legislation requiring no special majority.

The point is best illustrated by the posing of a rhetorical question. If you were one of the parties to a lawsuit, would you feel comfortable in knowing that the party on the opposite side could have access to the judge's chambers, could control the filing of documents and the keeping of all the records in the matter, the selection of the judge who would handle the matter, the scheduling of courtrooms and other resources, the composition of the judge's support team including his or her research assistant, all the information, technology and security associated with the matter and the court, the judge's leave and travel approval, training, reading material and personnel records?

You might with some justification entertain great apprehension that the scales could be tilted against you. Well all of those things are part of what Court Administration is about and that is the challenge to which the current draft would expose us. The fact is that in every criminal matter before the courts and in a large percentage of the civil matters, the executive arm of the state is on one side and individuals and otherwise powerless citizens are on the opposite side. How, pray tell, can a constitution meaningfully provide for the judiciary to be independent only in the exercise of its judicial functions? And what is one to make of clause 136 which provides that the Chief Justice shall be responsible for the general administration and business of the Supreme Court (no mention here of the magistracy) and yet provide in a later subsection that the Minister of Justice shall have control of administrative matters relating to the judiciary as may be prescribed? Prescribed how, where and by whom? How is the Chief Justice to be responsible, and therefore accountable, for that which he does not control? The matter is not helped by the reference to consultation. Anyone who understands constitutional language knows that he who merely has to be consulted can be safely ignored. The Permanent Secretary for the Judiciary who will be appointed by the executive President and responsible for the day to day administration of the Judiciary will report to the Minister of Justice and not to the Chief Justice. Outside of the construction of buildings, which is the only pertinent example cited thus far, it is difficult to think of any

other aspect of Court Administration that could be safely devolved from the judiciary without impinging on its independence. Constitutions are not necessarily places for attempting to place exhaustive lists. As we have seen, Court Administration evolves. Must we amend the Constitution every time there is a change? It would be a lot simpler to acknowledge explicitly in the Constitution the principle of independence of the judiciary in its administrative and adjudicative functions if we agree on it.

But it does not end there. Perhaps the most worrisome clause is clause 125, which gives Parliament the power to confer on any court any part of the jurisdiction and powers conferred on the High Court by the Constitution or any other law. It requires no special majority, nor does it require that the new court or courts enjoy the constitutional protections designed to ensure the independence of the Supreme Court. Arguably, the most important power of the Supreme Court inherent in the separation of powers and recognized both at common law and by statute, is the power of judicial review of executive action. It is the only protection that citizens have against arbitrary or unlawful state action. In some instances, it is the backstop to the Service Commissions and will assume even more significance if the independence of the Service Commissions is weakened. If the draft constitution is adopted in its current form, that power can be simply and unceremoniously stripped away.

Under the draft, the Chief Justice and the members of the Judicial and Legal Service Commission are all appointed by the Executive President. Given our political realities and the way in which its composition would be determined, the fact that the House of Representatives must approve these appointments hardly provides a convincing check, or at least one that is likely to foster public confidence in the independence of the judiciary. In fact, the Chief Justice will cease to be a member of the Judicial and Legal Service Commission altogether.

Service Commissions were originally created for the express purpose of insulating certain public offices from political interference. Their composition and the process for the appointment of members are critical in ensuring the fulfilment of that purpose. The nation has to decide whether we still want that. If there is some aspect of that that is no longer working then we can only have a meaningful debate and consultation if we identify it with clarity and then articulate exactly what we want to achieve and why we think it will be better. I am afraid that the explanatory notes to the draft Constitution fall far short of that!

I fear that whoever produced this draft may not have served us as well as they might have, but the judiciary remains open to consultation on the best way forward. May I reiterate, however, that the process of developing a new Constitution is not merely a matter for negotiation between the judiciary and the executive. Every citizen has a stake. Of course there

will be some individuals, groups or organisations that will be better equipped to contribute to the debate and I hope that they will shoulder that responsibility.

At the end of the day, whatever form the constitution eventually takes, there has to be ongoing consultation and collaboration between the judicial and executive arms of the state if the country is to be run properly, but neither should attempt to set internal policy for or administer the other. As a concrete example of how that collaboration might work, I could take the example of information technology. As we move towards making e-government a reality, it is obvious that policy decisions will have to be taken on an IT platform that would best provide a seamless service and allow the various arms of government to communicate and share information. Collaboration will be necessary and it makes sense to share a basic framework. However, when it comes to what information is to be collected within the judiciary and how it is to be collated stored and who will have access to what, that must remain the province of the judiciary. The judiciary is a necessary component of the system of justice but it is not an arm of the executive. Policy decisions taken in either sphere will of course have implications for the functioning of the other and a healthy working relationship is necessary for the efficient functioning of the whole justice system.

I have been encouraged by the cordiality and cooperation that has been the hallmark of relationships between the Judiciary and the Ministries of Finance, Public Administration, National Security and the office of the Attorney General in recent times. I am therefore not sure what it is that is not working that we are trying to fix. If a Justice Ministry were to provide a focal point for communication with the judiciary that would channel all of those inputs, then there should be no difficulty, that is a matter for the executive. What it cannot and should not do if we are to remain true to the principle of separation of powers, is to remove the proper and independent administration of the judiciary from the judiciary. As our American friends sometime say *“if it aint broke, don’t fix it!”*.

What is troublesome about the current draft constitution is that, in this regard, it represents a reversal of the progress we have been making over the past two decades and a departure from internationally accepted norms including the Latimer House principles to which this nation has publicly subscribed.

I sincerely hope that nothing that I have said will be construed as a personal criticism of anyone, including whoever authored the current draft. However, given our propensity in this society to flavour commentary with speculation about motive and intention there is something I feel I must say.

We have an unfortunate tendency to shoot the messenger instead of analyzing the message so let me be as frank as those who know me would expect. One day, whether through choice, death, illness or mere effluxion of time, I will demit office. Only God knows when and He is in control of that. It will be a relief as I crave a simple life. Power, pomp, status and flashing lights hold no allure for me and the burdens of office are onerous. My singular interest lies in the opportunity to make a difference and to contribute to the national good.

The office of Chief Justice carries with it the responsibility to speak out on occasion in order to contribute balance and mature perspective to debate on matters of national interest particularly when they impact upon the judiciary and the administration of justice generally. This is one such occasion. We are talking about our constitution! It is supposed to be a distillation of all the values we hold dear, an expression of our hopes and aspirations for the society we want to create for the future. It therefore behooves us all to think very carefully about this exercise and voice our opinions. We should not abdicate that duty by leaving the 'heavy-lifting' to others. Any constitution that is finally adopted must be the product of our collective thought and deliberation and more importantly an expression of our collective will. Our thoughts may be garnered by consultation but only if there is active participation from all sectors of our society.

In the end, we will have to consider what is the best mechanism in our democratic society for determining the will of the people. There is a view that it is best expressed directly in a vote. It ensures that the final product corresponds to our expressed views. That which we specifically accept and adopt we are far more likely to respect and honour. May I respectfully suggest that serious consideration be given to that.

Extensive consultation has been promised. Lets us as a nation make it a meaningful and productive exercise. We can all learn and grow from such a process if we, including the judiciary, approach it correctly. Our constitution affirms that our nation is founded on the notion of the supremacy of God. If that is so then the object of this exercise is to discern His will. To those of us who dare to lead I can only share the words of an anonymous author:

*“I sought to hear the voice of God*

*I climbed the highest steeple*

*But God declared “Come down again.....*

*I dwell among the people”*

Fellow citizens, stakeholders! God has no voice unless we speak.

May God bless our nation. This court now stands adjourned.