This speech was delivered at the first Law Conference of the Guyana Bar Association (GBA) which was held on the 6th April 2002 at Hotel Tower at Georgetown.

My presentation will be on '**A Review of the Constitutional Reform Process**'. Let me state at the outset that this review is not intended to focus on all aspects of the Constitutional Reform Process as there are limitations in terms of time. I have therefore opted to deal with issues which I perceive would be of major concern to the profession.

We are all aware that as a result of the violence following the 15th December 1997 elections, there was a Caricom intervention which resulted in the signing of two documents popularly referred to as the Herdmanston Accord of 17th January 1998 and the St. Lucia Statement.

It was agreed, among other things, to establish a Constitution Reform Commission which was achieved by the *Constitution Reform Act 1999*, Act 1 of 1999. Some of the objectives of this Commission included the full protection of the fundamental rights and freedoms of all Guyanese, eliminating discrimination in all its forms, improving race relations, promoting ethnic security and equal opportunity, maintaining and strengthening the independence of the judiciary, safeguarding public funds and enhancing Parliament as a deliberative body.

To date although ten pieces of legislation have been made law, many of the draft constitutional amendments have not been enacted into law.

FUNDAMENTAL RIGHTS

With regard to the protection of the fundamental rights of all Guyanese, although Parliament passed the Act conferring many new fundamental rights, it seems rather strange that this Act has not been published and is therefore not yet law. The *Constitution (Amendment) (No.3) Act 2001*, Act No. 5 of 2001 established five new Commissions for the promotion and enhancement of the fundamental rights and the rule of law. They are the Human Rights Commission, the Women and Gender Equality Commission, the Indigenous Peoples' Commission and the Rights of the Child Commission. The Public Procurement Commission was also established by virtue of this Act with the objective of safeguarding public funds.

This amendment Act also provides for the establishment of five Tribunals to which appeals from the Commissions can be made. Sadly, all of these Commissions and the Tribunals remain a pipe dream.

RACE RELATIONS

With regard to the objective of promoting race relations, ethnic security and equal opportunity, quite apart from the question of whether legislation can actually achieve these goals, two Acts have been passed in Parliament - the *Constitution (Amendment) (No. 2) Act 2000*, No. 11 of 2000 which establishes the Ethnic Relations Commission and the *Ethnic Relations Commission Tribunal Act 2000*, Act No. 16 of 2000. Like the

Rights Commissions, this Commission is yet to be appointed and the appeal Tribunal is yet to be established.

JUDICIARY

I now turn to the judiciary - There are many provisions with the objective of promoting the independence of the judiciary, including removing from executive control the appointment of members of the Judicial Service Commission. You will later hear how this lofty ideal has led to non-compliance and *ipso facto* the non-existence of the Judicial Service Commission. What is important is the public perception of how justice is administered. We must not forget the old aphorism that justice delayed is justice denied! I will not dwell much on this as the most Honourable Chancellor herself and even the Chief Magistrate (ag.) have recently highlighted some of the deficiencies in the system.

What I will mention is **the new provision for part time judges**. The terms and conditions of the appointment of these part time judges are yet to be determined by Parliament, so it would be premature of me to comment at this time, except to say such appointments seem a bit unrealistic. To me, a most significant amendment could have been the clause which was intended to impose a duty on judges to write reasons for their decisions. But alas - **this provision was produced in a half-baked fashion.** The amendment to Article 197(3) sought to extend the grounds for removal of a judge for "persistently not writing decisions or for continuously failing to give reasons therefor, until such time as may be specified by Parliament." So until Parliament specifies the time, the amendment is decorative! Even if Parliament specifies a time limit, an

attempt to enforce this provision would provide fertile ground for litigation as in order to make the provision effective, subsection 4 of the same Article 197 should have been amended contemporaneously and this was not done. The question would arise as to whether the omission to concurrently amend subsection 4 was deliberate or inadvertent?

There is one other area I wish to highlight. It is the amendment that expands the ambit of the Judicial Service Commission by including the Director of Public Prosecutions and the Deputy Director of Public Prosecutions, who are public officers from the executive arm, within the jurisdiction of the Judicial Service Commission. With the DPP and the Deputy having to appear before the judiciary, the question arises as to whether this would not be in conflict with the separation of powers doctrine? In any event, the drafters did not bother to cater for the transition. With the present DPP and the Deputy not having been appointed by the Judicial Service Commission, it remains to be seen who will take any action in relation to these public officers, since the Deputy DPP was appointed by the Public Service Commission and the DPP was appointed by the President. As the present law stands, a DPP can now be removed by the Judicial Service Commission and the President upon recommendation of a tribunal.

This particular amendment raises other questions. Having decided to include the DPP and the Deputy under the Judicial Service Commission, were similar graded offices such as the Solicitor General, the Deputy Solicitor General, the State Solicitor and the Deputy, the Chief Parliamentary Counsel and the Deputy considered? Alternatively, why

was the entire DPP's Office not brought under the jurisdiction of the Judicial Service Commission?

SERVICE COMMISSIONS

I will now move on to the amendments that deal with the appointments of members to the Public Service Commission, the Judicial Service Commission, the Police Service Commission and the Teaching Service Commission. These amendments came into effect since August 2001 and have resulted in all the Service Commissions being non-existent. The new "meaningful consultation" process between the President and the Leader of the Opposition seems to have created difficulties. Although the definition does not state that it is mandatory for the President to accept the advice of the Leader of the Opposition, it does not guide the President as to his role in accepting or refusing the nominations of the Leader of the Opposition. This has presumably led to non-compliance and consequently the non-appointments of all the Commissions. We can only speculate that the two leaders have formulated different interpretations for this definition.

With regard to the Public Service Commission, the "meaningful consultation" process is the formula for the appointment of three members. The fourth and fifth members have to be nominated by the National Assembly after it has "consulted" with bodies that represent public officers. To date, the National Assembly has also not fulfilled this constitutional obligation. It is not difficult to understand why, as the amendment is characterised by a total absence of specifics. While providing for a standing committee, which was intended to enable

Parliament to carry out its function of nominating the appointment of two members to the Public Service Commission, the legislation is silent on the constitution of this committee. This legislative vacuum is now being filled by opposing interpretations.

The non-existence of these Service Commissions has serious implications for all categories of workers who come within their jurisdiction since no appointments, terminations and disciplinary action can take place lawfully. In fact, due to the non-existence of these Service Commissions, many fundamental rights are being affected.

In the absence of the Public Service Commission, what has taken place is most appalling! Although Article 201(1) of the Constitution states that the power to make appointments to public offices, to remove and take disciplinary action vest in the Public Service Commission, the Public Service Ministry and senior Government officials have assumed the functions of the Public Service Commission and proceeded on a whimsical and capricious course. Individuals have assumed the functions of the Commission itself and have purportedly effected transfers of public officers "pending the formal decision of the Public Service Commission". Even the Attorney General has attempted to usurp the functions of the Public Service Commission. There are instances where Permanent Secretaries and other senior Government officials, including a member of this honourable profession, have in a most autocratic fashion sent out letters dismissing public officers who have been appointed by the Public Service Commission. Their actions are in breach of the Constitution of Guyana. In many cases, dismissals took place although

"informed that the Public Service Commission is still in recess and having consulted the Public Service Ministry." In another case, the dismissal took place although the Secretary to the Public Service Commission advised the Permanent Secretary that the officer should remain on the job since the Public Service Commission was in recess. This Secretary was removed shortly after this recommendation. This conduct clearly illustrates that the Public Service Commission is intended by some to function as a mere rubber stamp.

Appointments are also being made contrary to the Constitution by way of contract. The selected individuals are offered far higher salaries that salaries offered to persons who are lawfully appointed by the Public Service Commission. In many instances, the illegal contract method is used to circumvent the filling of vacancies in the public service and is also used to deny promotional opportunities to those highly qualified in the public service.

It is my view that legislation which states that before something can be done or someone appointed, there must be approval or consent of the opposition will more likely than not lead to a constitutional and political gridlock. This is because this formula amounts to a form of power sharing and power sharing does not usually produce favourable results, even if the power sharing is disguised in the form of legislation. This is more so when it is supported by sloppy and ambiguous drafting. With legislation not being comprehensive, effective and definite, it is not surprising that various interpretations will be given to the provisions and demands will increase.

In my humble view, the criteria for appointment of decisions makers whose rulings are likely to affect the fundamental rights and livelihood of individuals, should be based on selecting the most eminently qualified persons, rather than persons with political affiliation. With this formula, there will be little or no scope for those holding positions to act in an unreasonable and dictatorial manner. False allegations, deliberate non-utilisation of skills, unjustified transfers and sexual harassment have no place in a truly democratic society.

Notwithstanding recommendations, it is the duty of competent and qualified draftspersons to offer proper advice, point out flaws in ideas and consequently to avoid unworkable laws that would inevitably create difficulties and open the floodgates to litigation and chaos.

As an alternative, even if there is a general consensus particularly by the governing party to share power, it is expected that the experts would clearly define the power and make provision for the likely situation when the legislative mechanism produces a non-result or a non-meeting of the minds.

The present situation is particularly disturbing. I had commented earlier that proper advice and drafting were particularly important in a society which was already charged with high political tension and the concomitant well known negative consequences. I repeat, it is poor drafting and absence of clarity which encourages those who wish to undermine the rule of law.

The purpose of a Constitution is to protect its citizens. The goal of the present reform process was to reduce tension. Legislation ought to reduce litigation and conflict, not create it. According to Lord Denning, 90 percent of the cases that come before the courts are on the interpretation of one Statute or another. This means that with properly drafted legislation, we will burden the judiciary less. It is not without significance that the recent constitutional amendments have already produced litigation as to interpretation and, unsavory as it may sound, is likely to burden the judiciary even more, particularly when high ranking officials take a certain course and challenge the unfortunate victims to go to the Courts. In doing so, they arrogantly take advantage of the long delays in the system. It is not difficult to understand why the public perception is that citizens' rights are purely illusory and in practical terms unattainable on account of judicial sluggishness and the prohibitive cost of litigation.

Lastly, I would like to mention the Parliamentary Committees. We are not unaware that the *Constitution (Amendment) (No. 6) Act 2001*, Act No. 8 of 2001 is so vague and woefully inadequate in the drafting that it has given rise to various interpretations as to how it was intended to be constituted. The Parliamentary Standing Committee on Constitutional Reform for reviewing the effectiveness of the Constitution cannot be appointed. The various Parliamentary Sectoral Committees which were intended to keep under scrutiny all areas of Government policy have also not been appointed. We have already heard that the standing committee

which was intended to address matters relating to the appointment of members to the Commissions cannot be appointed.

SUMMARY

In summary, **four years** after the constitutional reform process which was done at huge cost, there have been no new fundamental rights. In fact, many have had their existing rights eroded. The many new Commissions and Tribunals which were intended to promote fundamental rights have not been appointed. The various Parliamentary committees have not been appointed thereby restricting the effectiveness of Parliament as a deliberative body. The four Service Commissions have not been appointed and this has led to Government officials usurping the functions of the PSC in an abusive and illegal manner, in many cases to get rid of persons they perceive not to be sycophants, in other cases to subjugate and frustrate individuals. The Ethnic Relations Commission and Tribunal which were intended to promote race relations have not been appointed. The Public Procurement Commission which was intended to safeguard public funds has not been appointed. Even the idea of a Local Government Commission has been cast aside. We have also heard that the amendments have led to litigation.

In a word, the constitutional reform process, rather than providing answers, seems to have caused more problems. Many of the amendments have produced lofty statements and incomplete provisions that need further legislation to make them effective. The constitutional reform process has also produced many unrealistic

and unworkable solutions without including alternative mechanisms. This unpalatable brew which has resulted from this process seems to be a recipe for enhancing political affiliation rather than ensuring the paramountcy of competence. What has happened in fact is that, the experts have not anticipated problems that were likely to arise and will continue to arise.

On the positive side, I am happy to say that the rights of women have not taken a subordinate position and we lead the rest of the Caribbean in being the first to have a jurist of pre-eminence at the head of the judiciary.

What the present constitutional reform process has certainly done is to highlight the importance of the skill of legislative drafting. To draft cut and paste style is to go to sea without a compass, but to draft without civil litigation experience is not to go to sea at all. It places an unfair burden on the legal profession and the judiciary as very often what we have is a cacophony of misused words and phrases. The use of the phrases 'he or she', 'his or her' five times in one sentence, illustrates a lack of awareness of the proper use of gender neutral language. In addition, no attempt was made to draft the amendments in simple, clear, accurate and unambiguous language. Verbosity and tautology were the preferred style.

Finally, unbelievable as it may sound, the last published laws of Guyana took place in 1977 – 25 years ago. We therefore need as a priority an updated version of all our laws which will be made available to the

public as it is cumbersome for practitioners to go through the arduous task of updating laws passed since 1977. Although a draft Constitution was printed in 1996, this is now already outdated. I use this opportunity to urge those in charge to complete the law revision process which commenced in 1996 and reportedly completed the revision of laws up to 1998. The revision of the laws ought to be updated and published so that we can all locate the laws that affect us.

Before I take my seat, Mr. Chairman, might I be permitted to express my profound thanks and gratitude to the Guyana Bar Association for affording me the privilege of speaking at this forum. I feel confident that this conference will be a resounding success.

6th April 2002.