Chapter 3

GUYANA

It is widely believed that judicial independence, as conventionally understood, was seriously eroded in Guyana during the Burnham years, especially after 1980 when a new constitution came into effect declaring Guyana a Cooperative Socialist Republic. In their book, *Law and the Political Environment in Guyana (1984)*, Rudy James and Harold Lutchman laid bare the various ways in which a power hungry executive sought to influence the judiciary and other state institutions, and the manner in which the judiciary and those institutions capitulated to the executive. There was a heavy price to pay for this accommodation. James and Lutchman believe that the price which the Guyanese paid for "judicial obsequity" was *inter alia*, the destruction of the moral fibre of the people, including children and future generations (*ibid*.: vii). As the two authors continue:

> Guyana has adopted a written constitution guaranteeing basic democratic structures, but has rejected the principle of "constitutionalism," i.e. there exists a vital gap between the Constitution on paper and the Constitution in action. It is a serious indictment on the higher judiciary which, when presented with cases of glaring infringements of the Constitution by the executive, the judges have sought refuge in (i) the absence of common law remedies, (ii) misplaced sophistry, and (iii) antiquated principles which have long ceased to be the law in developed and many other developing common law countries. (*ibid*.: vii)

The basic argument of the Burnhamites was that the creation of a new socialist order required a new legal system which took the society rather than the individual as its point of departure. In a socialist society, the individual had obligations to the state. As such, the common law, which took the right to property and other liberal canons as its point of departure, had to give way whenever necessary to the imperatives of state policy. Burnham himself declared that under revolutionary socialism, old concepts of land ownership would be swept away. He poured scorn on the 1966 independence constitution which he said reflected, for the most part, the beliefs and ideology of Guyana's imperial masters. Thus, if limiting the individual's property rights, muzzling the press, circumscribing freedom of movement or of assembly was deemed to be in the interest of the state, so be it. The common law doctrine of *stare decisis,* let precedent stand, was deemed obsolete.

The PNC, as the vanguard party in this quest for socialism and national goal fulfillment, was given the historic task of indicating what was required of all state institutions. The party was in fact declared in 1974 to be "paramount" to all agencies of government. Party spokesmen, including the President, also let it be known that whenever the meaning of a particular law was unclear or ambiguous, it should be given an interpretation which was consistent with national goals and principles as enunciated in the Constitution. Some of Guyana's judges were noticeably perplexed by these developments. As men of a certain age who had been trained in, and who were steeped in the traditions of the common law, they found themselves being asked to adopt new and "alien" traditions with which they had no ideological sympathy. It is worth noting that Burnham had sent a delegation to Cuba to obtain information about how Cuba's socialist judicial system worked, and had also given thought to abolishing trial by jury.

The role that judges were expected to play in "socialist" Guyana was made clear to them in a lecture given by the Chancellor of the Judiciary, sponsored by the Guyana Bar Association in 1981. Justice Crane began by making all the "right" genuflections about the importance of judges in the maintenance of the rule of law

and in the protection of society from the "arbitrary power of the state and the schemes, caprices and nefarious contrivances of the criminal and the authoritarian personality." Justice Crane was however at pains to advise the judges that Guyana was trying to create a socialist society, and that as such, their jurisprudence should be geared towards achieving that goal. The Chancellor advised the judges that "socialist democracy is now an inseparable and organic part of our national ethos." This meant that judges and lawyers had to abandon their slavish adherence to common law notions and approaches, and their nostalgic reverence for and reliance on precedents that derive from foreign cases and foreign judicial pronouncements. This dependence, and the refusal to be self-reliant, was the chief obstacle to the development of a Guyanese jurisprudence. Crane was in fact explicit in his view that judgements of the Privy Council were no longer binding on Guyana's courts. As he said while delivering judgement in *Persaud vs. Plantation Versaills and Schoon Ord Ltd. (1970):*

> It is my considered opinion that consequent on the removal of the Privy Council as our final court of appeal, the doctrine of *stare decisis,* in so far as that court is concerned, is a dead letter with us; its former judgements are now only persuasive authority. Of course, we shall regard them as we have always done, in the highest esteem; we shall continue to cite, apply and to follow them and, when we do so, they will thereafter speak with our authority; but henceforth, it will be our privilege, if not our duty, to decline to follow them if we think fit to do so. It seems to me that it is only the natural consequence of its abolition as the final court of appeal for Guyana that the Privy Council should lose its place as a binding force in the hierarchy of authority. *Ipso jure,* its pronouncement have ceased to be authoritative.

What then about the notion of judicial independence? The Chancellor noted that while judges should not consider themselves to be the "mouthpieces of government policy," it was not possible for the courts, if they were to be faithful to the new Constitution, to ignore the political bases of the economic and social system of the State. Elaborating further on the notion of judicial independence, Crane noted that the English teaching is that while there was no rigid separation between the legislative and executive powers, since ministers who exercise the executive power also direct a great deal of the legislative power of Parliament, the critical test which the judge must pass if he is to receive the confidence of the people is that he must be independent of the Executive. The Guyana version of judicial independence must however differ. While judges should retain their judicial independence and conscience, *they had to work in conjunction with, and not separately from the executive for the advancement of socialism.*

There was no rigid sphere of constitutionally assigned jurisdiction with regard to the judiciary. There was no longer any theory, as there is in England, about a judge in a co-operative socialist State "standing between the State and the citizen" because, under socialism, it cannot be envisaged that the State and the citizen could ever be in conflict; they ought never to be if they were pursuing the same goals towards socialist democracy and co-operation. Crane was extremely ambivalent about what should be the proper relationship between the Judiciary and the Executive. While the Judiciary should not be "pressurized by the Executive, [it] should not set itself up in opposition to that organ of government." Striving to appear balanced, he further observed that "the judiciary must not hesitate, if the occasion ever warrants it, courageously to demonstrate the principle of its independence. Sometimes this principle was performed in the interpretation of the Constitution, and may involve the very life of the government."

One might well wonder whether many judges in Guyana, after hearing this discourse, would have dared to bring in a judgement that threatened the very life of the government. As noted above, Burnham himself had made assertions that were similar to Justice Crane who in fact might have merely been echoing the opinions of Comrade President, who it should be observed, had openly referred to the judges as "my judges who did my bidding."[9]

Opinion is divided as to whether Forbes Burnham ever gave specific directives to judges as to what they should decide. One judge advised the author that he knew of at least one case where the President phoned the Court to recommend that they determine a matter in a particular way. The call unfortunately came after the decision had been made, much to the chagrin of the Chancellor! Many attorneys were equally convinced that instructions were given. It is said, for example, that Burnham specifically advised judges that they should not rule against any state enterprise. One attorney in fact advised the author that he overheard judges saying that they were so instructed. Others claim that Burnham did not need to instruct judges since the latter well understood what the official state religion required them to do. They also understood that the doctrine of party paramountcy meant that the state and its institutions were subordinate to the party. They likewise understood how ruthlessly power could be used in Guyana to bring dissidents to heel. As Burnham was wont to say, "I am not God! God forgives!"

In this view, Burnham was too crafty to give specific instructions, except perhaps to the Chancellor. He would however make general statements (even as to what sort of dress was appropriate in a socialist society) on occasions when judges were present which served to shape the environment in which they functioned. Most judges took their cue from such statements and sought to avoid embarrassing the state if they were able to do so. As one senior attorney, David de Cairies also opined, (in a communication to the author) "one suspects that in many cases, judges were not directly spoken to; they did what they thought was "politically correct" given the exigencies of the time..." In sum, judicial pusillanimity and *raison d'etat* were the underlying considerations which informed many judgements.

Observers of the relationship between Burnham and the judicial elite generally agree that the President deliberately and "silently" seduced the judges by offering them all sorts of special privileges, perquisites, and even national honours while serving on the bench. Two distinguished legal personalities were induced to join the bench by Presidential offers to forgive debts owed to the state as a result of unpaid taxes. Burnham, it was said, wanted the best minds on the Court, but made sure they were vulnerable and therefore obligated to him. Judges, it was noted, requested and received lavish perks which included chauffeur driven cars, free gasoline and utilities, generous housing and duty allowances, equally generous leave passages, and access to foreign exchange when this resource was scarce. Customs officials were also instructed not to search judges on their return to Guyana. Judges were also promised that they would be considered for diplomatic and other high profile postings on retirement. The latter was Burnham's response to the judges request that their salary following retirement should be the same as that which they received just prior to retirement. It was also his way of keeping the members of the judiciary expectant, and thus compliant. Burnham was also aware that in catering to the judges, he had to do so in a manner that did not create a "me too" syndrome in other areas of the public service.

Why did Guyana's judges allow themselves to be compromised? In an address given in May 1988, one of Guyana's leading attorneys, Miles Fitzpatrick S.C., argued that Guyanese judges were concerned about their personal security as well as their professional advancement. In his view, it was difficult for the judges to be independent since they had to function in an environment that was insecure and authoritarian. Judges, he noted, were human beings, who had much the same prejudices and concerns that most persons have, including ambition. Though they were expected to be above reproach and to rise above those prejudices, many did not. "Manipulation of the bench does not have to take the more brutal forms of dismissal or exile. Most judges like most professional people, are very concerned about their careers." Thus, "when giving examples of judicial independence or control in first world countries, we should bear in mind the differences between the social prejudices of the judicial class in developed western societies and [judges'] fears in many third world

countries for their own professional, financial or even in some cases, physical security." As P.K. Amoah of the University of Swaziland observed:

> It is possible that even where there has not been direct interference on the part of the executive, the general atmosphere of insecurity and fear can cause the judiciary and the legal profession to "watch their step" in relation to the executive and to avoid confrontation with the more powerful forces of state. (cited by Fitzpatrick 1988)

The dilemma faced by judges in third world countries was similar to that experienced by judges in America 200 years ago. In 1760, John Adams noted that the role of judges was to settle differences between "prerogative and liberty." To do so, each had to be free from the influence of the other. Adams felt that the main threat was coming from the "prerogative," i.e., the state, largely due to the fact the natural weight and authority of the state was working upon the almost universal love of promotion and private advantage" (cited by Fitzpatrick 1988).

Fearless judicial independence requires the existence of an environment in which "judges can breathe." It is difficult to have judicial independence in the absence of substantive democracy that is informed by free and fair election. Where this does not obtain, judges behave much like unionised civil servants who petition the authorities for what they need or wish. As Fitzpatrick puts it bluntly:

> Judges are citizens too. They are as influenced by these social factors as anyone else. Soon they begin to accept as normal attending annual meetings with the Head of party and State to discuss their employment conditions of service, just as trade union officials meet with employers to bargain for better conditions of service.

Fitzpatrick noted that such meetings took place annually with President Burnham. Judges in fact looked forward to the meetings which served to confirm them in their belief that they were a class apart.

Fitzpatrick's assessment of the judiciary in Guyana was that they regarded their primary function as being the defense of the State as opposed to the "protection of the population." The symbiotic relationship between the Executive and the Judiciary was perhaps most glaringly represented when the Chancellor of the Judiciary, Justice Keith Massiah, resigned to become Attorney General and Minister of Legal Affairs in a PNC Government, a move that sparked a great deal of controversy throughout the region.

Fitzpatrick's arguments are well taken. Judicial independence can only be meaningfully sustained if the social and political environment in which it nestles is permissive. Such an environment is more easily found and more readily sustained in democratic states which have competitive political systems, social networks and free floating economic assets which allow for alternative political choices, meaningful options, careers, and opportunities for social intercourse. In small claustrophobic societies where the state is "heavy" and is the main or the dominant job provider, problems are bound to arise. The same holds where the state displays its intolerance of judges who go against the wishes of the state. One notes that in one such case, the ruling party used its parliamentary majority to reverse the judgement of the Court in a matter affecting the rights of a trade union, "not once but twice."

Another senior Guyanese attorney, Fenton Ramsahoye SC, was equally critical of the role which the courts played in Guyana under Burnham. Ramashoye believes that there was a relationship between what occurred and the abolition of appeals to the Privy Council. As he wrote:

> West Indians have seen with their own eyes the destruction which came to pass in Guyana after appeals to the Judicial Committee were abolished. The result has been a subversion of the rule of law and the democratic process there. The destruction of Guyana could not have come about without the abolition of appeals to the Judicial Committee. They cannot undo the destruction. (*Trinidad Guardian*, February 19, 2001)

These criticisms were stoutly challenged by Brynmor Pollard, SC, formerly Guyana's Chief Parliamentary Counsel as well as CARICOM's General Counsel. Pollard felt that the critics seem to have forgotten the richly deserved reputation for erudition and jurisprudence which the Guyana Court of Appeal enjoyed after 1966. "The members of the Court ..., including the legendary J. O. F. Haynes, enjoyed a high reputation and earned the respect of the legal fraternity, both inside and outside Guyana. Pollard argued that it was this reputation for quality that emboldened Guyana to take the step of abolishing appeals to the Judicial Committee of the Privy Council." Surely, however, the motivation to abolish appeals had to be found elsewhere, viz., in the Burnham Government's determination to take Guyana along the road to "socialism," and the felt need to have the courts depart from the principles of the common law. It is also clear that Burnham did not wish to have "his judges," and his policies and those of his party overruled by a foreign court.

Pollard was of the view that the matters won by the state in the Courts had much to do with the quality of the evidence offered by the state's prosecuting attorneys who battled against some of the more able counsel at the bar in Guyana, both in the High Court and the Court of Appeal. "Dr. Mohammed Shahabbudeen could be relied upon for his thorough preparation and presentation." Interestingly, when asked to comment on the views articulated by Chancellor Crane which critics say "demoralised the judiciary and the profession, and caused consternation in the region," Pollard could only say that he "always regarded Chancellor Crane's comments as demonstrating the desire of the Courts to adjust to the new situation as declared by the

Supreme Law, the Constitution, under which Guyana was moving towards socialism" (*Stabroek News*, January 5, 1999). It is however not clear whether the judges genuinely shared Crane's views or felt that they had no option but to behave as if they did since the 1978 Constitution gave the President the power not only to appoint, but also to "fire" judges, albeit after having appointed a tribunal to inquire into the question as to whether just cause exists. The members of the tribunal were to be selected by the President on his own authority if the subjects of the inquiry were the Chancellor or the Chief Justice, or, in other cases, on the advice of the Prime Minister, acting after consultation with the Judicial Service Commission.

Following the change of regime in 1992, there were demands for constitutional reform, and it was widely believed that the justice system would be among the first tasks to be undertaken. In response to these expectations, President Cheddi Jagan, who had been a vocal critic of the judiciary while in opposition, invited a group of senior attorneys to advise him as to what was required to improve the state of the justice system in Guyana. Recommendations were made which were endorsed by the Leader of the Opposition. These recommendations were however never implemented, and were restated in a more detailed submission to President Bharat Jagdeo who succeeded President Janet Jagan in 1999. The committee making the submissions was chaired by Miles Fitzpatrick.

In the preface to its submissions, the Fitzpatrick Committee contended that in countries wherein there is a tense political climate, and where courts play a pivotal role, the temptation is to appoint judges who were safe. In countries where human resources are scarce, it is difficult to find persons who are both safe and competent and who have integrity. The temptation is to put water

in the "brandy" and choose persons who are politically reliable. Reliability becomes the preeminent concern. The Committee noted that the existing Court of Appeal was "not far short of disgraceful," and in real danger of being perceived as being generally "both incompetent and submissive." Continued Fitzpatrick (2000: 3)

> As it is our highest court, its stature has a massive influence on the rest of the system. We cannot continue the present practice of selecting judicial heads on the basis of their sympathies with the political interests of the government. Nor should the supporting appellate judges be rolled-over short-term extended post-retirement functionaries, constantly looking over their shoulders at those who command their uncertain judicial futures.... No Court of Appeal or High Court Judge - including the Chancellor and Chief Justice - should have his or her term extended beyond retirement age. The retirement age should be extended, but only in respect of judges coming on in the future.

The Committee was also of the view that it was important, at least in the medium-term, to remove the appointment of judges and the heads of the judicial system and/or those who appointed them from the party political arena. It was felt that they should be appointed following agreement by the President and the Leader of the Opposition. This of course presumed that such agreement would always be forthcoming. But what if it was not? The Committee also recommended financial self-administration by the judiciary, and the relocation of the power of appointment of the senior staff of the Registry to the Judicial Service Commission. On the question of the management of the Courts, the Committee was of the view that there was no need for a "two headed justice system in Guyana." Under the current system, the Chancellor was the administrative head of the system, above the Chief Justice, and also sat in the Court of Appeal. Such a system had little or nothing to do with the real needs of Guyana. The Committee recommended that there should be a President of the Court of Appeal responsible only for that Court and a Chief Justice to head the High Court and administer the justice system. So far, none of these changes have been instituted. The Government said it was willing to consider financial self-administration, but only if the judiciary agreed to finance itself entirely from its own earnings, a condition that was simply not practical.

In its manifesto for the 2001 general elections, the PPP however boasted that much had changed with respect to the judiciary in Guyana since 1992 when it assumed power. As it declared:

> By 1992, the Judiciary [had become] demoralized and weakened by low pay, atrocious physical conditions and by accusations of partiality. Since the advent of the PPP/Civic Government, most court buildings, including the Supreme Court, have been refurbished, and Judges and Magistrates have had substantial salary increases. The independence of the Judiciary has been considerably enhanced.

The PPP/Civic went on to promise that in its new term, it would:

- modernize the Magistracy and Judiciary by equipping them with modern technology
- continue to improve the physical infrastructure
- establish larger and more modern library facilities
- keep salaries under constant review
- take continuous steps to ensure earlier and speedy trials and clear the backlog of cases
- establish continuous learning mechanisms for magistrates, judges and lawyers
- establish a Law Reform Commission to update our laws taking into account the need to adapt our laws to developments in information technology

The PPP's critics were however skeptical of these claims and promises. In their view, the PPP had treated the judiciary in much the same way as did the PNC, that is, as an extension of the executive.

The concept of the independence of the judiciary in Guyana appeared to have received a major boost when High Court Justice Claudette Singh, in a judgement handed down on January 15, 2001, ruled that the 1997 election was "null and void" since the political parties had agreed to an arrangement about the use of special voter identity cards without altering the relevant provisions (Art. 59, 162, 163) of the Constitution. In her ruling, Justice Singh chastised the parties and the politicians for their "arrogance" which had led them to act unconstitutionally, and in the process violate the rights of citizens as it related to their ability to vote without special identity cards. To quote Justice Singh:

> Parliament cannot, under the guise of making regulatory provisions, prohibit or restrict the exercise of rights conferred under the Constitution unless the constitution itself provides for Parliament so to do. It follows therefore, that no political party can arrogate unto itself the power to barter away or waive the constitutional right of members of the electorate. The voice of members of the electorate to speak through the ballot cannot be silenced by arrogant agreements among political parties. Even Parliament cannot do so since the voice of members of the electorate to speak through the ballot is a constitutional right under Article 59. (Cited in *Guyana Review*, Vol. 9, Nos. 96, 97, 2001: 20)

Some 30,000 to 40,000 persons were said to have been denied the right to vote because the special cards were not delivered to them. Justice Singh noted that the election was marked by massive irregularities of various kinds, but felt that she was in no position to determine whether their incidence was sufficient to influence the outcome. In her consequential order, the Judge ruled that she had no power to order the PPP government to quit office, and that the Government could remain in office until new elections were held on March 19th 2001. The government was however prohibited from making any but the most routine policy decisions relating to the elections.

The decisions allowing the government to remain in office was appealed by the Opposition, though it would seem that this was for ritualistic reasons only, since the rulings of the Court could not be heard before the new elections were held (*Trinidad Guardian*, January 30, 2001).

Critics of Justice Singh's consequential order argued that it was fundamentally flawed and non-sensical. In their view, she should have ordered the government to cease operating and return authority to the government which was in office prior to the election i.e., the government led by Prime Minister Sam Hinds, however impractical this might have seemed. They also chide the judge for allowing the matter to drag on for some three years. This was seen as an example of poor or perhaps clever case management. Indeed, some allege that Justice Singh deliberately allowed the government and its attorney's to filibuster by allowing as many as 294 witnesses to appear, only 16 of whom were called by the petitioner.

The judge was however under severe political pressure from elements associated with the Government, some of whom threatened her life. The President of Guyana is also said to have visited her Chambers on the pretext of interviewing her for a vacant post on the Court of Appeal to which she was eligible, being the most senior High Court Judge. Departing from the advice given him by the Judicial Service Commission, *viz.*, to appoint three persons to *act* as Appeal Court judges pending the conclusion of the petition, the President chose to appoint Justice Singh to the Appeal Court before she delivered her judgement, arguing that in

doing so, he was not offering her a "bribe" or an inducement to rule in favour of the PPP, but delinking the promotion from whatever judgement she might bring in. The pressure was thus being taken off the judge. It was a clever argument, but one that was viewed with great skepticism by the legal fraternity which saw the President's decision as being both unconstitutional (in that he did not follow procedure (Article 128(1)) in not accepting the advice of the JSC and unethical. In their view, President Jagdeo and the PPP were doing exactly what they and others had accused President Burnham of doing, viz., seducing the judiciary and treating it as the footstool of the new "paramount" party, the PPP/ Civic.[10]

As evidence of this, pro-PNC Attorney, Rex Mc Kay SC, accused President Jagdeo of deliberately breaching the constitution in October 2000 when he disregarded the recommendation of the Judicial Service Commission in respect of Justice Claudette Singh. Mc Kay argued that the President appointed Justice Singh to the Court of Appeal in order to make it possible for him to appoint Justice Carl Singh to the position of Chief Justice, a position to which Justice Claudette Singh was entitled being the most senior High Court Judge. Justice Claudette Singh had been a High Court Judge for 13 years whereas Justice Carl Singh had served a mere 5-years. Mc Kay alleged that Justice Claudette Singh was being punished for her judgement in the election petition though her judgement was delivered following her promotion to the Court of Appeal.

Mr. Mc Kay further accused the President of "political sleight of hand" in making the appointments of Chancellor and Chief Justice. The trick, he said, was to delay the passage of the constitutional amendment dealing with the appointments until after the elections of March 2001. That amendment requires the Leader of the Opposition to agree to the choices being made for filling the two posts. The appointments, which were not urgent, were however made prior to the opening of the new Parliament, notwithstanding the fact that the President and the Leader of the

Opposition had agreed that the amendment (along with others) would have been sent to the Legislature within a month of the new Parliament being convened. This was seen by PNC/Reform elements as a major breach of trust and a violation of the entente into which it had entered with the PPP (*Stabroek News*, May 6, 2001).

Similar comments were made by Arif Bulkan who also lamented the fact that the most senior High Court judge, Justice Claudette Singh, was by passed for the post of Chief Justice for reasons which were not self-evident. As he complained, "the recent judicial appointments where the President ignores seniority and hand picks a Chief Justice, can hardly inspire confidence in the selection process and by extension, in the integrity and independence of the judiciary.... Evidently, the PPP/Civic hold itself to standards no higher than those espoused by the previous administration" (*Stabroek News*, May 19, 2001).

Chapter 4

Trinidad and Tobago

The relationships between the judiciary and the executive were not very cordial in the years immediately following the achievement of independence in 1962. Two areas of controversy are worth noting; these were the question of salaries and pensions for judges and the place which the Chief Justice should occupy in the protocol order. In terms of the latter, the Chief Justice, Sir Hugh Wooding, strenuously objected to having the Chief Justice ranked after Cabinet Ministers, the Speaker, and President of the Senate, and refused to attend official functions until such time as the office was placed after that of the Governor General and the Prime Minister, i.e., third in the order of precedence. This was eventually conceded when it became clear that the entire judiciary (with one exception) was firm in its support of the Chief Justice on this issue.

The question of full pensions for the judiciary was also an issue of great controversy. Before Wooding moved to the Bench, it was the practice to recruit judges from the Civil Service. As such, these judges were able to transfer their accumulated pensions from the Civil Service to the Judicial Service. Wooding and some of those whom he recruited from the Bar would not have been entitled to full pensions under the then rules since their length of service would have been insufficient (35 years of service was required) to permit them to qualify. Promises were made by the executive, speaking through the Attorney General, but they were long in being fulfilled. The judges felt that they were being shabbily treated on this and other issues and protested vigorously. It was noted that in Jamaica, the Chief Justice was guaranteed a full pension even if he served only one day in office. In a meeting with the Governor General called to discuss the issue in 1964, Wooding made it clear that he was prepared to resign if the matter was not satisfactorily resolved, which it eventually was.

Writing about relations between the Executive and Judiciary in these years, Justice Telford Georges had the following to say:

> The place of the judiciary in the society and the working conditions of the judges had to be settled clearly in the new order of things. Keeping the judges firmly united was vital if objectives were to be achieved. Maintaining the independence of the Judiciary from the Executive while at the same time securing from the Executive optimum salaries and working conditions called for special skills when the relationship between these branches had not been gradually defined by the processes of historical development.
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> [Wooding] adhered strictly to constitutional proprieties at every step. The Governor General, Sir Solomon Hochoy, with whom he had an excellent relationship, was at all times the intermediary through whom the judicial consensus was passed on to the executive. The process of negotiation was no doubt lengthened by the adoption of this course, but it was effective. Within two and half years, judicial salaries were significantly increased, retroactive to the date of Independence. The rank of the Chief Justice in the protocol list was moved to third after the Governor General and the Prime Minister from a ranking after Cabinet Ministers, the Speaker and the President of the Senate. These were, in my view then, and still remain so now, significant administrative gains which would not have been achieved but for the fact that Sir Hugh brought to the office of Chief Justice tremendous personal prestige and worldly experience which could not be ignored.

By 1966, relations between the Executive and the Judiciary had improved. In April of 1966, Justice Aubrey Fraser wrote to the Chief Justice expressing satisfaction that easier relationships now existed between the two branches. To quote Fraser's letter which had a curious ring about it:

> I am happy that an earlier relationship has again been restored between the executive and judiciary and it is a highly complimentary procedure for the Chief Justice to share the confidence of the Prime Minister on matters which are national in concept and impact, and therefore, strictly political. I believe the Lord Chancellor in England has long enjoyed that relationship, and I hope it continues here although not merely for that reason.

One is not clear what political confidences the Prime Minister shared with the Chief Justice. Whatever the cordial nature of the relationship in 1966, by 1970 it had again become contentious. The period 1970 - 1973 was a particularly difficult one for the Judiciary of Trinidad and Tobago in terms of its relationship with the Executive. The need to appoint a Chief Justice in 1970 occasioned a great deal of controversy. There was doubt as to whether any appointment could have been made since the Independence Constitution provided for the Prime Minister and the Leader of the Opposition to consult before making appointments to offices of a national character. At the time, there was no Leader of the Opposition since the Opposition had boycotted the 1971 General Elections. In a letter to the Governor General in July 1971, the Judges took the view that "little if any damage could result from a failure to adhere to this convention in circumstances where it is not possible to do so." The Judges were not happy about the proposal to appoint an Acting Chief Justice, and expressed concern about "the maintenance of the position and independence of one of the main pillars of our democratic society, viz., the judiciary." Eric Williams, the then Prime Minister, however chose to ignore this recommendation and appointed Justice Clement Phillips to act. Williams told the Judges that "it is to be hoped that where, as in the present circumstances, one of the Honourable judges is designated under Section 79 of the Constitution to carry out the functions of Chief Justice, such designation would not be viewed in the light of such a person not having the security of tenure, which is the very basis of judicial independence as the judges had contended in their letter (Ryan 1990).

The "Neville Clarke Affair," which occurred in March 1972, also became the focus of a major confrontation between the judiciary and the political executive. The incident involved allegations that Neville Clarke, a magistrate, had become involved in a corrupt action involving the payment of a bribe of TT$500.00 by one Mark Anthony Ali whom he was due to sentence for an offence involving the illegal possession of explosives (a molotov cocktail). In the course of discussing the potentially corrupt transaction, Clarke made remarks which gave the impression that he was part of a conspiracy which had as its ultimate aim the elimination of the Prime Minister who lived in a house quite close to his own. According to the police informant, Mark Anthony, Clarke said, *inter alia,*

> ... you see that light in the house? That is the [home of the] Prime Minister. He is a liar, a bastard; that is how he got in that position. The next time they [are] going to [put] out those lights. We wouldn't fail as in the 1970 revolution.... Mr. Clarke [also] told me that there was a cold war between the magistrates and the judges against the Prime Minister.

It was also alleged that Clarke had made critical comments about the behaviour of the Police, including the comment that it was dangerous to have them carry arms. Given this, it was felt that the Police were bent on carrying out retaliatory action against him. To this end, it was alleged that they improperly secured a warrant to search his premises, first for the proceeds of the alleged corrupt transaction, and ultimately for arms, ammunition and subversive literature. It was further alleged that in the course of the search, the Police recklessly and oppressively ransacked Clarke's home, and that they rummaged in his library and home, left books and other material strewn all over the place, pulled down and tore curtains, and damaged his stove, refrigerator, and washing machine. It was also claimed that they dug up his yard.

In sum, it was alleged that the search was intended as a reprisal against Clarke for performing his judicial functions fearlessly, and that the action of the Police was in contravention of the rule of law and not compatible with the doctrine of the independence of the judiciary. It was further argued that the behaviour of the Police was shocking and needed a shocking public reaction.

In his Report of the Commission of Inquiry into the Clarke Affair, the Chairman of the Commission, Justice Isaac Hyatali argued that the crux of the matter was

> ...whether the assertion attributed to Mr. Clarke was sufficient to constitute reasonable grounds for the decision to search his premises for arms, ammunition and prohibited documents. It is now a well-known fact that in what has been dubbed as the 1970 Revolution, there was an attempt to overthrow the Government by force of arms. The assertion therefore that they would not fail as in the 1970 Revolution was reasonably capable of bearing the interpretation that the next attempt to overthrow the Government by force of arms will not fail. Moreover, the threat to put out the lights of the Prime Minister in the context in which it was used could have been reasonably interpreted as the expression of an intention to get rid of him in one way or another. And if one superimposes the fact that we are living under a State of Public Emergency proclaimed in consequence of the threats to public safety and to supplies and services essential to life, then it seems to us that the principles enunciated in the several authorities we have cited would amply support the view and we so hold, that the Police Officer who was in charge of the search in all the circumstances had reasonable grounds to suspect that the author of the assertion referred

> to, had arms and ammunition concealed on his premises. We were hard put however to discover any reasonable grounds for [the] suspicion that evidence in relation to prohibited documents was likely to be found on Mr. Clarke's premises.

Hyatali and his fellow Commissioners for the most part justified the actions of the Police, and where censure was forthcoming, it was quite mild. It is evident that Hyatali was of the view that the Police had in fact acted improperly in the procedures which they used to secure the warrants and that the police had laid a trap to catch Clarke with the use of marked notes. He was however genuinely satisfied that the Police did not in fact act recklessly and oppressively as they searched Clarke's premises, and had treated Clarke with respect at all times, which Clarke did not deny.

The Clarke affair is germane because it provides a window on the crisis through which the legal profession and the judiciary were going in the 1970-73 period. The allegations which were made against Clarke and the reports which were published relating to the manner in which his premises were searched provoked a massive outcry from all sections of the legal profession, and lawyers opted to boycott the Courts as a mark of protest. There was a widespread and deeply felt view that the independence of the judiciary and the rule of law were under serious attack, that judicial officers who did not tow the official line were being singled out for police harassment and other forms of victimisation. It was argued even by pro-establishment lawyers that the action of the State was demoralising to those who had to administer justice and that the Executive was undermining public confidence in the judicial system. It was also argued that where there were charges against a judicial officer, these should not be the subject of criminal prosecution, but should be dealt with by the Judicial and Legal Services Commission, a view which the Commission quite properly did not accept on the ground that no one was above the law. Those who felt otherwise claimed that the lawyers overreacted because the State had dared to attack one of their own "fraternity."

The majority view within the legal profession was that Clarke had been framed by the Police, acting with the encouragement of the political executive, because he was known to be openly critical of what was being done by Eric Williams and the PNM to suppress the political dissidence that was characteristic of the period April 1970 to 1974, a period which was characterised by shoot-outs between the Police and dissidents, (some of whom took to the hills and bushes calling themselves guerillas and freedom fighters), arrests without warrants, detentions, states of emergency, searches, and the brutality of the Flying Squad (Ryan and Stewart 1995:625-659).

If the efforts of the legal establishment were designed to discredit Justice Hyatali and advance the claim of Justice Clement Phillips for the office of Chief Justice, they failed. Hyatali was appointed to the post on July 14, 1971. Williams' letter to Phillips advising him that he was being bypassed was terse. The handwritten letter read as follows:

Dear Mr. Phillips

This is to inform you that the Governor General, acting on my advice, is today appointing Mr. Hyatali Chief Justice, and I am so announcing in the House this afternoon.

Eric Williams

Williams' appointment of Hyatali has to be seen against the background of the crisis through which the judiciary was going in 1972. It is clear that Williams regarded Phillips, Georges and Fraser as politically suspect, since they had handed down a number of judgements that went against the State, including the judgement of the Military Court in the Mutiny Trial which they had reversed in January 1972 on the ground that the Judge Advocate, Mr. Mills

Odoi of Ghana, had made a number of legal errors during the Court Martial, and that the misdemeanours of the mutinous soldiers had been condoned by their Commanding Officer during negotiations which brought the Mutiny to an end. What perhaps galled Williams even more was the fact that the Appeal Court, consisting of these same three judges, had refused the State's application to appeal the matter to the Privy Council in February 1972, and that in May 1972, Fraser and Georges were part of a *curia* which freed another soldier who had been found guilty by the Court Martial in 1971. The State then sought to by-pass the Appeal Court by going directly to the Privy Council which subsequently threw out the State's Appeal, forcing an embarrassed Government to withdraw charges of treason from all the soldiers, and to advise the Mercy Committee to free those whose sentences for Mutiny had been previously confirmed (Ryan 1972, 1990).

Williams' decision to appoint a substantive Chief Justice, despite the fact that there was no Leader of the Opposition with whom to consult was hastened by demands being made by influentials in the legal fraternity and the press that he should do so in order to stabilise the Judiciary which was driven with jealousies and seemed in danger of collapse. On July 10, the Bar Association and Justice Trinidad publicly called upon the Prime Minister to appoint a Chief Justice. The *Express* also endorsed this demand editorially. The *Express* noted that there were reports that Justices Fraser and Georges planned to resign to work elsewhere in the Caribbean and that Mr. Karl de La Bastide was due to retire shortly. Another High Court Judge had also passed retirement age and remained on the bench on a month to month basis. The *Express* considered the crisis in the Judiciary to be alarming. To quote its editorial at some length:

> As the call for swift appointment of a substantive Chief Justice builds up, it is reported that two Appeal Court judges will soon be resigning their jobs to work elsewhere in the Caribbean. This must be a development of tremendous concern to everyone in the territorial confines of Trinidad and Tobago who values the strength and authority of the judiciary. That the two Appeal Court judges concerned, Messrs. Aubrey Fraser and Telford Georges are the same who, along with Justice Clement Phillips, the acting Chief Justice, refused the Crown leave to appeal to the Judicial Committee of the Privy Council in the case of the two Lieutenants, Rex La Salle and Raffique Shah, must cause some anxious speculation among thinking people in Trinidad and Tobago. (*Trinidad Express*, July 11, 1972)

Williams had perhaps hoped that he could get around the constitutional difficulty posed by the absence of a Leader of the Opposition when two members of the PNM broke ranks with the ruling Party - one of them was in fact expelled - and formed the United Progressive Party (UPP) and advised the Governor General that they now constituted an opposition party. Mr. Roy Richardson, leader of the UPP, however indicated to the Governor General that he did not wish to be appointed to the post of Leader of the Opposition since (among other things) he found it difficult to "ignore rumours that the Chairman of the Clarke Commission (i.e., Hyatali) was strongly tipped to be the next Chief Justice." Richardson said that he had read the Report of the Commission and the analysis of it by distinguished members of the Bar and the analysis had raised serious questions, so far unexplained, which would make it impossible for him to approve such an appointment. "I would not wish, unwittingly, to ease the way for it." (For a fuller treatment of these issues, see Ryan 1990 esp. Ch 14).

Some 36 years after the achievement of Independence, a newly elected Government of Trinidad and Tobago which derived its base support from the Indo-Trinidadian as opposed to the Afro-Trinidadian community, felt that the time had come to introduce legislation to amend the 1962 Constitution to deal with the autonomy that was given the Service Commissions in that Constitution. The Bill (The Constitution Amendment Bill No. 3 of 1998) provides, *inter alia,* that "at the first meeting of the House of Representatives after any general election or as soon thereafter as Parliament may prescribe, Parliament shall appoint a joint select committee to report to both Houses of Parliament in respect of government ministries, statutory authorities, enterprises owned or controlled by or on behalf of the State, and the Services Commissions in respect of their administration, powers and methods of functioning and any criteria adopted by them in the exercise of their functions." The sittings were to be held in public unless the Committee of parliament decided otherwise. The declared purpose of the amendment was to ensure that all of these bodies were made accountable to the people and that there operations be transparent and seen to be so.

The Bill drew strong objection from the political opposition, the Public Service Commission and the Judicial and Legal Services Commission, all of whom believed that the creation of such a Committee would have certain unintended consequences for the body politic. Spokesmen of the Judicial and Legal Commission argued that the criteria for the appointment of judicial officers were well known. It was also noted that the Chief Justice furnished a full report on the functioning of the Judiciary at the annual opening of the Law Term. As such, there was no need for any "heavy handed" scrutiny of the JLSC by a joint select committee.

The JLSC in fact believed that the Government's true aim was not to have the operations of the Commissions reviewed generally but the individual decisions which it made. Note was taken of the Attorney General's statement that the bill was the mechanism through which "the House and the people of Trinidad and Tobago would be able to know what [were] the reasons for the [Committee's] decisions, and how [these] decisions were being effected." As the Chief Justice remarked in response to the AG's statement:

> The giving of power to the Select Committee to investigate individual decisions of the Commissions is easily the most objectionable feature of the Bill. It will give a disgruntled person who is dissatisfied with the decision of the JLSC not to appoint him (or her) as a judge, or not to extend his/her tenure as a judge beyond the age of retirement, or not to promote him/her to the Court of Appeal, or not to appoint him/her as Chief Magistrate or DPP, the opportunity to lobby members of the Select Committee and get them to embarrass and harass members of the Commission by a hostile cross-examination carried out in public, or by making and publishing an adverse report. The mischief this can cause is compounded, rather than mitigated, by the absence of any power in the Committee, the Parliament or the Executive to alter the Commissions' decision or take any remedial action against the Commission or its members. On the other hand, there is no effective redress available to Commission members who may be unfairly and unreasonably scandalized in this way.

The Attorney General argued that government and Parliament were not one and the same, and denied that there was any danger that the independence of the judiciary would be undermined by the Government's appointment of such a parliamentary committee. He however made it clear that, in the view of the government, "no one, whether he be Chief Justice, whether he be Ombudsman ... no one is above scrutiny" (*Trinidad Express*, April 29, 1999). The Chief Justice however expressed concern that the government's aim was to keep the judiciary "in line." He also believed that the judiciary should not be a unit located in the Attorney General's Department or in the Ministry of Legal Affairs as is currently the case, but an autonomous unit with its own annually budgeted funds, the spending of which would be accounted for in the usual way. The Government was however opposed to granting such financial autonomy, and there was concern that its aim was to use the leverage of financial dependence to bring pressure to bear on the judiciary to decide cases in a manner which enabled it to retain the goodwill of the executive.

One of the main objections to the Bill was that the Chief Justice, as Chairman of the JLSC, could be compelled by the Committee to testify and be subject to public cross examination by parliamentarians or pain of "punishment." This provision was amended to make the attendance of any member voluntary. There was also concern that public cross examinations could lead to the disclosure of confidential information that might cause embarrassment to an appointee and possibly force him to resign. It was feared that this could serve to discourage worthy candidates from offering themselves for the Bench. Objection was also taken to the backdoor strategy that was adopted by the Government to amend the provisions of the Constitution relating to the Service Commissions which required a two-thirds majority. The Government's strategy was to amend Section 66 of the Constitution which dealt specifically with the passage of money bills and not with Section 129 which dealt with the Service Commissions. The charge was that they were seeking to do covertly what could only have been done by altering the fundamental provisions of the Constitution. To quote the Chief Justice, "the Government is .... setting up a system which would enable Parliament, (including ministers) to intimidate, harass and embarrass members of the Commissions, to hold them up to public ridicule and scorn, and to impugn their motives and integrity - all under the guise of satisfying the public's need to know."

The UNC government however had a deep seated belief that over the years when the PNM was in control, the Service commissions did not work in the interest of the Indo-Trinidadian community. They believed that some of the decisions made by these bodies could only be comprehended if the ethnic factor was taken into consideration. Thus, while the Bill was profiled as a "democratic mechanism designed to achieve the laudable goals of transparency and accountability in a free and democratic society," and a desire to curb the "unrestrained power" of the commissions,

there was also an unarticulated agenda. This was not to say that the Amendment was driven entirely by an ethnic purpose. The commissions in Guyana, Trinidad and Tobago and elsewhere in the Caribbean have not worked effectively or even fairly at all times, and there was need to put mechanisms in place to reform their operations. The Bill was passed in the House of Representatives. It was however amended in the Senate to exclude the Judicial and Legal Services Commission. The Independent members of the Senate, whose support was required, refused to approve the Bill unless that particular provision was deleted.

The issue of judicial independence was again dramatically put on the front burner of politics in Trinidad and Tobago once more in September 1999 when the Chief Justice, Mr. Michael de La Bastide, alleged that the Attorney General was again enunciating principles that, if not resisted, would ultimately subvert the principle of judicial independence. The Chief Justice in fact feared that the Attorney General was continuing with the agenda which had been made clear in the Constitution Amendment Bill No. 3 of 1998. In his Address on the occasion of the opening of the 1999 Law Term, the Chief Justice claimed, *inter alia,* that the view held by the Attorney General, Mr. Ramesh Lawrence Maharaj, that he was the Minister responsible to Parliament for the administrative as opposed to the judicial function of the Judiciary, and should therefore be the person through whom the Judiciary should be made accountable to the people, undermined the concept of the separation of powers and the independence of the Judiciary. To quote the Chief Justice (1999:2):

> ...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.

In the view of the Chief Justice, such an arrangement creates "the risk that the judge may not be strong enough to resist the pressure, and as a result, public confidence in his impartiality has been diminished."

The Attorney General argued that the Chief Justice had impugned the integrity of his brother judges. In the AG's view, "it would be quite ludicrous and unfair to judges to suggest that their ability to give independent judgements in cases where the state was involved would be negatively impacted if they are mindful of the fact that the Judiciary's release of funds is subject to financial rules to promote accountability." The Chief Justice's concern was "far fetched, implausible and without factual basis...." To reinforce his view, the Attorney General quoted somewhat out of context, Professor Keith Patchett who, in a paper titled "Safeguard For Judicial Independence in Law and in Practice," opined as follows:

> ...the essence of independence is that the judge in the discharge of his functions, reaches his decisions because his analysis, legal knowledge and understanding, his training and system of values, and no-one else's, lead him to the particular conclusions. That independence is demonstrated in the judge's refusal to submit to any external pressures to reach conclusions different from those which, in his evaluation of the law and interpretation of the evidence, appear to be right ones. Judicial independence at its best derives from the judge's own determination to be free to make up his own mind in the end. The purpose of such independence is to entrust to suitably equipped individuals in whom general confidence lies the resolution of conflicts, according to standards embodied in pre-existing rules of law. Such confidence derives from the assurance that those individuals are not responsible to any of the parties interested in the outcome of the decision. (cited in *Guardian*, November 12, 1999).

Maharaj also quoted US Supreme Court Justice, William O. Douglas who, in his Tagore Law Lecture, observed that judicial independence is a commodity that was only derived by what judges did over time to earn the respect of the community in which they operated:

> The Judiciary has no army or police force to execute its mandates or compel obedience to its decrees. It has no control over the purse strings of government. Those two historical sources of power rest in other hands. The strength of the Judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgements and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly. They are the products of time and experience. But they flourish when judges are independent and courageous.

What obtains in mature democracies does not however always apply in many newly independent and authoritarian states where a judge often has to pay an unacceptable price for independence.

The Chief Justice for his part noted that judicial independence was rarely ever the subject of a 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 (de La Bastide 1999:1). He also noted that it is simply not true and naive to say that political executives satisfy their commitment to maintain judicial independence by desisting from instructing judges how to decide cases and not interfering with their decisions once made. "Any school-child will tell you that there are many ways to skin a cat." de La Bastide alleged that the Attorney General had in very subtle and not so subtle ways sought to determine ("almost at whim") whether a judge should go abroad to attend an important legal conference for which funds had been provided, whether posts which had been approved by Cabinet and for which funds were available, should be filled, as well as which judicial officers should go abroad for training and for what kind etc. In the CJ's mind, if the Attorney General was allowed to exercise these functions, "he would have a powerful leverage which he could use to extract an ever-increasing degree of administrative submissiveness from the judiciary" (de La Bastide 1995:10).

The Chief Justice also raised questions as to what would happen if the Attorney General were to assume 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 such powers were exercisable by the executive, the judiciary would in effect become a department of the Attorney General's ministry. In the past, it had never been a repository of such powers.

What the Chief Justice was seeking to establish was that in practical terms, the administrative and judicial independence of the courts could not be easily separated. The Chief Justice conceded that administrative autonomy did not mean financial autonomy, which the judiciary was not seeking. But in his view, there already existed a variety of mechanisms to ensure financial accountability

which were adequate and which were scrupulously observed. What was being sought was "budgetary independence." Moneys allocated by Parliament should be managed by the Judiciary, subject to the rules enshrined in the Exchequer Ordinance and to the availability of funds, a discretion presently enjoyed by the Ministry of Finance.

The problem, therefore, was not accountability or autonomy and irresponsibility. There was to be accountability. The question was, "to whom and for what." It could not be to the Executive. "When accountability of that kind comes in the door, judicial independence flies out the window." It could also not be to the Legislature, especially since the difference between the executive and the legislature in small Caribbean societies was "imperceptible." The Attorney General claimed otherwise. In his view, he was the official to whom the judiciary was administratively accountable. The Chief Justice considered this a dangerous doctrine since with "accountability must go control." He in fact challenged 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 (de La Bastide 1999:10-11). To quote the Chief Justice further:

> There is a fundamental difference between us. It arises from your claim that you are the Minister responsible to Cabinet and to Parliament for the administration of justice, and that the Chief Justice is accountable to you, or through you to Parliament, for his administration of the Judiciary. This in the context of Trinidad and Tobago is a novel misstatement of the true constitutional position. It has never to my knowledge been put forward by any previous Attorney-General or indeed by you during your first three years or so in office.
>
> The Attorney-General under our Constitution is responsible for the administration of legal affairs – not the administration of justice. It must be assumed that the framers of the Constitution chose their words with careful

> deliberateness. The Chief Justice is not and has never been accountable for the Attorney General for anything.
>
> As for your claim to be 'the guardian of public interest,' you do not seem to recognise the very limited purpose for which you may properly assume this responsibility. The Chief Justice does not report and has never reported to the Attorney General. Your insistent, though politely worded, demands that I or the department of Court Administration submit to you reports on this, that and the other, *are therefore out of place* and *ultra vires*. We are under no obligation to report to you on the performance of the judges, either collectively or individually, nor on our system for dealing with the complaints, nor how we have dealt with specific complaints – and I decline to do so now.[11] (*Trinidad Guardian*, September 30, 1999)

All the judges save one agreed with the position taken by the Chief Justice. As they said in a signed statement:

> We unequivocally support the Chief Justice in saying that institutional or administrative autonomy of the Judiciary, free from legislative or executive control, is a vital aspect of the independence of the judiciary and that any action that may undermine, reduce or remove such institutional or administrative autonomy amounts to a threat to the independence of the Judiciary, an erosion of the doctrine of the separation of powers and is contrary to the spirit of the Constitution of Trinidad and Tobago. (*Express*, May 25, 2000)

Some judges went so far as to contemplate a sit down strike or mass resignation to protest what they viewed as the government's hostility towards them.[12]

One reason why some believed that the judiciary should not be accountable to either the Executive or the Legislature is that unlike what occurs in the United Kingdom, the Constitution of Trinidad and Tobago and not Parliament is supreme. Given this,

the courts are empowered to find and are often called upon to declare Acts of Parliament unconstitutional. It would be difficult, though not impossible, for the courts to perform this constitutional function impartially if they were not institutionally independent and were supervised and micro managed by Parliament or the Executive. If the latter were to obtain, it would constitute a derogation from the principle of the separation of powers which provides that the legislature should not encroach or trespass on the province of other branches.

On the question of whether there should be a chancellor to undertake the administrative responsibilities of the Court, the Chief Justice argued that dual headship would give rise to difficulties. It was a "recipe for divisiveness and disunity." He also saw in the move a "plot' by the Executive, the President of the Law Association and others to neutralise the Chief Justice. "If you can't remove the man, destroy the office." Either that, or "you pursue another well known strategy, "divide and rule" (*ibid.*: 25). de La Bastide viewed the proposal to create a "new super judge to be known as a Chancellor," and the attempt on the part of the Attorney General to bring the Judiciary under greater control, as one that was aimed directly at him. As he told the gathering in his Address:

> It would be foolish to 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.... 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. (de La Bastide 1999:23-24)

In his response to the Chief Justice, the President of the Law Association, Mr. Karl Hudson-Phillips, opined that the principle of judicial independence should be strictly limited to judicial decision making and should not extend to the administrative arrangements supporting the judicial function.[13] The Law Association President said he found it highly undesirable to put administrative matters in the hands of judges who decide cases. These should be in the hands of another official who would be responsible for managing the administrative functions of the judiciary.[14] Questions arose as to who would appoint the Chancellor, whether he would be part of the Executive, and what would be his relationship with the Chief Justice. Hudson-Phillips' view was that the chancellor should have the status of an Appeal Court Judge appointed by the Judicial and Legal Services Commission of which the Chief Justice was chairman. "If he chose to appoint someone who would subvert the judiciary, he would have no one to blame but himself." He deemed it a "red Herring" to claim that the chancellor would be subject to the executive.[15]

Like the President of the Law Association, the Attorney General argued by way of response to the Chief Justice that the judiciary was both a judicial decision making institution and an administrative body. While the Judiciary was not accountable to the Executive or to the Legislature for the decisions which it makes in the judicial process, the people were entitled to have the Judiciary accountable to them for the administration of justice. If the Judiciary was not perceived to be accountable, the people would regard the institution as a "harsh and oppressive tyranny." This hyper-populist view of the relationship between the judiciary and

the people of course has a long history, and is taken to its limits in the United States where judges are either elected or must have their nomination to high judicial office approved by the Senate. Locating himself in that populist tradition, Maharaj insisted that the Attorney General was the Minister responsible to Parliament and ultimately to the people for the judiciary.

The Attorney General's case was based on what he considered the meaning of the separation of powers principle as well as on the specifics of the Trinidad and Tobago case. He argued that the Trinidad and Tobago constitution was a hybrid between the British and American models in that separation was not complete as it is in the latter. We note in passing that this view of the American model is not quite accurate. As Richard Neustadt (1960) put it more accurately, the American system is one in which "separate institutions share power."

In the Attorney General's view, the role of the judiciary in Trinidad and Tobago was to uphold the law and to check against the over-concentration of power in the other arms of the State. To effect this role, it had to be independent of both the Executive and the Legislative branches. This independence was the "backbone of democracy." Independence, however, did not mean that the Judiciary was not accountable to anyone. The Judiciary too must be subject to checks and balances:

> ... the delicate balance of the Constitution can only be maintained if there is built into the system of Government a system of checks and balances by one arm on the others. And the need for checks and balances, for accountability, is no less pressing in respect of the Judiciary than it is with the political branches of the State. Unchecked independence and separation would enable the Judiciary to usurp power from the other branches of State just as their unchecked independence and separation would enable them to do the same. Without mechanisms of accountability, the Judiciary may unwittingly fall into the trap of operating an institution that was inefficient and ineffective in delivering justice. That

is not to say the Judiciary would knowingly do that, but there must be safeguards to the people against such a possibility. (*Trinidad Guardian*, October 30, 1999)

In the Attorney General's view, the Judiciary, had to be put in funds by the Executive and the Legislature, and it thus had to be accountable for the use of those funds. This was quite different from it being accountable to the political executive for the judicial decisions which it makes. The other branches of government also had the responsibility to ensure that the structure and procedures which the judiciary employed to perform its judicial functions were adequate and allowed for the efficient and timely delivery of its service. While the Executive must not withhold the benefits to which judges were contractually entitled since to do so would compromise judicial independence, it must have a say as to how other public resources are requested. To quote the Attorney General, "to the extent that public funds are to be spent on matters outside those allocations, *the political branches are under a duty to determine whether further calls upon the public purse should be met, or whether there are pressing demands that ought to be given priority.*" This in fact seemed to be the crux of the dispute between the Chief Justice and the Attorney General.

The Attorney General argued that while Parliament did approve monies for the judiciary in its annual appropriations bill, it did not follow that releases should be automatic. Nor did it mean that "the minute details of the Judiciary's expenditure [had] been approved. It is not correct to say, therefore, that the approval of the Budget is an adequate mechanism of accountability." The Chief Justice had argued that it was subject to the post expenditure evaluation of the Auditor General. Interestingly, the Attorney General argued that even in the United States where separation obtains, the judiciary accounts to the Executive and Congress in relation to administrative matters. What the Attorney General wished to advise the judiciary was that "not every disagreement [was] a threat to the judicial independence, nor every inquiry as to how it spends money a hostile act." Citing American Supreme

Court Justice William Brennan, the Attorney General argued that "judicial independence is not a talismanic slogan to be invoked every time [government] performs its constitutional duty to oversee and regulate the ... courts" (*Newsday*, November 7, 1999).

On the question of the appointment of a Chancellor, the Attorney General quite rightly noted that the call for the appointment of a chancellor was not new. Indeed, the proposal was several decades old and was advocated by those who believed that the administrative and judicial decision-making roles of the judiciary should be separated since the burdens of the Chief Justice's office seemed too onerous to be borne by one official. One not only needed to ration precious judicial time, but also to find a way to provide the judiciary with management skills that judges do not normally have. The Attorney General noted that the Chief Justice had himself recognized that judges were not normally the best of administrators. As the Chief Justice had written in September 1999:

> Judicial experience ... [did not equip judicial officers for management]. It trained them to be somewhat autocratic, to be uncomfortable with uncertainty, to keep things close to their chests and to command and control, hence their judicial experience tended to make them less inclined towards a participatory approach to management.

The Chief Justice had however made it clear before accepting the appointment that he would not be interested in the post if the Government's plan was to create a chancellor. His preference was for the creation of a Court Administration Department under the day-to-day supervision of a full-time administrator. In respect of the Lord Chancellor in Britain, the Chief Justice correctly noted that "the office is a huge anomaly with roots deep in English history. Other countries copy it at their peril" (de La Bastide 1999:9). It was an essential part of the Executive, the legislature, and the judiciary.

In terms of some of the other specific concerns of the Chief Justice, the Attorney General was of the view that he was within his right to query some of the activities of the judiciary related to funds for travel. He noted that judges were allocated approximately US$10,000 per year for travel on what is called "judicial contact", i.e., conferences etc. The problem was that the judges often did not use this perk for official travel and applied instead for funds from the Overseas Travel Vote or the Training Vote for the Judiciary. The Attorney General argued that he had to have a say as to how this vote was used. In his view, the Judiciary had to seek Cabinet's approval for the use of this fund, and that he was the Minister responsible for advising the Minister of Finance as to what was appropriate.[16]

The Attorney General denied that he had the power to appoint staff on the establishment of the Court Administration Department. Only the Judicial and Legal Services Commission (JLSC) had such power. In terms of posts on contract, the Cabinet, and not the Attorney General, had the power to hire staff and it did so on the request of the Chief Justice. The Attorney General merely took the note to Cabinet. He did the same in cases where persons wished to go abroad for training. "This was always the practice. There is no instance when the Attorney General has refused to take any such Note to Cabinet."

Clearly, the question was whether the Attorney General made any comment to Cabinet on the Note or requested that alterations be made. The Attorney General was of the view that he was not and would not agree to being a mere conduit or "a PVC pipe," to use his phrase (*Trinidad Guardian*, February 19, 2000). The process had to be interactive. In his view, he was the Minister answerable to Parliament for the administration of justice and the Minister who must be consulted by the Minister of Finance whenever the issue of funds for the judiciary was on the public agenda. "This procedure was designed to ensure financial accountability, and was the only mechanism which the Executive had in place for that purpose." In sum, all Notes that caused funds

to be accessed had to be submitted through the Minister responsible for the Judiciary. "Once the Attorney General was satisfied with the contents of the Note, he submitted the matter to the Cabinet. If [he] had concerns, queries or suggestions, he discussed them with the Chief Justice, or the Permanent Secretary discussed them with the Administrative arm of the Judiciary, and such amendments as are necessary are made and then submitted to the Cabinet." It has always been so, insisted the Attorney General. Previous Chief Justices did not object to that formula. Maharaj noted that the "Lattimer Guidelines" which dealt in part with the question of the financial autonomy of the Judiciary as a requirement for independence on which the Chief Justice based his case, had not been approved by Commonwealth Governments, and had been referred for further study by the Commonwealth Law Ministers Meeting which was held in Trinidad and Tobago in 1999.

The Attorney General's argument was that all officials and estates of the land, including the President and the Prime Minister were subject to the Exchequer and Audit Act., Ch. 69:01 which dealt with financial matters. In his view, the Chief Justice clearly misunderstood how the system worked, a misunderstanding that, if allowed to prevail, "[would place the judiciary above the law]." The Attorney General also claimed that his office represented all the organs of state and therefore had a right to request information about the administration of justice as opposed to what the judiciary did in terms of its purely judicial functions. That was a right of the Executive. The right to investigate complaints made by members of staff who were dissatisfied with a departmental decision affecting them also belonged to the Executive. The Attorney General had certain political responsibilities to Parliament and the electorate which could not be eschewed. "If the judiciary was not accountable to the people, or was perceived not to be accountable, the people would regard the institution as a harsh and oppressive tyranny."

Maharaj noted that the Standing Orders of the Parliament allowed motions to be debated in respect of the conduct of a judge or the administration of justice and that it was the Attorney General who in any debate, had to answer for the judge or the judiciary. The same was true when the judiciary or the magistracy became embroiled in litigation. Claiming that he had treated the Chief Justice's assertions with utmost seriousness, the Attorney General told Parliament that

> The remarks of the Chief Justice are an assault upon democratic freedoms because he seeks to avoid accountability of the Judiciary to the Executive and Parliament. Judicial accountability does not destroy judicial independence. It is only if the Judiciary is of a fragile quality that there can be fear by the Judiciary of judicial accountability. To suggest that accountability within the very constructs defined by the Chief Justice would strike fear among this country's Judiciary and thus, influencing their decisions in matters involving the State is an unfortunate and shockingly low estimate of the character and individual independence of our judges....Unchecked independence and separation would enable the judiciary to usurp power from the political branches of the State, that is, the Executive and Legislative just as the unchecked independence and separation of those two political branches would enable them to usurp judicial power. Without mechanisms of accountability, the Judiciary can operate an institution that is inefficient and ineffective at delivering justice....Learned Hand, a famous American Judge said, "an independent judge would be the person whom nothing could daunt and nothing could bribe. It is the inner strength of the Judge which will prevent the independence of the Judiciary from being compromised. (*Trinidad Guardian,* October 30, 1999)

The Chief Justice of Trinidad and Tobago, and those in the rest of the Commonwealth Caribbean who harked back to a more isolationist tradition, challenged the view of the Attorney General as to his role in the judicial administrative process. As they declared at a meeting of Heads of the Judiciary in Kingston on October 16th, 1999:

- in the public interest, the importance of maximizing the principle of institutional independence of the judiciary should be emphasized

- in keeping with that principle, no member of the executive should assume or be given the responsibility for or control over the administration of the judiciary

- the judiciary should have unimpeded access to funds voted to it by Parliament and once voted, access should be subject only to the availability of funds

- a Chief Justice shall not be given directions by any member of the executive in matters affecting the administration of the judiciary.

Part of the problem in Trinidad and Tobago was that the Attorney General was often equivocal about what powers he believed he should have. He asserted quite categorically that he had no power to hire contract staff for the Judiciary, and that Cabinet had never refused any request by the Judiciary to fill contract posts. He further denied that as Attorney General, he ever sought to make the judiciary's access to funds voted by Parliament subject to the approval of the Attorney General. "The fact is that such is not the function or power of the Attorney General ... The release of funds is a matter for the Minister of Finance..." The Attorney General also claimed that while he was the Minister answerable to Parliament for the Judiciary, the actual powers of administration over the Judiciary are exercised by the Chief Justice "without interference."

What the letters exchanged between the Chief Justice and the Attorney General do show, however, is that while he might have no formal power to make certain kinds of personnel or administrative decisions, the Attorney General insisted that requests must go to the Ministry of Finance through his office and not directly to the Director of Budgets, even in respect of requests for matters which did not require prior Cabinet approval. These requests included, *inter alia,* access to funds for refreshments for official functions, funds to acquire furniture and equipment, to maintain facilities, to travel for purposes of training or attending conferences, virements from one account to the other etc., all of which have been delegated by Cabinet to Ministers. The Attorney General's position was that the Chief Justice was not a cabinet minister, and that the Attorney General was the person to whom discretionary authority in these matters had been delegated. Not only was he not to be by passed; he could also attach riders (conditionalities) to these requests before transmitting them to the Ministry of Finance. These riders have included requests for reports on the operations of the Department of Court Administration (CAD), detailed reports about how persons chosen to fill the post of Deputy Chief Executive Administrator were made etc.

The letters also made clear that there was a running dispute between the two state officials as to what was proper and settled practice on a range of issues, including the claim by the Attorney General that he was entitled to listen to, and address grievances which staff in the judiciary might have. In his view, some of these claims to injustice had financial implications which the state might have to bear. The Chief Justice challenged this, and argued that due process should be followed, including an appeal to the Ombudsman (see *Trinidad Guardian,* November 1, 1999 and February, 26, 2000 for copies of the letters in question).

One also got the impression that the Attorney General was not satisfied with the extent of the ethnic diversity to be found within the administrative staff of the CAD. Also affecting the crisis was the fact that the Attorney General was an indefatigable minister who enjoyed micromanaging his ministry, and saw the administrative arm of the judiciary as within his domain. Despite official denials, the Attorney General clearly believed that he must have a say, whether formally or informally, in what went on within the administrative confines of the Judiciary. As such, he was bound to clash with any Chief Justice or Court Administrator who firmly

believed that the institutional autonomy of the Judiciary was a paramount value that could not be lightly trampled upon.

The Georges Report

The Law Association appointed Justice P.T. Georges, former member of the Court of Appeal of Trinidad and Tobago and former Chief Justice of Tanzania and of the Bahamas, to investigate and possibly mediate the differences between the Chief Justice and the Attorney General. Georges found that the language used by the Chief Justice in his Address at the opening of the 1999 Law Term was immoderate, and reprimanded the Chief Justice for threatening to descend into the arena to defend the judiciary. To quote Justice Georges:

> A judge speaking in a debate in the House of Lords can claim to speak as a politician. A judge delivering a lecture to a general or academic audience can claim to be speaking as a commentator on legal matters. A judge delivering from the bench an address on the opening of the term should only speak as a judge. He should neither descend nor threaten to descend into the arena. The case for the independence of the Judiciary and the separation of powers can be made on the basis of the logical analysis of constitutional principles. While the Chief Justice may have felt provoked beyond endurance, there was no adequate evidence to support the charge of an attempt to drive him from the bench eliciting the response that he would not be so driven. (Georges 2000: 34)

Georges nevertheless shared the concerns of the Chief Justice. He noted that a free and democratic society could not exist without the rule of law, and that the independence of the judiciary must thus be the cornerstone of such a society. He recalled that in 1999, the political directorate had sought to place the judiciary under legislative scrutiny when it provided in a Bill which was introduced into Parliament in 1999 that joint select committees of Parliament should be constituted to investigate and report on the powers, methods of functioning, and the criteria adopted by Service Commissions, including the Judicial and Legal Services Commission.

In introducing the Bill, the Government claimed that the Commissions enjoyed unrestrained power which was incompatible with the principles of accountability, transparency and openness in a free and democratic society. The Government's proposal to include the JLSC in the proposed Bill did not get the support of the independent members of the Senate whose support was constitutionally necessary to have it passed, and was dropped. The independents argued that the proposal violated the separation of powers principle which was enshrined in the Constitution.

In George's view, the Attorney General was now seeking other ways to make the judiciary "accountable." This strategy involved seeking to control funds which were allocated by Parliament to the Judiciary. Georges agreed that the allocation of funds for the Judiciary must be under Parliamentary control. The question was the constitutionality of the formula and mechanisms to be used. Georges was of the view that the Judiciary was not under the control of the Attorney General's Department. The fact that the Attorney General had been the member of Cabinet responsible for bringing to the attention of Cabinet matters of concern to the judiciary was an inheritance from the pre-independence administrative structure.

Georges did not agree with the Attorney General that his predecessors had done more than serve as conduits between the judiciary and the executive. Maharaj's two predecessors had advised him otherwise. In his view, the Attorney General could not be deemed to be the "relevant minister' whose responsibility it was to give prior approval for judges to travel overseas on official duty as was the case in respect of persons in other departments of state as was provided in Cabinet Minute No. 2711 of October 1998.

This was indeed one of the main bones of contention between the AG and the CJ with the former insisting that the CJ was not a minister, and that he was the relevant minister who had a supervisory role to advise the Minister of Finance as to whether funds should be released. The CJ's claim was that once funds were voted for the Judiciary by Parliament, he was the person who had a responsibility for approving expenditure under the relevant heads and that there were provisions for audit which would indicate whether the funds were properly expended.

In Georges' view, the insistence on the Attorney General's approval was an erosion of the principles of separation of powers and the independence of the judiciary. Georges noted that the Attorney General had sought to exercise this supervisory control in relation to the Chief Justice's wish to travel to Jamaica to attend a meeting of Chief Justices. As he opined:

> If the consent of any other functionary is demanded at this stage, that arrangement can only arise from an intention to vest in that functionary the authority to countermand the decision of the Chief Justice to attend the conference. This must plainly be an impermissible intrusion. The fact that the Chief Justice himself is involved highlights the impermissibility. But the basic situation is no different if the request is made by the Chief Justice with respect to a member of the Judiciary whom he has deputed to travel officially on judiciary business. (Georges 2000: 23)

Georges noted that the principle of judicial independence was not enshrined for the sake of the judges. Judicial independence was instrumental to the achievement of good governance. As he said, "it cannot reasonably be said that the judiciary is a law into itself. It is merely protected from interference to ensure that its decisions are not subjected to any influences, but guided solely by law" (*ibid.*: 24).

On the vexed question of how matters of concern to the judiciary should be brought to the attention of the executive, Georges noted that the Attorney General was often a litigant on behalf of the state in matters that are politically explosive or problematic. This being so, one should identify an officer who was less concerned with litigation who would serve as the conduit between the two arms of the state. His suggestion was that the Prime Minister should be the person who should interface with the Chief Justice. This, in my view, was not a very helpful suggestion, since it could well create other kinds of unhappy and unintended consequences. One notes that the protocol which obtained in the past in Trinidad and Tobago was for the Governor General, and later the President, to serve as the preferred channel of communication on certain kinds of sensitive issues. It may well be that matters relating to funding should be channelled directly to the Ministry of Finance, allowing that office to consult with the Attorney General if the responsible minister so wished. Matters of a politically sensitive nature should perhaps be channelled through the President. Admittedly, however, the problem also has a personality dimension. In the past, no insuperable difficulty seemed to have arisen between Chief Justices and Attorneys General.

The Mc Kay Commission of Inquiry

Needless to say, the Government was not happy with the Georges Report and persisted with its decision to appoint a Commission of Inquiry. It deemed the Report "flawed" and oblivious of certain critical issues. Prime Minister Panday gave several reasons why the Commission of Inquiry was necessary. He claimed that he took the concerns raised by the Chief Justice seriously, and that he was mindful of the fact that other Caribbean Heads of Government had raised the matter with him. The public was also said to be concerned about the matter. Given this and the other kinds of concerns that had been articulated about the character and competence of the judiciary, the Government was of the view that a Commission of Inquiry was necessary. To quote Mr. Panday, "whenever there is such public disquiet in respect of any institution of civil society that public confidence in such an institution may be shaken, the law provides for the President of the Republic, acting on the advice of Cabinet, to appoint a Commission of Inquiry into any such matter" (*Trinidad Guardian*, September 9, 1999). Mr. Panday denied that his government was seeking to interfere with the independence of the judiciary, claimed that the appointment of a Commission of Inquiry into the Administration of Justice in Trinidad and Tobago was a development of "great historic significance for our country."[17] And so indeed it was. The question was whether that significance was likely to be positive or negative.

The decision to establish a Commission of Inquiry to investigate the claim made by the Chief Justice as well as to report on the problems and difficulties which inhibit good judicial governance in Trinidad and Tobago was received with mixed reactions. The decision was opposed by a substantial section of the legal fraternity and the business community speaking through the Chamber of Commerce, and the advice given by the Prime Minister to the President of the Republic to appoint the members of the commission was for long resisted by the latter who expressed concern that it might be unconstitutional for him to do so since it seemed to violate the concept of the separation of powers. The President was in fact uncertain as to whether he should heed the Prime Minister's advice to appoint the commission. As he said, "if I were advised to appoint members of such an inquiry, matters of a constitutional nature would arise. In this matter, as in the matter of [removing two dissident Tobago] Senators, the constitutional role of the President to advise, or warn even to appoint, was ignored" (*Express*, February 5, 2000). The President delayed appointing the commissioners for several weeks, claiming that he was seeking legal advice as to whether it was constitutional for him to do so. He eventually capitulated rather than create a constitutional crisis.

Many wondered why the Government chose to appoint a Commission of Inquiry staffed entirely by three foreigners (one

English, one African, and one Indian), when the Law Association, one of the groups in civil society most critically concerned about the issues, had considered that option and chose instead to invite Justice Teleford Georges to inquire into the matter and seek to find a formula to arbitrate the conflicting concerns of the Chief Justice and the Attorney General for judicial independence on the one hand, and public accountability on the other. While it is true that the two inquisitions were not incompatible, and that one was broader in focus, their concerns overlapped.[18] Many believed that Messrs. Panday and Maharaj were not driven by any concern for what best served the public interest, but were instead determined to discredit or humiliate the Chief Justice whom they believed had embarrassed them by exposing their plan to bring the judiciary under closer executive control. It also seemed that there was an unarticulated plan at work to intimidate and harass the Chief Justice, whom Mr. Panday never wanted to have occupy the post in the first place, preferring instead a sitting judge who was a co-ethnic.[19]

Whatever the government's intention, the McKay commission saw its role differently.[20] The Commission sought to broker an accord between the Attorney General and the Chief Justice in the hope of restoring the cordiality and comity that once obtained between these two senior officers of the state. The general aim of the accord was to facilitate the goal of achieving good judicial governance. To quote the Report of the Commission (2000: 63).

> In the heat of disputes, things are sometimes said which are much better unsaid, and on both sides of this dispute it appears to us that this has happened. Inflammatory remarks on one side are apt to provoke extreme reaction on the other. In our opinion, it would be unwise to rake over what has happened apportioning blame. Rather, we have tried in the course of this report to suggest the principles and machinery by which such matters should be settled in the future and we hope that if this is followed, an amicable relationship between the Honourable Chief Justice and the Honourable Attorney General can be resumed with the beneficial effects which were apparent at the beginning of their work together.

One of the issues that generated a great deal of heat during the hearings before the Commission related to the manner in which judges were chosen. Former magistrate Dana Seetahal claimed that judges in Trinidad and Tobago were selected on an ascriptive basis. Seetahal told the Commission that only those who graduated from certain prestige secondary schools or were members of certain elite clubs are given consideration for appointments. "Only those who hang out together get appointed" (*Trinidad Guardian*, June 26, 2000). Seetahal also alleged that the members of the JLSC were part of a clique who only knew the older lawyers, "and it is the sons and relatives of these lawyers who may be recommended."

A similar view, viz., that judges were appointed in a "secret process" in which the Chief Justice's view was decisive, was expressed by Senior Council Fenton Ramsahoye, a close associate of the Attorney General (*Trinidad Guardian*, June 20, 2000). Ramsahoye argued that offers of appointments to the Bench should only be made to persons of long experience. Intellectual ability was not always a substitute for experience. Without such experience, a judge would be unable to give "extemporaneous judgements." Dr. Ramsahoye complained that

> Today, judges are being called on to function without getting sufficient time to distinguish themselves at the Bar. Appointments are given to persons who never appeared in court or held a brief or did a serious case, and it is a strain to practice before them because one had to explain fields of learning which they should know before they sit on the bench. It is very discouraging and frustrating to practice in such a system. Magistrates who have not had much practice, were appointed as judges and were called upon to take on heavy cases in such areas as land or company or succession law. They are not equipped to do it. Race, class and social connections by a few firms ensured that they got the best paying work that comes from the banks, the insurance

companies and the energy sector, while all the heavy litigation was done by persons outside those firms. (*Trinidad Guardian*, 20 June, 2000)

Similar claims were made by Justice Anthony Lucky who told the Commission that the JLSC had arbitrary powers guaranteed by the Constitution. Justice Lucky who had been bypassed on several occasions for promotion to the Court of Appeal alleged that the Chief Justice had "absolute power" which had to be curtailed. Lucky noted that the Chief Justice had made about 15 appointments to the High Court and three to the Court of Appeal. "Most of these appointees agree with whatever he proposes." He also endorsed the view that a Chancellor should be appointed, or alternatively, a President of the Court of Appeal, along the Jamaican model (*Express*, June 30, July 3, 2000).

The Attorney General likewise shared the view that the Chief Justice should not be a member of the JLSC. "There should be lawyers, laymen, and persons other than the Chief Justice." He also made a case for the appointment of a judicial ombudsman to whom complaints against judges could be made (*Express*, June 24, 2000). In response, the Chief Justice firmly denied that he dominated meetings of the JLSC in which new judges were recruited or that the selection process was effected in secret. As he complained," the idea of the Chief Justice making all decisions is unfair to other members of the Commission.... And when I am wrong, there are people to tell me so." With regards to the allegation that judges were chosen in secret, he asked, "what do people want, that we meet in Woodford Square?" He also disapproved of the suggestion that the Attorney General should be a member of the JLSC. "I do not think that the Attorney General has the right to interact with the judiciary" (*Express*, June 23, 2000).

In terms of the controversy about how judges were appointed, the Commission agreed that all was not in order. A great deal of the acrimony that obtained between the Executive and the Judiciary in the last few years was in fact informed by the

belief that the selection process was flawed. The Commission did not however accept the recommendation that the Chief Justice should not chair the JLSC arguing that as head of the Judiciary, the Chief Justice had an indispensable role to play in the recruitment process. The Commission recommended instead that the membership of the JLSC should be expanded to include the Senior Justice of the Court of Appeal, the Senior Puisne Judge, three lay persons, and a senior and influential member of the legal profession familiar with potential candidates for judicial and magisterial office. This person might well be the President of the Law Association whom it was felt should be a member of the JLSC by right. The Mc Kay Commission did not share the view that there should be open hearings such as obtain in the United States before judges were approved for presidential appointment. This recommendation was in fact made by the President of the Law Association who proposed that some equivalent mechanism be put in place. The Mc Kay Commission perhaps accepted the view that open hearings would discourage prospective candidates for the Bench from making themselves available.

Quite apart from the composition of the JLSC, the Commission also felt that the process of consultation should be widened to include senior judges, senior members of the Bar, members of the academic community, and the Attorney General whom it believed would have a wide knowledge of those who might be suitable for appointment from the public as well as the private sectors. Other bodies with a knowledge and experience of the judicial process might also serve as valuable consultees. The Commission noted the view of the Chief Justice that members of the Commission were always free to consult whomsoever they wished. It however thought that the process of consultation should be made more formal by encouraging consultation with senior members of the profession over and above the President of the Law Association.

On the vexed issue of the role of the JLSC in disciplining a judge who was "slothful" or delinquent in other ways, the

Commission noted that judges were given security of tenure on appointment, subject to their breaching the conditions under which the appointment might be constitutionally terminated. "This makes any lesser discipline a delicate task." The Commission nevertheless felt that mechanisms should be put in place to receive and deal with complaints against delinquent judges and magistrates, and that the Chief Magistrate and ultimately the Chief Justice should be the official to deal with these complaints, albeit in a discreet way. If the cause for complaint persists despite "diplomatic" intervention at the highest level, the only available sanction was ultimate removal from office under the constitutional safeguards provided.

The Commission considered and rejected the suggestion that the JLSC should have power to issue a public reprimand. "The difficulty of any form of public discipline of a judicial officer short of deprivation of office is that... the office holder [would] definitely be damaged in the eyes of the public with consequent damage to his or her authority as a judge" (McKay Commission 2000:41). Where complaints are made against the Chief Justice, the only reasonable arrangement is that it should be referred directly to the JLSC. It was assumed that the CJ would not take part in any discussion pertaining to the complaint. The Commission was firm in its recommendation that the Attorney General should have no role whatsoever in investigating or adjudicating upon complaints against judicial officers which it notes was the responsibility of the JLSC. It also diplomatically advised the Attorney General that if there were criminal matters alleged against a judge, this was a matter for the police and the DPP and not the Attorney General who had no *locus standi* in the matter as the Attorney General seemed to have believed.[21]

On the vexed question of the manner in which funds voted by Parliament for use by the judiciary should be accessed, the Mc Kay Commission observed that it was the responsibility of the Executive and the Legislature to determine the quantum of the allocation that should be made to the Judiciary. "What the country

can afford is a matter on which the Executive government is likely to be informed, and it carries the responsibility of accountability to its electorate enforced by regular general elections." By the same token, the Judiciary also had a view as to what funds it would require to carry out its constitutional responsibility. Dialogue was thus needed to ensure that both branches of government were in a position to meet their commitments to the community. While the Commission did not go so far as to accept the view that the judiciary should be given a bloc vote which it would then be free to utilise - subject to normal audit checks - such as obtains in some jurisdictions, it did make a plea for more autonomy, arguing that "unless in times of unforeseen stringency, ... expenditure for the support of the Judiciary included in estimates approved by Parliament should be granted" (*ibid.*:49).

On the vexed question as to whether there should be a Chancellor who would be responsible for the administrative affairs of the Courts or whether one should continue to rely on the recently created Department of Court Administration, the Commission again sought to function as a mediator. It opined that when the President of the Law Association, Mr. Karl Hudson-Phillips, urged the creation of the office of chancellor, he was not threatening the position of the Chief Justice whose preference was for a Department of Court Administration with a Master of the Supreme Court at its head. The Commission further observed that the President of the Law Association merely wished to have a more senior member of the judiciary appointed to the post, someone who would carry more weight with other judges. It however expressed the hope that everyone would seek to make the existing system work. To quote the Report:

> We hope that everyone involved in the administration of justice will now accept the decision taken by the Cabinet at the request of the Chief Justice to set up this department and give it every support because we are clear that if it is successful, this will be the best way of resolving the difficulties that have dogged the administration of justice

> in Trinidad and Tobago for a long time as one can readily see by reading the report of successive Chief Justices at the opening of the legal term over the years. The first real improvement has come with the last report in 1999, and it is very sad that just as improvement was beginning to emerge, the unfortunate dispute to which we have referred between the Honourable Chief Justice and the Honourable Attorney General has darkened the scene. (*ibid.*: 55)

On the controversial question as to who should be the medium through which communication should flow between the Executive and the Judiciary, the Commission argued that the Attorney General has been the time honoured "channel of communication" between the political executive and the judiciary, and agreed that that relationship should continue. This did not however mean that the judiciary was accountable to the Attorney General. This was not the position. The Commission also accepted the view of the Chief Justice that "the judiciary perform their responsibilities in public, and in this way account to the public on a daily basis for the discharge of their responsibilities."

The Commission noted further that the Attorney General was the person responsible for legal affairs in Trinidad and Tobago. As part of the executive, he was also responsible for legal administration and thus ought to be the communication link between the judiciary and the executive. The Commissioners however dodged the question as to whether he should be a mere medium or whether he should seek to influence or shape the message as well. The Commission considered and rightly rejected the view advanced by Justice Georges that the Prime Minister should be that link, arguing that "the Chairman of the Cabinet is not well placed to press the case of the Judiciary in matters that might come before the Cabinet for decision." Indeed, in trying to avoid the frying pan by using the Attorney General as the medium of communication, Georges' formula ran the risk of having the judiciary jump into the middle of a flaming fire. It eliminated the fiction that by using the Attorney General, one was not dealing directly with the executive but with a politically neutral medium.

One of the contentious matters the Commission was called upon to advise upon had to do with the role, if any, which the Cabinet and the Attorney General should play in determining which judicial offer should have the cost of their travel abroad met by the state. The Commission agreed that Cabinet could make general policy decisions about judges travelling abroad and that it could also delegate this responsibility to the Attorney General. It however considered it "inappropriate" to have the Attorney General or even the Cabinet exercise any such judgement in terms of specific judges. That discretion lay with the Chief Justice. It was however felt that it would help if he were to consult with the Senior Justice of Appeal and the Senior Pusine Judge to make clear the policy which he proposed to follow in the exercise of this discretion.

The Commission also sought to effect a compromise formula in determining what should obtain in respect of travelling abroad for officers whose function it was to support the judiciary. The Commission noted that there was need to ensure that there was fairness across the public service. As such, when the Chief Justice was making recommendations as to who should travel abroad for what purpose, the decision should be subject to the Ministry of Finance. It felt that it would be "perfectly reasonable for these decisions to be taken after consultation with the Attorney General."

The other prickly matter which the Commission addressed related to "judicial sloth," *viz.*, the failure of judges to deliver their judgements in a timely manner. The Commission noted that the reasons for this did not always lay at the feet of judges, and that the system was sometimes responsible. Legal submissions by attorneys were not always sufficiently reliable, and judges often had to research matters themselves. Unlike what obtains in jurisdictions such as the USA, they did not have clerks who could do the required research for them, or access to a corpus of up to date books, articles, and research papers by academics to which they could readily turn. Despite these mitigating factors which obtained in some, though not in all matters, there was a chronic problem of delay in delivering judgements on time which had to be addressed. The Commission recommended that whenever judgement was reserved, the practice should obtain that a date be publicly given as to when judgement would be forthcoming. If this date could not be met, detailed reasons should be given for the delay and a new date set. The Chief Justice and the Chief Magistrate as appropriate should be formally advised about the new arrangement.

The Commission wisely advised that delay in giving judgement in the Supreme Court sets a bad example for the magistracy. The Commission also noted that when judgement was unduly delayed, confidence in the administration of justice was undermined. The Commission saw no reason why a delinquent judge should not be made to assume responsibility for his sloth. "If the name of the particular judge is withheld from the public, but the fact that a judgement has been unreasonably delayed is known, this tends to put blame on the judiciary as a whole from which those judges who give judgement are entitled to be protected" (*ibid.*: 56).

The Chief Justice had publicly complained about the number of requests that were forthcoming from the Attorney General's Office which seemed to suggest that the Judiciary was accountable to that office. In the Chief Justice's view, the Attorney General was unduly inquisitive. The Commission however felt that the Attorney General was entitled to expect the Judiciary to comply with requests for information so that he might be better enabled to discharge his responsibility to Parliament and the people, and not because the Judiciary was accountable to him. Any unwillingness to provide the information might trigger suspicion which could damage the reputation of the judiciary. The judiciary, on the other hand, was also entitled to have the Attorney General present a fair and balanced picture to Parliament of the judiciary's successes and failures. (*ibid.*: 59)

The Commission also advised the Executive that where a judge was conscientiously discharging his or her duty, the executive should refrain from "unsympathetic criticism." "Judges may err, and this is the reason for appeal procedures. But the fact that a judge has been overruled ought not to be the occasion of harsh criticism from any official quarter" (*ibid.*: 64). This admonition was clearly directed to the Attorney General who had openly reprimanded a judge for a decision which he made in a drug related case which led to the release of the accused who absconded before he could be retried following successful appeal by the state.[22]

The Commission felt that good judicial governance in Trinidad and Tobago required that the motto, "together we aspire, together we achieve" be applied in the context of the relationship between the Attorney General acting on behalf of the executive, and the Chief Justice, both of whom seem to be actuated only by the desire that the administration of justice in Trinidad and Tobago should be as efficient as possible. The Commission, perhaps wisely, chose not to deal with the power dimension of the relationship, nor with the personalities involved. It also deliberately chose to avoid assigning blame for the indiscretions of either side, and seemed bent on finding a mechanism to nudge the players back to the centre of the playing field. As it sagely advised, "nothing is gained by public disagreement between the Attorney General and the Judiciary."

Reducing Delay

As in the Eastern Caribbean and elsewhere in the region, the question of delay in the delivery of judicial judgements and what was believed to be responsible for them, also provoked considerable controversy. The Attorney General focussed his criticisms on the Judiciary:

> Judicial delay is an enemy of justice and weakens public confidence in the judicial process. Justice delayed is justice denied. Judicial delay by a judge in completing his judicial duty denies justice to the successful party during the period of delay. Judicial delay undermines the unsuccessful party's confidence in the credibility of the Court's Judgement. Judicial delay facilitates persons charged for criminal offences and those found guilty of criminal offences to escape justice. Judicial delay denies justice to victims of crime and weakens public confidence in the whole judicial process. (*Newsday*, March 23, 2000)

Judicial delay not only caused despair and stress, but increased costs to litigants. In many cases, the victims were little people - widows, people injured by motor vehicles or in the work place, public servants - who often gave up in despair. Maharaj noted that some countries like the Philippines had sought to deal with the problem by withholding or suspending the payment of salaries and pensions for non-delivery of judgements. In others, judges were called upon to resign for failure to deliver timely judgements. Some critics of judicial sloth also suggested that all judges should not be paid the same, regardless of length on service as is the case in Trinidad and Tobago, and that use should be made of increments to encourage performance.

The Attorney General let it be known that he was considering introducing legislation to provide fixed time frames for the delivery of judgements. Judges were to be required to state in open court at specified intervals why they were unable to give their judgements within the specified time frame, failing which, they would be deemed incompetent and subject to removal. Opined Maharaj: "...a judiciary ... cannot shelter incompetence behind the façade of judicial independence. One wonders whether a judiciary without competence could ever be independent." He also noted that the Chief Justice himself had called upon "all the players in the administration of justice to develop an attitude of intolerance to judicial delays." The proposal provoked a storm of controversy within the legal fraternity (*Newsday*, March 23, 2000).

Despite the criticisms that were levelled at the Judiciary by the Executive and persons who have suffered as a result of delay, the Chief Justice de La Bastide was extremely reform minded and determined to drag the judicial system into the 21st century. To this end, the Judiciary systematically augmented its stock of modern technological hardware and related software, and also sought to train and manage its human resources, both judicial and administrative, more effectively through the use of staff seminars and retreats, or by sending officials abroad for training or exposure. Particular emphasis was placed on case management and court recording systems. Systematic efforts were also made to reduce backlogs. In January 2000, a backlog Reduction Committee was established and charged with the task of creating an improved system of dealing with long outstanding matters. Close to 1,600 matters filed between 1980 and 1990 were put on the cause lists and an effort made to have them heard before the end of the 1999-2000 term. One thousand and fifty-three (1,053) were completed at July 31, 2000, and several others struck off the list or stood abated (*Judiciary of the Republic of Trinidad and Tobago: Annual Report* 1999-2000:15).

Special efforts were also made to clear up the backlog of cases that were on appeal from the magistrates' courts with much success. There was a 91 percent increase in the number of civil appeals from the Magistracy and the High Court that were disposed of in the 1999-2000 law term over that which was disposed of in the preceding year. The total number of magisterial appeals disposed of (including those which were withdrawn) in 1999-2000 represented an 116.14 percent increase over that of 1998-1999. Attempts to further reduce the backlog were however hampered by delays in the typing of notes of evidence and provision of reasons for decisions. As the Court Administration Unit complained in the *1999-2000 Annual Report:*

> The extent of these delays ... continues to be alarming. At June 30, 2000 there were one thousand and thirty seven (1,037) appeals from decisions of magistrates that have not

been submitted to the Court of Appeal because the notes and reasons are not yet ready, the number having been reduced from 1,154 at July 5, 1999. In the Magisterial District of St. George West, notes of evidence are still being typed for appeals filed in 1996. This deplorable situation is exacerbated by the archaic method used to record evidence in the magistrates' courts.

Note takers are required to write the notes of evidence in long hand and with the large volume of cases heard in the magistrates court each day, their handwriting is at times illegible. These notes are then read back to the typist, a process that must be synchronised with the availability of the note taker whose main function is to take the notes of evidence in court. However, note takers spend an average of five hours per day in court, making this system of transcribing the notes ineffective. To alleviate this situation, the Judiciary decided to address the backlog of notes of evidence as a specific project. Using the district of St. George West as a pilot (there were 344 appeals from decisions of magistrates awaiting the typing of notes of evidence and magistrates reasons at June 30, 2000), data were gathered on the staff requirements and funds needed to alleviate the situation and a note was prepared for submission to cabinet through the office of the Attorney General. Although details of the project were provided in the note to cabinet, the office of the Attorney General has queried the note in a manner which the Judiciary believes is in keeping with micro-management of the judiciary by a department of the executive. Since the Judiciary felt that the project scope with full costing was already detailed in the note, it was suggested to the Attorney General's office that the cabinet should consider the note in its submitted format. This matter is still outstanding (*ibid.*: 43).

In order to fulfill the imperatives of the Privy Council's judgement in the Pratt and Morgan case (see below, p 169), there was a substantial reduction in the time taken to deal with matters relating to capital punishment. Some litigants in fact complained that these matters were being pursued too expeditiously and had

asked for adjournments. Crowed the Chief Justice: "while there has been much talk about delay, this case is about the pace at which the case has come before the court (*Express*, March 3, 2000). Ironically, in one particular case, the AG's office was the party which sought the adjournment in a matter that was on appeal since 1996. The Chief Justice however noted that improvements in the time frame for delivering judgements on the criminal side had had a negative impact on the speed with which civil matters were dealt with. The Chief Justice further observed that delays were in part caused by shortages of equipment and staff, both administrative and technical. Appeals from the magistrate courts also increased delay since many magistrates were tardy in giving reasons for their decisions. The Chief Justice also felt that if the civil list was to be reduced, there was need for more Appeal Court Judges. This would allow judges time to write judgements without disrupting the hearing of appeals (*Independent*, March 3, 2000).

Legislation to force judges to deliver judgements on time was thus not the only or perhaps the best way to deal with a problem that was complex. Reducing delay also involved reforming the Court's rules, if not changing them altogether. Rules of Court facilitate access to justice and regulate the progress of disputes settlement. When lawyers use the rules to frustrate rather than facilitate the delivery of civil justice, they encourage individuals to adopt "self help" methods of dispute resolution which undermine the rule of law, democracy, and good governance.

The Jamadar *Report of the Advisory Committee on Rules* (2000:9) noted, that access to justice is hindered by objective as well as subjective factors. Objective factors include economic, procedural, linguistic and other considerations which affect ready accessibility to the justice system. Subjective barriers include class, culture, ethnicity, as well as a lack of awareness of one's rights, a tradition which encourages individuals to seek to pursue their rights, as well as confidence in the system and those who officer it.

A considerable effort had been made over the years to reform the rules of civil procedure in Trinidad and Tobago, the last comprehensive revision of which was effected in 1975. Several committees and conferences have examined the system to determine what was required to adapt them to the needs of the time. All the studies, the most comprehensive of which was done under the Chairmanship of Dennis Gurley (1992), took as their point of departure the fact that delay was endemic, and that the principal reason for delay was the tendency of lawyers, who were "masters of delay," to apply for adjournments for a variety of reasons, many of which were spurious or inappropriate - they were only recently briefed and not yet ready to proceed, or briefed but not paid etc. The culture of the court was characterised by the presumption that cases would be postponed. Lawyers assumed that their case would not be heard and therefore did not come prepared to proceed. Delay thus became self-fulfilling.

Studies have revealed that an average of 85 to 95 percent of the adjournments were sought by lawyers (whether for private litigants or for the State) who were not ready to proceed. The studies revealed that the management of cases was effectively under the control of attorneys and litigants and not the judges and the Courts as many critics assume. The judges in many cases were however not interventionist , and obliged attorneys. The Chief Justice, Mr. Michael de La Bastide, in fact felt constrained to point this out in his Address at the opening of the 1997-1998 Law Term. As he observed:

> The Administration of justice is a very complex system involving the input of services from a number of differing bodies and institutions as well as the provision of a number of different physical facilities. If the administration of justice does not work as smoothly or as efficiently as it should, there is little point in simply saying: "It is the judges fault - they don't work hard or fast enough" or "it is a lawyers' fault - they are never ready and talk too much anyway." It is more useful to examine more carefully why the machinery of justice is not working as well as it should, and to fix those parts that need repairing and replace those parts that are missing. (cited in Ryan 1999: 323)

As de la Bastide reflected, "it is perhaps a little known or little publicised fact that nine out of ten adjournments are on the application of counsel or their clients, the parties" (*Express*, April 4, 2000).

On most days, matters were called only to be postponed at the request of the parties. Attorneys were often to blame since the better qualified ones invariably took on board more matters than they could deal with. They refuse to pass on briefs as is done elsewhere. By repeatedly requesting adjournments, many civil matters remained part heard. In this way, the complete hearing of a case which should take a week could extend to four years. Such delay often led to faded memories and decisions to abandon petitions. The process often worked to the advantage of wealthier litigants while stretching the resources of those who were indigent or of modest means. Court statistics revealed that the average time between the serving of a writ and the obtaining of a decision was upwards of 7 years as compared to 3 in the United Kingdom where part heard cases are the exception rather than the norm.

Gurley (1992) reports that between August 1970 and October 1990, the number of new appeals filed annually in the Court of Appeal more than doubled, while the sanctioned strength of the Court increased by only two judges, with the actual strength increasing by only one. In the Criminal Jurisdiction of the High Court, during the period 1970 to 1971, the number of outstanding committals was 286 and the number of matters actually completed was 275. In contrast, during the 1990 to 1991 period the outstanding committals were 1,324 while the matters actually determined were 344. Between August 1970 and July 1971, 381 new civil actions were set down for hearing on the General List and 568 new matters were filed. Between October 1990 and July 1991, 297 matters were set down and 6,884 new matters were filed. It was readily apparent that while the rate of turnover of matters in both the Criminal and Civil Jurisdictions was only marginally higher in 1990-1991 than it was in 1970-1971, the number of outstanding matters increased six times in the Criminal Jurisdiction and ten times in the Civil Jurisdiction. The problem was the same in the magistracy. As of July 31, 1987, a total of 75,665 cases were outstanding. The reasons given for this dramatic increase in the number of matters that came before the courts were the same as they were in 1955: an upsurge in criminal activity and the growing litigiousness of the citizenry. It is also evident that the judicial system was burdened by numerous trivial matters that should not reach its upper levels. According to one report, "the Magistrates' Court has completely collapsed and the entire system is in extremis" (Clement *et al* 1999:68).

In the view of the Chief Justice, if justice was to be more speedily delivered, and the "culture of delay" transformed, the Courts had to become more interventionist. One needed more "trial day certainty." This meant that a system had to be put in place which would allow cases to be heard on or about the dates when they were fixed for hearing. In his view, the system also had to become less adversarial. What was required was a profound almost cultural change in approach "towards litigation from one that was overly adversarial and combative and which gave nothing away, to one that was more cooperative and open, and which recognised the obligation of litigants and their lawyers to prosecute and defend proceedings with efficiency and despatch."

It was also felt that better use had to be made of written briefs, elimination of the practice of judges taking notes in long hand, and the use of court annexed Alternative Dispute Resolution (ADR) techniques. Better and greater use also had to be made of pre-trial conferences to narrow the differences between the contending parties. It was felt that too many cases were decided at the trial stage, all of which served to increase the cost of litigation. It was argued that pre-trial settlements would save all parties, including the courts, a great deal of money. To effect these economies, it was imperative that relevant documents be exchanged

in advance of hearings, and that non-contentious matters were settled or eliminated from the process prior to the actual trial. The aim of the new proposed rules was to reduce delay and practices which increase costs.

The new Civil Proceedings Rules (CPR) which were to take effect on December 31, 1998, did not however meet with the unanimous approval of the legal fraternity. Some members of the Law Association argued that CPR would lead to an increase in costs, the front-loading of such costs, outcomes which would adversely affect the ability of some litigants to obtain justice. It would thus serve as an objective barrier to the achievement of justice. As one attorney explained, "the new rules of court do not simply deal with procedural changes which affect form only. They substantially affect the right of the public to access the courts" (*Guardian*, September 30, 1999). It was claimed that poor clients paid fees when money was available, and they could not be expected to meet the up front costs which the new system would require to be paid. It was also argued that the work involved in the new system would favour well organised and well staffed firms and clients, and adversely affect single practitioners or small firms which did not have the resources to do all that was required before a matter came to trial. The urgency to introduce the rules was in fact seen, perhaps unfairly, as a plan hatched by the Chief Justice and the big firms to gobble up work now done by little lawyers.

The Chief Justice did not agree with the claim that the new rules would impose hardships on one man practitioners. While the rules did make important changes in procedure, they would, in his view, "make a vast difference in our civil system, cutting down costs, and delays for everyone who has to use that system" (de La Bastide 1999:9). In his view, there was nothing that the single practitioner could not do as efficiently as a firm could with the aid of a "typist, a messenger and a diary." On the question of the system imposing hardships on the poor, the Chief Justice was equally dismissive:

> 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.... 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 judgement. 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 for years for their cases to be determined, then they should make it clear that their concern is not for the public but for themselves. (de La Bastide 2000: 22)

The Chief Justice argued that the new rules did not require attorneys to do more work, just to do it earlier. They were being asked to prepare their cases by investigating the facts and the documents at an early stage. By doing so, they might in fact save their clients a great deal of money or prevent them from throwing good money after bad.

The Chief Justice was nevertheless accused by the Law Association of autocratic behaviour and of seeking to ram the new rules down the throats of a previously unsuspecting profession, rules which were largely imported from the United Kingdom *via* a consultant whom he had hired. While it is true that the Law Association's representatives had approved the new rules, they had been specifically advised to vote against their adoption. Their term of office had in any event expired. One of them had since resigned and had been elevated from the Bar to the Court of Appeal. The other, who was associated with one of the old firms, was asked to resign. As one senior attorney whinged:

> Look at the firms most of the utilities and big State institutions retain to handle their legal business, and you will understand what I mean. Even banks and insurance companies stick to selected firms while there are large numbers of bright young attorneys out there who are better than those attached to the so-called prestigious firms. These attorneys are suffering, getting little or no work from State agencies, banks, etc. Little has changed from the colonial days. (*Independent*, December 24, 1999)

The President of the Law Association made much the same allegations!

> The main plank of the argument of the Association against the new rules is their inappropriateness in the context of the present state of development of the legal profession in Trinidad and Tobago. The majority of the profession consists of single practitioners and small firms of attorneys who do not have deep pockets. This majority claims that there are serious imbalances in the distribution of legal work because of historical factors.
>
> This argument the Chief Justice describes as "racial prejudice calculated to rekindle old resentments." It is the Chief Justice who now characterises the position of the Law Association as a racist position. He must know why. If to advocate that the new rules will entrench existing cartels and monopolies

> in the profession is to be racist, then I regret to have to plead guilty. The Chief Justice very well knows what he is doing when he pretends to be unaware of what is essentially entrenched neocolonialist class structured bias in the profession. (*Trinidad Guardian*, October 5, 1999)

In his view, it was a struggle between "sharks and sardines," one which touched "very raw nerves." The fusing of the profession in 1987 which allowed solicitors to do work that only barristers once did had also served to skew the profession in favour of those who once did only commercial as opposed to criminal work. According to Hudson-Phillips, "what [was] at stake [was] the philosophical under-pinnings of the rules; the effect they would have on the ability of a certain section of the population to continue in professional life with dignity; that is how I see it, and it is not a frivolous issue. It is perhaps an issue for the final emancipation of a certain section of professionals in this country" (*Independent*, October, 1999).

Spokespersons for the old established firms denied the allegation that they would be the principal beneficiaries of the new rules system. Dennis Gurley a member of one of the oldest law firms in the country, had the following to say by way of rebuttal to Hudson-Phillips.

> Hudson-Phillips is trying to rekindle or spark some very base sort of social, racial and class sentiments to support his argument that the rules of Court are designed for big firms. We don't consider ourselves to be a firm that exclusively serves large corporate clients or rich people. We always prided ourselves on offering a comprehensive service, and we also do a lot of *pro bono* work for poor people who are not able to pay for it. (*Sunday Express*, October 19. 1999)

Gurley in fact claimed that the new rules were "specifically designed to give poor people access to the courts." He noted too that many of the older firms focus on conveyancing and legal work

that did not involve litigation which was the type of work that the new rules were intended to streamline. He however agreed that it was wrong for banks to compel clients to use specific law firms for conveyancing work, but noted that the banks did so because these firms had indemnity insurance.

While agreeing that there were serious deficiencies in the existing system, the Law Association averred that the old rules should be amended instead of being comprehensively restructured. The new medicine would kill rather than cure the majority of the patients. The Association claimed that it had no objections to case flow management and ADR, but was critical of the manner in which the reform was being introduced and the schedule proposed for its implementation. The Association was likewise of the view that the personnel who would wield power under the new system in the Courts - the registrars, assistant registrars, and deputy registrar, did not have the depth of experience needed to manage the flow of cases and impose proper sanctions when parties did not comply. It was one thing to shift power from litigants and lawyers to the Courts. It was another thing to get the system to work as expected. In their view, the system had to be administered by experienced judges and not by lesser court officials.

Those who supported the change felt that the litigants would gain in that they would not have to continually brief attorneys who seem to prosper as a result of the delays in the system. Lawyerly self-interest and not concern about the small man was seen to be at the root of the opposition to change in the system. This was the view of Michael Theodore of the Hugh Wooding Law School. Theodore argued that many attorneys were professionally irresponsible and did not advise prospective clients properly to enable them to better understand what they stood to gain or lose by having their proverbial "day in court." Failure to do so often proved to be expensive for poor and not so poor clients. According to Theodore, "if it were not for the fact that attorneys are immune from suit for negligence in the conduct of litigation, many who advocate this "pay as you go" method would be the defendants in negligence actions before the very courts in which they practice. Would they then be so concerned about the "poor client"? (*Trinidad Guardian,* December 21, 1999).

Theodore agreed with the Chief Justice and those who argued that the poor and persons of moderate means should not be deprived of the benefits that accrue from access to speedy resolution of judicial conflicts. With respect to the argument that the small practitioner lacked the human and material resources to compete with the large firms, Theodore argued that modern computer technology and software made it possible for sole practitioners to do all that larger firms now did and more. Given their lower overheads, they could become more competitive. What was required was a "willingness to do things in a new way and get out of the rut of the cloistered existence where everything revolves around them" (*ibid.*). Theodore also believed that the new rules would also allow the client to participate actively in the litigation process rather than being passive as is now largely the case. While admitting that the rules were not perfect and would require adjustment in time, he felt that they would contribute to speedier and more cost effective justice for poor as well as rich litigants. As he told fellow attorneys, "the public has been the butt of injustice for far too long. Here is a system that promises efficiency, justice and fair play to a long suffering public" (*ibid.*).

After weighing the pros and cons of the proposed change, the Jamadar Committee came down in favour of adopting the new rules, even though it urged a measure of compromise. As it declared:

> There is little doubt that under the CPR, attorneys will be required to do work at an earlier stage, thus leading to some front-end loading of costs.... The Committee however recognises that when justice is delayed, justice itself may be lost. When matters are delayed, it is not uncommon that memories are lost, relevant witnesses cannot be located, and the necessary documents may be lost or destroyed. In those cases, the delay itself is a denial of access to justice. The Committee however also recognizes that the front-end loading of costs can have the effect complained of in cases involving litigants of lesser means who may not be eligible for legal aid funding. Some compromise must therefore be found. (Jamadar 2000: 35).

The compromise involved striking a balance which would allow litigants who wanted speedy resolution of their matters to go to conference early, and for those who wished time to pay their attorneys to request a deferment, provided that this did not exceed 9 months after the service of defense.

Among the modifications recommended were:

- the extension of certain time limits for taking certain steps in the civil process
- deferring the court's assumption of control for the progress of a case until after the case management conference
- that control be retained by the parties for requesting the first case management conference
- the removal of the threshold test used for the imposition of sanctions to give the court a greater discretion to grant relief for failure to adhere to the rules.

The committee further recommended that the new Family Proceedings Rules be implemented first, to be followed at least six months later with the new Civil Proceedings Rules (Jamadar 2000: 75-76).

The use of this "hybrid" case management system was said to be more "indigenous" and thus better suited to the circumstances of Trinidad and Tobago especially, "given the lack of adequate state funding for civil litigation (legal aid) and the impact of that on litigants of small means" (*ibid.*: 70). It was noted that change had to be carefully managed and should thus be introduced gradually. Forcing the new rules on entrenched vested interests was likely to engender reaction and resistance. The hybrid system which allowed for shared control of the conduct and management of cases between attorneys and the Courts was expected to facilitate "a less traumatic entry into the new culture" in that it would give time to all and sundry to be educated and made familiar with the new system (*ibid.*: 71).

The hybrid system however had certain disadvantages which some feared would negate its anticipated advantages. A minority on the rules Committee noted that a party wishing delay may achieve that delay for a variety of reasons unrelated to the concerns which the amendment was designed to address. Under the mixed system, parties may deliberately seek to delay a matter in order to gain unjustified advantage. The system makes delay a norm and could frustrate persons, including impecunious litigants who wish a speedy trial. As Messrs. Justice Mendonca and Robin Mohammed warned, "delay may more suit those who can afford it" (*ibid.*: iii). The dissenters felt that any party wishing to proceed with a matter should be able to do so without the consent of the other party and should be free to apply within the 9 month period to institute the Case Management Conference. The onus should be on the other party to show that it should be postponed. The court would decide whether to grant the application for postponement by applying the overriding objective.

At time of writing, the new rules have not yet been implemented. The Chief Justice, in conjunction with the Law Association, has however given new practice directions which seek to bring rationality to the process of litigation and to reduce delay caused by the lack of pre-trial preparedness on the part of practicing attorneys. In their diagnostic assessment of the judicial system in Trinidad and Tobago, Clement *et al* (1970) offer the following opinion which our study also makes evident. "One thing is clear: there are widely disparate visions about the future of civil justice in Trinidad and Tobago. Without a consensus about direction, the civil justice crisis is likely to continue. As a result, the opportunities for improving social and economic well-being that come from a smoothly functioning civil justice system may not be quickly realised."